

(1964) 12 BOM CK 0003
In the Bombay High Court
Case No : Appeal No. 67 of 1964

Harinagar Sugar Mills Ltd.

APPELLANT

Vs

M.W. Pardhan

RESPONDENT

Date of Decision : 14-12-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Companies Act, 1956 — Section 434, 434(1), 439

Citation : AIR 1966 Bom 4 : (1965) 67 BOMLR 294 : (1965) ILR (Bom) 531

Hon'ble Judges : Tulzapurkar, J; Patel, J

Bench : Division Bench

Advocate : H.D. Banaji and S.J. Sorbaji, instructed by N.C. Dalal and Co, for the Appellant; M.R. Parpia, instructed by Kanga and Co., for the Respondent

Judgement

Tulzapurkar, J.

(1) This is an appeal preferred by Messrs. Harinagar Sugar Mills Ltd. (Hereinafter called "the Company") against the order passed by he Mr. Justice Kantawala on 22nd September 1964 in company petition No.4 of the admitting the petition and directing the advertisement to be given on and after the 13th October 1964 in the "Indian Express" and "Bombay Samchar" and the Government Gazette.

(2) A few facts giving rise to this appeal maybe stated. The company was incorporated in January 1938 and its authorized capital consists of 12500 equity shares of Rs. 100 each and 25000 equity shares of Rs. 10/- each. The issued and subscribed capital of the company concise of the 7500 shares of Rs. 100/- each 25000 equity shares of Rs. 10/- each. All these shares are fully paid up. Out of this subscribes capital of the company 788, equity shares of The 100 each and 14265 equity shares to Rs. 10 each stand is the name of Narayanlal Bansilal who is the chairman of the Board of the Directors of he company. Narayanlal Bansilal is also the karta and manager of joint Hindu family consisting of himself his sons and daughters and the shares standing intake name of Narayanlal Bansilal were purchased in out of the funds belonging to the joint family.

According to the court Receiver who was appointed Receiver High Court suit No. 224 a of 1961 and who presented the petition for winding, up a large also a number of other shares of the company were also purchased out the fund belonging to the joint family and were taken in the names of Kishanlal Murlidhar Jayakrishnan Gangadas and Sevaram Ranchhodas as the Benamidars for the joint family.

(2a) It appears that prior to the 8th of March 1956 the joint family of Narayanlal Bansilal owned a sugar farm at Harinagar in the state of Bihar. On 8th March 1956 by a registered conveyance made between Narayanlal Bansilal and his sons Balkrishna Narayanlal Narayanlal on the one hand and the company on the other, the said sugarcane farm with all the crops, buildings agricultural equipment's bridges, tool pumping live - stock carts etc. Was sold to the company for Rupees forty Lakhs out of this price of Rupees Forty lakhs, it appears the company paid to the vendors (Narayanlal and his three's sons) a sum of Rs. Ten lakhs on 31st January 1956 and it was agreed that the balances of Rupees thirty lakhs should be paid by quarterly installments of Rs. 2,50,000/- each the first of such quarterly installment being payable at the end of the subsequent installments were payable at the end of each subsequent quarter. The registered conveyance dated 8th March 1956 further provided that if the company failed to pay the vendors any of said installment of Rs. 2,50,000/- on the company should pay interest at the rate of 5 percent per annum to the vendors on the amount of the unpaid installments. It further provides that after the execution of the conveyances the company paid to the vendors on two installments of Rs. 2, 50,000/- each but failed to pay the remaining installment aggregating to Rupees twenty - five lakhs and this is the debt which was claimed by the petitioner [the court receiver] under a statutory notice upon neglect to pay the same a winding up petition was presented by the petitioner under following circumstances.

(3) In or about July 1961 Madhusudanlal, one of the sons of Narayanlal filed a partition suit on the Original side of this court and being suit No. 224 of 1961 against Narayanlal and others claiming certain share in the joint family properties and after the filing of the suit Madhusudanlal took out a Notice of Motion for appointment of court Receiver as the Receiver of joint family properties. On 20th October 1961 the Court appointed the court Receiver as the Receiver of all the joint family properties with all powers under Order XL Rule 1 Clause 9d) of the Civil Procedure Code. After the court receiver thus came on the scene the court Receiver issued statutory notice on 28th June 1962 under s 434 of the Indian Companies Act to the company requiring the company to make payment of Rupees twenty-five lakhs with interest to the Additional Collector of Bombay and by that notice the court Receiver further stated that if the said payment was not made within 21 days of the receipt of the notice proceedings for winding up of the company will be adopted without any further intimation. On 17th July 1962 the company sent a reply of the court Receiver raising several contentions. It was contended that a

