

(1968) 08 CAL CK 0021
In the Calcutta High Court
Case No : Company Petition No. 261 of 1967
In Re: The India Electric Works Ltd.

Date of Decision : 27-08-1968

Acts Referred:

Companies (Court) Rules, 1959 — Rule 21
Companies Act, 1956 — Section 293(1), 439, 443, 443(1), 529
Industries (Development and Regulation) Act, 1951 — Section 18E(1)

Citation : AIR 1970 Cal 398

Hon'ble Judges : K.L. Roy, J

Bench : Single Bench

Advocate : Subrata Roy Choudhury and R.N. Pyne, for Petitioning Creditor, N.G. Roy Choudhury, for Steel Distributors supporting Creditor, A. Ganguli, Attorney for Anwar Ali and Co. one of the Supporting Creditors, for the Appellant; S.C. Sen and P.K. Pal for R.K. Rohtagi, an Opposing Creditor, Ajoy K. Ghosh, for Narayan Choudhary and Bros. Pvt. Ltd. an Opposing Creditor, R. Ghose, for James Finley and Co. Ltd., one of the opposing Creditors, Somnath Chatterjee and Tapash Roy for Tulsi Chatterjee, one of the employee Creditors, for the Respondent

Judgement

K.L. Roy, J.—This is an application u/s 439 of the Companies Act, 1956 for the Winding-up of the India Electric Works Ltd. (hereinafter referred to as the Company). The petitioning creditor is the State Bank of India, who claims to be a secured creditor of the Company to the extent of Rs. 1,67,78,000. The petitioning creditor is supported by two other creditors namely, Anwar Ali and Bros, whose claim against the Company is for Rs. 33,157 for the price of goods supplied and Steel Distributors, whose claim is Rs. 31,000 also for goods supplied to the company. The petition is being opposed by several creditors, namely, James Finlay and Co., whose claim against the company is for Rs. 59,527, M/s. Narayan Choudhury Bros. (P.) Ltd., whose claim amounts to Rs. 54,525 and by the Secretary of the India Electric Works Employees Association, a registered trade union, who claims that the company is indebted to the members of the said association to the extent of Rs. 29,50,000 consisting of provident fund dues amounting to Rs. 22,00,000 approximately and arrears of dearness

allowance of Rs. 7,50,000 approximately and also by an employee of the company, Tulsi Chatterjee, claiming an amount of Rs. 2,707 on account of arrears of salary, provident fund etc., and by Ravindra Krishna Rohatgi, one of the principal shareholders of the company, holding shares of the face value of Rs. 2,56,000 and also claiming to be a creditor of the company for another sum exceeding Rs. 3,00,000.

2. The facts stated in the petition are as follows. The company was incorporated in December, 1930 as a public company limited by shares with its registered office at Diamond Harbour Road, Behala. The authorised capital of the company is Rupees 1,00,00,000 (one crore) divided into seven lacs equity shares of Rs. 10 each and 30,000 7 1/2% cumulative redeemable preference shares of Rs. 100 each. The amount of capital paid-up or credited as paid-up at present is Es. 34,00,000. The company was incorporated for the purpose of taking over the business carried on by a firm or the name of the India Electric Works, which had been manufacturing electric fans and other electric goods and had acquired a reputation in the market for their product the India Fans". The main object of the company was to manufacture various electrical fittings, cables, wires, lamps, bulbs, accumulators, batteries, motors, engines, fans etc. etc. Disputes and differences arose between two groups of shareholders of the company as a result of which the company started incurring heavy losses, In or about January, 1959 the Government of India appointed a committee under the provisions of the Industries (Development and Regulation) Act, 1951 to investigate the financial position of the company and on the recommendation of the said Committee, the company raised an additional capital of Rs. 9 lacs. Even after the increment in the capital as aforesaid there was no improvement in the company's affairs and the then bankers of the Company, M/s. Punjab National Bank Ltd., in or about June 1960 withdrew the financial accommodation accorded to the company resulting in the closure of the Company's factory. Thereafter by an order dated the 11th July, 1960, in exercise of the powers conferred by Section 18A of the Industries (Development and Regulation) Act, 1951, the Central Government appointed one S. C. Banerji, a Central Government Officer, as the authorised controller to take over the management of the affairs of the company in consultation with the Advisory Board. The financial arrangements with the Punjab National Bank Ltd. were revived after the Central Government took over the management of the company. Subsequently by an order dated the 8th November, 1960 one P. C. Basu, another officer was appointed the authorised controller of the company. The taking over of the management of the company by the Central Government did not result in any improvement in the affairs of the company and by the month of January, 1963 the liabilities of the company to M/s. Punjab National Bank Ltd. had amounted to Rs. 85,00,000 and the company had used for working capital purposes the employees' provident fund to the tune of Rs. 24,00,000. In January, 1963 the petitioner, State Bank of India, was appointed the bankers of the company by the Government of India and the liability of Rs. 85,00,000 of the company to its previous bankers M/s, Punjab

National Bank Ltd. was transferred to the petitioner. Thereafter by an agreement dated the 2nd January, 1963, the petitioner agreed to advance monies and grant accommodation to the company to the extent of Rs. 85,00,000 with interest at 1/2% over the State Bank of India Advance Rate with a minimum of 5 1/2%. As security therefore the authorised controller, for and on behalf of the company, executed a promissory note for Rs. 85,00,000 payable on demand in favour of the President of India which was in turn assigned to the petitioner and on the same date the President of India executed a deed guaranteeing the due repayment of the amount of the principal and interest due on the aforesaid promissory note by the company in favour of the petitioner. By way of further security the company, on the same date, also hypothecated its stock-in-trade and various other goods and also created a first charge on book debts, outstandings, claims, bills, contracts etc. by an agreement for Cash Credit Account Hypothecation of Debts and Assets. By a further agreement entered into in January, 1963 the petitioner agreed to advance monies or grant accommodation to the company by way of Cash Credit called the Second Cash Credit Account, to the extent of Rs. 55,00,000 and the said limit was subsequently raised upto Rs. 70,00,000 during the year 1966. The amounts advanced or to be advanced to the company under the Second Cash Credit Account were secured by an equitable mortgage by deposit of title deeds on the 4th January, 1963 in respect of the lands and buildings comprising the factory, fixed, plant and machinery belonging to the company with intent to create a first mortgage on the said lands, buildings, factory, plant and machinery as continuing security for payment of all moneys due in respect of the said account No. 2. The company also executed an on-demand promissory note for Rs. 70,00,000 on 5th April, 1967 payable to the President of India which was in turn duly assigned to the petitioner and the President of India also executed a deed of guarantee on the 5th April, 1967 in favour of the petitioner for Rs. 70,00,000. The petitioner advanced various sums to the company in the said two Cash Credit Accounts and the said Accounts were at all material times maintained as mutual open current and continuous accounts according to the English calendar. As the company failed to abide by the terms of the said Cash Credit Account agreements, the petitioner by two letters both dated the 18th April, 1967 informed the company that the company would not be allowed to draw on the said two Cash Credit Accounts after the close of business on the 22nd April, 1967. On April 22, 1967 the petitioner stopped further operation of the said two accounts by the company and after adjusting the said two accounts the outstanding debit balance with interest on that date in the said Cash Credit Accounts Nos. 1 and 2 were Rs. 85,29,768 and Rs. 69,17,632.53 respectively. The petitioner duly notified the company that the said two amounts had become due in respect of the said two accounts. According to the petitioner upto the 5th November, 1967, a total of Rs. 1,01,30,623 became due and owing by the company to the petitioner in respect of the said two accounts. On the 22nd September, 1967 the petitioner's solicitors demanded the repayment of the said amount of Rs. 1,59,72,953 then due on account of principal and interest and the said notice of demand was received by

