

(1988) 12 CAL CK 0051
In the Calcutta High Court
Case No : Company Petition No. 67 of 1987
In Re: Bajrangbali Engineering Co. Ltd.

Date of Decision : 23-12-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, 11
Companies Act, 1956 — Section 443

Citation : AIR 1989 Cal 356 : (1991) 70 CompCas 488

Hon'ble Judges : Satyabrata Mitra, J

Bench : Single Bench

Advocate : B.C. Dutt, P.K. Das, for the Appellant;

Judgement

Satyabrata Mitra, J.—This is an application for winding up of Bajrangbali Engineering Company Limited having its registered office at No. 66. G.T. Road, Liluah. Howrah, hereinafter referred to as the "company". The petitioners are the executors of the Will of one Mriganka Mohan Sur, since deceased. The said Mriganka Mohan Sur was the owner of more or less 49 bighas of lands comprised in premises No. 135, Girish Chose Road and 11/2, Guha Road, Ghusuri, P. S. Bally, District Howrah. The said Mriganka Mohan Sur died on 3-11-1983 leaving a Will whereby he appointed the petitioners herein as the executors thereof.

2. Without going into details of the history as to how the claims in this petition arose, it will suffice to state it shortly that the instant petition is founded on the basis of three ex parte money decrees passed against the Company, i.e. in favour of the petitioners by the Second Subordinate Judge, Howrah. The particulars of the suits and the decrees obtained therein and the decretal claims of the petitioners are set out herein seriatim as follows :

Suit No. Date of the Decree Period of occupation Decretal amount. Total

(1) 11 of 75 6-2-86 for mesne profits from 1-6-70 to 15-4-75 (a) Rs: 3,05,270.00 Rs. 3,10,240.20

(b) cost Rs. 4970.20

(c) Interest at the rate of 6% from the date of the decree till realisation

(2) 4 of 78 30-1-86 for mesne profits from 16-4-75 to 15-1-78 (a) Rs. 1,93,068.50 Rs. 1,97,323.00

(b) Cost Rs. 4254.50

(c) Interest as above

(3) 17 of 79 10-2-86 for the period from 16-1-78 to 30-6-79 (a) Rs. 96,530.46 Rs. 99,950.71

(b) cost Rs. 3,420.25

(c) Interest as above.

These three money suits claiming mesne profits against the said company for wrongful occupation of the said two premises were originally instituted by the said Mriganka Mohan Sur while he was alive and after his death on 3-11-83 during the pendency of the said suits, the petitioners as executors of his will were substituted in the said three money suits as the plaintiffs after obtaining Probate, The substituted plaintiffs had thus proceeded with the said suits and obtained the said three decrees in the said three money suits in 1986.

3. The claim of the petitioners in this winding up petition is to the tune of Rs. 6,43,311.09/- being the total of the decretal amount in the said three money suits.

4. The petitioners' case is that the Company had contested the said suits by duly filing its Written statement therein but ultimately did not contest the same at the trial and as such ex parte decrees were passed in the said three money suits in favour of the petitioners. The said Company did neither take out any application under Order 9 Rule 13 of the Civil P.C. for setting aside the said three ex parte decrees nor had preferred any appeal against the said three ex parte decrees. In the application for substitution under Order 22, Rule 3 of the Code taken out by the petitioners after the death of the original plaintiff, the Company although served with notice did neither object to the substitution of the petitioners as the plaintiffs in the said three money suits nor did raise any dispute as to the competency of the petitioners for being so substituted in the said three suits and allowed the said three ex parte decrees to have been passed against it.

5. Seeing that the Company did not pay the said claim of the petitioners for mesne profits as decreed in the said three suits in spite of demands, the petitioners issued statutory notice to the Company u/s 434 of the Companies Act on 6th Nov. 1986. On 25th Nov. 1986 the Company replied to the statutory notice denying their liability to pay the same as demanded and made out a case that the petitioners were not entitled to claim any amount by way of damages and/or mesne profits as successors-in-interest of the late Mriganka Mohan Sur by reason of the fact that the said Mriganka Mohan Sur while he was alive had by then already transferred his right, title and interest in the properties being the

subject matter of the said three money suits during the pendency of the said three suits to certain trusts viz. Sarat Chandra Sur Jana Kalyan Charitable Trust (hereinafter referred to as the said Trust) by a registered Deed of Gift dt. 6-5-1981 and as such the petitioners being the legal representatives of the original plaintiff had no right, title or interest in the property and were not competent to take out and proceed with this winding up petition. It has been further alleged that the Company never expressed their inability to pay the decretal dues of the petitioners nor had they failed and neglected to pay the same in the manner as alleged by the petitioners and as there was serious dispute between the parties, the payment of the decretal dues was withheld but the Company were/are ready and willing to pay the same provided the same was found to be payable at all by them.

6. In the affidavit-in-opposition filed by the Company, the Company has made out the following case :

1) that the petitioners have no locus standi to move the instant petition inasmuch as they have no right, title and interest whatsoever in the decretal amount.

2) that the said Mriganka Mohan Sur, since deceased, prior to his death had executed a deed of gift on 6-5-1981 whereby he made a gift of the said property being the lands at Ghusuri, Bally to the trustee of the said Trust together with the rights and benefits of litigation.

3) According to the said deed of gift, the said Trust became the absolute owner of all lands, hereditaments and premises comprising 49 bighas and 6 cottahs of land in premises No. 135, Girish Ghose Road and 11/2. Guha Road.

4) that by virtue of the said deed of gift the present petitioners required (acquired ?) no rights whatsoever in respect of the said lands as executors to the estate of late Mriganka Mohan Sur.

5) that the said Trust by a registered sale deed dt. 25-2-1985 sold, transferred and conveyed all their right, title and interest in the suit lands to "Bajrangbali Market Association".

6) On the date of the decrees in the said three money suits, the petitioners had no right, title and interest in the suit lands out of which money claims of the petitioners as executors arose, This fact had been fraudulently suppressed from the court by the petitioners at the time of obtaining the said three money decrees.

7) the said three decrees passed in the court of second Subordinate Judge, Howrah were vitiated by fraud and the decrees are nullity and as such the petitioners are no longer the creditors of the said Company.

8) that the said decrees obtained by the petitioners are not executable in any manner and the purported decrees were vitiated by fraud practised on the court

by the petitioners and the petitioners were not competent or had no authority to continue the said suits in their capacity as executors of the estate of the said Mriganka Mohan Sur deceased on the face of the facts that the said late Mriganka Mohan Sur had himself transferred by the said deed of gift pendente lite all the lands and the benefit attaching thereto conveying all his right, title and interest and profits either past, present or future including his rights and benefits of all pending litigation pertaining to and in respect of the said lands in favour of the said Trust. This fact was brought to the notice of the late Mriganka Mohan Sur during his lifetime when he agreed and assured the Company that he would not proceed with the said suits in any way or in any manner and on the basis of such assurance the Company did not contest the said suits. In any event, three suits obtained by the petitioners as such are not enforceable and executable against the Company.