sum of Rupees twenty - five lakhs and odd was not but that a per the company balance - sheet the said amount was due and payable to Narayanlal bansilal and his three sons who were the vendors under the conveyed that the conveyances dated 8th July 1956 . It was further contend that in the installment due under the registered conveyances court not be paid by the company on accept of a notice of attachment dated 24th July 1956 that had been issued and served upon the company be the Additional Income - tax officer, section v. Central Bombay u/ s 46 (5 -A) of the Indian Income - tax officer Act 1922. The company further contended that in any event the claim for the Rupees twenty - five lakhs had become barred by the law of limitation. In view of the these contentions the accompany pointed out that the there was no question of payment of the said amount of Rupees twenty - five lakhs to Additional Collector of Bombay as required to by the court receiver an the company further informed the court receive that the inspire oft these facts being brought his notice if any steps of these fact being up to the company were taken. Since the statutory notice that the issued by the court Receiver on 28th June 1962 was not complied on with by the winding company the Court Receiver presented a winding up petition being company petition No. 4 of 1964 on 10th January 1964. After the petition was accepted notice was issued to the company and the company put in affidavit in the reply showing cause against the petition. After hearing the parties. The learned judge by the his order dated 22n September 1964 admitted the petition and directed that advertisement be given in newspapers mentioned in this order and the Gazette. It is against the judgment and order that has been passed by the learned judge the present appeal has been preferred by the company before us.

(4) In this appeal Mr. Banaji on behalf of the Appellant company has urged two or three technical contentions. In the first place in contend that the court receiver who had presented the petition for winding up and ho power to present the same under order XL Rule 1 of the CPC under which he was appointed by this in the which he was appointed by this court in the partition suit No. 224 of 1961. Secondly the urged that the court Receiver was not a creditor of the company within the meaning of the section 434 of the Indian Companies act and therefore was not entitled to file and petitioner. He further contended that the statutory notice which had been issued byte court receiver con 28th June 1962 was invalid and not a in accordance with the provisions of section 434 of the companies act. Lastly he contended that the because of the prohibitory order and the notice of attachment that had been issued by the Additional Income -tax officer under the provisioned of the section 46 (5 - A) of the India Income = tax act the company could not pay the amount and could not comply with the requisitions and contained not comply with the requisitions 28th June 1962 and therefore it could not be said the company to make payment. Apart from these technical contentious Mr. Banaji also urged two points in merits. According to him on the facts and circumstances of the case of the points had been preferred by the court Receiver at he instance of the sons of Narayanlal out of the interim notices and if

had been filed mala fide. Mr. Banaji further urged that the company was perfectly solvent and therefore the petition ought not to have been admitted and the direction not to have been given by the learned judge. We shall deal with these points one after the others presently.

(5) In support of his contention that the court Receiver had no power to present a winding up petition in this case, Mr. Banaji relied upon the provisions of order XL Rule 1 clause (d) of the CPC and also on the order that had been made by this court while appointing court Receiver as the Receiver of the joint family properties. The relevant provision of Order XL Rule 1 runs as follows:

"1 (1) Where it appears to the court to be just convenient, the court may be order:-

(a) appoint a receiver of any property whether before or after decree:

(b) X X X X X

(c) X X X X X and

(d) Confer upon the receiver all such powers as to bringing and defending suits and the for the realization management of protection preservation and improvement of the property the collection of the rent and profits thereof, the application and disposal of such rent profits and the excision of such rent and profits and execution of document as the owner himself has or such of those powers as the court think fit"

In this case the order appointing court receiver as an interim Receiver of the property was passed on 28th August 1961 in the partition suit filed by Madhusudanlal against Narayanlal and others being suit No. 224 of 1961 and the said order was confirmed by an order dated 20th October 1961. The operative part of the order dated 20th October 1961 runs as follows:

"And it is further ordered that the court Reserve be and he is hereby appointed Receiver the property belonging, to the joint family in suit and all the books of accounts papers and vouchers with the necessary powers under Order XL Rule 1 of the CPC including power to vote and/or exercise all the property rights in respect of the shares belonging to the joint family in the several joint stock companies mentioned in the plaint including power to file suit"