the company on the 23rd September, 1967. In spite of the said notice the company failed and neglected to pay the petitioner the amounts aforementioned. The petitioner further states that the company had been incurring heavy losses year after year and such losses for the years ending 30.9.62, 30.9.63 & 30.9.64 amounted to Rs. 13,62,000, Rs. 9,05,000 and Rs. 12,67,000 respectively. The petitioner claims that the company is hopelessly insolvent and it is just and equitable that the company should be wound up.

3. Mr. Subrata Roy Choudhury, the learned counsel for the petitioner, submitted that the petition was based on two grounds, namely, (1) that the company is unable to pay its debts and (2) that the company is unable to carry on its business due to recurrent losses in the past years. Apart from the creditors supporting and opposing this petition, various other creditors have filed suits in this Court as well as other court against the company, the total amount of claims in such suits being over Rs. 19,17,756. The creditors opposing the winding-up as well as the shareholder Rohatgi contest the petitioner's right to a winding-up order mainly on two grounds, namely, (1) that the petitioner is a secured creditor which has not given up its security and as such it is not entitled to proceed with the winding-up and (2) that the Central Government, which had been in actual control of the company for the last seven or eight years, had by its negligence, malfeasance and misfeasance created this huge burden of debt and the State Bank, which is another undertaking controlled by the said Government should not be allowed to present this application. Another point taken is that the sanction given by the Central Government u/s 18E(1)(c) of the Industries (Development and Regulation) Act is neither valid nor bona fide and as such the petition is not maintainable. The last two points have been elaborated by Mr, S. C. Sen, the learned counsel appearing for the shareholder Rohatgi and will be dealt with later. Mr. Roy Choudhury objected to the admission of the affidavit filed on behalf of the employees' association as neither the Secretary nor the Association could claim to be a creditor of the company. Though strictly the Association is not entitled to take part in these proceedings for winding-up, the affidavit filed on its behalf gives some material facts which are to be taken into consideration in determining whether the company is solvent or is able to pay its debts. Apart from mentioning that an amount of about Rs. 29,50,000 is due to the members of the Association from the company on account of provident fund and arrears of dearness allowance, the affidavit points out that even prior to 1960 the company was working at a loss and its liabilities to the Punjab National Bank Ltd. and other creditors were to the extent of Rs. 1,07,85,000 upto September 30, 1960. This liability had further increased during the period the company was under the management of the Government and the affidavit makes certain suggestions as to the way the company could be put up on its feet again. But for that purpose another sum of Rs. 80 lakhs was required as working capital over and above its various other liabilities. There was no liquid working capital available and the production had practically come to a stand-still.

4. It has been nobody's case before this Court that the company was solvent or

that it could in any way pay its liabilities or that it could carry on its production. Everybody is agreed that it is only the Central Government who can keep the company going. That the company is hopelessly insolvent has not been denied by anybody.

5. Mr. Roy Chowdhury referred to the well-known cases of *Moor v. Anglo-Italian Bank* (1879) 10 Ch D 681 and in *Re: Borough of Portsmouth Tramways Co.* (1892) 2 Ch D 362 where it had been held that a secured creditor is not debarred from presenting a petition for winding-up without giving up his security or without valuing the, security and proving for the balance. A similar view was also taken by the Madras High Court in *Karnatak Vegetable Oils and Refineries Ltd. Vs. Madras Industrial Investment Corporation Ltd. and Another*, where, following the decision in (1879) 10 Ch D 681 (*supra*), it was held that the rule in bankruptcy, that before a secured creditor could file a petition for winding-up he had to give up his security or to value the security and aver that after giving credit to such value there would be a balance due and payable to him, did not apply to a winding-up. It was therefore submitted that the fact that the State Bank was a secured creditor did not disentitle it from presenting the petition,

6. Several decisions of the English Courts were cited by Mr. Roy Chowdhury for the proposition that though the order which the petitioner for the winding-up seeks is not an order for his individual benefit but for the benefit of a class of which he is a member, yet the mere fact that the majority of the creditors oppose the petition does not by itself make it incumbent on the Court to refuse an order for winding-up. As has been observed in *Re: Great Western Coal Consumers Co.* (1882) 21 Ch D 769 that in determining whether regard should be paid to the wishes of the creditors who oppose the making of a winding-up order, the Court ought to consider not only the number of creditors and the amount of their debts, but also the reasons which they assign for their conclusion. If the opposing creditors do not give a satisfactory reason for their opposition or it is not shown that the petitioner would gain nothing if the company was wound up, the Court would be justified in making an order for winding-up. Even where all the assets are charged in favour of the secured creditors and there were no assets available for the unsecured creditors a winding-up order should be made in order that the unsecured creditors might be represented before the Official Receiver. It has also been observed that an order, when there is nothing at all to be wound up, might at times be justified as the means of bringing to an end a vicious career. (*Crigglestone Coal Co's case* (1906) 2 Ch D 327). The view that the Court has a discretion whether to grant or to withhold the order and the bare fact that the opposing creditors are a majority is not sufficient or itself to entitle them to have the order refused is also borne out by the decision of the English Court of Appeal in *Re. P. and J. Macrae Ltd.* (1961) 1 All ER 802. In my opinion these cases have no application to the facts of the present case, as, assuming that the petitioner Dank, though a secured creditor, is entitled to present this petition, its claim would undoubtedly exceed the claims of all the other creditors put together.

7. The test to be applied in such cases has been laid down by the Privy Council in *Davies and Co. Ltd. v. Brunswick (Australia) Ltd.* (1936) 1 All ER 299 : (AIR 1938 PC 114) thus:--

"Holding an even hand between the two conflicting interests in the present case, their Lordships are of the opinion that the decisive question must be the question whether at the date of the presentation of the winding-up petition there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained."

