

(2000) 03 CAL CK 0026
In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction Appellate Side A.P.O. No. 287 of 1994

Smt. Rukmini Devi Todi and Another APPELLANT

Vs

Official Liquidator and Others RESPONDENT

Date of Decision : 03-03-2000

Acts Referred:

Companies Act, 1956 — Section 391, 446(2)

Citation : (2000) 3 CALLT 158

Hon'ble Judges : Vinod Kumar Gupta, J; Prodyot Kumar Sen, J

Bench : Division Bench

Advocate : Mr. Dipankar Ghosh, Mr. S.K. Kapoor, Mr. Arindam Singh, Mr. Jayanta Kumar Mitra, Mr. Soumitra Sen and Mr. Joujit Ganguly, for the Appellant; Dipak Kr. Basu, for the Respondent

Judgement

P. K. Sen, J.—This appeal is at the instance of two respondents in a winding up proceeding and is directed against an order of a Company Judge by which the learned Company Judge allowed a prayer made by the person who claims to have purchased a property in a Court sale.

2. The matter out of which this appeal has arisen is a Court sale held by the Court while disposing of company petition. The land belonging to Thakurdas Sureka Iron Foundry Limited (in Liquidation) (hereinafter referred to as the said "Company") was sold on 10.7.92 and M/s. Llca Private Limited who is respondent No.2 before this Court of appeal, and they paid the entire consideration money as fixed by the Court on 17.9.92. The sale was confirmed in favour of the said purchaser and the Official Liquidator was directed to hand over the possession of the land to the purchaser that is the present respondent No.2.

3. On 6.8.92, the purchaser made an application for a direction on the Official Liquidator to give the purchaser the actual physical possession of the land purchased and to make the land accessible. The land appertains to 1, Mohanlal Sureka Road, Howrah. There is no dispute that there is no direct access to the

land in question. Immediately on the northern side of the land is premises No. 1/1, Mohanlal Sureka Road, which is in the possession of Mahabir Prasad Todi's successor-In-Interest, to the West and South-west side of the land are premises in occupation of Bazrangball Market Association. To the South and South-east of the land is premises No.10, Guha Road (formerly known as Takhurdas Sureka Road) in the occupation of Takhurdas Sureka Engineering Private Limited. On the northern side of the Todis' premises is Hopklns Road now known as Mohanlal Sureka Road. On the south immediately adjacent to the premises of Takhurdas Engineering Corporation Pvt. Ltd., and Bazrangbali Market Association is Guha Road. The purchaser that is the respondent No. 2 claims access to the land purchased over premises No. 1/1, Mohanlal Sureka Road.

4. Their case is that the land purchased is land locked, and it is only accessible from the northern side that is from Mohanlal Sureka Road and over 1/1, Mohanlal Sureka Road. The purchaser, that is the respondent No. 2 stated that the present occupants of 1 /1, Mohanlal Sureka Road are in possession of land to which they are not legally entitled and which the respondent No. 2 is willing to purchase from the occupiers of 1 /1, Mohanlal Sureka Road. Finally, respondent No. 2 claimed a quasi-easement and an easement of necessity over 1/1. Mohanlal Sureka Road. The said application made by the purchaser, M/s. Lica Private Limited was opposed by the Todis, who are occupants of 1/1, Mohanlal Sureka Road. Their case is that their occupation are partly owned by them absolutely and partly leased by them as tenants. The leased portion is, according to the Todls, part of 10, Cuba Road and the portion held by them absolutely is premises No. 1 /1, Mohanlal Sureka Road.

5. The Todts have stated that the Company Court has no Jurisdiction to pass the orders as prayed for. The Todls have said that the purchaser having purchased the land on "as is where is basis" whatever there is basis knew that the premises were land locked when they were purchased and so that they could not now claim any right over another's property. In any case, it is said that access could not be claimed over the land in occupation of others. It is argued that even if there were an access to the land purchased at one point of time from Mohanlal Sureka Road, the passage was locked in 19C7 and any claim to access over Todl's land was barred by limitation. The Official Liquidator having never claimed any right over Todl's land, the purchaser cannot have a better title over the land. Todls also denied that they were in possession of excess land. The claim of right of easement of any kind was denied by the owners of the land, who hold land on the boundary of the disputed plot.

