

(1967) 09 BOM CK 0001

In the Bombay High Court

Case No : Appeal No. 94 of 1967, Company Application No. 23 of 1967 in I.C. No. 221 of 1956

In Re: Colaba Land And Mills Co. Ltd., V.M. Deshpande and Another

Date of Decision : 28-09-1967

Acts Referred:

Bombay General Clauses Act, 1904 — Section 7
Companies (Amendment) Act, 1960 — Section 165(2), 187
Companies Act, 1913 — Section 171, 239
Companies Act, 1956 — Section 442, 446, 446(1), 457, 530
Income Tax Act, 1961 — Section 142(1), 147, 148
Life Insurance Corporation Act, 1956 — Section 41
Sales Tax Act, 1953 — Section 48(2)

Citation : (1970) 78 ITR 584

Hon'ble Judges : N.A. Mody, J;K.K. Desai, J

Bench : Division Bench

Judgement

Desai, J.—This is an appeal on behalf of the original respondents from the judgment and order of Mr. justice Vimadalal dated September 28, In Re: Colaba Land and Mill Co. Ltd., , granting an order of injunction restraining the original respondents from assessing or reassessing the Colaba, Land and Mills Company Ltd., hereinafter ter referred to as the " mills company to Income Tax for the assessment years 1950-51 to 1955-56.

2. It is sufficient to notice that in the Company Petition No. 221 of 1958 the official liquidator was appointed interim liquidator of the mills company by an order dated May 1, 1959. By an order dated October 7, 1959, the mills company was ordered to be wound up and the official liquidator was confirmed as liquidator of the mills company with all powers u/s 457 of the Companies Act, 1956. By six different notices dated August 23, 1966, issued u/s 148, the Income Tax Officer, Companies Circle 1(8), Bombay, recorded in respect of the assessment years 1950-51 to 1955-56 that the mills company had escaped assessment within the meanin, of section 147 of the Income Tax Act, 1961, and that he therefore proposed to reassess the income of the mills company for these assessment years and called upon the liquidator to deliver to him within thirty

days a return in the prescribed form of the income of the mills company assessable for these years. It was recorded that the said notices were being issued after obtaining the necessary satisfaction of the Central Board of Direct Taxes.

3. By six different notices for each of the above assessment years dated December 31, 1966, issued u/s 142(1), the Income Tax officer, Companies Circle, referred to the above six notices and called upon the official liquidator to produce certain documents and give in writing duly verified in the prescribed manner information called for in the forms attached thereto and on the points or matters specified, to the Income Tax Office on January 10, 1967.

4. In connection with the above notices, by the judge's summons dated July 1, 1961, the official liquidator of the mills company claimed that the notices should be quashed and or set aside and cancelled and also for certain directions and an order of injunction restraining the appellants from in any way assessing or reassessing the mills company for the above six assessment years. The grounds in support of the claims made in the summons appear in paragraph 26 of the affidavit in support dated July 1, 1967, made by B. J. Rele, the then official liquidator.

5. The main contentions made before the learned judge on behalf of the mills company were that the reassessment proceedings (under the above notices u/s 148 of the Income Tax Act, 1961) against the mills company could only be instituted or commenced after first obtaining leave of the company court u/s 446(1) of the Companies Act, 1956. The consequential submission was that the proceedings having been concerned without such leave were without jurisdiction and a nullity.

6. On behalf of the appellants two contentions which were advanced before the learned judge, were as follows :

(1) The notices for reassessment issued u/s 148 were not "legal proceedings" within the meaning of that phrase in section 446(1) of the Companies Act, and

(2) assuming that the reassessment proceedings started under the above notices were "legal proceedings " leave of the company court under sub-section (1) of section 446 of the Companies Act was not necessary, because the Income Tax Officer alone had exclusive jurisdiction to make reassessment and to determine the tax liability. The proceedings were such as in respect whereof no civil court, including the company court, could have jurisdiction of any kind.

