

(1940) 11 AHC CK 0006
In the Allahabad High Court

In Re: Benares Bank Ltd. Benares Shri Nath Shah Official Liquidator

Date of Decision : 04-11-1940

Acts Referred:

Companies Act, 1956 — Section 229

Citation : AIR 1940 All 544 : (1941) 11 CompCas 36

Hon'ble Judges : Braund, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Braund, J.—This is an application in the matter of the Benares Bank Ltd., in liquidation, which raises an interesting and a very important point. The facts are exceedingly simple. The applicant Sri Nath Sah, is admittedly a contributory of the Bank in respect of shares on which there is an uncalled liability. He was also at the date of the winding up order a depositor in the Bank to the extent of Rs. 5000. In addition to this, he had at the date of the winding up order an overdraft account with the Bank which was in debit to the extent of Rs. 3822-9-9. Put shortly, therefore, the applicant was a contributory of the Company, a creditor of the Company and a debtor to the Company. The list of contributors of the Company has been settled and the applicant's name is on it. The official liquidator has now called upon the applicant to pay to him the sum of Rs. 3822-9-9 due on his overdraft account. The applicant's answer is that he is entitled to satisfy it by setting it off against Rs. 5000 due from the Bank to him on his deposit account, with the result that the Bank will remain his debtor on this deposit account to the extent of only a little more than a thousand rupees. The rejoinder of the official liquidator is that, u/s 229, Companies Act, the applicant is entitled to no such set-off, inasmuch as he is a contributory. At present the matter has only reached a stage in which the official liquidator has intimated by letter that he does not accept the applicant's claim to a set-off. And in form this application is one by the contributory u/s 183(5), Companies Act, complaining of a decision of the official liquidator. No "order" has yet been made by the official liquidator u/s 186(1) of the Act. In order to remove any question as to the regularity of these proceedings, the official liquidator has undertaken to

file "pro forma", an application u/s 186(1) for an order upon the contributory and I propose to treat this application also as an application under that section by the official liquidator. The difficulty arises in consequence of Section 186, Companies Act and of certain decisions under it. The section runs:

186(1) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profits; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that, in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call.

2. There is a decision of a learned Judge of this Court under this section which, it must at once be conceded, is indistinguishable in its facts from, and directly applies to the case before me. It is the case in Babu Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd., . In that case, the official liquidator claimed from a contributory a sum of money due to the Company for work done and electric current supplied. The contributory replied by claiming a set-off of money due to him from the company in respect of a loan. The learned Judge, in reliance on the decision of Sir George Jessel, M.R., in (1878) 9 Ch D 595 *In re Whitehouse & Co.* came to the conclusion that Section 186, Companies Act, clearly applied and that the applicant, being a contributory, was not entitled to a set-off. As I have already said, this case, on its facts, is indistinguishable from the present case. But I venture, with great respect, to think that a number of relevant considerations and authorities were not made available to the learned Judge who decided it. For this reason and because the question is one of vital and immediate importance, both in the liquidation of the Benares Bank Ltd., and to the winding up administration in general, I shall think it right to refer this case to His Lordship the Chief Justice to be heard before a Full Bench of the Court appointed by him, if he thinks proper to appoint one. But before making the order of reference, it is right that I should indicate those further authorities and considerations which have, as I think, been omitted to be considered in the case to which I have referred. I propose at once to refer to the case of the Privy Council in Abdullah Ashgar Ali v. Ganesh Das, AIR (20) 1933 PC 63 a case which does not seem to have been brought to the learned Judge's notice in Babu

Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd., . In this case Lord Russell of Killowen dealt with Section 186, Companies Act. He refers to it as a section which: "...creates a special procedure for obtaining payment of monies. It creates no new rights..." and adds:

The power of the Court to order payment is discretionary. It may refuse to act under the section, leaving the liquidator to sue in the name of the company, and it will readily take that course in any case in which it is made apparent that the respondent under the procedure, if continued, would be deprived of same defence or answer open to him in a suit for the same monies.