7. In the affidavit-in-reply, the petitioners while annexing a xerox copy of the said deed of gift denied the contentions of the Company. It was particularly denied that the petitioners had practised fraud on the court or otherwise. It was specifically stated in para 13 to the reply that the aforesaid pleas of the Company were utterly irrelevant, misleading and mischievous as the said allegations, if made in the execution case, would tantamount to asking the executing court to go behind the decree which is not permissible in law. It was stated that in the circumstances aforesaid and since the Company did not contest the said suits the Company is estopped from questioning the validity and/or legality and/or the enforceability of the said decrees.

8. From the facts of the case as stated above, it appears that the short point and crux of the matter hinge over the fact as to whether on the date of the said three money decrees, the petitioners had the right to obtain such decrees and having obtained the decrees, to proceed with this petition in view of the fact that the original plaintiff the late Mriganka Mohan Sur. while alive, had by the said deed of gift already transferred pendente lite all his right, title and interest as also the benefits of litigation past and present in the said property in favour of trustees in the said deed mentioned (viz. the said trust) before the decrees were passed in favour of the present petitioners.

9. Mr. B. C. Dutt, learned Advocate, appearing on behalf of the petitioners contended that the Company could not at this distance of time be heard to say that the present petitioners before the winding up court were not competent to proceed with the instant winding up petitions inasmuch as the Company by not having contested the said three suits had allowed the ex parte decrees to have been passed against it. Mr. Dutt submitted the Company did not apply under Order 9 Rule 13 of the Civil P.C. for setting aside the said ex parte decrees. Again the Company thought it fit not to have preferred any appeal from the said decree. It was submitted that the Company could not now challenge the said decrees on any of the grounds whatsoever including the ground that the petitioners had no right as on the date of the said decrees to obtain decrees or

that no such decrees should have been passed in their favour. It was further submitted that the substitution application was made by the petitioners under Order 22 Rule 3 of the CPC on the death of the original plaintiff and notice thereof was given to the Company in the said suits, but the Company did not raise any dispute or objection that the petitioners were not competent to be so substituted and to continue the said suits in view of the fact that the said Mriganka Mohan Sur the original plaintiff himself before his death had already transferred the said property pendente lite by the said deed of gift of 1981. Mr. Dutt submitted that the Company could not raise such pleas as was raised in the affidavit-in-opposition at this distance of time after keeping silent over the years and as such they were estopped from doing so and that the petitioners were and are quite competent to obtain the said decrees and the said decrees are still good and valid decrees operating against the Company. It was also contended on behalf of the petitioners that since this was a winding up petition the court can go behind the decrees in determining the true scope, effect and/or validity of the said three decrees and to enquire as to whether the debt owed by the Company was real, i.e., for consideration and this was so even in the case of judgment debt. Mr. Dim submitted that this power of court is limited to the extent recognised by the principles of law as to Insolvency. The court has the power to go behind the decree to see whether it was obtained by fraud or collusions and whether the judgment debt is legally due and recoverable. But that is a matter exclusively for the court to determine and the judgment debtor (here the Company) has no say in the matter. Here the Company did not dispute the debt but only the right and capacity of the petitioners. Mr. Dutt submitted that if the transferees (viz., the said trust) were substituted in place of the original plaintiff rather than the petitioners, the company could not have raised the kind of dispute as is raised now and in that case they would have been immediately out of court. In this connection Mr. Dutt submitted that law allows the plaintiffs or whoever is substituted as plaintiffs to continue with the suits if they chose notwithstanding the transfer pendente lite of the interest of the original plaintiff. If the transferees are not substituted as plaintiffs, the persons substituted instead will get the decrees on behalf of either the original plaintiff or his transferees or assignees. In this connection Mr. Dutt relied on the case *Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another*, (head note). In that case the appellant was the purchaser of the properties which was the subject matter of a preliminary mortgage decree obtained by the first respondent. In appeal from an order made by the trial court that the execution of the decree for sale of the mortgaged properties was not barred by limitation, the appellant applied to be brought on record. It was held that whoever was entitled to be but not brought on record under Order 22, Rule 10 in a pending suit or proceeding would be entitled u/s 146 of the C.P.C. to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal. Mr. Dutt did not dispute the proposition that the transferee or assignee had the right to be substituted, but submitted that if he did not choose to do so the proceeding could not abate or be arrested. Mr. Dutt further clarified the proposition that the

effect of Section 146 and Order 22 Rule 10 of the C.P.C. was that the right of the proper person to be substituted or brought on record was preserved but because Such person having not been substituted or brought on record, the passage of the suit, could not be halted and the suit must be proceeded either by the original plaintiff if he was alive or by his legal representatives if he was dead.

10. It was also submitted on behalf of the petitioners that the allegations made in the reply to the statutory notice under the Companies Act were by and large admitted by the Company with a feeble plea of dispute raised therein. In any event it was submitted from the Bar on behalf of the petitioners that the pleas raised by the Company were all afterthought and concocted and they were contrary to what had been stated in the Company's reply to the statutory notice and there was utter lack of bona fides on the part of the Company.

11. On the point of competency of the petitioners to proceed with the suits and to obtain the decrees and in taking out the instant petition it was specifically submitted by Mr. Dutt on behalf of the petitioners that the late Mriganka Mohan Sur the original plaintiff, could have continued the said three suits in his individual capacity notwithstanding execution and registration of the said deed of gift in 1981 during the pendency of the three suits or in other words the transfer pendente lite by the original plaintiff in the subject matter of litigation would not affect his right to proceed with the suits as such and after his death his legal representatives who stepped into his shoes could likewise proceed with the suits and obtain the decrees as of right. It was further submitted that the death of the original plaintiff. Mriganka Mohan Sur, could do nothing to prevent the petitioners from continuing the suits until and unless the transferees to the said deed of gift made an application for their substitution to continue the suits or they were brought on record otherwise. It was further submitted on behalf of the petitioners that under Order 22 Rule 10 of the Civil P.C. a transferee and/or assignee need not necessarily be made party to the suit. It was contended that the transferee might or might not choose to be substituted in the suit on the death of the original transferor. If the transferee or assignee did not choose to be substituted, the continuance of the suit could not be arrested and the suit must proceed either by the original plaintiff or by his personal representatives in the absence of the transferees. It was further urged that the defendants could have taken steps to substitute the transferees in the place of the original plaintiff in the suits. In either case, the original plaintiff or his legal representative who had been substituted here did not lose the right to proceed with the suits. Mr. Dutt heavily relied on the provisions of Order 22, Rule 10 of the Civil P.C and submitted that the question in the instant case was not one of substance but of procedure and it came within the ambit of Order 22 Rule 10. The learned Advocate for the petitioners explained that in terms of Order 22, Rule 10 of C.P.C. in the case of any assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest had come to reside or devolve. Therefore, was submitted that if the transferees of assignees of the

original plaintiff in this particular case did not choose to make any application for their substitution in place of the original plaintiff, the suit could proceed by the leave of the court without substitution. Since it was a matter of procedure, the substantive rights or liabilities of the original plaintiff or his successor had not been affected or that legal position of the original plaintiff or his successors was not changed or altered. In this connection Mr. Dutt relied on a Bench decision of this Court in the case of Rai Charan Mondal v. Biswanath Mondal reported in 20 Cal LJ 107 : (AIR 1915 Cal 103). In this case the great Judge, Sir Asutosh Mookerjee speaking for the court held after considering various decisions that "the trial of the suit should not be arrested merely by reason of devolution of the interest of the plaintiffs. The successor-in-interest may, if he chooses, obtain leave of the court under Order 22, Rule 10; but if he does not do so, the original plaintiffs are entitled to continue the suit and their successor will be bound by the result of the litigation. The consequence will be that the plaintiffs, if successful, will obtain a decree which will enure to the benefit of their successor."