6. The matter came up for hearing before the Company Judge and the Company Court appointed a surveyor by order dated 10.11.92 and the report was directed to be submitted by the said surveyor. The surveyor was directed to see whether Todls were in possession of any portion of the land of 1, Mohanta) Sureka Road and the plot purchased by the respondent No. 2 which did not belong to them and to indicate if any excess lands were found contiguous or next to any portion

of the land purchased for possible Ingress and egress without infringing on lands to which Todis may be entitled. The surveyor was also directed to measure the lands claimed to be leasehold.

7. The entitlement was directed to be determined not only with regard to the registered conveyance, annexed, but also with regard to any lease, deed that may be produced by the Todis.

8. The surveyor duly submitted a report after visiting the locale. In his report, the surveyor has submitted that on the basis of the registered conveyance produced by the Todis, they had purchased 16 cottah, 30 chltack and 39 sq. ft. and according to the lease deed they had taken on rent 2 cottah, 8 chltack and 6 sq. ft. lands. In other words, the total area in Todis' possession should be about 19 cottah and 6 chltack. The surveyor, therefore, found that the Todis were in occupation of an excess area of land of 3 cottah, 13 chltack and 26.2 sq. ft. excluding the boundary wall from the measured area in the possession of the Todis. The surveyor found that the lease was not a valid document. But he found that the lease portion would not be suitable for a two way track, to and from the purchased land according to him the possible Ingress and egress would be made through the western portion of the area now in the possession of the Todis. Thereafter, Rukmini and Sabitri Devi Todi, that is the present appellants made application before the Company Judge challenging the report of the surveyor.

9. The original application of the purchaser came up before the Company Judge for hearing and it was heard on the following points.

(i) Does the Court have the Jurisdiction to grant the relief as claimed by the purchaser?

(ii) if so, whether the relief was barred by limitation?

(iii) in the event, the previous is decided in the negative and over whose land should access be granted?

10. After having heard, the learned advocate of all the sides the Court allowed the application of the purchaser. The Court found that the land was inaccessible and should continue to be accessible from Mohanlal Sureka Road over premises 1/1, Mohanlal Sureka Road. The Official Liquidator will remove all the obstruction including the wall separating the land from the premises No. 1/1, Mohanlal Sureka Road and also any portion of the wall or gate next to the disputed structure on the western portion of premises No. 1/1, Mohanlal Sureka Road so that the land become accessible from Mohanlal Sureka Road over a sufficiently wide path measuring 12 ft. in width more or less. The Todis, their servants and tenants are restrained from interfering with the right to way. The purchaser will limit its use strictly to the 12 feet path. The Official Liquidator was thus directed to take police help and Implement the order.

11. On being aggrieved by this order, the Instant appeal has been preferred by Rukmini Devi Todi and Sabitri Devi Todi whose land was encumbered by the order

of the learned Company Judge.

12. Therefore, the points for determination before this Court of appeal is how far Judgment under appeal is sustainable in law.

13. Now, before we enter into the merits of the appeal, a brief history leading to the Court sale of the property in question is required to be stated. Prior to 1986, premises No. 1/1, Mohanlal Sureka Road consisting of an area of 1 bigha, 4 cottah, 13 chittack belong to Takhurdas Sureka Iron Foundry Ltd. which is the Company under liquidation. On 19.10.66, the Company executed a registered indenture in favour of Sachdeva and others, predecessor-In-interest of the appellant by which a portion of premises 1/1, Mohanlal Sureka Road consisting of 16 collah, 13 chittack and 39 square feet was sold to Sachdeva. On 7.8.67, Sachdeva conveyed the said land purchased by them to Todis. On 15.5.68, the Company that is Takhurdas Sureka Iron Foundry Ltd. was ordered to be wound up. On 9.7.69, the sold out portion was numbered as 1/1, Mohanlal Sureka Road. The land retained by the Company continued to remain as 1, Mohanlal Sureka Road. On 20.3.80, the Official Liquidator took possession of the land retained by the Company. In the report submitted by the surveyor, it was said that only approach to 1, Mohanlal Sureka Road was through 10, Guha Road. It was also stated that other three sides were surrounded by brick walls and there was no road from northern side. On 26.5.92, the sale notice was published by the Official Liquidator regarding sale of No. 1/1, Mohanlal Sureka Road belonging to the Company under liquidation. On 10.6.92, Llca Private Ltd., that is the respondent No. 2 Inspected the property put up for sale.