3. Now, it is in that aspect of the matter that I venture to think the consideration of the question in Babu Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd., was possibly incomplete. The section is, as their Lordships of the Judicial Committee have held, one which introduces a special procedure only. The object is to avoid a double process and to enable the winding up Court itself to do complete justice in the winding up without recourse to the ordinary Courts: see Buckley on the Companies Act, Edn. 10, p. 439. It is not intended to enhance or abridge existing legal rights. And, as is evident from the section itself, it is within the discretion of the winding up Court whether it will exercise this statutory jurisdiction or not. It is not compelled to. In a case in which it can do complete justice itself, within the limits of the section, it will do so. In a case in which it cannot, then, following the words of Lord Russell it will "readily take the course" of leaving the liquidator to his ordinary remedies, rather than, by slavishly applying the section, deprive the opposite party of some "defence or answer open to him in a suit for the same monies." It seems to me therefore that in every case of this kind, the Company Courts has first to ask itself whether, in the particular circumstances, the case is one in which it ought to exercise its statutory jurisdiction u/s 186 at all; and only, on that receiving an affirmative answer, should the section be applied. Assuming that, in Babu Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd., , it was clear that the Company Court ought to exercise its jurisdiction, then I think, with great respect, that there was no other answer that could have been given than the one which the learned Judge gave. But, so far as can be judged from the report, it does not seem ever to have been considered whether it was a case in which Section 186 should be applied at all. It is for that reason that I suggest that possibly that case needs reconsideration. Nor am I satisfied that, had it been approached in the manner which Lord Russell of Killowen has indicated as the right one, its result would have necessarily been the same. And for my doubts in this respect I propose to give my reasons.

4. It is first necessary to observe that u/s 229, Companies Act, the same rules are to be observed and prevail in the winding up of an insolvent company as are for the time being in force under the law of insolvency. This section, in short, imports into the winding up of a company the same rules as in insolvency. The section is in exactly the same words as Section 262, English Companies Act,

1929. And under the English section it has never been doubted that the bankruptcy law of mutual credits and set-off applies in company winding up: see *Mersey Steel Co. v. Naylor Banzon & Co.* (1884) 9 AC 434, *In re Asphastic Wood Pavement Co.* (1885) 30 Ch D 216, *Sovereign Life Assurance Co. v. Dodd* (1892) 2 QB 573 and *In re Thorne & Sons* (1914) 2 Ch 438. The corresponding sections to Section 31, English Bankruptcy Act, 1914 allowing mutual set-off and credit are Sections 46 and 47, Indian Provincial and Presidency Towns Insolvency Acts, respectively. There is no difference, therefore between English law and Indian law, in this respect. Both recognize that, "where there have been mutual dealings between an insolvent and a creditor," there is to be a set-off in the case of a creditor proving for his debt and in both cases these rules are imported into the winding up of companies. It is true that is the reverse case from one in which, as in this case, the insolvent estate is seeking to enforce the debt due to it. But, even in that case, apart from Section 186 of the Act, it is clear, I think, that if the Bank had sued the applicant for the Rs. 3822-9-9 due to it, the applicant would have had a complete, answer by setting off that sum against the Rs. 5000 due from the Bank. In short, in one way or the other, the applicant would, apart from Section 186, have had a legal right to a set-off. Now the question is, why he should be deprived of that right in the winding up? The only answer that can possibly be given is "because he is a contributory." That must be so, because it is only to contributories that Section 186, Companies Act, applies. And yet I find it very difficult to see why the mere fact that a man happens to be a contributory should deprive him of a legal right of set off which was available to him at the date of the winding up. *Babu Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd.*, case was a very strong one in this respect, because there the applicant held fully paid up shares and nothing whatever was due from him in his character of a share-holder. I cannot perceive what reason there can be why a man, for the reason only that he happens to be a contributory, should forfeit an accrued right of set-off. And I venture to suggest that this may be just such a case as is referred to by Lord Russell of Killowen as one in which the winding up Court may, and should, decline to exercise its jurisdiction u/s 186 and "leave the liquidator to sue in the name of the company," in an ordinary, not the winding up Court, where the debtor's right of set-off will, or may, be available to him.