7. This contention is hereinafter referred to as the. above second contention. The learned judge accepted the contentions made on behalf of the official liquidator and observed that on the plain reading of section 446(1) there was no reason whatsoever for coming to the conclusion that the expression "legal proceedings" would not include a proceeding for assessment or reassessment under the Income Tax Act. In support of that observation the referred to the

decision of the Federal Court in the case of Governor-General in Council v. Shiromani Sugar Mills 1; where also the question of the true effect and construction of section 171 of the Indian Companies Act, 1913, which is in Pari materia with the provisions of section 446(1) of the Companies Act, 1956, arose. Reference was also made to the case of Abdul Aziz v. State of Bombay where a Division Bench of this court came to, consider the phrase "legal proceedings " as contained in the Sales Tax, Act, 1953, and in that connection referred to the provisions of section 7(e), of the Bombay General Clauses, Act. Reference was also made in that very connection to the decision of the Supreme Court in the case of Union of India v. India Fisheries Pvt. Ltd., where the Supreme Court came to consider the true effect of section 446(1). The learned judge negated the submission made by Mr. Joshi for the appellants that the phrase " legal proceeding " was synonymous with judicial proceeding ".

8. In connection with the above second contention Mr. Joshi for the appellants relied before the learned judge and in this appeal on the decision ,of the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India 1. In that case the Supreme Court had made certain observations which might have been construed as supporting the second contention made by Mr. Joshi, but the learned judge held these observations to be Per incuriam and rejected the contention. The learned judge accordingly granted an order of injunction as already recited above.

9. In this appeal, Mr. Joshi for the appellants once again contends that the proceedings under the Income Tax Act for assessment of Income Tax liability could not justifiably be held to be " legal proceedings" within the meaning of section 446(1) of the Companies Act, 1956. In that connection he emphasised that the proceedings are under a special Act and are undertaken by a special officer nominated for the purpose in accordance with the scheme of the Act. Under the Act, a statutory duty is imposed on that officer alone to initiate and proceed further with such proceedings and in those proceedings to ascertain the quantum of the liability to pay Income Tax in respect of assessee and or matters falling within his jurisdiction. He submitted that proceedings of the above kind undertaken by a special officer designated and nominated in accordance with the scheme of the Act for ascertaining liability as prescribed by the Act cannot be " legal proceedings " within the meaning of that phrase in the above section. In that connection he submitted that the observations of the Division Bench of this court in the case of Abdul Aziz v. State of Bombay, must be restricted to the facts of that case and in particular to the provisions in section 48(2)(ii) of the Sales Tax Act, 1953. Towards developing this submission, he relied upon the decision of a single judge of the Allahabad High Court (Manchanda J.) in the case of Tika Ram and Sons Ltd. v. Commissioner of Income Tax He sought to distinguish the observations of the Federal Court in the case of Governor-General in Council v. Shiromani Sugar mills 4 by submitting that the true effect of the observations of the Federal Court in that case was that the proceedings for enforcement and recovery of tax already ascertained in the assessment proceedings were " legal

proceedings ". The prior actions taken by and before the tax officer up to the final stage of ascertaining the quantum of tax, i.e., the assessment proceedings, were not held in that case to be legal proceedings. He strongly relied upon the observations made by Sen J. sitting singly in the High Court of Calcutta in the unreported case of Brahmaputra Tea Co. (India) Ltd. v. Commissioner of Income Tax disposed of on April 25, 1969. In reply to submissions on the first contention strong reliance was placed on behalf of the liquidator on the observation regarding the true construction and effect of the phrase " legal proceedings " of the Division Bench of this court in the case of Abdul Aziz v. State of Bombay. Strong reliance was also placed on the observations of the Federal Court in the case of Governor-General in Council v. Shiromani Sugar Mills Ltd. as regards the meaning of the phrase " legal proceedings " whilst construing that phrase in section 171 of the Indian Companies Act, 1913. Reliance was also placed on the decision in the case of Raizganalha v. Government of Iladras" and it was submitted that the meaning of the phrase " legal proceedings " as ascertained by the Federal Court in the case Shiromani Sugar mills was affirmed by the Supreme Court in that case. Reliance was also placed on the observations of the Supreme Court in the case of Union of India v. India Fisheries Pvt. Lid.,", where the question of the true construction of section 171 of the Indian Companies Act, 1913, had arisen before the Supreme Court.

10. We do not propose to decide the correctness or otherwise of the arguments advanced on behalf of the parties on the above first contention made by Mr. Joshi because, as discussed hereunder, having regard to the observations of the Supreme Court in the case of Dainji Valji Shah v. Life Insurance Corporation of India it would be incorrect to hold that in respect of the assessment proceedings adopted against the mills company leave of the court was necessary u/s 446(1) of the Companies Act, 1956. It is convenient to deal with the above second contention made on behalf of the appellants at this stage.