14. It may be noted here that when the possession of the premises was handed over to the Official Liquidator on 20.3.90, there was a boundary wall round the premises and entry to the premises was through the premises of the applicant. On 20.7.92, the land of the Company was sold to Llca Private Ltd., at a price of seven lakhs fifty thousands. The sale was confirmed on 17.7.92. The Official Liquidator was directed to hand over the possession in accordance with the report of the valuer. On 6.8.92, the respondent No. 2 filed an application praying for a direction upon the Official Liquidator to take appropriate steps for demolishing the wall separating premises No. 1, Mohanlal Sureka Road from 1/1, Mohanlal Sureka Road and to make No. 1, Mohanlal Sureka Road accessible from Mohanlal Sureka Road. Direction upon the respondent to give actual possession of the said land was also issued. On 25.8.92, pursuant to an order of the Court, the Official Liquidator filed a report with regard to whether any recent construction had been made on 1/1, Mohanlal Sureka Road. In the report, it is stated that there is an old wall approaching the land belonging to No. 1, Mohanlal Sureka Road from 1/1, Mohanlal Sureka Road on which a shade had been constructed. On 4.4.94, the Company Court while allowing the prayer of Llca Pvt. Ltd., directed the Official Liquidator to remove all the obstacles including the wall separating No. 1 from 1/1, Mohanlal Sureka Road so that the land sold becomes accessible from Mohanlal Sureka Road over a sufficiently wide path

measuring 12 ft. In width more or less through.

15. As per previous arrangement, the present respondent No. 2 who was the petitioner before the Company Court went to concerned place for taking possession of the said land. The representatives of the Official Liquidator tried to give possession through the property adjacent to the factory namely, Takhurdas Engineering Corporation Ltd. from Guha Road in accordance with the directions of this Court, but it appears that the passage leading to the wall separating the said land was a private land belonging to Bazrangbali Market Association. The people of the said Association restricted the entry of the Official Liquidator representatives through the said passage and categorically stated that they would not allow access into the land through their land. Thereafter, representatives of Official Liquidator tried to enter the said land through the factory of Takhurdas Engineering Corporation Ltd. for giving possession through which the surveyor, valuer, representatives of Official Liquidator had earlier entered and through which respondent No. 2 had also taken Inspection of the said land. But such entry was not allowed by the said Takhurdas Engineering Corporation Ltd. Thus, being unable to give possession of the said land from Guha Road as was Intended by the respondent by the Official Liquidator, it was decided to enter into the said land from Mohanlal Sureka Road being the original entrance of the said land. On reaching there, the representatives of Official Liquidator found that the entrance has blocked by a newly constructed wall fitted with an Iron gate. Thereafter, the representatives of Official Liquidator wanted to give possession of the said land to respondent No. 2 on "as is where is basis" when the respondent No. 2 that is the original petitioner declined to take possession. Their case is that the Company (In liquidation) had deliberately made the land unaccessible with a view to frustrate the said sale. At the time of taking Inspection, the original petitioner that is the respondent No. 2 knew that the said land was actually approachable and always being approached from Mohanlal Sureka Road, but such entry was denied subsequently. Their further Case is that the entry and access would be extremely Inconvenient Inasmuch as there is only a very narrow passage because of the existing factory and the distance from the Guha Road to the said land would be at least 350 ft. It may be mentioned here that the approach to the said land from Mohanlal Sureka Road is only 25 to 30 ft. The further case of the Lica Pvt. Ltd., are that the wall separating the said land from Mohanlal Sureka Road was an unauthorised construction and was constructed only to frustrate the sale and prevent the entry of Lica Pvt Ltd. Accordingly, the original petitioner that is the respondent No. 2 before this Court approached the Company Court for giving possession of the land.