8. In *Re: The Cine Industries and Recording Co. Ltd.*, Chagla, as he then was, enunciated the principle to be followed in such cases in the following words:--

"The test for determining whether a company should be wound up is whether the company is commercially insolvent at the date of the petition for winding-up. The expression, "commercially insolvent" means that the existing assets and liabilities of the company are such as to make it reasonably certain that the existing and probable assets would be insufficient to meet the existing liabilities.

The other test is whether at the date of the presentation of the winding-up petition there was any reasonable hope that the object of trading at a profit with a view to which a company was formed would be attained."

9. On the facts of the present case there can be no dispute that the company was commercially insolvent at the date of the petition for winding-up and there is no reasonable hope that the object of trading at a profit, with a view to which the company was formed, would ever be attained. Accordingly, an order for winding-up should be made *ex debito justitiae*.

10. Mr. Ganguly, the learned solicitor for one of the supporting creditors, Anwar Ali and Bros, supported the petitioner and submitted that if there was some surplus, the unsecured creditors might be paid something. He submitted further that if the petitioning creditor is held not to be entitled to present this petition, the supporting creditor should be substituted in its place under Rule 101 of the Companies (Court) Rules. A similar prayer was also made by Mr. N. C. Roy Choudhury, the learned counsel for the other supporting creditor Steel Distributors to be substituted for the petitioner under the said Rule 101. He also submitted that the only other alternative was framing a scheme u/s 391 after a compromise with the creditors. Even if such a scheme was sanctioned, it would be found unworkable and a winding-up order would follow in terms of Section 392(2). As the company itself had not appeared and opposed the application, the allegations made by the opposing "creditors and the shareholder Rohatgi of mismanagement by the Central Government would be an additional reason for dissolution of the company.

11. Mr. Rajat Ghose, the learned counsel for one of the opposing creditors, James Finlay and Co. submitted that no order should be made on the petition though it is not disputed that the company could not go on. The proviso to Section 529 of

the Companies Act makes the rules of insolvency applicable to a petition for winding up. Accordingly, a secured creditor, in order to continue the winding-up proceedings, if he is not prepared to give up the security, could only prove for the balance after valuing the security and setting it off against his claim. No such valuation of the assets of the company charged or mortgaged to the petitioner has been given in the petition. So unless the security fell short of the claim of the secured creditor no petition could be maintained. The mortgage gives the petitioner the right to appoint a receiver of the assets in case of default of payment. The petitioner has not taken any steps to recover its dues. Mr. Ghose relied on certain decisions under the Insolvency Acts which, in my opinion, have no application to the facts of the present case. Mr. Ghose tried to distinguish the ratio laid down by Sir George Jessel in (1879) 10 Ch D 681 on the ground that the decision was based on the fact that in English law there was no rule of bankruptcy forfeiting the petitioning creditor's debt.

12. I am entirely unable to accept this contention. The said decision is a clear authority for the proposition that the rules in bankruptcy are not applicable to a petition for winding-up presented by a secured creditor and this view has also been accepted by the Courts of this Country. Mr. Ghose then submitted, that as all the assets are mortgaged to the petitioner it can realize its security without a winding-up. The petition was an abuse of the process of the Court, I am also unable to accept this contention as there can be no doubt that the Company is hopelessly insolvent and the assets are not sufficient even to satisfy the claim of the secured creditor. Mr. Ghose also wanted to raise an issue that as there is no affidavit from the Central Government, the sanction u/s 18E(1)(c) of the Industries (Development and Regulation) Act 1951 had not been proved to have been duly granted and as such the winding-up proceedings had not been validly initiated. In his view the interlocutory proceedings for the production and inspection of the written sanction by the Central Government at the instance of the shareholder Rohatgi have no relevance so far as the competency of the petition was concerned. There is no substance in this contention also as the production and inspection of the written sanction was directed by the Court.

13. Mr. S. C. Sen, the learned counsel for the shareholder Rohatgi, made no attempt to prove that the company was solvent. He fairly and frankly admitted that unless the Central Government took up and continued the management of the company, it would not be possible to keep the company alive. He, however, urged two grounds for rejecting the petition.

14. His first objection was against the maintainability of the application, in that the petition has been verified by an affidavit affirmed by one Samindra Kumar Gupta describing himself to be the Superintendent, Advances Department of the State Bank of India and as such a principal officer of the petitioner. Mr. Sen submitted that under the Rules of this Court, which are mandatory, all pleadings and affidavits on behalf of a Company are to be affirmed and signed by a principal officer of the company. A principal officer is a person holding a

substantial post in the company. Rule 21 of the Companies (Court) Rules, 1959 provides that a petition, including a petition for winding up by a company, shall be verified either by a Director, Secretary or other principal officers of the company. It would, therefore appear that even a Secretary of a company is not its principal officer. Mr. Sen referred me to Buckley's Companies Act 12th Edition at page 1028 where the learned author sets out Rule 30 of the English Rules which is more or less in the same terms as the aforesaid Rule 21 of the Companies (Court) Rules, and points out that where the petitioner is a company, its assistant secretary cannot be regarded as a principal officer under the said Rule. Mr. Sen further submitted that "principal" is defined in Jowett's Legal Dictionary, Vol. II page 1404, as "a head, a chief and therefore the Superintendent of one of the numerous departments of the State Bank of India could not be said to be a principal officer thereof. But on the same page in Buckley's aforesaid Commentary there appears the following note:-- "For the rule is only directory, and does not say that no other affidavit is admissible. If the petitioner's affidavit cannot be obtained, the affidavit of some person who can speak to the facts as well or better than the petitioner, may be accepted." The authority cited for the above note is Re: African Farms Ltd (1906) 1 Ch 640. The learned author also mentions a case where the Court allowed the affidavit to be made by a clerk of the solicitors of the petitioner who had full knowledge of the proceedings where the petitioners were resident abroad. It would, therefore, appear that the above rule is not mandatory, as claimed by Mr. Sen and even assuming that Samindra Kumar Gupta could not be said to be a principal officer of State Bank of India, the petition verified by his affidavit could not be rejected in limine.