11. It is first necessary to refer to the relevant parts of sections 442, 446, 530 and 537 of the Companies Act, 1956, on which reliance has been placed by both sides. These sections are in pari materia with the provisions in sections 169, 171, 230 and 232 of the Indian Companies Act, 1913.

12. Section 442 relates to the power of court to stay or restrain proceedings against a company pending the hearing of a petition for winding up and authorises the winding-up court to stay any suit or proceeding.

13. The marginal note to section 446 reads " Suits stayed on winding-up order and the relevant part of the section provides :

(1) When a winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company except by leave of the court and subject to such terms as the court may impose.

(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of -

(a) any suit or proceeding by or against the company;

(c) any application made u/s 391

(d) any question of priorities or any other question whatsoever whether of law or fact, which may relate to or arise in the course of the winding up of the company;

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transfer erred to and disposed of by that court.

(4) Nothing in sub-section (1) or sub-section (3) shall Apply to any proceeding pending in appeal before the Supreme Court or a High Court.

14. Sub-sections (2), (3) and (4) were inserted in section 446 by section 165(2) of the Amending Act (65 of 1960). The provisions of these subsections do not form part of the provisions in section 171 of the Indian Companies Act, 1913, which was in all respects in Pari materia with sub-section section (1) of section 446.

15. Section 530 relates to preferential payments and, inter alia, has the effect of providing that in a winding up the ground rent and or debts due, and tax and or revenue dues will have not any priority unless the same became due within twelve months next before the date of winding-up.

16. Section 537, inter alia, provides that attachment, distress or execution put in force and execution sales held without leave of the winding-up court shall be void. Sub-section (2) provides :

" Nothing in this section applies to any proceedings for the recovery of any tax or impost or -any dues payable to the Government."

17. This sub-section, however, was inserted into section 537 by section 187 of the Amending Act (65 of 1960).

18. The facts in the case of Damji Valiji Shah v. Life Insurance Corporation of India may be shortly stated as follows : On or about July 1, 1.95,6, a surn of Rs. 82,000 was alleged to have been transferred from the life fund of the Vishwabharati Insurance Company, Bombay, to its general department contrary to the provisions in the Insurance Act, 1938. On January 19, 1956, the Life Insurance Corporation Ordinance was promulgated and thereafter on July 1, 1956, the Lift Insurance Corporation Act came into force. On November 9, 1959, the Vishwabharati Insurance Company was ordered to be wound up. Subsequent thereto the Life Insurance Corporation of India instituted a petition before the Life Insurance Tribunal, Nagpur, claiming the sum of Rs. 82,000 as being

payable, under the scheme of the above ordinance and the Act, to the corporation by the insurance company. u/s 15 of the Act the Tribunal had jurisdiction to deal with the claim made. In fact, the tribunal, while decreeing the claim of the corporation, negated the contention made on behalf of the insurance company that the leave of the High Court of Bombay as a winding-up court was necessary u/s 446(1) for proceeding with the petition. In the appeal filed in the Supreme Court against the decree passed by the tribunal, on behalf of the appellants it was contended that the Tribunal had no jurisdiction to proceed with the proceedings on the petition presented by the corporation without the leave of the High Court in view of section 446 of the Companies Act, the company having been ordered to be wound up by the High Court on November 9, 1959. We are not concerned with the other contentions made on behalf of the appellants. In paragraph 16 of its judgment the Supreme Court summarised the provisions of section 446 which we have quoted above. In paragraph 17 the Supreme Court referred to section 41 of the Life Insurance Corporation Act, and to the fact that the section provided that no civil court shall have jurisdiction to entertain or adjudicate upon any matter which the tribunal is empowered to decide or determine under the Act. It was observed:

"The tribunal is given the exclusive jurisdiction over this matter."

19. In paragraph 18 in connection with the provisions in sub-sections (1) and (2) of section 446, the observations made are :

"It is in view of the exclusive jurisdiction which sub-section (2) of section 446 of the Companies Act confers on the company court to entertain or dispose of any suit or proceeding by or against a company or any claim made by or against it that the restriction referred to in sub-section (1) has been imposed on the commencement of the proceedings or proceeding with such proceedings against a company after a winding-up order has been made It must follow that the consequential provisions of subsection (1) of section 446 of the Companies Act will not operate on the proceedings which may be pending before the tribunal or which may be sought to be commenced before it.