16. The learned Company Judge after having considered all aspects made the following orders.

"For the reasons aforesaid, the application of the purchasers is allowed. I find that the land was and should continue to be accessible from Mohanlal Sureka

Road over premises 1/1, Mohanlal Sureka Road. The Official Liquidator will remove all obstacles including the wall separating the land from premises No. 1/1, Mohanlal Sureka Road and also any portion of the wall or gate next to the dilapidated structure on the western side or portion of premises of 1/1. Mohanlal Road abutting Mohanlal Road so that the land becomes accessible from Mohanlal Sureka Road over a sufficiently wide path measuring 12 ft. In width more or less. The Todls, their servants and agents are restrained from interfering with the right to way the purchaser will limit its use strictly to the 12 ft. path".

17. The Todls, who are owners of 1/1, Mohanlal Sureka Road raised objections with regard to the orders of the learned Company Judge with regard to the right to passage over their land. Mr. Dipankar Ghosh, learned advocate appearing for the appellant (that is the Tpdls) while assailing the order under appeal, has submitted that the Company Court cannot encumber other's property which was never the subject matter of litigation, the Company Judge cannot go into the question of any right of way by way of easement, nor can it go into the question of any easement of necessity. Mr. Ghosh has also contended that in the original conveyance there being no express provision with regard to the right of passage, such right cannot be created by the Company Court. It is his submission that the land was sold "free from all encumbrances" and therefore, no right of easement cannot be created over that plot of land when the maker of the deed had no intention to create such right in favour of the vendee. Sri Ghosh further contended that when there was no express provision for creation of any easementary right, there is no room for creation of such right of implication. The next branch of argument of Mr. Ghosh was that it was never the case of the purchaser that they have any right of easement so as to use the land belonging to Todis, neither it was their case that to make their purchased land accessible, a path should be created by way of encumbering other's properties. Now, in this context, if we look into the original petition presented before the Company Court, we find that no such case was made out in that petition, the case of the purchaser was only that when they purchased the property in Court sale, they should be put into actual physical possession. Mr. Jayanta Kr. Mitra, learned Advocate appearing for the respondent No. 2 that is Lica Pvt. Ltd., which company is the purchaser of the disputed plot of land has submitted before us that when the sale was conducted by the Court and when it was confirmed by the Court, the Court must put the purchaser into possession and, therefore, the Court had rightly done so, by creating a right of easement by way of using the land of the Todis so that the purchaser can use the said path for Ingress and egress to their purchased property. Now, in this respect of learned submission of the learned advocate refer to several case laws as well as some text books which we shall refer later on.

18. Now, on close scrutiny of the petition submitted by Lica Private Limited before the Company Court, we do not find any pleading with regard to acquisition of any right of easement over the Todl's property by the purchaser or their predecessor-in-interest.

19. In this connection, we may refer to the Indenture made on 19.10.66 between Takhurdas Sureka and Sachdeva by which the Takhurdas Sureka Iron Foundry Ltd. sold part of the property. In the said deed there was a clear recital that "the vendor doth hereby grant sell, convey, transfer, assign or assure unto the purchaser free from all encumbrances and liabilities whatsoever". It indicates that the property was sold "free from all encumbrances". Therefore, Lica Pvt. Ltd., who are successor-in-Interest, cannot have a better title than their predecessor-in-interest. Mr. Dipankar Ghosh, learned advocate appearing for the appellant has submitted that in the original petition there was no assertion with regard to the right of easement, nor any document was produced before the Company Court with regard to acquisition of any easementary right over the land of Todls. In AIR 1953 Nag 205. It was held that right of easement should be pleaded and it cannot be taken at the time of hearing by way of surprise. In the deed itself, there was no whisper about the right of easement. The deed was very specified. Therefore, no implied reservation that will go counter to the express terms of the contract can be created.