Relaying upon the aforesaid provisions Mr. Banaji in the place urged before us that the court Receiver in these cases had been specifically clothed with the powers to file a suit but in terms he had not been clothed with the but in terms he had been power to present a winding up petition. However it must be observed that apart from the power to file a suit has been specifically referred to in the order dated 20th October 1961, the said order in terms confers upon the court Receiver "all powers under Order XL Rule 1 of the code of the Civil No. Procedure" In other words it is clear that all the power under Order XL Rule 1 clause (d) of their CPC have been conferred upon the court Receiver in this case

and it is clear that under clause (d) sub = rule (1) such powers include not only a power to bring and defend suits but power to bring and defend suits but power "for the realization management of the property. An attempt was made by Mr. Banaji to suggest that when a specific power to file a suit was conferred upon account Receiver, that power merely empowered the court Receiver to commence all proceedings by filing of plaint and since a winding up petition was not a proceedings which is commenced by filing of plaint the court Receiver could be not present a winding up some observation of this court in the has case of *Indrajitsinghji Vijaysinghji Vs. Rajendrasinghji Vijaysinghji*, In our view it is really unnecessary to consider this argument of Mr. Banaji for the simple reason that the clause (d) of sub - rule (1) or order XL R.1 of the code Receiver for the purposes of filing a suit but the with all powers for the purposes of the realization management protection preservation and improvement of the property in the case under the order dated 20th October 1961 the court Receiver was clothed not only with a power to file a suit but with all necessary and power for realization, management protection and preservation of the property under clause (d) mentioned above. The old question that need therefore be considered is as to whether a proceedings which is initialed by filing a winding - up petition which is proceedings for the realization management protection of preservation of the prepay or not. Mr. Banaji urged that ordinarily a winding up petitioner is not the normal mode for realizing a debt due to a creditor and that the suit would be the proper remedy for realization of such by a creditor. According to Mr. Banaji, a winding - up petition was a process by which the court achieves the objects of equitable distribution of debtors property. In support to his contention Mr. Banaji referred us to the case of *Bukhtiarapur Bihar Light Railway Co. Ltd. Vs. Union of India (UOI)* and Another, and the relevant observations of which reliance"s was placed by him appear p. 517 (of Bom cas): (at p. 504 of AIR) which run as follows:

"A winding - up order may be a from of equitable execution, but there is no equity in making such an order when the debt of the creditor is not in peril although the substratum of the company may be gone., and when matters remain outstanding of the shares holders by the company functioning a company throng its directors. A winding - up order is not normal alternative in the case of company to the ordinary procedure for the realization of the debts due form it"

Relying upon the above observations Mr. Banaji urged before us that the main object of a winding - up proceedings of was to ensure the quotable distribution of debtors property. On the other hand Mr. Parpira on behalf on the petitioners relied upon the following passage petitioners relied upon the the following passages which occurs in the polymer"s company precedents part II 1960 Ed., at p. 25 The passenger runs as follows

" A winding - up petition is a perfectly proper remedy for enforcing of the payment of just debt. It is the mode of execution which the court gives to a creditors against the company unable to pay its debt.

It appears clear that the this passage is based upon three decided cases in *Bower v. Hope Life Insurance and General guarantee Co.* (1865) 11 HLC 389, *In re General Company for promotion of Land credit* (1870) 15 Ch. 363 and in *Re. National Permanent Benefit Building Society* 1869 5 ch 309.

(6) In our view in this case we are not called upon to decide the question as to whether a proceeding which is commenced by filing a winding - up petition is a normal or proper mode realization of a debt or not. What we are really concerned with is as to the whether such a proceeding is proceeding "for realization of property" It is true as has been pointed out by Mr. Banaji that the main or dominate object of winding - up petition is to ensure the equitable distribution of the property to debtor. But it cannot be forgotten that before there could be any equitable distribution of the property of the debtor amongst his creditors this property must be first got in i.e. realized and it cannot be disputed that the property of the debtor is realized by filing the winding - up petition. It is not doubt true that the dominate object of suit to realize a particular debt, while that of winding - up petition is the equitable distribution of the debtors property amongst his creditors of the debtors property amounts must necessarily be preceded by the getting in of all such debtors property and realization of all such property. It cannot be disputed that the necessary consequence of filing a winding - up petition is the realization of all the property of debtor and thereafter commences. In this view of the matter it is clear that the proceedings which is commenced by filing a winding - up petition is proceeding for realization of the property and therefore when the court Receiver was clothed with all the court power under Order XL R 1(1) (d) of the CPC it must be file a winding - up petition for the purpose to realizing the property to the benefit of the which would endure to all the creditors of the company. We are, therefore, unable to accept Mr. Banaji's contention that the court Receiver in the present case has no power to present a winding - up petition.