The reason for the last observation quoted" above is in the intervening sentence which we did not quote for convenience and which runs as follows :

"In view of section 41 of the L.I.C. Act the company court has no jurisdiction to entertain and adjudicate upon any matter which the Tribunal is empowered to decide or determine under that Act."

In paragraph 19 the Supreme Court stated:

Further, the provisions of the special Act, i.e., the L.I.C. Act, will override the provisions of the general Act, viz., the Companies Act, which is an Act relating to companies in general.

Now Mr. Joshi for the appellants contends that there is no distinction of any consequence which can be made in the facts of the present case and the facts in

the case of *Damji Valji Shah v. Life Insurance Corporation of India* in so far as the question as regards the application of the provisions in sub-section (1) of section 446 arises. His submission is that the Income Tax Act, like the Life Insurance Corporation Act has created machinery of a complete code providing for assessment of Income Tax dues. The provisions of the Act in all respects are such that no civil court could ever be constituted as an officer to set in motion proceedings for assessment of Income Tax dues. His submission is that, apart from the Income Tax Officer who is under the scheme of the Act authorised to set in motion machinery for assessment of Income Tax dues, none other could in law have the authority to commence or deal with the question of assessment of Income Tax dues. He has in that connection strongly relied upon the analysis of the provisions in the Income Tax Act as appearing in the case of *Commissioner of Income Tax v. Tribune Trust, Lahore* decided, by the Judicial Committee. It is sufficient to state that in connection with the provisions of the Income Tax Act, 1922, the judicial Committee noticed chapter by chapter the provisions of the Income Tax law and the scheme thereof, inter alia, in respect of the charging sections, deductions and assessments, recovery and penalties, refunds and notices, the sections prescribing the duties of the Income Tax authorities and the right of appeal to the Assistant Commissioner, and such other matters. The judicial Committee also noticed section 67 of the Act which, inter alia, provided that no suit shall be brought in any civil court to set aside or modify any assessment made under that Act. Now the judicial Committee reviewed the code of Income Tax law for the purpose of showing that it exhaustively defines the obligations and remedies of the taxpayer. The findings read as follows:

"Their Lordships are of opinion that the only remedies open to the taxpayer, whether in regard to appeal against assessment or to claim for refund, are to be found within the four corners of the Act. This view of his rights harmonises with the provision of section 67, to which reference has already been made, that no suit shall be brought in any civil court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced."

Mr. Joshi is right in his submission that the distinction sought to be made by Mr. Chagla in the scheme of the Income Tax Act and the Insurance Corporation Act which was before the Supreme Court in the case of *Damji Valji Shah v. Life Insurance Corporation of India*, that the Income Tax Act does not contain any provision like that contained in section 41 of the Life Insurance Corporation Act ousting the jurisdiction of civil courts is a distinction of no consequence at all. It is quite clear that in connection with the assessment to ascertain the quantum of Income Tax a separate independent machinery and or a complete code is provided in the Income Tax Act. It is not possible to make a study of each and every relevant provision of that Act in this judgment. That the Act provides for assessment of the quantum of Income Tax dues by the Income Tax Officer and further provides for an appeal to the Appellate Assistant Commissioner and provides for a reference only on questions of law to High Courts is well-known.

There are detailed provisions in the Act in respect of commencing proceedings for reassessment of escaped income with the sanction of the Income Tax Commissioner. The right of appeal is also circumscribed and there is a provision for deposit of tax before any appeal could be filed. Now it is true", that in sub-section (2) of section 446 it is provided that," notwithstanding anything contained in any other law for the time being in force ", the winding-up court would have jurisdiction to entertain any proceeding by or against the company. It is also true that, having regard to the language in this sub-section, an argument that the winding-up court has acquired jurisdiction to assess Income Tax liability of the company in winding up could be advanced and has been advanced on behalf of the original applicant. Reliance has been placed in that connection on the phrase " notwithstanding anything contained in any law for the time being in force ". Now it appears to us that the constitution of the civil court acting as a winding-up court is such that it would be impossible for such court to act as Income Tax Officer 1 and commence assessment proceedings. In this connection we are not called upon to find out the limitations on the powers of the winding-up court in respect of proceedings referred "to in sub-section (2). It is quite clear that, having regard to the scheme for assessment for quantum of Income Tax contained in the Income Tax, Act, a civil court and or a winding-up court could not "entertain nor dispose of" assessment proceedings. The procedure prescribed is altogether, so foreign to the procedure prescribed for it that a civil court would not, be able to put into effect the machinery prescribed by the Income Tax Act. This discussion has the effect of holding that the absence of a provision like section 41 of the Life, Insurance Corporation Act in the Income Tax Act does not alter or affect the established position that the Income Tax Act, in so far as the proceedings for assessment are concerned, provides for a scheme of a complete code. This part of the scheme of the Act is such as can never be enforced through the machinery of a civil court. It is this reason that we have not been able to appreciate Mr. Chagla's contention that the absence of a provision like section 41 of the Life Insurance Corporation Act in the : Income Tax Act is an important distinction and that for that reason the observations in paragraph, 18 of the judgment of, the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India are not applicable to the facts of the present case.