12. Then the learned Advocate for the petitioners relied upon Buckley's Company Law, 13th edition, page 452 under the heading "judgment debt". Mr. Dutt relied upon the following lines from Buckley :

"If the petitioners have already obtained a judgment in his favour, he cannot upon an allegation that the judgment was obtained by fraud, be called upon, as a preliminary to his right to an order, to go into further evidence in support of his claim. But upon the respondent's undertaking to bring an action to set aside the judgment, the petition may be ordered to stand over".

Mr. Dutt argued that the petitioners were not required to adduce further evidence in support of their claim even if fraud was alleged in obtaining the decrees and the company had not so far taken any steps to set aside the judgment. In this connection Mr. Dutt also relied upon Mullah's Law of Insolvency, 3rd edition, page 129, para 151 on the proposition as to how far the Bankruptcy court can go behind the decree. It was submitted that these three decrees were not obtained illegally or through fraud practised on the court. There might have been procedural defect in obtaining the decrees before getting the assignees substituted but those defects did not go to the substance of the matter. Again the procedural defect did not relieve the judgment debtor of its liability or indebtedness to the debt due. He then relied upon the case in The State of Punjab Vs. S. Rattan Singh, . Following this decision of the Supreme Court the learned Advocate submitted that Insolvency court could very well go behind the decree to determine whether the alleged debt owed by the debtor was really due or not and this jurisdiction of the Insolvency court is extended not only at the stage of adjudication proceedings but also to the stage of the proof of debts, i. e., the court is entitled to scrutinise debts to be proved by a creditor in order to determine the amount of all debts which the insolvent owes since its total asset will be utilised for the payment of his total debts and if any debt is wrongly included in its total debt, that will adversely affect the interest of the creditors

other than the judgment creditor in respect of that particular debt as they were not parties to the suit in which only the judgment debt was decreed. This power is also extended to the cases of fraud or collusion or under the circumstances suggesting miscarriage of justice. He argued that the power of the court to go behind the decree was to investigate whether the judgment debt was legally due and whether the debtor does owe the debt to the judgment-creditor and the extent thereof. Mr. Dutt argued that the Insolvency court has jurisdiction to determine itself the alleged debt owed by the debtor irrespective of whether those debts are based on contract or under a decree of court. Even at the stage of proof of debt, the Official Receiver in behalf of the Insolvency Court could even demand proof of a debt on which the judgment debt had been decreed. Mr. Dutt explained the circumstances as laid down in the said case of *The State of Punjab Vs. S. Rattan Singh*, as to how far the Insolvency court can go behind the decree. But he argued that the judgment debt or the indebtedness of the Company had not been challenged here. On the contrary there were averments that the company would pay off the debt if it were legally recoverable, Mr. Dutt submitted that the debt was not disputed but only the recoverability was challenged viz, the judgment debt was not recoverable by the persons seeking to recover. Thereafter Mr. Dutt also scanned the circumstances as to how far the Insolvency court can go behind the decree by relying upon the case of *Ex parte Lennox* reported in (1886) 16 QB 315 at p. 320. Mr. Dutt although relying upon the observation of Lord Ersher M. R. in (1886) 16 QBD 315 that the Bankruptcy court could enquire into judgment debt upon sufficient cause being shown which would show that the judgment ought to be disregarded in the bankruptcy, contended that the judgment was the prima facie evidence of a debt and that the judgment or order was far stronger evidence against debtor on the validity of the debt for which it was purported to be given. Mr. Dutt further submitted that although it was the duty of the Insolvency court to see whether the debt was genuinely due or whether a genuine debt was due and payable by the debtor, this aspect of the matter had nothing to do with the question as to whether the legal position of the creditor had been altered in the meantime. In the instant case Mr. Dutt contended that it could not be said that the judgment was obtained by default of the debtor. The debtor knew of the pending suits, appeared in it and filed written statements challenging the averments in the complaints, the debtor was also served with the notice of application under Order 22 Rule 3 of the CPC but it did not contest nor did it appear at the hearing of the suits and by his overt act allowed the decrees to be passed ex parte which were all matters of record. Even thereafter the debtor, in order to show its bona fides, did not take any steps either for setting aside the ex parte decrees or preferring any appeal therefrom.

13. It was submitted further on behalf of the petitioners that the present petitioners proceeded with the suits and obtained the decrees in the interest of the transferee of the original plaintiff notwithstanding the fact that the transferee viz, the said Trust subsequently transferred the property to some other party. Here the recoverable debt was the exclusive property of the said trust. Mr. Dutt

submitted that for want of transferee or assignee, the petitioners could not allow the suits to be dismissed. Mr. Dutt contended that the right of the original plaintiff or of his legal representatives was not extinguished by the death of the original plaintiff and any decree obtained by the original plaintiff or Ms legal representatives could not effect or change the defendant's position as a debtor to the plaintiff and the defendants as such could not question the right of the creditor/plaintiff to obtain decrees against them. He argued that the debt although remained a debt owing by the defendant company notwithstanding alteration in the legal position of the plaintiff. In this connection Mr. Dutt relied upon the case in Krishan Sharma Vs. Shital Prasad, . This was a suit filed by the plaintiff for recovery of arrears of rent and for ejectment of the defendant. During the pendency of the suit the plaintiff sold the subject matter of the suits to one Babulal Jain. Thereafter the plaintiff died during the pendency of the suit. It was held that on the landlord dying during the pendency of the suit for ejectment and for realisation of arrears of rent after transferring the suit property, the transferees could not be brought on record as the legal representative of the deceased transferor since u/s 2(11) of the Civil P.C., a person can be said to be legal representative who represents the estate of the deceased; the transferee did not represent the estate of the deceased inasmuch as no right which the transferor had did accrue on his death to the transferee and accordingly the transferee could not come in as the man entitled to have his names substituted in consequence of the death of the original plaintiff. Therefore, Mr. Dutt's argument was that the transferees of Mriganka Mohan Sur, the said trust could not be substituted under Order 22 Rule 3 because they were not the legal representatives of the original plaintiff. Again under Order 22 Rule 10, the transferees may or may not be substituted or brought on record in the suit in cases of transfer pendente lite by the original plaintiff or in other words he submitted that bringing on record of the legal representative is a must under Order 22 Rule 3 or 4 whereas the case is entirely different under Order 22 Rule 10 where there is no question of abatement if the assignee or transferee or persons with whom any interest by way of assignment, creation or devolution has come to reside did not apply to be substituted. Therefore, in this case, by not bringing on record and substituting the transferee or assignee of the original plaintiff, the right of the original plaintiff or his legal representative had not been affected or taken away to continue the suits and decrees obtained by either of them was a valid legal decree. In this connection Mr. Dutt also relied on the case in Shakti Chand Vs. Chamaru and Others, . This was a case before the Division Bench of Himachal Pradesh High Court where the plaintiffs (original owners) filed a suit for possession of the land in dispute alleging that the defendant Rirku (whose legal representative, Chamaru had been brought on record) executed documents undertaking to relinquish tenancy rights. The defendant, not having fulfilled the terms of the documents retained the possession thereby contravening his undertaking and as such a suit was filed for a decree for possession of the land in dispute in favour of the plaintiffs. The suit was decreed. Rirku defendant preferred an appeal before the District Judge and during the