15. The second argument advanced by Mr. Sen was that the alleged loan given by the Petitioner to the Company was ultra vires the Companies Act in as much as the said amount exceeded the aggregate of the paid-up capital of the Company and its reserves and no consent of the members in a general meeting had been obtained as provided in Section 293(1)(d). u/s 18E(1)(c) of the Industries (Development and Regulation) Act, 1951 the person authorised u/s 18A of that Act to take over the management of an industrial undertaking, which is a company, shall for all purposes be the director of the company, duly constituted under the Indian Companies Act and shall alone be entitled to exercise all the powers of the Director. It is, therefore, submitted that by borrowing the amounts in excess of the limits prescribed by Section 293(1)(d) of the Companies Act, the authorised person has exceeded the authority conferred on him by the Industries (Development and Regulation) Act and as such the loan is not binding on the company. That the members of a company whose management has been taken over by the Central Government under the Industries (Development and Regulation) Act are not debarred from holding meetings and passing resolution is apparent from the provisions of Section 18E. In my opinion, there is not much substance in this contention. Under the proviso to Section 443(1) the Court would not refuse to make a winding up order only on

the ground that the assets of the company had been mortgaged for an amount exceeding the limit, prescribed in Section 293(1)(d). Further, in view of the provisions of the Industries (Development and Regulation) Act no resolution of the members of the company would be binding on the Government or on the authorised person.

16. The more substantial ground of objection raised by Mr. Sen is that the petition is not maintainable as there is no proper sanction by the Central Government u/s 18E(1)(c) of the Industries (Development and Regulation) Act, 1951. As such a sanction is the condition precedent to the presenting of a petition for winding-up, the petition should be dismissed as incompetent, Mr. Sen submitted that the sanction alleged to have been granted by the Central Government to the petitioner is already under challenge in proceedings under Article 226 of the Constitution and this Court has already issued a rule on the 5th April, 1968 and the hearing of the application is pending. The grounds taken in the said application are (1) that the Industries (Development) and Regulation) Act, 1951 is ultra vires as it imposes unreasonable restrictions on the subject in carrying on its business and (2) that the alleged consent purported to have been given by the Central Government u/s 18E(1)(c) of the said Act was illegal, inoperative, without jurisdiction, arbitrary, capricious, mala fide and void. In the said application very serious allegations of malfeasance, misfeasance and non-feasance by the controlling authority have been alleged. Mr. Sen submitted that in view of the rule issued by this Court no order should be made on the winding-up petition until the writ petition was heard and determined. Mr. Sen pointed out that in the event of a winding-up order, the winding-up proceedings would be conducted by the Official Liquidator, who is an officer of the Central Government and his client apprehends that the various allegations of misconduct against the controlling authority would not be properly investigated. Mr. Sen further submitted that both in England and in this country winding-up proceedings have been adjourned when there had been any doubts as to the competency of the petitioner to present a petition for winding-up. In *Ex parte Lennox, In Re Lennox* (1885) 16 QBD 315 it was held that on a petition by the judgment creditor for a receiving order, even though the debtor had consented to the judgment, if at the time of the hearing of the petition facts are alleged by the debtor, which if proved, would show that notwithstanding the judgment, there was by reason of fraud or otherwise no real debt, the Court ought not to make a receiving order without first enquiring into the truth of the debtors' allegation, This was a decision of the Court of Appeal consisting of Lord Fisher M. R., Cotton L. J. and Lindley L. J. and the observations of Lindley L. J. at page 329 are apposite: --"It means, I think, that although the judgment debtor could not go behind the judgment, the Court of Bankruptcy will not allow itself to be put in motion at the instance of a person, who is not a real creditor. The Court will not allow bankruptcy proceedings to be had recourse to for the purpose of enforcing debts, which are fictitious and not real even although they are in the form of judgment debts." This case was cited by Mr. Sen for the proposition that in winding up

proceedings the Court could go behind the transaction to find out the true nature thereof and is not bound by the assertions which are apparently proved. The next case cited by Mr. Sen is a decision of a Division Bench of this Court in *Mohammed Amin Bros. Ltd. Vs. Dominion of India and Others*, . In that case very heavy demands were made on the company for arrears of Income Tax and corporation tax and some assets of the company were attached in execution of such demand. Thereafter the company passed a resolution for voluntary winding-up and appointed a Liquidator. Subsequently, an application was made by the Revenue Authorities for the compulsory winding-up of the company and the Company Court admitted the petition and gave direction for advertisement and also appointed a Provisional Liquidator. At the hearing, the company opposed the application, inter alia, on the ground that the claim of the revenue was being disputed and the appeals filed by the company against the assessment orders were still pending before the Appellate Tribunals, and as such the amount of the claim of the revenue authorities were disputed. Sinha, J., passed an order for the winding-up of the company. On appeal the Division Bench held, inter alia, that an order for winding-up should not be made when the company wants to challenge or impeach a judgment in proper proceedings and where there is a reasonable doubt as to whether a valid debt exists or not. In a case where the debt is disputed the Court has first to see whether the dispute is on the face genuine or merely a cloak for the company's real inability to pay its debt and that winding-up proceedings should not be utilised for recovery of a disputed debt. Chatterjee, J., observed that in that case there was no doubt that the debts claimed by the Dominion of India were disputed and that the disputes with regard to these debts were "bona fide and serious, But his Lordship felt some difficulty as to the form of the order to be passed by the Court of Appeal and observed that in his view the Court should not accede to the extreme contention raised by the appellant that the petition should be dismissed but should see that justice was done to both the parties and the only way in which justice could be done in that case was to set aside the winding-up order but to keep the application for winding-up on the file and to refuse to pass any final order thereon unless and until there was a determination of the assessment proceedings and until the adjudication by the proper forum determining what was the debt justly due to the Dominion of India. Mr. Sen submitted that in this case also the hearing of the petition for winding-up should be kept pending until the disposal of the writ petition determining the validity of the consent required u/s 18E(1)(c) of the Industries (Development and Regulation) Act, 1951.

17. The next case relied on by Mr. Sen was another Division Bench decision of this Court in *Bengal Luxmi Cotton Mills Ltd. and Others Vs. Mahaluxmi Cotton Mills Ltd. and Others*, where the ratio of the decision in *Amin Brothers* case was further enlarged and it was observed that when a debt was disputed on a substantial ground and the dispute was bona fide, the winding-up court would not proceed further and decide the dispute itself and determine whether or not a debt existed and had become payable. In such a case the Court would either

dismiss the petition for winding up or keep it pending till the creditor has established his claim in a regular action. In that case the creditors of the respondent company were entitled to certain payments under a scheme framed by the Court and on failure of the respondent to make such payments four of such creditors made an application for winding-up of the respondent company. The respondent company admitted that the claims by the creditors were due but contended that the scheme provided that the debts were to be paid out of the profits and inasmuch as the respondent company had not made sufficient profits, the debts had not yet become payable. The Court observed that the scheme presented a substantial problem of construction and there being bona fide dispute as to the maturity of the appellants' claim and as to the company's liability for immediate payment, no winding-up order would be made till the "dispute was decided. In that case also the appeal was kept pending till the disposal of the suit which had been brought for the construction of the scheme. In *Re, Bharat Vegetable Products Ltd.* (1952) 58 CWN 29 Bachawat, J., made a further extension of the principle enunciated in *Amin Bros*, case and held that even if some part of a debt was admitted, but if a sufficient part was disputed, the Court would not proceed with the petition for winding-up and would stay further hearing of the petition. In *Amalgamated Commercial Traders (P) Ltd. v. A. C. K. Krishnaswami* (1983) 35 Com Cas 456 (SC) the Supreme Court held that it was well settled that a winding-up petition was not a legitimate means of seeking to enforce payment of a debt which was bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed. Mr. Sen submitted that in this case also the shareholders were challenging the loan u/s 293(1)(d) of the Companies Act and also the factum and validity of the alleged consent given by the Central Government for the commencement of winding-up proceedings against the company.