Now it is quite clear that the Supreme Court has held in the above paragraph that the provisions of sub-section (1) of section 446 are consequential to the provisions of sub-section (2) of section 446 and that this is so because under sub-section (2) exclusive jurisdiction is conferred on the company court to dispose of all suits or proceedings by or against a company and further that the consequential provisions of sub-section (1) of section 446 are not attracted and cannot be applied to proceedings (like those before the Life Insurance Tribunal) before an administrative tribunal and or a tribunal which is given exclusive jurisdiction to decide and determine matters arising under the relevant Act. Apparently, in connection with matters of exclusive jurisdiction triable by special tribunals in paragraph 19 the Supreme Court observed that:

"the provisions of the special Act, i.e., the L. I. C. Act, will override the provisions of the general Act, viz., the Companies Act, which is an Act relating to companies in general."

It appears that the court formulated a view that in matters which are by special Acts liable to be decided, determined and disposed of by special tribunal of exclusive jurisdiction, the company court will not have any jurisdiction under sub-section (2) of section 446 and that, consequently, in connection with such matters or proceedings, even if they are legal proceedings, leave of court would not be necessary under sub-section (1) of section 446.

Mr. Chagla contended that in this connection we should first notice the scheme of the Companies Act, 1913, and particularly the provisions of section 171 thereof. He rightly submitted that the phrase " legal Proceedings " in section 171 related to the same matter as is contained in sub-section (1) of section 446. He rightly submitted that section 171 and this phrase in the section was the subject-matter of decision of the Federal Court in the case of Governor-General in Council v. Shiromani Sugar Mills ² and the construction of that phrase as made by the Federal Court has been cited with approval by the Supreme Court in the case of Ranganathan v. Government of Madras ³. Though the section was not referred to, there was some discussion about the jurisdiction of the company court and the Income Tax authorities in the case of Union of India v. Fisheries Pvt. Ltd. ⁴ His submission was that the observation of the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India ¹ had in no way limited or restricted the meaning of the phrase " legal proceedings ". He strongly relied upon the fact that sub-section (1) of section 446 was the only part of that section before the Amending Act 65 of 1960 introduced sub-sections (2), (3) and (4). He therefore was emphatic in his submission that these newly added sub-sections had not changed the meaning of the phrase " legal proceedings " and that the phrase must be held to have continued to have the same meaning as was ascertained by the Federal Court in the case of Shiromani Sugar Mills. In his submission the consequence of the observation of the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India was that the winding-up court would have exclusive jurisdiction under the Indian Income Tax Act and would therefore be entitled to proceed under that Act to assess the quantum of tax dues of the mills company and he therefore argued that the assessment proceedings against the mills company would become stayed in accordance with the provisions in section 446(1). In his submission wherever conflict of jurisdiction for disposing of claims against a company appeared it would be settled by deciding if the jurisdictional provisions are special and or general. The special would exclude the general. In his submission the provisions in section 148 of the Income Tax Act where-under the notices in question were issued was a general provision relating to all assesseees. On the contrary, in connection with the very same matter section 446(2) was a special provision applicable only to companies in winding-up. In the result, the proceedings u/s 148 were liable to be set aside. In this connection he particularly relied upon the observations of the

Supreme Court in the case of Union o India v. India Fisheries Private Ltd.