pendency of this appeal the plaintiffs obtained possession pursuant to the decree of the trial court and sold the property to the appellant and the respondents 7 and 8. The Vendees were put in the possession of the land. The learned Additional District Judge, Khangro, allowed the appeal and dismissed the suit. A second appeal was preferred to the High Court but the learned judge dismissed that. In the second appeal it was urged on behalf of the appellant that he should have had an opportunity of being heard in the appeal by the learned Additional District Judge before it was disposed of and that for want of such hearing he had been gravely prejudiced. The learned single Judge of the High Court observed in the judgment that it was open to the appellant or the respondents in the appeal to apply under Order 22 Rule 10 of the Civil P.C. for bringing on the record a transferee of a party to the appeal if during the pendency of the appeal, the property in dispute had been sold to such transferee. It was further observed that no such application was made during the pendency of the appeal. The learned Judge while discussing the judgment in Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, observed that in the present case there was nothing to show that the vendors had been acting against the interests of the transferee in the appeal before the lower appellate court, It was also observed that the law does not require that if property is transferred during the pendency of an appeal and the transferors are already on the record, it is still necessary that the transferee should be brought on record. It was further observed that mere circumstance, that the property had been transferred during the pendency of the appeal did not give a right to the transferee to be brought on record. While dismissing the appeal the learned Judge observed that he was not satisfied that the judgment under appeal was vitiated by any error of law. In that case while considering the various decisions of other High Courts the learned Judges of the Division Bench came to the conclusion in paras 5, 7 and 8 of the said judgment as follows :-- Para 5 : "we have also perused judgment but we have no hesitation in holding that the observations made by the learned single Judge are fully justified".

Para 7 : "The provisions of Order 22 Rule 10 did not, however, compel an assignee to make an application in that behalf, but if he chooses to do so, the said application should ordinarily be granted, unless there are some exceptional grounds for rejecting it and such grounds do not exist in the instant case".

Para 8 : "It is not the case of the appellant that he applied to the learned District Judge to be added as Respondent in terms of Order 22 Rule 10 of the CPC. The case of the appellant, however, is that it was incumbent on the Respondent No. 1 to implead the appellant as the Respondent in the appeal before the learned District Judge. We are Unable to agree with this contention of the learned counsel for the appellant in view of the decisions referred to above. It may be pointed out that it is also not the case of the appellant that the transferors respondents had not been defending his interest in the litigation".

14. It appears therefrom that the provisions of Order 22 Rule 10 of the Civil P. C.

do not compel an assignee of party to a suit or appeal to make an application during the pendency thereof. The provision is merely of enabling character. If no application is made then the suit or appeal will be continued and will be decided between the parties on the record, but the decision would bind the assignee on whom interest in the subject matter in the litigation had devolved during the pendency of the suit.

15. Mr. P. K. Das, the learned Advocate for the Company while laying stress on a portion of the operative part of the said deed of gift dt. 6-5-81 that the lands in suit together with the benefits of litigation were transferred by the original plaintiff during the pendency of the suits, argued that

(1) the present petitioners were not competent to proceed with the suits and obtain the decrees by reason of the fact that the Original Plaintiff had transferred pendente lite all his rights title and interest in the lands including the benefits of litigation and consequently the plaintiffs who were the present petitioners here had no right or title to the lands to enable them to continue with the suits and as such the decrees obtained by them were bad in law and nullity, Mr. Das argued that as the petitioners had no right to recover the debts from the Company as there was no lis pending between the petitioners and the company the company was no longer a debtor either to the original plaintiff or to the petitioners and there was no relationship between them as the debtor and creditor, He further contended that the three decrees should not have been passed in the three suits in favour of the petitioners as they were not the persons legally entitled to obtain the decrees.

(2) He next submitted that where decrees were obtained by wrong persons, such decrees were nullities and the same were and/or are unenforceable against the company as being bad in law.

(3) His next contention was that for the purpose of determining the indebtedness of the company, the winding up Court can go behind the decree to enquire and investigate how far and to what extent the company owed the debt to the creditors and the winding up Court can enquire whether the alleged debt was legally due and owing by the company by reason of that transfer pendente lite of the subject matter of the suits.

(4) He next contended that it was an act of fraud on the part of the petitioners to obtain the decrees without bringing to the notice of the Court that they were merely legal representatives of the deceased plaintiff and not the transferee and/or assignees of the deceased plaintiff in whom only the right to recover the debt resided.

(5) Mr. Das next submitted that from the definition of mesne profits as appearing in Section 2(12) of the Civil P.C., it appeared that there was no legally recoverable property of the petitioners at the time of passing of the decree or at any rate on and from the date of the said deed of gift i.e. 6-5-1981 so as to enable the petitioners to claim mesne profits of any property.

(6) His last submission was that the Company was not answerable to wrong persons viz. the petitioners who got no right or title or interest in the property or could not be said to have any legal right therein in view of the transfer pendente lite.

16. In this connection Mr. Das placed before me the provisions of Section 2(12) and 47 of the Civil P.C. and submitted that unlike the ordinary Courts which cannot go behind the decrees in the execution proceedings u/s 47 of the Code, the winding up Court could do so having larger power than the ordinary Courts. In this connection Mr. Das relied on the case, *Om Prakash Mohta v. Steel Equipment & Constructions Co. (P) Ltd.*, reported in (1968) 38 Com Cas 82. In this case a Company in consideration of loan advanced by the petitioning creditor guaranteed the loan to its sister concern on certain security. A suit was filed for repayment of the loan and a consent decree was passed therein. The decree also created charge on the assets of the company situated outside the jurisdiction of the Court. Thereafter the winding up petition was filed for non-payment of the decretal debt. The Company contended that it had no power to guarantee the loan to third parties in terms of its Memorandum of Association and raised further plea that the Court which passed consent decree had exceeded its jurisdiction in doing so. Moreover, as there was a bona fide dispute, the petition must be dismissed. It was held that there was a bona fide dispute regarding the debt whether the dispute was based on substantial ground. The bona fide dispute need not extend to the whole of the debt, though a substantial part of the claim was bona fide disputed. Just as the consent decree founded on the incompetency of an individual or a minor was void and nullity, the consent decree founded on the incompetency of a company was also void and when the decree was void by reason of its being ultra vires, it could be successfully attacked in any collateral proceedings, though it had not been set aside. This rule was applicable in the winding up proceedings with greater force, as the jurisdiction of the winding up Court was of wider amplitude. It was further held that on the facts that though the Memorandum of Association of the Company authorised it to do several acts for the benefit of the company, no power could be spelt out from the Memorandum which would enable it to be guarantor not for its own but for the debts of strangers. It was also held that it was doubtful whether the clause of the Memorandum which authorised the company to subsidise and assist companies would enable the company to guarantee loans to strangers. There was, therefore, a substantial ground in law on bona fide dispute regarding loans. It was also held in that case that in considering those pleas raised on behalf of the company that there was a bona fide dispute, the consideration that the passing of the decree raised a strong presumption as to the existence of the debt, must be kept in view. The practice of the Calcutta High Court of referring one of the parties to a suit, when there was a bona fide dispute as to debt, should be applicable in the case of decretal debt also.