(7) The next contention of Mr. Banaji is that the court Receiver cannot be regarded as a creditor of the company within the meaning of section 434 and 439 of the Indian Companies Act and as such the court Receiver who was after the all an officer appointed by the court in the partition suit could not be serving a statutory notice onto company demanding payment of the behalf file the winding - up petition. In this behalf Mr. Banaji relied upon the decision of the English court *In re, Sacker* (1888) 22 QBD 179, where it was held by the court of Appeal that a receiver was not a "creditor" entitled to present a bankruptcy petition against the debtor within meaning of section 6 of the Bankruptcy Act, 1883 in the case in an action in Cannery Division, a Receiver was appointed to collect, get in and receive the good comprised in its charge given to the plaintiff by one of the defendants including there in any one balance of the proceedings of the good so charged in the hand of the other defendants. As order was subsequently made for the payment for the mentioned defendants to the receiver of the specific sum being of the money recede by the him in respect of the proceeds of the good and comprised in the charge. It appears that the receiver presented a bankruptcy

petition against the defendants who was ordered to a pay. It was held that the receiver was not a creditor entitled to present a bankruptcy petition. Lord Esher M.R. after pointing out that the position of receiver was not that of a trustee and that there was no debt due to him from the particular defendants went on to observe as follows:

"The Petitioner is receiver. He is not a trustee. There is no debt to him from the appellant. He could not sue for this sum of money in his own name either at law or in equity. Even if he sues either at the authority of the court or in his own name is the court set for the in this own made personally either at law or in equity? At law it is certainly not. The debt was due to another person whom he is not a trustee. The money will not be when he has got it. Would it be his in equity? I apprehend that he would hold it subject to the authority of the court who would deal with it according to the circumstances of the case, but certainly not for his benefit"

"As a general rule, a receiver cannot maintain an action to compel obedience to an order for the delivery of goods or payment of money to him by a party to the action. There may no doubt be exceptional cases in which a receiver can bring an action in his own name when for instance he is the holder of a bill of exchange. In that case he can maintain an action, not because he is receiver but because he is the holder of the bill"

It would thus appear that according to the above maintained decision under English law a receiver except cannot maintain an action in his own name except in special cases. We may point out that the decision by (1882) 22 QBD, 179 came to be considered by the English court in later decision and the general observation made by Lord Esher have been dissented from and have been regarded as being dissented from and later decision of *In Re Macon* 1904 2 KB 700. In this later case the court of Appeal held that the Receiver who had obtained the assignment of the judgment debt over the creditor could present a bankruptcy petition and it was further held that the decision in 1888 2 QBD 179, only decided that the receiver who cannot sue in his own name cannot be a good petitioning creditor. The relevant observations of Vaughan Williams L.J. appear at p. 703 and they run as follows:

"I think those words (referring to the observation of Lord Esher in 1888 22 QBD 179) go very far to cover the proposition for which Mr. Hansell contended but it was not really necessary for the case which was before the court of appeal that this question should have been determined that is the question whether a receiver having a title is the question whether a law could be good petitioning creditor, it is plain from the judgment, I think of each of the Lord Justices that in the case the position of things was such that it was perfectly impossible for the receiver to bring an action to recover the debt either at law or in equity and therefore I think we must there treat these observations of Lord Esher as obiter, and one can only look at the case as having decided that a receiver who could not sue could not be by himself a good petitioning creditor. Looking at the

judgment of Fry. L.J. I observe that the judgment begins by saying that in that action a receiver could not have maintained an action either at law or in equity and later on he deals with exceptional cases in which a receiver could maintain such an action. One of the cases which he gives is an action for exchange and the other is where he is in possession of chattels, and the chattels are wrongfully detained from him. In these circumstances it seems to me that he ought not to hold to the case of [1888] 2 QBD 179 to be an authority for the proposition that a receiver cannot be a good petitioning creditor even though the state of things is such that he could maintain an action at law. In the present case a receiver happens to be the assignee of the judgment, and I think that being the assignee of a judgment he can be a good petitioning creditor even though when the money is recovered it is recovered for the purpose of enabling the court of Chancery to deal with it. The position that emerges from a consideration of the above two cases is that under English law if a receiver could maintain an action at law in his own name he could be a good petition creditor and could present a bankruptcy petition.