In connection with these contentions it first requires to be recorded that in the case of Shiromani Sugar Mills the question related to the proceedings commenced u/s 46(2) of the Income Tax Act for recovery of already assessed tax. Though the assessment, of the quantum of tax had taken place subsequent, to the date of the winding up, order, the question that the assessment proceedings were unauthorised or, invalid because leave of the court u/s 171 had not been obtained was not raised or decided. In connection with the recovery-proceedings the court was called upon to find out the true, meaning, of the phrase " legal proceedings as contained in section 171. In that connection the court first noticed that u/s 239 of the Indian Companies Act, 1913, only limited priority was fixed in connection with Crown debts. Ordinarily, Crown debts ranked for payment pari Passu with ordinary creditors. The court also noticed that except for the machinery provided in section 171 - for compelling the de art leave of court before proceeding to make recovery, there was no machinery for having the account of the monies recovered and for securing the recovered monies into court so that the assets of the company in winding up were duly distributed Pari Passu amongst all the ordinary creditors. In connection with the meaning of the phrase " legal proceedings " the argument on behalf of the revenue was that it must be in the nature of a suit and reliance was placed in that connection on the observations of the Full Bench of the High Court at Lahore in the case of Shakuntala v. Peoples Bank of Northern India Ltd. The Federal Court negated the submission. The court observed that : "The phrase " legal proceedings " need not be confined to original proceedings in a court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint. Section 171 must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act."

20. Having seen the scheme of sections 232 and 211, the court found that :

:..... no narrow construction should be placed upon the words (or other legal proceedings" in section 171. In our judgment, the words can and should be held to cover distress and execution proceedings in the ordinary courts. In our view, such proceedings are other legal proceedings against the company, as contrasted with ordinary suits against the company."

21. The further observations were :

""But we see no reason why in British India no "legal proceeding" can be taken otherwise than in an ordinary court of law, or why a proceeding taken elsewhere than in an ordinary court of law, provided it be taken in a manner prescribed by law and in pursuance of law or legal enactment, cannot properly be described as a "legal proceeding "."

22. Similarly a Division Bench of this court in the case of Abdul Aziz v. State of Bombay" definitely observed in the context of section 48(2) of the Sales Tax Act,

1953, that " " legal proceeding" in its normal connotation can only mean a proceeding in accordance with law, and there can be no doubt that assessment proceedings under the Sales Tax Act are such proceedings."

23. The further relevant observation was that " It must be remembered in this context that the expression "legal proceedings " is not synonymous with "judicial proceedings". Proceedings may be legal even if they are not judicial proceedings, if they are authorised by law; and Mr. Palkhivala, by his argument, undoubtedly requires us to equate the expression "legal proceeding " in section 48, sub-section (2)(ii), with judicial proceedings, for which, our opinion, there is no warrant in law."

24. The ultimate finding of the court in that case was that :

"The expression "legal proceeding" in section 48(2)(ii) includes assessment proceedings

Now Mr. Chagla insisted that having regard to the history of the legislation in section 171 and section 446(1) and the above observations in connection of India, which has affected the above position. In support of that submission he has placed strong reliance on the contents of sub-sections (3) and (4) of section 446. Now it is quite clear that under sub-section (4) of section 446, in spite of a winding-up order having been made in connection with proceedings pending in appeal before the Supreme Court or a High Court, leave u/s 446(1) is unnecessary. It is also clear that under sub-section (3) the winding-up court, in its discretion, may, notwithstanding anything contained in any other law for the time being in force, transfer to itself any suit or proceeding and dispose of the same. Relying on this part of the section, Mr. Chagla sought to argue that under sub-section (2) exclusive jurisdiction is created in a winding-up court in connection with the matters mentioned in that sub-section. He, therefore, argued that the true effect of the observations of the Supreme Court in the case of *Damji Yalji Shah v. Life Insurance Corporation of India* 1 was that in each and all proceedings in which a claim is made for or against a company in liquidation the same was within the jurisdiction of the company court and for that reason the assessment proceeding commenced by the, impugned notices was within the jurisdiction of the company court. We should, therefore, hold that the order of injunction granted by the learned judge was justified and correct.

These arguments in defence of the above second contention made by Mr. Joshi do not disclose any real defence and are liable to be rejected for the reasons following :

(1) The second contention made for the appellants is on an assumption that the notices for reassessment issued under section 148 of the Income Tax Act, 1961, were in respect of legal proceeding covered by sub-section (1) of section 446.

(2) In connection with its findings regarding the true meaning and effect of the provisions in sub-sections (1) and (2) of section 446 the Supreme Court did not

find it necessary in the case of *Damji Valji Shah v. Life Insurance Corporation of India* 1 to discuss, the connotation of the phrase " legal proceedings ". The Supreme Court further found it entirely unnecessary to refer to the provisions in sub-sections (3) and (4) of section 446 and other relevant sections such as sections 442, 530k and 537.