17. Mr. Das on behalf of the Company relied strongly on this case to substantiate his argument that even if the Company not having challenged the decrees in the

instant case by applying under Order 9, Rule 13 of the Civil P.C. for setting aside the decrees and not having taken any other steps to get round the decrees, the decrees could be successfully attacked in any collateral proceedings as the winding up proceedings when the decrees were void by reason of their being nullity on the ground that there was no lis between the parties to be decided by the Court as there was no debt recoverable by the petitioners from the Company on legally sustainable ground. Mr. Das contended that the Company had every right to challenge the decree in the collateral proceeding, i.e., the instant winding up proceedings with greater force inasmuch as the jurisdiction of the winding up Court is of wider amplitude. Mr. Das elaborated his arguments by submitting that the company could raise such pleas in this proceeding without being required to take other legal proceedings.

18. On the point that the Bankruptcy Court can very well go behind the decree in order to ascertain or investigate whether the debt was legally due and recoverable by the creditor in the Bankruptcy proceedings, Mr. Das relied upon the case, *In Re: Ko-Ku-La Ltd.*, , where the observation of Lord Esher M. R. in *Ex parte Lanox*, reported in, (1986) 16 QBD 315 had been quoted by the learned Judge and relied upon by Mr. Das. The said observation was to the following effect : --

"The Court is entitled to enquire into the alleged debt and the Court exercising a judicial authority is bound to do so upon a sufficient case being shown. Circumstances may be alleged which would show that the judgment ought to be disregarded in bankruptcy."

19. Mr. Das next submitted that the cases relied upon by the learned Advocate for the petitioners did not apply in the instant case as in those cases the question of transfer of the benefits of the litigation pendente lite was not involved. Therefore, those cases had no direct application in the instant case. In this connection Mr. Das relied upon the case, *Kiran Singh and Others Vs. Chaman Paswan and Others*, . Mr. Das contended that in view of the principle of law enunciated by the Supreme Court in the case of *Kiran Singh and Others Vs. Chaman Paswan and Others*, , the principles of law laid down in *Buckley's Commentaries on Company Law* and relied upon by Mr. Dutt were not always true and the winding up Court has ample power to go behind the judgment debt to scrutinise whether it was obtained from the Court having jurisdiction to render the judgment. Mr. Das contended that in view of the altered legal position on the death of the original plaintiff and in consequence of transfer pendente lite by him of the properties including the benefits of litigation there was no lis existed between the parties on the date of the decrees and as such legal representatives (the petitioners here) had acquired no right at all to proceed with the suits and obtain the decrees and therefore the Court passing the decrees was without jurisdiction to render them. In *Kiran Singh and Others Vs. Chaman Paswan and Others*, the point for decision was only as to which Court was competent to entertain an appeal from the subordinate Court having regard to the valuation of

the suit as paid on the plaint and as determined by the High Court and consequently the question of jurisdiction of the Court to render them. Para 6 of that judgment as relied upon by Mr. Das reads as follows : --

"The answer to these contentions must depend on what the position in law is when a Court entertains, a suit or an appeal over which it has no jurisdiction and what effect on Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of the parties. If the question now under consideration fell to be determined only on application of general principles governing the matter, there would be no doubt that the District Court of Monghyr was "coram non judice" and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits valuation Act on this position". Since the petitioners, as Mr. Das contended were not the parties legally entitled to recover the debt due to the Company, the decrees obtained by them were nullities. Mr. Das further submitted that the contentions raised by Mr. Dutt in the case reported in Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, supported his contentions that the assignees or the transferees pendente lite in the suit or appeal should have been brought on record to enable them to proceed with the suit. Mr. Das next submitted that the principles of law laid down and relied upon by Mr. Dutt in The State of Punjab Vs. S. Rattan Singh, and in Mullah's Insolvency Law and in In Re: Ko-Ku-La Ltd., had been conceded to by him and there was no quarrel about it.

20. To support his contention that in order to obtain the decrees the transferees or assignees have to be brought on record who were alone entitled to the debt due to the original plaintiff, Mr. Das relied upon the case, AIR 1939 170 (Privy Council) and submitted that in view of this Privy Council case, all the cases so far relied upon by Mr. Dutt had been set at rest. In this Privy Council case certain persons executed a mortgage in favour of a firm. Subsequently some of the partners of the firm retired after assigning their interest in favour of the remaining partners by unregistered deeds. The remaining partners brought a suit on the mortgage and an objection was taken to the maintainability of the suit. The plaint was amended bringing on record the retiring partners who were assignors as defendants. It was held, inter alia, that no doubt it was true that the parties who had assigned the whole of their interest pendente lite could not ask for judgment in respect of an interest which was no longer therein, but it did not follow from that their assignees were thereby precluded from recovering the same. Mr. Das relied on this case heavily to contend that the person who had parted and/or assigned the whole of his interest including the benefits of litigation could not ask for judgment in respect of an interest which was no

longer his, that is, the present legal representatives of the deceased plaintiff who are the petitioners herein and who derived no interest in the subject matter of the litigation which was transferred to somebody else pendente lite by the original plaintiff could not ask for judgment in their favour in the subject matter of the suits which stood transferred before they came into picture in the suits.

21. To appreciate the respective submission of the learned Advocates for the parties it is necessary to examine first the conduct of the parties and their legal rights particularly of the petitioners as to their competency to obtain the decrees in question in this application. At the outset it appears that it is on record that the Company never challenged its indebtedness for the mesne profits for the periods prior to the institution of the suits for which three decrees had been passed. It is also on record that the Company admitted its readiness and willingness to pay the decretal dues of the petitioners provided the same was legally recoverable by them. In this case the debt is admitted. What has been challenged and disputed is the right of the petitioners to claim the debt and obtain the decrees.