20. While examining the question of acquisition of any right of easement as thought of by the Company Court, the question that may arise for consideration is about how a right of easement is created. As now, we all know that right of easement can be had either by way of prescription or otherwise of express grant or by way of issue of necessity. Now it is nobody's case that issue of right of easement contemplated by the Company Court was acquired by prescription. Next is the question is to whether such easement was created by express grant. We have already found that as there was no specific recitals with regard to such express grant, no right of easement can be acquired by way of express grant. When we have already referred to the deed in question wherein the deed was silent with regard to the acquisition of any right of easement, therefore, there was no scope for implication that may be drawn. When there was no express grant, the implication that follows is that there is express restrictions and, therefore, no inference can be drawn. The learned advocate appearing for the appellant has submitted before us that covenant did not reserve any right of way and therefore, there is no room for consideration of any easementary right of way. In this connection, he has referred to the text book on Easement by Gale. In the 16th edition of the book "Gale on easement", paragraph 3.36, it was observed that ordinarily on disposition of part of land by the disposing party, no reservation of any easement in favour of the part retained will be implied. If the vendor or the grantor had any intention to reserve any such right over the tenement granted. It is his duty to reserve it expressly in the grant itself. In the instant case, if we resort to conveyance dated 19.10.66 it will be found that there was no express reservation of any right to pass over any right of way over the portion covered by the sale. There are certain cases when there is express reservation but a term may be implied that the grantor has a right of way over the land if there is no other access to the part retained. This implication is made from the facts existing at the time of severance. In this connection, a reference

may be made to paragraph 3.87, page 149 of the 16th edition of "Easement by Gale", it was never the case of the respondent that Lica Pvt. Ltd., that the original vendor had reserved a right with regard to for ingress and Igress and. therefore. there seems no reason as to why an Inference in favour of the respondent No. 2 will be drawn.

21. In a case reported in AIR 1944 Lah 417 it was held that easement is an encumbrance and when there is no express provision for creation of such easement, there is no scope for drawing any inference in favour of creation of such right. Had it been the Intention of the vendor to reserve any right of easement that would have been expressed in the deed itself that is the deed dated 19.10.66.

22. We have already found that there is no pleading in the petition itself with regard to the user of Todi's land as a passage nor any document was forthcoming to Indicate the existence of any right over the land of Todls. There can be no implication of any easement if it would be contrary to or Inconsistent of the intentions of the parties as appearing from the express words of the grant. This principle of law finds support from Halsbury's Laws of England, Volume 9, para 212 as also from volume 12, para 1475.

23. We have already noticed that in the present case, the conveyance dated 19.10.66 in favour of Sachdevas, the terms were very explicit inasmuch as the land was sold "free from all encumbrances and liabilities whatsoever". Further, there is an express conveyance for quite enjoyment in favour of the grantee. Thus, the words "free from all encumbrances" indicate that the vendor had no Intention la reserve any right. Itonly shows that the property was sold completely without any reservation.

24. It is found by the Trial Court that is the Court exercising company Jurisdiction that the disputed plot is land locked Inasmuch as it is not easily accessible and therefore, the question of easement of necessity has arisen. Mr. J. K. Mitra. learned advocate appearing for respondent No. 2 has submitted before us that it is a need based law and not user based and therefore, the easement necessity should be Implied in this case. But easement of necessity will only arise if there is no alternative access to the land retained at the time of severence. Thus, the onus lies upon the respondent No. 2 who are claiming such easement of necessity to show that there is no alternative mode of access to the land in question. It has been argued by the respondent No. 2 that since the property is land locked, the Court while selling the property should give access to the property to the purchaser. To this, the learned advocate appearing for the appellant has contended that the respondent purchaser cannot have any legitimate grievance because the property was sold to him "as is where is basis" and in his connection, he referred to the decision of the Supreme Court reported in United Bank of India Vs. Official Liquidator and Others, where property of the Company in liquidation was sold by the winding up the in Court in similar terms.