(3) The Supreme Court arrived at its findings regarding the true effect of the provisions in sub-sections (2) and (3) of section 446 in spite of, and we must presume with the full and complete knowledge of, the provisions in subsections (3) and (4) of section 446 and all relevant sections, including sections 442, 530 and 537.

(4) The main ratio of the decision of the Supreme Court was, as already discussed above, that the provisions in sub-section (1) of section 446 were consequential provisions for the reasons discussed in the first part of paragraph 18 of the judgment. For that reason the Supreme Court found that having regard to the special provision conferring jurisdiction on " a special tribunal u/s 41 of the Life Insurance Corporation Act and the general provisions of that Act being in a special Act " will override the provisions of the general Act, viz., the Companies Act." The Supreme Court must be held to have held that in the context of a special Act like the Life Insurance Corporation Act the provisions in sub-sections (1) and (2) of section 446 were provisions of a general Act and provisions in a special Act and or special provision like that in section 41 of the Life Insurance Corporation Act would override the provisions in sub-sections (1) and (2) of section 446.

We are unable to accept the argument made by Mr. Chagla that the provisions in sections 148 and 142 of the Income Tax Act are general provisions, and the scheme of those provisions was liable to be overridden by the provisions in sub-sections (1) and (2) of section 446(1) as being special provisions. The scheme in sections 148 and 142 of the Income Tax Act and the scheme thereof for assessment of quantum of tax must be considered in *Pari malaria* with the provisions in section 41 of the Life Insurance Corporation Act. These sections and the above scheme are in a special Act investing jurisdiction in special tribunals and accordingly such as would " override the provisions of the general Act, viz., the Companies Act ".

25. Now it is true that in the case of *Union of India v. India Fisheries Pvt. Ltd.*", in connection with the recovery proceedings envisaged by section 49E of the Income Tax Act, in the context of the provisions in sections 228 and 229 of the Companies Act, 1913, in consonance with the previous decision of the Federal Court in the case of *Governor-General in Council v. Shiromani Sugar Mills Ltd.*, the Supreme Court observed :

" Section 49E is a general provision applicable to all assesseees and in ,all circumstances; sections 228 and 229 deal with the proof of debts and their payment in liquidation."

26. The Supreme Court decision was on the footing that the provisions of section 49E were overridden by the provisions in section 228 and 229 of the Indian Companies Act, 1913. Similar provisions in the Income Tax Act, 1961, and the Companies Act, 1956, will bear the same effect. It, however, requires to be noticed that the scheme of the Companies Act in the chapter relating to winding up of insolvent companies as regards unsecured debts is like that in the Provincial and Presidency Towns Insolvency Acts for satisfaction of these debts *Pari Passu*, i.e., for distribution of the available assets between the creditors in the proportion of their claims. Sections 228 and 229 enact the "above scheme. Provisions like these in respect of companies in winding-up as contained in the chapter relating to companies in liquidation in the Companies Act would always override, as being special provisions, proceedings for recovery of tax dues and the special provisions like section 49E enacted in the Income Tax Act. Even so, the effect of the decision of the Supreme Court in *Damji's case* 1 is that where claims arise for decision by special tribunals and or special officers like Income Tax Officers in the present case under special jurisdiction, the provisions in sub-sections (1) and (2) of section 446 must be considered as general provisions only. The matter is not *res integra*. We are, therefore, unable to accept Mr. Chagla's contention that the impugned notices were liable to be stayed by issuing an order of injunction because the Supreme Court had not changed or restricted the meaning of the phrase " legal proceedings " as construed by the Federal Court and the Supreme Court in *Goveritor-General in Council v. Shiromani Sugar Mills Ltd.* 1 and *Union of India v. India Fisheries Pvt. Ltd.*

27. The alternative contention in this connection was that in so far as the observations of the Supreme Court in *Damji's case* 1 alter and or restrict the meaning of the phrase legal-proceedings " the same are casual and or made in :passing. The submission was that the observations were not relevant to arrive,at the findings which the Supreme Court made. The further submission in the alternative was that the findings of the Supreme Court in connection with sub-sections (1) and (2) of section 446 were patently in ignorance of the relevant provisions in sub-sections (3) and (4) of section 446, as also. in sections" 442, 530 and 537 and certain other sections of the Companies Act. These findi"s were made in ignorance of the above decision of the Federal Court, as also of the, Supreme Court, in the two cases iust mentioned., These findings were therefore *Per,incursam* and we are not bound to follow them. In that connection reference was made to *Salmond on jurisprudence*, 12th edition," page 151, where it is, *inter alia*, stated that the precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. "The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of" the statute." The lower court may refuse "to follow the later decision on the ground chat it was arrived at *per incuriam*.