22. While the decrees are being challenged as nullities, no step whatsoever has been taken to set aside the ex parte decrees. Although the suits were contested by the Company by filing written statements and taking no objection despite notice having been served on it at the time of substitution of the petitioners as plaintiffs after the death of the original plaintiff, the Company overtly allowed the decrees to have been passed ex parte by not choosing to appear at the hearing thereof. It might have been that initially the Company had no real intention to fight out the suits having no genuine defence to offer, but when it came to the hands of the lawyers, a different complexion to the whole case had been sought to be given by challenging the right of the petitioners. In a substitution application the Company should have objected to the substitution of the petitioners on the authority of the Allahabad case reported in *Krishan Sharma Vs. Shital Prasad*, . In support of the case of the Company, Mr. Das relying on the case of *Ex parte Lenox*, (1886) 16 QBD 315 (supra) had thrown an open invitation to the bankruptcy Court to undermine the basis and validity of the judgment debt that happens to be questioned by the Company disregarding the wholesome observation of the Master of Rolls Lord Esher in the said case reported in, (1886) 13 QBD 315 which is quoted herein as follows : --

"It cannot be doubted that a judgment is prima facie evidence of a debt and that judgment or order to which a debtor has consented is far stronger evidence against him of the validity of the debt for which it purports to be given than a mere judgment by default. It is very strong evidence against him".

It is evident from the observation of the Master of Rolls that what weight the judgment debt carries and when no attempt being made to reverse that judgment in terms of the notes of Buckley's Commentary (supra) the judgment is firmly rooted and cannot be upset by mere assertion of fraud without particulars. In *In Re: Ko-Ku-La Ltd.*, Mr. Justice P.B. Mukharji, as his Lordship

then was observed in paragraph has follows : --

"But in no view of either the Insolvency Law or general jurisprudence can it be suggested that the mere assertion of fraud will at once in every case entitle the judgment-debtor to an enquiry into the validity of the judgment debt on the basis of which the petition for insolvency is presented".

His Lordship further went on to point out the purpose of enquiry of a judgment debt by the bankruptcy Court in paragraph 12 of the said judgment as follows : --

Para 12 -- "The reason why a judgment debt may be enquired into by a bankruptcy Court is obvious and that reason must be clearly understood in order to discover the limits of this doctrine that a bankruptcy Court can go behind a judgment debt. On the petition of one single creditor the bankruptcy court is asked to make an order of insolvency or as in the case of a company, an order for winding up, which means that all the creditors will be affected and that is the reason why a single judgment debt may be questioned lest a spurious or fraudulent or collusive debt of a party should be the foundation for making the debtor bankrupt for all other creditors and for the rest of the world.

23. But that does not mean that the judgment debt is of no value and is no evidence and it cannot be just disregarded by the judgment-debtor by merely making an allegation it has been obtained by fraud or collusion. I should have thought that such baldest and vaguest allegations which I have found in this affidavit of the Company challenging the decree do not even amount in law to the averment of fraud or collusion. That is all that I would observe of this case of " Ex parte Lenox, (1886) 16 QB 315 (A)" except saying also that this is not a case under the Companies Act and not a case in the winding up of a company but relates to the bankruptcy of an individual". The learned Judge had already spelt out the main purpose of enquiry into a judgment debt and its tenet by the winding up Court. This enquiry is for the protection of the general body of creditors lest they should come to grief to rank as ordinary creditors in the winding up for a spurious, fraudulent or collusive debt of a single creditor. By no stretch of imagination can it be said that the debt or the judgment debt in this application was spurious or collusive. As for fraud, no particulars have been given and it was not also hardly pressed for.

24. It appears that in a genuine case where there is a genuine grievance by the judgment-debtor that the judgment was obtained against him either by fraud or otherwise, the bankruptcy or winding up Court can surely go behind the decree to enquire and scrutinise the circumstances to find out the real position in fact and in law. In this connection Mr. Das relied upon the case (Steel Equipment Co. Pvt. Ltd.) reported in (1968) 38 Com Cas 82. In that case, the claim against the company arose on the basis of a consent decree passed against the Company on the basis of a guarantee given by it to secure a loan to its sister concern without the authority in its Memorandum of Association. In that case the power of the Company to guarantee the loan was challenged by the Company itself on the

ground that such exercise of power of guarantee by the Company was ultra vires of its Memorandum. The winding up petition was thus stayed on certain terms. There the learned Judge endeavoured to drive home the point relying upon various authorities that where there is initial lack of jurisdiction from passing judgment, the winding up Court has larger power than the ordinary Courts to travel behind the judgment to find out and satisfy itself whether the judgment was properly obtained. Therefore this aspect of the matter is well settled that if there are circumstances which are impeccable, the bankruptcy or winding up Court has larger power to go behind the decree.

25. That apart the main plank in this case upon which the arguments of both the petitioners and the Company rested was on the scope and effect of Order 22, Rule 10 of the Civil P.C. The said rule is set out hereunder :

"Rule 10 : (1) In other cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by the leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved".

In this connection it will be relevant to deal first with the case, AIR 1939 170 (Privy Council) , which was heavily relied upon by the learned Advocate of the Company. In this case one Mawji Waghji and his wife, the appellants. had borrowed Rs. 1,20,000/- from the firm of Cooverji Umersey & Company and gave a promissory note for that sum in favour of the firm. The advance was secured by certain bales of cotton and at the same time title deeds of two houses belonging to the appellant and her husband were deposited with the firm by way of equitable security. In case of default, the firm was to have recourse to the bales of cotton in the first instance and against the house property for any deficiency. Sometime thereafter seven members of the firm retired from the firm leaving the respondent and "his father, the only remaining members of the firm. Sometime thereafter seven partners by unregistered deeds of assignments assigned whole of their interest in the partnership Company to the respondent and his father and released all their share right, title and interest in the assets, outstandings, the property and the goodwill of the partnership business in favour of the respondent and his father. Thereafter the respondent and his father continued to carry on the business in that firm name as then constituted and brought a suit in the High Court against the appellants for a declaration that the plaintiffs were equitable mortgagees of the two houses and for an order that the defendants did pay them a sum of Rs. 1,33,500/- with interest and for other reliefs as contained in Order 34 of the Civil P.C. During the pendency of the suit, proper registered deeds of assignments were executed by the retiring partners. It was contended on behalf of the appellants that the suit in respect of equitable mortgage was not maintainable inasmuch as the proper parties (viz. the retiring partners who initially executed unregistered deeds of assignment) to the suit had not been joined. It was further contended that the house property not having been passed under the unregistered assignment still remained vested in the

original partners and could only be recovered in an action in which they were the plaintiffs or at least were parties. Pending trial of the action the respondent's father (Cooverji Umersey Capachara) died leaving the respondent solely entitled beneficially to all the assets, outgoings, property and goodwill of the partnership business and to the benefits of the said mortgage. Upon an objection being taken that the original partners were not made parties to the action, the plaintiffs applied that the seven retiring partners should be placed on record as co-plaintiffs or as co-defendants and leave was granted to them to amend the cause title of the suit by adding the retiring partners as defendants and allowing consequential amendments in the plaint to be made and therefore the seven retiring partners were added as defendants. The suit was decreed by the trial Court which was upheld by the Court of appeal. The point before the Privy Council was that since seven of the original partners by virtue of their transfer and assignment pendente lite of all their rights and interest in the mortgaged premises could not by themselves maintain an action for sale of the mortgaged properties, it was observed by Privy Council that "no doubt it is true that the parties who have assigned the whole of their interest pendente lite cannot ask for judgment in respect of interest which is no longer theirs. But it does not follow that their assignees are thereby precluded from recovering. If it were so, no assignment of property during the course of a trial would be possible. Such contention is on the face of it improbable and it is now dealt with by Order 17, Rule 1 of the Rules of Supreme Court which states :

A cause or matter shall not become defective by the assignment of any estate or title pendente lite".