(8) In our view the position in India is more clear and unambiguous, order XL of the CPC deals with appointment of receivers and under Rule 1 a receiver could be empowered to bring and defend actions and for its realization, management, protection, preservation and improvement of the property. It is well settled that once a receiver is appointed by a court under O. XL r. 1 of the CPC with all the powers mentioned in clause (d) of subrule (1) the property in respect whereof such a receiver is appointed is in custody of the court and the receiver is a party to the litigation except where of such receiver is appointed in his custody the receiver is entitled to deal with the property of which he is entitled to file suit in his own name. If necessary we may refer to the decision of the Supreme Court reported in *Kurapati Venkata Mallayya and Another Vs. Thondepu Ramaswami and Co. and Another*, where their Lordships of the Supreme Court have pointed out that "a receiver authorized to collect the debt" is empowered to institute suit therefore and a suit instituted by the Receiver in his own name is perfectly competent. A decision of our court reported in *Achut, v. Shivajirao* 39 Bom LR 224; AIR 1937 Bom 224 has also taken the same view. Though it is true that at the same time it is clear that the receiver so appointed is entitled to maintain action in his own name. In this view of the matter it is clear that though the debt in respect whereof a statutory notice was issued by the court Receiver was really due to the members of the joint family the court Receiver who has been managing and administering of the entire joint family properties for the benefit of such parties who may ultimately be found entitled thereto, would be a good petitioning creditor for the purpose of filing a winding-up petition since in our view if it is clear on authorities an action in this receiver is entitled to maintain an action in his own name. Reading the provisions of an action in his own name. Reading the provisions of Ss. 434 and 439 of the Companies Act along with the provisions of O. XL R 1 CPC we are of opinion that the court Receiver would be a creditor of the company and as such was

entitled to present the winding - up petition.

(9) The next contention of Mr. Banaji is with the regard to the statutory notice that was issued by the court Receiver u/s 434 of the Indian Companies Act. In this a two - fold contention was urged by Mr. Banaji before us. The first place he contented hat the statutory notice, being a formal document as well as the provisions of section 434 should be strictly construed and so construed the notice in question would appear to be not in conformity with the said provisions it may be stated that be his said notice dated 28th June 1962 addressed to the company the court Receiver pointed out that in company balance sheet for the year ending 30th September 1961 a sum of Rupees twenty Five Lakhs and odd was the shown as due and payable by the company to the joint family of Narayanlal Bansilal being the balance of he purchase price of the Sugar farm belonging to the joint family purchased by the company under the registered conveyance dated 8th March 1956 and that since he was appointed a Receiver of the joint family properties in High Court Suit No. 224 of 1961 he was issuing that notice to the company. By that noise to the Court Receiver called upon the company to make immediate payment of the said sum of Rs. 25,00,000/- and interest payable thereon at 5 per cent per annum a in the manner above mentioned and to give you noise as I here by do, that the if you will fail to pay the amount to the Additional collector of Bombay byway the debt is attached by with in 21 days from the receipt of this letter by your, I will without and further intimation of to you, take proceeding for the winding up of he company. Incidentally it may be stated that a large amount by way of Income - tax arrears nd pentacle and tune of the Rupees Thirty five Lakhs and odd was due to and payable by Narayanlal Bansilal to Income - tax authorities and I respect of the said due the Additional Income -tax officer. Section v. Central Bombay, has served a notice date 24th July 1956 on the company u/s 46 (5 - A) of the Indian income - tax Act 1922 where by the additional Income - tax act 1922, where by called upon the company to pay on account of Narayanlal Bansilal in Liquidation of the said Income - tax dues. The Additional Income - tax officer had pointed out to the company that any payment that would be made by the company to him pursuance"s of his notice would in law company liability to Narayanlal Bansilal and hte officer has further pointed out to the company that if the after service of this notice the company de any payment to Narayanlal Bansilal, the company would be held personally liable to the income - tax authorities to the extent to which such payment would be made by the company to Narayanlal Bansilal. In other word s under the relevant provisions of Income - tax act the Income - tax authorities had served prohibitory order and had in effect attached the debt of Rupees twenty five lakhs and odd in hands of the company. It was in the his circumstances that the court Receiver in the statutory notice u/s 434 of the companies act had called upon the company and odd to the additional Collector of Bombay by whom debt has been attached. With in the prescribed of period of 21 day.