25. In this decision, the Supreme Court's decision is that when the final liquidation as well as the property and assets of the Company in liquidation under orders of the Court, he cannot and does not hold out any guarantee or warranty in respect thereof. This is because he must proceed upon the basis of what the records of the Company in liquidation show. It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he cannot having purchased the property on such terms then claimed diminution in the price of the grant of defect in title or description of the property, because the case of the Official Liquidator selling the property of a Company in liquidation is altogether different from the case of an individual selling Immovable property belonging to himself.

26. In AIR 44 Lah 417, it was held that an easement of necessity can only arise on a severance of tenement and it is only in respect of the clear portion that an easement can be claimed. An easement of necessity can only arise on a severance of tenement and it is only in respect of the clear portion that an easement can be claimed. If a vendor of the portion of the property is precluded from asking for an easement of way from the portion which had been sold, he cannot ask the vendee to provide him with a right of way from other adjacent property which had been sold by him under the same sale deed. In 21 (1) Chancery Division, page 322 it was held that the right of way being de facto enjoyed by the tenants up to the date of conveyance passed by way of express grant under the word that appurtenance, but here is a case where no such right of way was ever enjoyed by the previous owners. In Rameshchandra Bhikhabhai Patel Vs. Maneklal Maganlal Patel and Another, , it was held that issue of necessity cannot survive after the alternative outlet is available. Here the contention of the appellants are that alternative accommodation is available. We have already found that the Court sold the property on "as is where is basis". The purchaser was given an opportunity of Inspection of the property before sale and it was for him to get himself satisfied in all respects regarding the property! Respondent No. 2 has not been entitled to argue that the Court should give access to a land locked property hold to him. Had it been the case of sale was governed by Transfer of Property Act, such question would have arisen, but provisions for Transfer Property Act are not applicable here as it was a Court sale. Now it was last argued by the appellants that even if it is assumed that an easement of necessity arise on the date of severance that easement was abandoned. The wall separating No. 1 Mohanlal Sureka Road (which was retained from 1/1, Mohanlal Sureka Road) which was sold has been in existence since 1967 when the Todis purchased the property from Sachdevas. There has been no user of 1/1, Mohanlal Sureka Road by 1, Mohanlal Sureka Road after 1/1, M. S. Road had been sold for. There has been no protest or objections to the continuance of the wall separating No. 1, Mohanlal Sureka Road from 1/1, Mohanlal Sureka Road. Thus, there has been no user of 1/1, Mohanlal Sureka Road for 1, Mohanlal Sureka Road for 30 years. Therefore, at this stage the respondent cannot claim any such right.

27. The learned advocate appearing for the appellant submitted before that there has been an alternative passage, that is, a narrow passage running from Guha Road on the south. The learned trial Judge found that the said passage is impassable. The word "impassable" implies that it cannot be traversed but it was nobody's case that the said path cannot be used. In paragraph 17, page 11 of the original petition the petitioner and the respondent No. 2 have stated that the "entry or access" would be strictly Inconvenient inasmuch as there is very narrow passage because of the existing "factory and the distance of the land or access" would be at least 350 ft. In paragraph 21 of affidavit-in-reply also, the petitioners admitted that access is possible from 10, Guha Road. Therefore, the fact remains that there is an alternative passage, so when there is an alternative passage, the question of having an easement by way of necessity cannot arise.