18. Mr. Sen then referred to various decisions of the Supreme Court where provisions of various Acts had been struck down on the ground that such provisions conferred an unfettered and unrestricted discretion and were as such invalid and unconstitutional, Even where the statute itself was not held to be ultra vires, the orders purported to be made thereunder were, in some cases, held to be ultra vires. Mr. Sen also pointed out that for violation of the principles of natural Justice, for instance, where no notice of an intended proceeding is given to the party affected thereby, the proceedings would be struck down and submitted that the rule in the writ petition in this Court was obtained on the aforesaid grounds challenging the vires of the Act and also the validity of the alleged consent given by the Central Government under the provisions of the Industries (Development and Regulation) Act.

19. Mr. Sen next submitted that though a secured creditor could apply for liquidation, the Court has always a discretion not to allow such a creditor to put the company in liquidation without enforcing his security and for this proposition he relied on the decision of the Madras High Court in *Karnatak Vegetable Oils and*

Refineries Ltd. Vs. Madras Industrial Investment Corporation Ltd. and Another, but in that case the High Court qualified the aforesaid observation by saying that where the secured creditor had ample security for his debt and there was no averment that his security was insufficient, no useful purpose would be served by an order of winding-up at his instance except the realisation by him of his security. In Ram Kumar Agarwala and Another Vs. Buxar Oil and Rice Mills Ltd. and Another, a Division Bench of this Court held that where there was a serious dispute as to the claim of the alleged creditors, the Court would not make an order for winding-up. In that case the trustees for the debenture-holders presented a petition for winding-up on the failure of the company to pay interest on the debentures, The petition was opposed by the unsecured creditors who raised serious disputes as to the validity of the debentures and the debenture trust deed. The Company Court dismissed the application and the Division Bench upheld the decision of the Court below. Bachawat, J., who was a member of the Bench observed that the dispute could not be resolved on the affidavits and in the circumstances the winding-up order ought not to be made. The debenture trustees would be at liberty to enforce their rights by other means. Mr. Sen finally cited the decision of the English Court of Appeal in *In Re, Chapel House Colliery Co. (1883) 24 Ch D 259*. In that case all the assets of the company had been assigned to trustees upon trust for its debentures and the colliery was also mortgaged for a large amount payable in instalments. The colliery was not worth the amount of the mortgage but it was working at a profit and the instalments of the mortgage debt were being paid but nothing was left to pay interest to the debenture-holders. There appeared to be reason to think that if the business was continued and the colliery trade improved, there would be something for the debenture-holders. The colliery was lease-hold and liable to forfeiture if the company was wound up. A holder of debentures to a small amount presented a petition to wind-up the company which was opposed by a large majority of the other debenture-holders. The Judge in the Chancery Division dismissed the application and the order of dismissal was upheld by the Court of Appeal. Cotton, L. J., observed that in his opinion a petition ought not to be presented when it was clear that the company could not pay any of its debts and the main ground on which he decided the case was that nothing could be got for anybody by a winding-up order. Bowen, L. J., observed that it did not follow that if the machinery provided by the Act could not possibly avail itself for the purpose of paying debts, the creditor was still entitled to put that machinery in motion for his own delectation. It was an abuse of the procedure to set it in motion when it was shown that it could not accomplish the purpose for which it was established by the legislature. Mr. Sen submitted that in the present case also the assets of the company would, not be sufficient even to meet the claim of the petitioner who is the mortgagee of all the move-able and immovable properties belonging to the company. There would, therefore, be nothing left for the other creditors and the feneral body of creditors would not be benefited by the winding-up order. The petitioner could enforce its claim against the company by a suit and realise whatever it could from the sale of the assets belonging to the company. The

procedure of winding-up was not the proper procedure for enforcing the claim of the petitioner. Mr. Sen accordingly submitted that the petition should be dismissed or, in the alternative, the application for winding-up should be kept on the file and any final order thereon should be refused until and unless the determination of the writ petition pending in this Court as suggested by Chatterji, J. in *Mohammed Amin Bros. Ltd. Vs. Dominion of India and Others*, .

20. Mr. Ajoy Ghose, appearing for the opposing creditor Messrs. Narayan Chowdhury Bros. Pvt. Ltd., elaborated two of the grounds against the maintainability of the petition raised by Mr. Sen. Mr. Ghose's contention was that the person who had affirmed the affidavit in support of the petition was not competent to affirm such an affidavit and the affidavit has not been properly verified. He referred to Rule 11 (15), Rule 21 and Form No. 3 in the Companies (Court) Rules and submitted that Form No. 3, which is the form prescribed, inter alia, for applications for winding-up, provides that in the case of such an application by a corporation the petition must be affirmed by a director, the secretary, or a principal officer of the Company and if not a principal officer of the company, the person affirming the petition has to declare that he is duly authorised to make the affidavit on behalf of the company. It was accordingly submitted that the petition not being in the proper form and properly verified, the application should be dismissed and this Court should not grant leave to the petitioner to cure the defect by re-verifying the petition. He relied on a decision of this Court in *In Re: Gaya Textiles Private Ltd. etc. and Star Textile Engineering Works Ltd.*, where it was observed as follows:--

"But it cannot be overlooked that the present petition is a petition for winding up of a company and the winding-up relates back to the date of the presentation of the winding-up petition. If on the date when the petition was presented there was no proper verification according to law, then there was no petition at all on which the Court could issue directions for advertisement. Secondly, if leave is granted to cure the verification today, then a proper petition for winding-up of the company would come into existence as from to-day and in that event the question of dealings by the company with its assets between the date of presentation of the winding-up petition and the date when the Court grants the company leave to re-verify the petition would also create a good deal of confusion."