28. Now in connection with theue submissions, as already stated to Mr. Chagla by us, we are of the view that - the Supreme Court. was called upon to ascertain

the true effect of the provisions of sub-sections (1) and (2) of section 446 as the main important point in the case of Damji. It is impossible to imagine that the contents of sub-sections, (1) and (2) of section 446, on which reliance is sought to be placed by Mr. Chagla, was not present to the mind of the Supreme Court in deciding the case of Damji. Paragraph 18, which we have already quoted above, contains direct reasoning of the court for the findings made in paragraphs 18 and 19 for arriving at the true construction and effect of the above two sub-sections. We are also unable to imagine that the Supreme Court was, whilst dealing with the provisions of these two sub-sections, unaware of the provisions of sub-sections (3) and (4) of section 446 and the relevant sections or the scheme of the Companies Act. We, therefore, reject these alternative submissions made by Mr. Chagla.

29. The result of the above discussion is that the arguments advanced by Mr. Chagla in reply to the above second contention made on behalf of the appellants fail.

30. As we have accepted this second contention, the appellants are entitled to succeed in this appeal and to have the order dated September 28, 1967, set aside.

31. Having arrived at the above conclusion on the above second contention made on behalf of the appellants, we do, not find it necessary to deal with the first contention made on behalf of the appellants. It is only necessary to refer in a very summary way to the arguments advanced in support of that contention.

32. Mr. Joshi contended that the proceedings initiated by the above impugned notices being assessment proceedings, were not covered by the phrase "legal proceedings" as contained in sub-section (1) of section 446. The contention was that up to the stage that the liability to tax was quantified, assessment proceedings would not be such legal proceedings because to that stage the department does not become creditor of the company. Up to that stage the debt itself is not ascertained and or quantified. Legal proceedings would be those which would directly affect the assets and properties of a company in winding-up. This was so because the object of the provision in sub-section (1) of section 446 was to facilitate protection and realisation of assets and to prevent wasteful litigation in regard thereto. The scheme in winding-up was to have the secured assets distributed pari passu among general creditors and to prevent a scramble by creditors of a company in winding up by taking custody and possession of assets of such company. The argument was that, in respect of proceedings which could not be withdrawn by a winding-up court for trial by itself leave under sub-section (1) of section 446 was unnecessary. The assessment proceedings were proceedings which an Income Tax Officer undertakes in discharge of a statutory duty imposed on him as such officer by the Income Tax Act and therefore these, are not legal proceedings. The contentions in reply were that the object of winding up was to collect assets of a company in winding up and to satisfy the claims of all the ordinary creditors pari passu. Sub-section (1)

of section 446 provided for stay of proceedings of every kind which were in the nature of claims against a company in winding-up. The object of sub-section (1) was to enable the company court to get complete control over all claims which might arise against the company in winding-up. For these reasons the phrase "legal proceedings" should be given the widest possible meaning. This phrase means action to recover any claim which may result into an order or a decree that can be recovered by legal process. The submission was that the charging section in the Income Tax Act created a debt and the proceedings for quantification thereof must be held to be a claim for decision of a claim against a company in winding up. The submission was that the notices u/s 148 of the Income Tax Act activates the machinery of taxation law from quantification till recovery of the tax dues. There was accordingly no warrant to distinguish the stage of recovery of tax dues from the anterior stage for quantification of the tax liability.

33. As already stated in the above discussion in connection with these contentions, there are extremely relevant observations in the decision of the Federal Court in the case of "Governor-General in Council v. Shiromani Sugar Mills Ltd." and of the Supreme Court in the case of Union of India v. India Fisheries Pvt. Ltd. There are also relevant observations in the case of Abditl Aziz v. State of Bombay. We, however, find it unnecessary to discuss these decisions and to arrive at any finding as regards these," rival contentions, in view of the fact we have accepted the above second, contention made on behalf of the appellants.

34. In the result, the appeal is allowed and the order made by Mr. justice Virnadalal, dated September 28, 1967 is set aside. The judge's summons dated July 1, 1967, is dismissed with costs. The respondent to pay the appellants' costs.