5. Nor do I think that the case in (1878) 9 Ch D 595 *In re Whitehouse & Co.* to which Harries J. refers in *Babu Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd.*, when properly considered, necessarily affords any authority to the contrary. (1878) 9 Ch D 595 *In re Whitehouse & Co.* was decided in 1878 under the Companies Act of 1862. It was a case in which a contributory endeavoured to set-off a debt due to him against calls on shares made on him, partly before and partly after the liquidation. Sir George Jessel M.R., points out in the earlier part of his judgment and I think it important to notice it for a proper understanding of the case that, apart from the Companies Act, 1862, no common law right of set-off would have applied to the case, because under English law

there was no mutuality of debts. The debt due from the contributory on the calls, whether made before or after the winding up, was not a "debt" due to the company. It was merely a "contribution to the assets of the company" assessed and levied by the liquidator under his statutory powers contained in the Act. He says at p. 599:

That is a new liability; he is to contribute; it is a new contribution. It is a mistake to call that a debt due to the company. It is no such thing. It is not, as has been supposed, in any shape or way a debt due to the company, but is a liability to contribute to the assets of the company, and, when we look further into the Act, it will be seen that it is a liability to contribution to be enforced by the liquidator....

6. Nor was there any mutuality as to debtor and creditor, for under English law the assets vested in the liquidator on the winding up. It seems to me therefore that for a proper understanding in (1878) 9 Ch D 595 *In re Whitehouse & Co.* it has to be appreciated that the whole foundation of it lies in the fact that the contributory never had a right of set-off apart from the Companies Act and therefore was deprived of nothing by the exercise by the Company Court of its jurisdiction u/s 101 of the Act of 1862, which was the equivalent portion to Section 186, Companies Act. And that I think also accounts for the fact that from first to last in (1878) 9 Ch D 595 *In re Whitehouse & Co.* there is no reference either to the principle of mutual credit and set-off in bankruptcy or to any common law right of set-off. Indeed, I find, on searching the authorities that although the principle in (1878) 9 Ch D 595 *In re Whitehouse & Co.* has been proved again and again-though not all the reasons given by Sir George Jessel have been approved-it has been expressly doubted in more than one case whether, even in a case in which calls are sought to be set-off, the same rule would have been applied in a suit by the liquidator as opposed to a proceeding in the liquidation: see for instance *In re Auriferous Properties Ltd. (No. 1)* (1898) 1 Ch D 691 at p. 696 in which Wright J. says:

And since the Judicature Act, 1875, it has been held in (1878) 9 Ch D 5952 that the same rule holds good whether the call is made before or in the liquidation, and whether the liquidation is compulsory or voluntary. The ground of the rule is that all contributions from share-holders enforceable in the liquidation are by the Companies Acts made applicable for the payment of the company's creditors *pari passu* (Ss. 38, 101, 133, Companies Act, 1862), and that a person who is a creditor and also a contributory cannot be allowed to do what might amount to paying his own claim in full out of a fund which ought to be distributed rateably: see *Black & Co.'s case In re Paragnassu Steam Tramroad Company* (1872) 8 Ch A 254 and *In re Pyle Works* (1890) 44 Ch D 534 where the decision in (1878) 9 Ch D 595 *In re Whitehouse & Co.* is approved, though some of the reasons given by Jessel M.R. in that case are questioned. Whether the same rule would apply if the liquidator sought to enforce the call by action seems not to have been the subject of express decision; but the call though made and payable before the

liquidation, and therefore at one time a debt due to the company, is also enforceable by the liquidator by balance order as a contribution to be made in the winding up for pari passu distribution, and in this aspect is not a subject of set-off in the case of a limited company.

