

**(1978) 01 MAD CK 0047**

**In the Madras High Court**

**Case No :** O.S. Appeal No. 72 of 1977 against Company Application No. 551 of 1976 in Company Petition No. 71 of 1972

State Bank of India

APPELLANT

Vs

Official Liquidator, Straps (India) Private Ltd.

RESPONDENT

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**Date of Decision :** 19-01-1978

**Acts Referred:**

Companies Act, 1913 — Section 171

Companies Act, 1956 — Section 446

**Citation :** (1979) 49 CompCas 514 : (1979) ILR (Mad) 292

**Hon'ble Judges :** Natarajan, J;Ismail, J

**Bench :** Division Bench

**Advocate :** M. Raghavan, for the Appellant; A.N. Rangaswami, for the Respondent

**Final Decision :** Allowed

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## Judgement

Ismail, J.—This is an appeal against the order of Ramaprasada Rao. J., dated 23rd June, 1977, made in Company Application No. 551 of 1976. The applicant in the company application is the appellant, which is the State Bank of India, Madras-1. The said bank instituted a suit, O.S. No. 117 of 1974, on the file of the court of the Subordinate Judge, Chingleput, which has been transferred to and numbered as C.S. No. 233 of 1974, on the original side of this court. The suit was originally instituted against 10 defendants, the first defendant being one Messrs. Chandra Paper Band, defendants 2 to 9, being the partners of the said first defendant firm and the 10th defendant, being the official liquidator. High Court, Madras. The suit was for the recovery of a sum of Rs. 1,99,170.04 with further interest at 10 1/2% per annum on Rs. 1,25,700.28 at half yearly rests and at 9 1/4% per annum on Rs. 38,797"85 at monthly rests, from the defendants and in default for a direction for the sale of the mortgaged property set out in Schedule A to the plaint and application of the net proceeds thereof in payment of the amount to be decreed with rights reserved in the appellant to proceed against defendants 2 to 9 personally for the balance, if any, due after

adjustment of the proceeds of such sale to the suit claim. Such a relief was prayed for on the allegation that the first defendant by its partners, defendants 2 to 9, applied to the appellant for grant of credit facilities and to secure the term loan, the first defendant by its partners, defendants 2 to 9, executed a registered mortgage over the first defendant's factory, land and buildings, described in Schedule A to the plaint and, subsequently, the first defendant was said to have handed over possession of the assets to Messrs. Straps (India) Private Ltd., in pursuance of an agreement the first defendant had with the said company under which the company agreed to take over the assets and liabilities of the first defendant. The said Messrs. Straps (India) Private Ltd. was ordered to be wound up by this court by an order dated 7th February, 1973, on a company petition, C.P. No. 71 of 1972, filed by one of the shareholders. This fact has been referred to in the plaint itself and that is the reason why the official liquidator, High Court, Madras, was impleaded as the 10th defendant in the suit. In the written statement filed by the 10th defendant, among other contentions, the 10th defendant claimed that the official liquidator had not been properly described, that the official liquidator as such could not have been impleaded as a party, that he was not impleaded as representing Messrs. Straps (India) Private Ltd., in liquidation, and that the suit itself was not maintainable against him, as no leave of the High Court which ordered the winding up of the company had been obtained for commencing the present action in accordance with the provisions of Section 446 of the Companies Act, 1956, which will be referred to hereinafter as "the present Act". These two defences gave rise to two applications by the plaintiff-appellant. One was to amend the cause title so as to make the official liquidator represent Messrs. Straps (India) Private Ltd., in liquidation. The other was for leave to sue the said Messrs. Straps (India) Private Ltd., in liquidation. Company Application No. 551 of 1976 is concerned with the said leave to sue the company in liquidation. The application filed by the appellant herein for the amendment of the cause title so as to make the official liquidator represent Messrs. Straps (India) Private Ltd., in liquidation, was allowed. C.A. No. 551 of 1976, namely, the application for leave to sue the company in liquidation was dismissed by the impugned order. The ground for the said dismissal was that u/s 446 of the present Act, as it stands, no leave can be granted in respect of a suit already commenced after the order of liquidation without obtaining such leave. In short, the basis of the dismissal of the application was that in respect of a suit instituted after an order of winding up has been passed, the obtaining of leave of the court which ordered the winding up is a condition precedent for the institution of the suit u/s 446 of the present Act, and such leave cannot be granted after the suit has actually been instituted without obtaining the leave of the court. For coming to this conclusion, Ramaprasada Rao J. relied upon the earlier decisions of Palani-swamy J. in *K. Vadivelu v. Official Liquidator, Madras: K. Vadivelu and Others Vs. The Official Liquidator, Madras, and Associated Industrial and Engineering Corporation Ltd , In re (In Liquidation) [1974] 44 Comp Cas 488 (Mad)* . In the latter case, Palaniswamy J., after an elaborate consideration of Section 446 of the present Act and Section 171 of the Indian

Companies Act, 1913, hereinafter referred to as " the former Act", and Section 231 of the English Companies Act, 1948, corresponding to Section 171 of the former Act, came the conclusion that even though Section 171 of the former Act was capable of authorising the filing of an application for leave even after the suit has been instituted without such leave, the language of Section 446 of the present Act did not authorise such leave being obtained after the suit has been actually instituted and that, in this respect, Section 446 of the present Act constituted a deliberate and definite departure. It is the correctness of the conclusion of Ramaprasada Rao J., based as it is on the decision of Palaniswamy J., that is the subject-matter of the present appeal.