(10) With regard to the above notice which was issued by the his court Receiver

u/s 434 of the Indian companies Act. Mr. Banaji first contention was that the court Receiver had not called upon the company to make payment of the debt of himself and that was not in compliance with the provisos of the section 434 of companies. Mr. Banaji drew our attention to the provisions of section 434(1)(a) of the companies act where under creditor to whom a company is in under debt in sum exceeding Rs. 500/- can serve on the company an notice called upon the company either to make payment of the sum so due or to secure or compound of the debt to the reasonable satisfaction of the creditor. What was urged by Mr. Banaji was that by the present notice the court Receiver left no room to the company to secure or compound the debt to the reasonable satisfaction of himself by called upon the company to make payment of the amount due directly to the Additional collector of Bombay. Mr. Banaji therefore urged that the notice that was issued by the court receiver was invalid and not in accordance with the provision of Section 434 of the Act. We are unable to accept this contention of Mr. Banaji for the simply reason that the section nowhere requires that such notice the creditor should make a demand upon the debtor to make payment of the debt to himself. It is perfectly competent for the creditor to direct his debtor to make payment to a third party under such notice. Further we fail to appreciate as to how by issuing a notice in question the court Receiver put it beyond the reach of the company to secure or compound for the debt to the satisfaction of the court Receiver. On receipt of such notice from the court Receiver it would have been computed for debt of the reasonable satisfaction of the court Receiver if the company were so minded to do. On the other hand, what we find is that the company by its reply, dated 17th July 1962 raised various disputes with regard to their liability of the said debt or containing that debt was not due to the joint family or Narayanlal and others but that it was due and payable to the four individuals from whom the company had purchased a sugarcane farm. Significantly enough, we may point out by Mr. Banaji has not even been stated by the 17th July 1962. It has nowhere been stated by the company in its reply that because of the manner in which the notice has been given the company had been deprived of its right to the company to secure or compound for the debt to the reasonable satisfaction of the court receiver. It is clear from the facts of the case that under the conveyances a sum of Rs. Twenty - five lakh and odd was payable by the company to Narayanlal Bansilal and his sons. There is no dispute that the income tax lakhs of rupees were due and payable of Narayanlal Bansilal to the income tax authorities and in the meantime the debt in the hands of the company had been attached by the Additional Income - tax officer. This fact is even referred to by the court Receiver in this statutory notice. After referring to the fact the company has been called upon by the court Receiver to make payment of the debt due to the Additional Collector of Bombay obviously to the purpose of liquidating the income - tax dues. In these circumstances it is difficult to accept Mr. Banaji's contention that the notice that has been issued by the court receiver is defective or is not in accordance with the provisions of section 434 of the Indian companies act.

(11) Mr. Banaji then contented that there was a bona fide dispute regarding this liability of Rupees twenty - five lakhs to and odd, for according to the company the amount of Rupees twenty - five lakhs which was payable to company under the registered conveyances dated 8th March 1956 was not a debt due and payable to the joint family or Narayanlal Bansilal and his sons but it was debt due to the four individuals mentioned in the conveyances and therefore the court Receiver was not entitled to serve a statutory notice upon the registered conveyances dated 8th March 1956 was not a debt due to the four individuals mentioned in the conveyances and therefore the court Receiver was not entitled to serve a statutory notice upon the company and make demand for the payment of that debt on behalf of the joint family. In this behalf it would be pertinent to note that in the partition suit it was admitted by Narayanlal Bansilal in Paragraph 14 of this affidavit filed to show cause against the Notice of Motion for the purchase price was payable under the family in respect of Haringange Sugarcane farm. In the said paragraph Narayanlal Bansilal inter stated as follows:

"Referring to para 10 (c) of the affidavit I deny there is any manipulation in the balance sheet in Haranguer sugar Mills Ltd. As falsely sought to be suggested by the 3rd defendants. No loan of Rs. 25,00,000/- has been given by or to the said company. The said amount is the balance of purchase price payable by the said company to the joint family in respect of the Harinagar Cane Farm"

It is true, as has been pointed out by Mr. Banaji that his admission which has been made by Narayanlal Bansilal would not be binding on the company since a company is a different entity from Narayanlal Bansilal but when considering the question on merits as to whom the amount was really due it does appear to us that the affidavit filed by Narayanlal Bansilal and the statement made by him in that affidavit would be relevant and by him it is taken into consideration by us. It cannot be forgotten that Narayanlal Bansilal was a chairman on the Board of Directors of the Harinagar sugar Mill Ltd. And was also the Karta and Manager of joint Hindu family consisting of himself, his sons and daughters. In view of this dual position which Narayanlal Bansilal occupied at the material time the admission made by Narayanlal Bansilal in this affidavit which we have quoted above would clearly go to show that the amount of Rs. 25,00,000/- being the balance of purchase price and was payable by the company to the joint family of Narayanlal Bansilal and his sons and this admission of Narayanlal would go a long way to indicate that the dispute raised by the company in its behalf was not bona fide. On the other hand the contention raised by the company to say the least was frivolous.