7. The passage appears to me to take very much the same view as is taken by Lord Russel when he says that the rights to be applied in the liquidation may be very different from the rights which ought to be applied if the liquidator brings a suit to enforce his debt in the ordinary course. As Sir George Jessel has pointed out, there was no room for a set-off between calls and a debt because the conditions for a set-off were not present and I think that the same must apply to all the English cases in which it has been sought to set off calls against a debt. I think therefore that the truth of the matter may be that cases in which calls are sought to be set off against debts stand on a very different footing from those cases such as the present one in which a debt is sought to be set off against a debt and in which all the elements giving rise to a legal right of set-off were present at the date of the winding up under Order 8, Rule 6 of Sch. 1, Civil P.C. I have endeavoured to trace all the English cases in which the principle in (1878) 9 Ch D 595 *In re Whitehouse & Co.* and of Grissell's case *In re Overend, Gurney & Co.* (1866) 1 Ch A 528 have been applied and I have not been able to find a single one which related to anything beyond an attempt to set off a debt against calls on shares in proceedings in the liquidation by the liquidator. I have been able to find no case that applied the principle in (1878) 9 Ch D 595 *In re Whitehouse & Co.* to a situation in which there was apart from the Companies Act, a clear accrued right of set-off of debt against debt. Nor has the industry of the official liquidator or of the learned advocate for the applicant in this case been able to refer me to any Indian case, other than *Babu Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd.*, in which Section 186, Companies Act, has been applied to defeat a right of set-off of debt against debt. In a Madras case *Mylapore Permanent Building Fund Ltd. v. Arogiaswami Pillay* ("18) 5 AIR 1918 Mad 995, it was applied only to a case of calls on shares.

8. This question is, I think, one of considerable importance. With great respect to the learned Judge who decided *Babu Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd.*, I am not certain that his attention was ever drawn to the words of Lord Russel of Killowen in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 or that the possibility was present to his mind that it was merely discretionary in the Company Court whether to apply Section 186, Companies Act or not. It is perhaps not necessary for me at this stage to express a concluded opinion that case was wrongly decided. But if it were, I should have difficulty, as at present advised, in following it. In any case, it appears to me, for the reasons I have given, that the matter deserves further consideration. I therefore direct that this case be sent to his Lordship the Chief Justice in order that he may, if he thinks proper, either constitute a Bench of two or more Judges, or appoint a second Judge to sit with me, to consider the following important question which, in my view, arises in this case:

9. "Whether, having regard to the observations made by their Lordships of the Privy Council in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 and in a case in which the contributory of a company in compulsory or voluntary liquidation, would, or might, but for the liquidation, have an accrued legal right to set-off a debt due to him from the company against a debt due by him to the company (other than in respect of calls on shares), the Court exercising jurisdiction in the winding up ought to refuse an application: by the official liquidators or liquidator as the case may be u/s 186, Companies Act and leave the official liquidators or liquidator to sue the contributory in the ordinary course; and, in particular, whether the application of the official liquidator of the Benares Bank Ltd., in this present case ought to be so refused."