In the circumstances the Court refused to allow the petitioner to re-verify the petition. In my opinion, Mr. Ghose is not right when he contends that Form No. 3 of the Companies (Court) Rules require that in the case of a petition by a company, inter alia, for an order for winding-up, such a petition must contain an averment that the person affirming the affidavit is duly authorised by the company on their behalf. The said provision only applied to a case where the petition is affirmed by a person who is not an officer of the company. As in this case the petition was affirmed by an affidavit of the Superintendent of one of the departments of the State Bank it could not be said that the petition was not

affirmed by an officer of the petitioner-company. I have already expressed my opinion as to the contention that Mr. Gupta was not a principal officer of the petitioner.

21. Mr. Ghose next argues that the loans given by the petitioner had exceeded the limits prescribed by Section 293(1)(d) and as such such borrowings were ultra vires the Companies Act and void altogether. No rights or privileges could accrue in favour of the State Bank from the aforesaid transactions and for this proposition the learned Counsel relied on the following passage in Gower's Company Law 2nd Edition page 88:-- "... or if the Company has no power to borrow or has only power to borrow up to a certain sum, the activity will be ultra vires whether the other party realises it or not and when the transaction is ultra vires, the other party, speaking generally, has no rights at all; the transaction being completely void, cannot confer rights on the third party nor duties on the company. Even recovery of Judgment on the ultra vires contract will not create an enforceable obligation, unless the Court specifically adjudicated on the ultra vires issue or unless there was a bona fide compromise of it." Mr. Ghose referred me to the decision of the House of Lords in the Ashbury Railway Carriage and Iron Co. Ltd. v. Riche (1875) 7 HL 653 where it was held that a contract made by the directors of a company upon a matter not included in the Memorandum of Association was ultra vires of the directors and is not binding on the company. Mr. Ghose cited another decision of the House of Lords in Baroness of Wenlock v. River Dee Co. (1885) 10 AC 354. In that case the company was a statutory company for the purpose of recovery and preserving of the river Dee. The Constituent Act was amended by subsequent Acts, but none of them expressly authorised or forbade the company to borrow. Section 24 of Act 14 and 15 Vict. c. 87 empowered the company to borrow at interest upon bond or mortgage of the lands recovered and inclosed by them, a sum not exceeding ₹25000 and also a further sum not exceeding ₹25000 upon mortgage of the tolls, rates and duties. It was held that under the statute the company was prohibited from borrowing except in accordance with the provisions of that statute and the decision in Ashbury Company's case was re-affirmed. This aspect of the matter would be dealt with along with the similar objection by Mr. Sen after considering the reason given by Mr. Roy-chowdhury in his reply.

22. Mr. Somnath Chatterjee, the learned Counsel for Tulsi Chatterjee, an employee of the company opposing the petition, also supported the contention of Mr. Ghose that if the petition was defective then it could not be looked into for any purpose whatsoever. He relied on the decision of this Court in In Re: Sulekha Works Ltd., . But that decision only reiterates the principle enunciated by Chagla, C, J., in AIR 1943 Bom 231 that the winding-up petition must contain all the grounds on which an order was being sought. Mr. Chatterjee referred to Section 18E(2) of the Industries (Development and Regulation) Act and submitted that once the management of a company was taken over under the Act, neither the shareholders nor the directors of the company could interfere with the management and control of the company without the sanction of the Central

Government. Undoubtedly, the share-holders are free to hold meetings but any resolutions passed in such a meeting would not be binding on the authorised person. An order u/s 18A therefore is a serious encroachment on the rights of the shareholders and directors of the company and the principle of natural justice would apply in such a case and where the Act confers on the executive arbitrary powers the doctrine of equality of law would be violated and in such a case the Act and any action taken thereunder would be liable to be set aside by the Courts. This point had also been urged by Mr. Sen, but Mr. Chatterjee referred me to some of the recent decisions of the Supreme Court dealing with this aspect of the case. In *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, , it was observed that "if there was power to decide and determine to the prejudice of a person, duty to act judicially was implicit in the exercise of such, power. If the essentials of justice be ignored and an order to the prejudice of a person was made, the order was nullify. That was a basic conception of the rule of law and the importance thereof transcends the significance of a decision in any particular case." It was therefore observed that even an administrative order which involved civil consequences must be made consistently with the rules of natural justice after giving an opportunity to the respondent of being heard and explaining or meeting the evidence. In *Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Others*, it was observed as follows:-- This doctrine of equality before the law is a necessary corollary to the high concept of the rule of law accepted, by our Constitution. One of the aspects of rule of law is that every executive action, if it is to operate to the prejudice of any person, must be supported ay some legislative authority. Secondly, such a law would be void, if it discriminates or enables an authority to discriminate between persons without just classification..... while in the case or enacted law one knows where he stands, in the case of unchannelled arbitrary discretion, discrimination is writ large on the face of it Such a discretion patently violates the doctrine of equality, for the difference in the treatment of persons rests solely on the arbitrary selection of the executive." Mr. Chatterji therefore submitted that in this case the alleged consent by the Central Government u/s 18E(1)(c) of the Industries (Development and Regulation) Act, without any notice to the persons affected, violates the principles of natural justice and exposes the provisions of that Section to the risk of being struck down on the ground of allowing the executive uncontrolled arbitrary discretion.

23. Mr. Roy Chowdhury, in his reply, submitted firstly that the petition was not defective and the provisions of either Rule 21 or Form No. 3 of the Company (Court) Rules had not been violated. Mr. Gupta the person who bad affirmed the petition was the Superintendent of the Advances Department of the Slate Bank of India and as such he is the officer who is conversant with all the facts relating to the loans made to the company. The petition consists of 27 paragraphs and Mr. Gupta has affirmed that the statements in all the paragraphs except paragraphs 2, 5 and 23 were true to his Knowledge and that the statements in

the aforesaid three paragraphs were based on information derived from relevant records which are believed to be true. It would therefore appear that Mr. Gupta was the person most suitable for affirming this petition. Mr. Roy Chowdhury also pointed out that in Form No. 3, prescribed under the Companies (Court) Rules the provision for a declaration that the person affirming the petition was duly authorised on behalf of the company applied only to the case where the petition is not affirmed by such an officer. As in this case the affidavit verifying the petition was affirmed by Mr. Gupta, who was an officer, and in the submission of Mr. Roychowdhury a principal officer of the petitioner, the petition could not be said to be defective. Mr. Roychowdhury further submitted that under the corresponding provisions of the CPC (Previous Section 435, at present Order 29, Rule 1) the Privy Council in *Delhi and London Bank Ltd. v. Oldham* (1893) 20 Ind App 139 has held that a person who was exercising all the powers of management was principal officer for the purpose of Section 435. It was also submitted that the term "principal officer" was very wide and a responsible officer with knowledge of the facts would come under that category.