(12) Mr. Banaji then urged that because of the prohibitory order and the attachment that had been levied by the Additional Income - tax officer on the debt claimed by the court Receiver in his statutory notice the company was unable to comply with the court Receiver's notice and therefore it would not be said that mere non - payment on part of the company would amount to a neglect to make payment. In this behalf sections 439, 433 and 434 of the Indian

Companies Act would be mature. Section 439 categorizes person who can make an application for winding up of a company under that section thier in application by winding - up a can be presented by any creditor or creditors an included an any creditors prospective creditor or creditors. Sec . 433 provides for circumstances in which a company may be would up and under clause (e) it could be would up it is it unable to pay its debts. Section 434 proved that under certain circumstances a company shall be deemed unable to pay its debt. Court Receiver had issued and served a statutory notice upon the company u/s 434 of the companies act where under a presumption has been as regard the companies inability pay iceboat under certain circumstances. u/s 434(1)(a) it has been provided that he a company shall be deemed to be unable to pay its debts under certain if creditors, it by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred, rupees than due has served on the company, by causing it to be delivered at it registered office by registered post or other wise, a demand under his hand requiring the company to pay cause into deliver its registered officer, by registered post or to pay the sum of due and company has for three week thereafter of which neglected to pay the sum of or to secure or compound to the reasonable satisfaction of creditor. Intone words if conditions which have been laid down in the clause (a) of sub - section (1) of section 434 are complied with the presumption arise that complied with unable to pay its debt. In order the such a presumption should arise. It is necessary that there must be a creditors to whom the company is owing a sum exceeding Rs 500/- secondly such a creditor must have serve a notice upon the company delivering the same for the due and lastly if the company has neglected to pay the said sum the within three week of such service of the notice upon it then the company would be deemed to be unable to pay its debt. What was urged to Mr. Banjo was that in the present case because the debt had been attached by the income - tax authorities and a prohibitory order had been issued on the company the company did not make any payment and therefore the presumption, will regard to the inability note part of the company to do duty would not arise because there was no neglect on the part of the company to make payment of the sum due.

(13) In this benefit Mr. Banaji referred us to a decision of the English court in re European Banking Co. (1886) 2 Eq. 521. In that case several petition has been presented that for winding - up of the company and when all the other petitions had been dismissed the question was as to whether the petition which had been presented by a creditors who had only to recover pounce 65 from the Banking company should have bee accepted and winding - up order be made on the petition. The petitioning creditor was a creditor of banking company for the only pounds 65 and the debt and has been attached in Lord Mayors court and the question arose as to whether the petition on behalf of such creditor whose the petition or dismissed and the court dismissed the same Mr. Banaji relied upon the observation of Sir. R.T. Kindersley, V.C. which run as follows:

"The question then is, whether if there were no other petition then this to Mr.

Baylis, an order for winding - up the company ought to be made thereon. Though Mr. Baylis appears as creditor in the book of the company for pound 65 (a very inconsiderable sum) the fact is that before the petition was presented an action had been brought against him by one of his creditors in the Lord Mayo's court under which this debt which was assumed by the due to him from the European Bank was attached it is true the does not absolutely do away the debt and he still remain legally a creditor of the bank. But the attachment is more efficacious than a mere stop order for it seizes the debt into hand of the Lord Mayo's court. Under these circumstances I am of the opinion that if this had been the only petition the court would not have made an order upon the it to wind up the company on the ground that the interest, of the petitioners as creditors is so uncertain of the petitioner as creditors is so uncertain in its character that the court ought not upon the ground of the interest, to impose upon the ground of the interest to share holder of the company so great a burden as a winding - up order. Dealing with the petition as if it has been the only one presented. I shall dismiss it with costs.

In our view the facts of the present case are clearly distinguishable from the facts which obtained in the case decided in [1886] 2 Eq. 521. In the first place from the fact which have been recited in the report it appears that the court considered to the amount due by the banking company to the creditor a very considerable amount secondly the fact that the petitioners debt had been attached in Lord Mayo's Court was undoubtedly taken in consideration as result of which it was stated. That the attachment had the effect of seizing debt into the hands of Lord Mayo's court. In those circumstances it was held that the interest of the petitioners as creditors was very uncertain in its character and therefore the petition for winding - up should be dismissed. In the present case the facts are entirely different. The amount claimed by the court Receiver on behalf of the joint family is not an insignificant amount. Incidentally it may be stated that the petitioners in his petition had referred to several other debts which the company owed to other creditors apart from this debt of Rs. 25,00,000/- which was payable to the joint family of Narayanlal Bansilal and his sons. Further the most important distinguishing feature, the most important distinguishing feature statutory notice issued u/s 434 the court Receiver had in fact called upon the company to make payment to the income tax authorities for the purpose of liquidating the income -tax dues for non - payment of which the debt had been attached. If by statutory notice the court Receiver had called upon the company to make payment of dues himself in spite of the attachment on that debt, the company would intuitively have been unable to comply with such requisition because of the attachment levied on that debt, due to the additional Collectors the Bombay for the purposes of liquidating the income - tax dues for non - payment of which the attachment had been levied. In these circumstances it is difficult to accept Mr. Banaji's contention that because of subsisting attachment on the debt at the instance of the income tax authorities, the company was unable to comply with the requisitions contained in the

statutory notice issued by court Receiver. On the other hand direct, compliances of the statutory notice would have resulted in the payment of the Income - tax dues and the attachment obviously would have fallen to the ground. As we have pointed out earlier without putting forth any all sorts of contentions against the liability to all sorts of contentions against the for us to accept Mr. Banaji contention that there as was no neglect as the part of the company to make payment as in contemplated by the provisions of section 434 of the Indian companies act.