28. The learned advocate appearing for the respondent No. 2 submits that there is inconvenience in the alternative passage. The finding of the trial Judge that the narrow passage between 107 Guha Road and the land of the Bazranghall Market Association was impassable, but we find that there is no supporting evidence. There is no allegation in the petition or in the affidavit-in-reply of the purchaser that the passage was impassable. The only complaint is that it was too narrow and, therefore, it is Inconvenient. Mr. J. K. Mitra, learned advocate appearing for the respondent No. 2 submits that practically there is no such passage, it is only a drain. If that be so, then it will render a disputed property not saleable and in that event, the purchaser that is respondent No. 2 shall be entitled to refund of the entire consideration money. But, from the materials as available in the papers produced before us, we are of the view that there is a narrow passage as referred to above. In AIR 37 Pat 589, it was held that an easement of necessity arises when immovable property is transferred by one person to another, it arises in favour of the transferee if the easement is necessary enjoying the subject of the transfer that is when the property cannot be used without exercising it. It does not, however, arise where its exercise is necessary for the reasonable enjoyment of the property. Inconvenience, therefore, cannot be a ground of acquisition of any right of easement. In AIR 1924 Calcutta 363 it was held that there cannot be an easement of necessity if there is an alternative route or way, but where the alternative route is expressly impassable, then a question of necessity will arise, but here it appears that the narrow passage can be traversed through difficulty and inconvenience. As a matter of fact, the Company Court directed earlier that possession should be given through 1, Guha Road as there was no appeal from that order, the said order reached its finality. Therefore, the respondent No. 2 cannot now say that they are entitled to a right of passage over 1/1, Mohanlal Sureka Road. The order of the Court dated 17.9.92 was very specific and the order, as we have observed reached its finality. Therefore, the respondent No. 2 cannot now say for a better right of way to the disputed plot. Thus, in our view, there is an alternative passage available to the respondent No. 2 to use the property that is 1, Mohanlal Sureka Road.

29. While submitting on the last branch of his argument, Sri Ghosli has

submitted that the winding-up Court had no jurisdiction to pass any order affecting any property belonging to a third party and not to the Company in liquidation. In this connection, he has drawn our attention to the provisions of section 446(2) of the Company Act, which run as :

Section 446(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;
- (b) any claim made by or against the company (including claims by or against any of its branches in India);
- (c) any application made u/s 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

Whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arisen or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

30. Therefore, it is only the property of the Company in liquidation and not the property of a third party that can be the subject matter of winding up proceedings. u/s 446(2)(d), the words "relating to" or "arising out of winding up" cannot empower the Court to pass an order on the property belonging to a third party which is not subject of the Company. Right of way is undoubtedly an encumbrance upon the property of another. Therefore, the question is whether such encumbrance can be created upon the property belonging to a third party, who is not a party to the proceeding and the property also is not the subject matter of the proceedings. There is no dispute that the land bearing No. 1/1, Mohanlal Surekha Road belonging to Todis, is not the subject matter of the winding up proceedings and the Todis also are not the persons answerable to the winding up proceedings. Therefore, how their land can be encumbered for the benefit of a third party? In this connection, a reference may be made to the decision of the Supreme Court reported in AIR 1969 SCC 823. That was a case under the Trust Act of 1882. In that case, the Supreme Court is of the view that the statute has prescribed what the Court can do and inferentially what it cannot do. From the fact that Court has been conferred power to grant only certain reliefs--it follows as a matter of law that the Court has been prohibited from granting any other relief. This principle will apply to the instant case also. The provisions of section 446(2) gives the Court the powers to do some acts which indicate that Court should not exercise other powers which the said section does not authorize. Therefore, while disposing of the prayer of the petitioner that its respondent No. 2, the winding up Court cannot create an encumbrance upon the property of a third party which was never the subject matter of the winding up

proceedings. While disposing of a matter in the winding up proceedings, the powers of the winding up Court is limited only to the subject matter of the Company in liquidation. It cannot encumber other property.

31. In view of the above, we feel constrained to hold that the Judgment under appeal cannot stand the test of appeal and it was liable to be set aside.

32. The appeal is accordingly allowed. The judgment under appeal is set aside. The respondent No. 2 that is the petitioner before the winding up Court is at liberty to take possession through 10, Guha Road as was originally directed. If it is found by the Official Liquidator that possession cannot be given through 10 Guha Road, in that case the respondent No. 2 shall be at liberty to apply before the winding up Court for refund of entire consideration money and the said Court shall dispose of that application in accordance of law.

V. K. Gupta, J.--I agree.

33. Appeal allowed