24. Mr. Roychowdhury's rejoinder to the argument that the loans made by the petitioner to the Company were ultra vires the provisions of Section 293(1)(d) and as such the transactions were void ab initio and DO rights accrued therefrom to the petitioner was to produce, under subpoena, the minutes of the extraordinary general meeting of the share-holders of the company held on April 30, 1956, authorising the Board of Directors to borrow any sum exceeding the aggregate of the paid-up capital and its fixed reserves. Mr. Roychowdhury also contended that as the advances made by the State Bank were under cash credit agreements payable on demand, they were temporary loans obtained by the company from its bankers in the ordinary course of business and Section 293(1)(d) had no application to this case. He also referred me to Explanation II to the said section. Mr. Roychowdhury submitted that as Section 293(1)(d) did not apply to this case or even if it applied there was sanction by the members, the authorities cited by Mr. Ghose had no application.

25. In answer to Mr. Sen's contention that the hearing of the petition for winding-up should be stayed pending the decision of the Writ Court, Mr. Roychowdhury submitted that under the Companies Act the Court could stay an application for winding-up only under the provision of two sections, namely, Sections 443 and Section 446. u/s 443(1)(b) the hearing of the petition may be adjourned conditionally or unconditionally, while Section 466 provides for a stay of the winding-up order after the order is made. The object of both the Sections is to see whether the company could be rehabilitated. The contention of the respondents is that the issue of the validity of the sanction u/s 18E(1)(c) of the Industries (Development and Regulation) Act is pending before this Court in its Writ jurisdiction and so the Company Court should not pre-judge that issue by holding that the sanction was properly given. According to Mr. Roychowdhury it would not be proper for this reason to stay the hearing of this petition pending the disposal of the Article 226 -- matter as it may take years for a final decision

to be arrived at. Even the rule that has been issued has not yet been served on the respondents to that application. Though there was a prayer in the petition for injunction restraining the State Bank from proceeding with the winding-up petition, no such injunction has been granted by the Writ Court. It was therefore submitted that the power of stay which this Court undoubtedly possesses should be exercised in very exceptional circumstances and this is not a fit case for its exercise.

26. The decisions of the Appeal Court in *Mohammed Amin Bros. Ltd. Vs. Dominion of India and Others*, and the decisions of the Single Judge in the Company Court in (1952) 56 CWN 29 and (1967) 71 CWN 38 were all cases of disputed debts. The company was strenuously contesting the claim of the petitioning creditor and it was in those circumstances that the Courts held that the dispute should be decided in an appropriate Court of law and the Company Court should not itself proceed to decide the disputes. In this case the dispute is regarding the validity of the sanction u/s 18E(1)(c) of the Industries Development and Regulation) Act, Such a sanction would prejudice the Company most-ly and the company was not appearing and challenging the sanction. Further Section 18E(1)(c) of the aforesaid Act restricted the right of the petitioning creditor to wind up the Company, it did not affect the rights of the company or the share-holders thereof. The provisions in the aforesaid section are more or less in the nature of a notice of the claim to the Central Government in the case of companies managed and controlled by it, so that the Central Government may have an opportunity of settling the dispute and are similar to the provisions of Section 80, of Civil Procedure Code. The restrictions imposed by the said section are that no petition for winding-up or applications for receiver should be instituted against a company under the control of the Central Government without notice to and consent of the Central Government. Such a provision does not give any right to the shareholders or the creditors of such a company and as no such rights are affected, the respondents are not entitled to challenge the validity of the liquidation proceedings.

27. Mr. Roychowdhury strongly relied on the observations of Chagla, C. J., in *Bachharaj Factories Ltd. Vs. Hirjee Mills Ltd.*, , The facts in that case are somewhat similar to the facts in the present case. The petitioners were holders or debentures issued by Hiraji Mills which contained a covenant to pay the amount of the debentures with interest thereon. The Mills failed to pay the interest which became due and thereupon the amount of the debenture became payable. The petitioners filed a petition for the winding-up of the Mills, alleging, as the facts were, that the liabilities of the Mills, which amounted to Rs. 1,41,50,000, far exceeded the assets which were not worth more than Rs. 60,00,000 and that it was impossible to carry on the business of the Mills except at a loss. The Trial Court ordered the petition to stand over to a later date. On appeal it was observed:-- "So now we come to the real merits of the matter and we are afraid that there is not much that can be said on the merits. The two grounds on which a winding-up is sought by the petitioners are that the company

is unable to pay its debts and it is just and equitable that the company should be wound up. Now, I took the view in *In Re: The Cine Industries and Recording Co. Ltd.*, that the insolvency contemplated by the Companies Act was that the company should be commercially insolvent, not in any technical sense, but plainly and commercially insolvent, that is to say, that its assets and existing liabilities must be such as to make the Court feel satisfied that the existing and probable assets will be insufficient to meet the existing liabilities. It is difficult to conceive of a stronger case than this where the Mills are not only commercially insolvent, but hopelessly insolvent, howsoever the expression "insolvent" may be construed or interpreted. There was not even a suggestion before the learned Judge below as to how the Company proposed to meet its liabilities of Rs. 1,41,50,000 with assets at the the most aggregating to Rs. 60,00,000, No scheme was proposed, no suggestion was made, no financier came to salvage the Mills." It was further observed "It is hardly necessary to point out what serious consequences a decision refusing to pass an order of winding-up may have in certain circumstances. A company may go on functioning, it may go on frittering away its assets, it may go on adding to its liabilities and serious and irreparable damage may be caused to creditors and even to shareholders." The Allahabad High Court in *Mohan Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others*, cited with approval the following passage from *Palmer's Company Precedents 17th Edn. Vol. 2* at page 81. "The Court will not, except in special circumstances, order a petition to stand over for a long period. It will either make an order or dismiss the petition; for if, after adjournment, a winding-up is made, the order would date back to the presentation of the petition, and avoid, therefore, or imperil, anything done by the company in the meantime," and held on the facts of the case before it that an order for holding up the winding-up proceedings till the disposal of the civil suit would be very much against the interests of the company and therefore should not be made.

28. Mr. Roychowdhury also referred to similar passages as quoted from *Palmer's Company Precedents* in the Allahabad decision from *Palmer's Company Law* at page 706 and also from *Buckley's Companies Act 13th Edition* page 468.