Their Lordships of the Privy Council also considered the effect and applicability of Order 22, Rules 10 and 11 of the Civil P.C. It was observed at page 174 by their Lordships as follows : --

""In the circumstances their Lordships think the appeal Court were right in looking at the substance of the matter and ordering the decree to be passed in favour of the respondent alone. But in any case once the assignment dt. 22nd Aug., 1974 was executed, the respondent alone was entitled to recover and the decree was rightly passed in his favour".

It appears from the above Privy Council case that the assignee who was the respondent was alone entitled to recover the debt. Their Lordships also held that in terms of Order 17, Rule 1 of the Rules of Supreme Court that a cause or matter shall not become defective by the assignment of any estate or title pendente lite and considered the scope and effect of Order 22, Rules 10 and 11 of the Civil P.C. It therefore, follows from the above case that a cause or matter can be prosecuted despite assignment of any estate or title pendente lite; secondly that the assignees who were before the Court were also entitled to recover and thirdly that the same principle governing the provisions of Order 17, Rule 1 of the Rules of the Supreme Court govern the provisions of O. 22, Rules 10 and 11 of the Civil P.C.

26. It appears from the Privy Council case that the facts there were different from the facts of the instant case. In that case a number of retiring partners who were assignors of their partnership interest were added as parties defendants (being the original transferors) so that there could not be any objection by the mortgagor/defendant on the ground of proper parties not being before the Court. The assignees were already parties in that case. But in the instant case, instead of assignees, the legal representatives of the assignor were made parties. This state of things are permitted to continue under Order 22, Rule 10 of the Civil P.C. which was also approved by the Privy Council in the case under review. Mr. Das relied heavily on the observation of their Lordships viz.. "No doubt it is true that the parties who have assigned the whole of their interest pendente lite cannot ask for judgment in respect of an interest which is no longer theirs", but this judgment in my view is no direct authority for the proposition that where transferees/assignees pendente lite were not brought on record as parties to the suit to either prosecute or defend the same, whether the original plaintiff and on his death his legal representatives could or could not proceed with the action and obtain judgment. Placed in that situation, the original plaintiff or his legal representatives in the absence of the transferees could not allow the suits to be dismissed. In this connection their Lordships of the Privy Council further observed that the same principle would apply as was provided in Indian Law (i.e., Order 22, Rules 10 and 11). Therefore, if Order 22, Rule 10 of the CPC applied in terms in the instant case, the assignees had the option to be substituted in place of the original transferor. But if per chance that substitution had not come to pass for any reason whatsoever, the continuation of the suit to its ultimate end could not be abated or arrested. The language used in Order 22, Rule 10 of the Civil P.C. does not debar or restrict the prosecution of the suit. The vital difference of the instant case from the Privy Council case is while in the instant case assignees were not before the Court, they were very much before the Court in the Privy Council case.

27. It appears that in the facts of this case, the case (Rai Charan Mandal v. Viswanath Mandal) reported in (1914) 20 Cal LJ 107 : (AIR 1915 Cal 103) (supra) is a direct authority on the point involved in this case. This principle of law was more or less followed in Shakti Chand Vs. Chamaru and Others, . The admitted position is that the transferees/assignees of the original plaintiff in the instant case did not choose to come forward and he made parties under Order 22, Rule 10 of the Civil P.C. in the suits which fact was not also disputed by the learned Advocate for the Company. Nor did the Company make any application for the substitution of the transferees/assignees in the suits to carry forward their point of contention as argued. It was the admitted position also that the Company did not raise any objection to the substitution of the petitioners as the plaintiffs in the suits which the Company could have very well done having regard to its present stand and objection and in the light of the Bench decision reported in Shakti Chand Vs. Chamaru and Others, . In the circumstances, the legal representatives of the original plaintiff could not have afforded to have the

suits dismissed in the absence of proper parties namely, the transferees/ assignees of the original plaintiff. That being the position, I am of the opinion that there was nothing wrong with the petitioners proceeding with the suits and obtaining the decrees because law allowed them to do so. Therefore, I hold that the petitioners were justified and were within their rights to proceed with the suits and obtain ex pane decrees which must necessarily have to enure to the benefit of the transferees/assignees.

28. On the question of fraud being practised by the petitioners on the Court, I am of the view that when a party proceeded to trial according to law and rightfully did so there was hardly any question of fraud or any fraudulent motive with the petitioners. Secondly no particulars had been furnished by the petitioners (respondents ?) in the affidavit-in-opposition as to the nature and extent of fraud practised on the Court and as such nothing turns on the question of fraud on that score.

29. As to the question of Court's jurisdiction to pass any decree, when allegedly the proper parties were not before the court as argued by the learned Advocate for the Company, it may be said that the purpose of Order 22, Rule 10 and in view of the law laid down in (1914) 20 Cal LJ 107 : (AIR 1915 Cal 103) (supra) the petitioners were the proper parties before the Court and the Court had ample jurisdiction to entertain the suits and pass the decrees. There is another aspect of the matter with regard to the case reported in Kiran Singh and Others Vs. Chaman Paswan and Others, which was heavily relied on by the learned Advocate for the Company. He relied on para 6 of the said report where the Supreme Court while considering the effect of Section 11 of the Suits Valuation Act, 1887 went on to discuss the position in law when the Court entertains a suit or appeal over which it had no jurisdiction. The position in law as laid down in that paragraph was mainly as to the consequence of the suit or appeal where the Court trying it lacked initial jurisdiction to try and doctrine the case, In the instant case before me no case was made out as to the Court lacking initial jurisdiction in entertaining the suits. Had it been so, it could have been said that the decree passed by it were nullities. The learned Advocate for the Company did not also argue on the point that the Court which tried the suits and rendered the decrees lacked initial jurisdiction. In this connection it may not be out of place to mention that the learned Advocate for the Company while placing para 6 of the said report, Kiran Singh and Others Vs. Chaman Paswan and Others, omitted for reasons known to him, to place para 7 of the very same report. In para 7 of the said report, the Supreme Court while considering the cumulative effect of Section 21 of the Civil P.C. and Section 11 of the Suits Valuation Act held that when a case has been tried by Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical ground unless it had resulted in a failure of justice. In that case the Supreme Court refused to accede to the contention of the appellant to treat the judgment of the District Court as a nullity. That was a case involving construction of Section 11 of the Suits Valuation Act to the effect whether, according to the valuation given in the plaint,