10. Sri Nath Sah, who is a contributory of the Benares Bank Ltd., (in liquidation) presented an application u/s 183(5), Companies Act. Subsequently during the course of the proceedings on his application the official liquidator of the Benares Bank preferred an application u/s 186, Companies Act. The question referred to this Bench has arisen out of the latter application. Sri Nath Sah was a shareholder in the Benares Bank. The shares he held were of the value of Rs. 50 each. He has paid Rs. 6-4-0 upon each of his shares. There has been a further call of Rs. 6-4-0 per share which however he has not paid. Rs. 37-8-0 per share remains uncalled. Sri Nath Sah further claims to be a creditor of the Bank. He has deposited a sum of Rs. 5000 in fixed deposit and the total amount due by the Bank to him upon his deposit is Rupees 5117-12-11. The deposit of Rs. 5000 was made as a security in respect of over-draft on his current account. It appears that for about 23 months after he made the fixed deposit of Rs. 5000 he was in credit so far as his current account was concerned, but when the winding up order was passed by this Court against the Benares Bank Sri Nath Sah had overdrawn his current account by Rs. 3882-9-9. This latter sum the liquidator now seeks to recover and in his application u/s 186, Companies Act, he prays for an order for payment of that amount. Sri Nath maintains that he is entitled to a set-off and that in fact he owes nothing to the Bank but that the Bank owes Rs. 1233-3-2 to him.

11. The question for consideration is whether it is open to the Court before whom the liquidation proceedings are pending in its discretion to grant an order or refuse to grant an order on an application u/s 186 or whether the amount of the debt to the Bank being proved the Court is bound to make an order for payment. Section 186 is in the following terms:

186(1) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive of any money payable to him or the estate by virtue of any call in pursuance of this Act.

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate

which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that, in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

12. It was contended for the liquidator that in view of the provisions of Section 186 in the case of a limited company-and the Benares Bank is a limited company-the Court has no power to allow a set-off in favour of a contributory. "Whether the Court may or may not allow a set-off in favour of a contributory in such an application is a question upon which we do not consider we are called upon to pronounce in the disposing of the matter before us. If the Court refuses in a particular case to make an order u/s 186(1) the liquidator to enforce his claim must proceed by way of a civil suit against the contributory and in this suit the contributory would be permitted to maintain the ordinary legal defences to such a claim. The real question for decision therefore is whether the Court in control of liquidation proceedings has any discretion in the matter and may refuse, should that appear just, an application u/s 186.

13. We would observe in the first place that the provisions of Section 186(1) are not mandatory. The wording of the section certainly suggests that the legislature intended to allow the Court a discretion in the matter as to whether an order u/s 186 should or should not be made. It was urged, however, for the liquidator that in refusing to grant an order u/s 186 the Court would be defeating the intention of the Legislature which was to deprive a contributory of the right to set-off. In support of this contention reference was made to the following cases: *In re Overend, Gurney & Co.* (1866) 1 Ch A 528 : (1878) 9 Ch D 595 *In re Whitehouse & Co.* and *In re Anglo-French Co-operative Society Ex Parte Pelly* (1882)21 Ch D 492 at p. 502. The decisions in these cases however do not touch the question which we have to decide. These decisions establish the principle that in a case of a call upon a contributory in respect of his shares or in the case of a claim against a director in respect of misfeasance no set-off may be permitted as against the liquidator. In the cases referred to the rights of a contributory to set off in a claim by the liquidator in respect of an ordinary debt due by the contributory to the company were not in issue. Learned counsel for the liquidator however founded specially upon a passage in the judgment of Jessel, M.R., in *In re Anglo-French Co-operative Society Ex Parte Pelly* (1882)21Ch D 492. The learned Master of the Rolls had under consideration the terms of Section 101, English Companies Act of 1862, the terms of which are identical with the provisions of Section 186, Indian Companies Act. In the course of his judgment he observes:

By Section 101 contributories of a limited company who owe money to the company must pay it to the company, although the company may owe them money. That is the meaning which has been attributed to that section, although it does not say so in so many words; but that is the result of the authorities upon it. If an ordinary contributory, perfectly innocent, is deprived of the right of set-off which he would have had in an action, what is to be said as to a director, manager, or any other officer of a company who has misapplied money. Is it to be supposed that the framers of the statute who have deprived an ordinary innocent contributory of the right he would otherwise have had of set-off against the company if he had brought an action, could have intended to give such a benefit to the persons who have committed what is described in Section 165 as an offence? I think if we wanted an additional argument to show that no such set-off was intended by the legislature, we have it in the construction which has been put on Section 101.