29. Mr. Roychowdhury then referred to certain passages from *Basil's Commentary on the Constitution of India 5th Edition Vol. 1* for establishing certain presumptions arising from the exercise of executive power by the State. The first of such presumptions is that officials will discharge their duties honestly and this presumption is heightened when the law vests a discretion in high officials or authorities as distinguished from minor officials, or in the Government itself. The second presumption is of legality of official acts, in other words, when an administrative act is challenged as *ultra vires*, it is presumed, until the contrary is shown, that it has been done according to the formalities and conditions laid down by the statute and the onus lies on the party who challenges its *vires* to establish the contrary. The authorities for these propositions are also given in the said volume. Mr. Roychowdhury submitted that there has been no attempt by any of the respondents to establish the contrary,

namely, that the sanction has not been given according to the provisions of Section 18E(1)(c) of the Industries (Development and Regulation) Act. Mr. Roychowdhury further submitted that as the aforesaid provision was for the benefit of neither the creditors nor the shareholders it would be preposterous to suggest that the notice of the proceedings for granting such a sanction should be given to the shareholders or the creditors of the company. The learned counsel relied on the following observations in Basu's Commentary on the Constitution:-- "Administrative orders are not, generally reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. Where a corporation is primarily affected by the administrative action, a stockholder can challenge it only if he has a "substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected"." Mr. Roychowdhury submitted that as the consent granted did not affect any substantial financial or economic interest of the shareholders or of the creditors as distinct from those of the company such a sanction could not be constitutionally challenged. The decision of the Supreme Court in *Radeshym Khare and Another Vs. The State of Madhya Pradesh and Others*, has been referred by Mr. Basu in his aforesaid work for the proposition that the doctrine of natural justice is applicable only to judicial and quasijudicial proceedings and not to purely administrative proceedings. It was accordingly submitted that the respondents could not make any grievance of the fact that no notice of the order granting sanction u/s 18E(1)(c) of the Industries (Development and Regulation) Act was given to them. Mr. Roychowdhury referred to the schema of the Industries (Development and Regulation) Act 1951 and pointed out that the provisions of Ch. III-A of that Act applied only to scheduled industries or other industrial undertakings which fulfilled the conditions laid down in Section 15. The power of the Central Government to take over control of such industries was to be exercised only in cases where the industry was being run detrimentally to the interest of the industry or the share-holders or the public. Section 18E provides that when the management of an industrial undertaking is taken over by the Central Government neither the Board of Directors nor the shareholders could interfere with the management of the company, though there is no prohibition to the share-holders holding, general meetings and passing resolutions. Such resolutions would not be binding on the authorised person. As the industries are being managed and controlled by the Central Government it is necessary that the Central Government should have notice of any contemplated action against the company, either by way of winding-up or by an action for appointment of receiver. Such proceedings could be instituted only with the prior consent of the Central Government. In this case complaint against the manner in which the sanction has been made is by a single share-holder, and by a few creditors. There is no allegation by the company or by the share-holders in a general meeting that the formalities required for the granting of such sanction had not been observed. The cases cited by Mr. Somnath Chatterji, in *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, and *Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer*,

Government of India, New Delhi and Others, were cases where the enquiries without notice caused serious prejudice to the applicants or where a fundamental right was involved. Mr. Roychowdhury further" submitted that nothing was shown in any of the affidavits in opposition that in the case of this company, which was in a hopelessly insolvent condition, the granting of the sanction was an arbitrary use of authority. Mr. Roychowdhury finally contended that this was a case eminently suitable for an order for the winding-up of the company.

30. Mr. Sen, in reply, pointed out that the resolution of the company in general meeting produced under subpoena was passed in the year 1956. The Companies Act was amended in 1960 and the Central Government took over this company in 1961. So the loan transactions by the company with the State Bank after 1960 could not be validated u/s 293 by such a resolution. Mr. Sen further submitted that under Order 27-A of the CPC suits involving a substantial question of law as to the interpretation of the Constitution cannot be heard by the Court without notice to the Attorney-General of India or to the Advocate-General of a State as the case, may be. Section 141 of the Code makes the provisions applicable to suits also applicable to all proceedings in any Civil Court, It was submitted that a suit challenging a statute as ultra vires or inconsistent with a mandatory provision of the Constitution has been held to involve a question of Constitutional interpretation and accordingly these proceedings cannot continue without the notice required under Order 27-A.

31. I am entirely unable to appreciate the last point urged by Mr. Sen. By no stretch of imagination could it be said that the petition for winding-up of India Electric Works Ltd., involve any question of law as to the interpretation of the Constitution. There can be no application of the principles of Order 27-A of the CPC to the present proceedings.

33. I am also unable to agree with the contention raised on behalf of the respondents that the present proceedings should be stayed until the final determination of the proceedings under Article 226 of the Constitution pending in this Court. As I have already pointed out, there is no dispute that the company is hopelessly insolvent and cannot carry on the object for which it was incorporated. I have been informed by the learned counsel appearing for the employees of this company that the production in the workshop had completely stopped and that on the State Bank ceasing to provide the company with credit accommodation the affairs of the company are at a stand-still. The authorised person in management on behalf of the Central Government is paying the salary and remuneration due to the employees and also making provisions for contribution to the provident fund. Thereby the company is incurring further liabilities and the longer the company is kept alive the larger would be such liability without any hope of ever repaying it. This is a case where the observations of Chagla, C. J., in *Bachharaj Factories Ltd. Vs. Hirjee Mills Ltd.*, apply with even greater force. In this case also the company is not only commercially insolvent but hopelessly insolvent and there is no suggestion as to

how the company proposes to meet its huge liabilities. No scheme has been suggested and no suggestions have been made as to how finance should be arranged for salvaging the company. To allow this company to go on functioning would be to allow it to go on adding to its liabilities and serious and irreparable damage may be caused to the creditors and even to the share-holders.

33. The serious allegations made by some of the respondents in their affidavits against the manner in which the company has been managed during the seven years it was under the control and management of the Central Government is, in my view, not germane to the decision in this petition as it is quite evident that the company was hopelessly insolvent even before the Central Government took up its management. If there have been any acts of mal-feasance, mis-feasance or non-feasance by anybody they can be properly investigated in the winding-up proceedings and the persons responsible therefore might be made to make reparations to the Company. No useful purpose would be served by allowing the company to go on in its present state. It is not a happy decision to make as it would deprive a large number of employees of this company of the means of their livelihood. I have racked my brains to find out a suitable solution and also requested the learned counsel appearing for the different parties to suggest some practical means of keeping the company going. Everybody is agreed that it is only the Central Government who can revive the company and make it a going concern. I am given to understand that there is no lack of orders or demands for the products of the company and if a further initial capital outlay of Rs. 60 lacs to 80 lacs could be made, the company could be turned into a profit making concern. No private financiers would be willing to undertake such a big risk and it is only the Government who can bear this burden. I am also not unimpressed by the fact that the State Bank of India, though a secured creditor, has not proceeded to realise its security, but proceeded by way of an application for the winding-up of the company. I would therefore make an order for the winding-up of the company, but the operation of this order would be stayed till the 15th October, 1968 to allow for negotiations with the Central Government as I am informed that such negotiations are already going on.

34. The petitioner and the supporting creditors would be entitled to add the costs of this application to their claim while the other parties would bear their own costs.

35. Liberty to apply.