(14) In our view, the learned trial judge was right in coming to the conclusion that none of the technical points that had been urged before him on behalf of the company heady substance.

(15) On merits Mr. Banaji contented before us that the petition had not been presented by court Receiver bona fide but the proceedings were instated at the instance of Madhusudanlal and other sons of Narayanlal with ulterior motives of causing harm to the company and the share holders in this behalf Mr. Banaji drew our attention to the several passages in the affidavits that has been filed before the learned trial judge to show that the their were disputes between Narayanlal Bansilal on the one hand and his sons on the other Directors or the company and because the sons failed on this attempt to get power, the had instructed to the court Receiver to apply and obtain directions from the court to winding up the company and thereafter the present petition was filed by the court Receiver. In other words according to Mr. Banaji the main object with which the petition had been main filed was to come cause harm to the interest of the company and it shareholder because the sons powers in the management of the company. On the facts of the case we do find that there were dispute between the father on the one hand and the sons on the other and the other nominees of the father, but it apart from preventing the sons from getting and any hand the management of the company is also trying to fight his personal disputes with his sons and is taking shelter under both his dual capacity, one as a chairman of the Board of Directors of the company and the other as Karta and manager of the joint Hindu family as and when the occasion arises. In this behalf it is an admitted position has that several litigation are pending between the father on the one hand and the sons of the other and several suits have also been filed by the court Receiver against the so-called benamidars of the father in respect of share - holding in the company. But quite apart from this position, there could be no dispute that the company has failed nd neglected to pay the debt that was claimed by the Receiver under a statutory notice during the preside period of 21 days and therefore a right undoubtedly accrued to the court Receiver a creditor to a file winding up petition against the company. Even apart from this debt, in the winding - up petition the court Receiver has referred t several other debts which are due and payable by the company to the third parties. For instance there is a reference to debt to the tune of Rs. 8,00,000/- owned by the company to the Bank of India in respect whereof the Bank of India in had obtained a decree against the company and amongst several ground that have been forward

be the court receiver in his winding = up petitioner there are principally two on which the petitioner was pressed, first that the company was unable to pay its debts and secondly it was just and equitable that the company should be wound. In this regard it would justice shaggy to the observations of chief Justice Chalgala in Bachharaj Factories Ltd. Vs. Hirjee Mills Ltd., where the learned chief justice has pointed out that the learned chief has pointed out that once a party had put proper matters before the court making out a prima facie was for winding up consideration was presented would be irrelevant. The relevant observations appear at p. 392 of the report (Bom LR) (at p. 361 of AIR) which run as follows.:-

"We have not permitted Mr. Mathalone to go into the merits of these allegations about our opinion these allegations are entirely in reliance. If the petitioner have made out a case for the winding up of the company it they have placed materials before the court which satisfy the court that the company if they have placed materials before the court which satisfy the court that the substratum of the company is gone it is difficult to understand what the motive of the petitioners has got to do with the question whether an order of winding up should be made or not." It is true that in that case the petitioners had placed sufficient materials before the court to show that the substratum of the company had gone and it was not possible for the company to carry on its business without difficulty. In the present case we may point out that apart from the several debts that are owed by the company to several creditors which have not been satisfied by the Company a suggestion was made to by us to Mr. Banaji that if the company were also be by of any guarantee through any bank or Insurance Company, the winding - up petition may not be proceeding further and Mr. Banaji had taken time to consider that the suggestion and even after adjourning the matter once or twice nothing has been done by the company in the behalf of to secure the amount of Rs. 25/- lakhs and odd to the Income -tax authorities to the satisfaction of those authorities. In these circumstances we do not feel that there is any substance in the contention urged by Mr. Banaji that the petition is actuated by mala fides and therefore, the suit ought to have been dismissed by the learned trial judge.

(16) In the result, the appeal fails and is dismissed with costs.

(17) Having regard to the fact that the inspector to look into the affairs of the company was appointed somewhere about 1955 and all attempts of investigation had been defeated by one method or the other, we do not think that the advertisement can be stayed any longer, we direct that the advertisement shall be published on Wednesday the 16th December and the petition to be heard on 11th January 1965. The court Receiver to bear liberty to withdraw the amount of Rs. 500/- deposited by the company towards his costs.

(18) Appeal dismissed.