and an determined by High Court, the District Court or High Court had jurisdiction to try the case. In my view, this case is not an authority for the proposition involved in the instant case before me and is not of any assistance 10 the learned Advocate for the Company. In the instant case before me, the Company never challenged the Court's jurisdiction to entertain the suits at any point of time in the District Court except what had been alleged in the High Court and that too on the question of competency or jurisdiction of the Court to pass the decrees only. The Company never challenged the jurisdiction of the Court even at the time of substitution of the petitioners as the plaintiffs in the suits who according to the Company, had no right to continue the suits. It, therefore, seems that the Company's plea raised for the first time in this proceeding as to the incompetency of the petitioners to continue this proceeding thus came squarely within the mischief of the principles of constructive res judicata to this effect that such plea as was raised now in this winding up proceeding could have been very well raised and decided in the earlier suits where the parties being the same and the issues involved being also the same. If the Company wished, it could have raised such an issue as a preliminary issue and have a decision thereon. A plea deliberately given up to be raised as an issue in the earlier suits must not be allowed to be raised in the subsequent proceedings like the present winding up proceeding which is indeed an independent proceeding (vide Chhotubhai Babarbai Patel and Others Vs. The State of Gujarat and Others,). It. therefore, appears that in this respect the Company had waived and/or acquiesced its right to challenge the right of the petitioners and that such attempt was being made too late in the day on the face of the facts that the petitioners had within the well defined parameter of the rule of law as laid down in 20 Cal LJ 107 : (AIR 1915 Cal 103) (supra), prosecuted the suits and obtained the decrees which must have to be taken to have been obtained on behalf of or for the benefit of the ultimate assignees.

30. The next question that I now pass to is the question as to what arc the rights of the petitioners in this application. The petitioners are no doubt the legal representatives of the deceased plaintiff within the meaning of Section 2(11) of the Civil P.C. It was the definite case of the learned Advocate for the petitioners that the petitioners had no direct vested right in the subject matter of the proceedings in the instant application, but had the right to obtain the relief in the suits filed in the subordinate Court by reason of the fact that neither the Company nor the transferees/assignees themselves had applied for the substitution of the transferees in place of the original plaintiff and that in such circumstances, the petitioners could not afford to allow the suits to be dismissed for want of the proper party when the law specifically allows that the suits may be proceeded with the leave of the Court. In this connection it was submitted by the learned Advocate for the petitioners that the suits could be proceeded with even by the original plaintiff if he were alive and in case of his death by his legal representatives in their fiduciary capacity such as. trustees for the benefit of the transferees and/or assignees. Therefore, the relief obtainable by the legal

representatives in such a situation would enure to the benefits of the persons with whom the right to obtain relief in the subject matter of the litigation had come to reside. There was good deal of force in this submission and there is nothing in the materials so far placed before the Court that I can disagree with the submissions so made.

31. It has not been challenged in this application by the Company that the petitioners are not the legal representatives of the deceased plaintiff. Therefore in the facts of the instant case their right to obtain the decrees for and on behalf of the transferees cannot, by any stretch of imagination, be taken away.

32. The next question which may crop up is whether the petitioners can give a valid discharge to the Company in respect of payment of the judgment debt. This point has not been raised before me nor argued by the learned Advocate for the Company. In this respect the Company may insist on the concurrence of the transferees in the matter of valid discharge being given to the Company. But this is a different question which was also not urged on behalf of the Company.

33. It, therefore, appears that it was open either to the Company or the transferees to apply under Order 22, Rule 10 of the Civil P.C. for bringing on record the transferee or assignee of a party to the suits, if during the pendency of the suits the property in dispute had been transferred to transferee (here the "said Trust"). No such application having been made before the District Court, the mere circumstance that the property in the suit had been transferred during the pendency of the suits does not by itself take away the rights of either the original plaintiff or his personal representative to continue the suit : Nor did it matter that the transferees must have to be brought on record. Moreover nothing has been shown in this case by the learned Advocate for the Company that the original plaintiff and in his absence his personal representatives had acted or been acting in any way against the interest of the transferee/assignee in the suits. Moreover, law does not require that if the property is transferred during the pendency of any suit and the transferor and in his absence his personal representative are on the record, it is still necessary that the transferees would be brought on record. The provisions contained in Order 22, Rules 10 and 11 of the Civil P.C. do not make it incumbent upon the assignee to make an application during the pendency of the suit or appeal. These provisions are of enabling character and entitle the transferee or assignee to do so if he or they so desire. It is not necessary for the assignee to make application for being impleaded as a party in the suit or appeal if he finds that his interest are being well looked after by its assignor. There is another fact which needs to be dealt with. It has been alleged by the Company in the affidavit-in-opposition that the late Mriganka Mohan Sur, the original plaintiff, while he was alive had assured the Company that he would not proceed with the said suits in any manner since he had transferred his interest pendente lite. No iota of evidence was produced before the Court to show that such assurance was given. It is very easy to allege that something had been said by a person who was dead taking advantage of the

situation that the material evidence from that person could no longer be available to the Court. This Court does not prefer to be moved by this type of vague and unfounded allegation.

34. There is yet another aspect of the matter. The learned Advocate appearing for the Company had not raised any dispute with regard to the indebtedness or of any other material facts related to the indebtedness of the Company nor any factual dispute as to the quantum of the debt, the circumstances giving rise to the claim or any other material evidence which cannot be gone into by the winding up Court. Nor any offer as to furnishing security for the claim was made before the Court to repel any presumption of insolvency of the company. Again no point was taken on behalf of the Company as to the structure of the present winding up petition whether the same does or does not conform to Form 46 of the Companies (Court) Rules, 1959. Dispute so far raised was with regard to the question of law whether in the circumstances of the case, the petitioners had the legal rights to continue with the suits and obtain the decrees which question in my view, the winding up Court can go into and deliberate on it.

35. Therefore it appears that apart from the question of law involved in this matter, there is no factual dispute on any account whatsoever which the winding up Court cannot go into but to refer the same to be gone into in separate proceedings. Nothing was shown on behalf of the Company on the materials disclosed in the affidavits that there was certain factual dispute which cannot be decided on affidavits. On the contrary the claim was admitted and the only dispute raised so far was as to whether the same was legally recoverable by the petitioners as such.

36. It appears therefore that the present petitioners had the right to continue the suits in the District Court and obtain the decrees, the fruits of which must necessarily be held by them for the benefit of the transferees pendente lite.

37. Considering all the circumstances of the case and the learned arguments advanced by the Advocates of both the parties, it must have to be held that this petition succeeds and in consequence whereof I pass the following order : --

Petition is admitted Notice is to be given to the company. Petition is to be advertised once in the Statesman, once in Aajkal and once in Biswamitra. Advertisement in Calcutta Gazette is dispensed with. Such advertisement shall not be published before 21-1-89. Petition is returnable on 13-2-89. If the company pays the dues of the petitioner on or before 21-1-89 the advertisement shall not be published and in that event the winding up petition shall remain permanently stayed,

38. Company is directed to pay the costs of this application assessed at Rs. 1,000/- to the petitioning creditors.

39. All parties to act on a signed copy of the minutes of this order on the usual undertaking.