14. The set-off claimed in that case was claimed by a director against whom proceedings for misfeasance had been taken u/s 165, Companies Act. The reference to Section 101 therefore in the passage above quoted is obiter; it is a dictum nevertheless which clearly supports the contention which has been advanced by the official liquidator in this case. There is high authority however to which we shall refer later which is quite inconsistent with the statement of the law. We would observe at this stage that the right of set-off is a valuable right recognized by the provisions of the Civil Procedure Code. A creditor's right of set-off in bankruptcy proceedings is preserved by Section 46, Provincial Insolvency Act and in liquidation proceeding by Section 229, Indian Companies Act, which is in terms identical with Section 262, English Companies Act. Now if, as was contended by learned Counsel for the liquidator, the intention of the Legislature had been to deprive a contributory of the right of set-off the legislature would without doubt in our judgment have enacted such a far reaching provision in clear and specific terms.

15. There is nothing in Section 186, Companies Act, in our view which can reasonably be construed as a general deprivation of contributories to companies in liquidation of the right of set-off. That is our view upon a consideration of the general principles of set-off and of the statutory provisions to which we have referred. The matter in our opinion however is put beyond doubt by a dictum in the judgment of the Privy Council in Abdullah Ashgar Ali v. Ganesh Das, AIR (20) 1933 PC 63 . In that case the board had under consideration the provisions of Section 186. In the course of the judgment of the Board, Lord Russell of Killowen observed:

Now, in considering the meaning and effect of Section 186 it is impossible to overlook the fact that it is verbatim identical with the corresponding Section in the legislation of this country, a Section which dates back some 70 years to 1862, and which has appeared in our company legislation ever since. It is therefore a Section with an ancestral history. Three features of the Section call

for notice: (1) it is concerned only with moneys due from a contributory, other than money payable by virtue of a call in pursuance of the Act. A debtor who is not a contributory is untouched by it. Moneys due from him are recoverable only by suit in the company's name. (2) It is a Section which creates a special procedure for obtaining payment of moneys; it is not a Section which purports to create a foundation upon which to base a claim for payment. It creates no new rights. (3) The power of the Court to order payment is discretionary. It may refuse to act under the Section, leaving the liquidator to sue in the name of the company, and it will readily take that course in any case in which it is made apparent that the respondent under this procedure, if continued, would be deprived of some defence or answer open to him in a suit for the same moneys.

16. It is true that the facts in the case just referred to differ somewhat from the facts of the present case. The observations of the Board may be obiter; nevertheless, the Board did in fact interpret Section 186 and their interpretation must be followed in this Court. Learned counsel for the liquidator relied on the decision in *Babu Parshottam Das Vs. Official Liquidator, Gorakhpur Electric Supply Co. Ltd.*, . This is the decision of a Single Judge of this Court and directly supports the liquidator's contention. The observations of the Privy Council above referred to however were not brought to the notice of the learned Judge and his decision can no longer be considered good law. The question referred to this Bench for decision is in the following terms:

Whether, having regard to the observations made by their Lordships of the Privy Council in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 and in a case in which the contributory of a company in compulsory or voluntary liquidation, would, or might, but for the liquidation, have an accrued legal right to set off a debt due to him from the company against a debt due by him to the company (other than in respect of calls on shares), the Court exercising jurisdiction in the winding up ought to refuse an application by the official liquidators or liquidator as the case may be u/s 186, Companies Act and leave the official liquidators or liquidator to sue the contributory in the ordinary course.

17. In disposing of the matter referred to us we consider it sufficient to hold that it is open to the Court exercising jurisdiction in the winding up of a company in its discretion to grant or to reject an application u/s 186, Companies Act. We direct that the case be sent to the learned Judge before whom the proceedings in the liquidation of the Benares Bank Ltd., are pending for disposal according to law. The question of costs will be decided by the learned Judge.