2. It is desirable to set out in parallel columns the above said three provisions, namely, Section 446 of the present Act, Section 171 of the former Act and Section 231 of the English Companies Act, 1948, as has been done by Palaniswamy J. himself in his judgment in Associated Industrial and Engineering Corporation Ltd., In re (In Liquidation) [1974] 44 Comp Cas 488 (Mad).

"1956 Act 1913 Act English Act of 1948

446. Suits stayed on winding-up order. ?

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

171. Suits stayed on winding-up order. ?

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

231. Actions stayed on winding-up order. ?

When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."

3. A comparison of the three sections will show that Section 171 of the former Act is practically identical with Section 231 of the English Companies Act, 1948, except for the fact that the English Act uses the word " action ", while Section 171 of the former Act uses the word " suit ". As far as Section 446 of the present Act is concerned, the language is more elaborate than the one contained in Section 171 of the former Act. Section 171 of the former Act uses the expression " shall be proceeded with or commenced against the company " without specifying as to what suit or proceeding shall be governed by the expression "

shall be proceeded with " and what suit or proceeding shall be governed by the expression "shall be commenced" and the language is compendious and condensed. On the other hand, Section 446 of the present Act distributes these two expressions, namely, the expression " shall be commenced " qualifying " suit or other legal proceeding " to be instituted after the winding-up order has been made or the official liquidator has been appointed as provisional liquidator and the expression " shall be proceeded with " qualifying " suit or other legal proceeding pending at the date of the winding-up order ". There are two other differences between Section 171 of the former Act and Section 446 of the present Act, one of which does not make any difference in substance and the other is of no consequence for the present discussion. The first is Section 171 of the former Act uses the expression " when a provisional liquidator has been appointed ", while Section 446 of the present Act uses the expression " when the official liquidator has been appointed as provisional liquidator ". This is the result of an official liquidator being permanently appointed under the present Act pursuant to Section 448(1) of the present Act; to be attached to each High Court. The second difference is that when the opening limb of Section 446(1) uses the expression " when a winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced", the alternative limb of the same provision uses the expression " if pending at the date of the winding-up order, shall be proceeded with against the company ". Thus, the alternative limb does not state " if pending at the date of the winding-up order or appointment of the official liquidator as provisional liquidator", which difference alone, as we have stated before, is not of any consequence to the present case.

4. The point that has to be considered is, whether the particular difference in the language of Section 446 of the present Act is intended to make a departure in substance from what was provided in Section 171 of the former Act. As far as Section 171 of the former Act is concerned, there is a direct decision of the Supreme Court in *Bansidhar Shankarlal v. Mohd. Ibrahim* [1971] 41 Comp Cas 21. In that case, one Md. Ibrahim instituted an action in the court of the Subordinate Judge, Alipore, for a decree in ejectment in respect of land occupied by the Luxmi Spinning and Weaving Mills Ltd., as his tenant. The suit was decreed on October 1, 1953. Before the suit was decreed, on January 31, 1951, the company had executed a deed in favour of Bansidhar mortgaging its fixed assets for securing repayment of Rs. 1,25,000. After the decree in the suit, the company executed on January 21, 1954, a second deed also in favour of Bansidhar mortgaging the fixed assets for repayment of an additional sum of Rs. 2,00,000. The decree of the trial court in the suit of Md. Ibrahim was confirmed on August 4, 1954. Against that decree the company and Bansidhar preferred Second Appeal No. 1380 of 1954 to the High Court of Calcutta. Bansidhar also filed a suit in the High Court of Calcutta on its original side to enforce the two mortgages in his favour and obtained a preliminary mortgage decree in the suit on May 13, 1955. Another creditor of the company applied for and obtained on

August 22, 1955, an order directing that the company be wound up. The liquidators of the company and Bansidhar prosecuted the Second Appeal No. 1380 of 1954. The decree of the District Court was confirmed by the High Court in its appellate jurisdiction on February 22, 1958. Thus, it will be seen that the order for winding up of the company was passed during the pendency of the second appeal on the file of the High Court and the second appeal itself was prosecuted by the liquidators of the company and Bansidhar. After the dismissal of the second appeal, the plaintiff-decreeholder applied for execution of the decree against the company without obtaining leave of the High Court of Calcutta u/s 171 of the former Act. On December 17, 1958, Bansidhar filed a petition contending that the application for enforcement of the decree was not maintainable without the leave of the High Court which ordered that the company be wound up. On the motion of the decreeholder, the company judge granted leave to execute the decree in Second Appeal No. 1380 of 1954. The executing court dismissed the application filed by Bansidhar and the order of dismissal was confirmed by the Additional District Judge and by the High Court in second appeal. Bansidhar filed a petition for a certificate for appeal to the Supreme Court under Article 133(1)(b) and (c) of the Constitution and the said petition was rejected by the High Court. Bansidhar then preferred two petitions for special leave to the Supreme Court--one against the order of the High Court dismissing his second appeal against the order in the execution proceedings, and the other against the order of the High Court refusing to certify the appeal under Article 133(1)(b) and (c) of the Constitution. The Supreme Court dismissed the petition against the order of the High Court in second appeal and granted special leave to appeal against the order of the High Court refusing to certify the case.

5. It is in the course of the judgment in that appeal that the Supreme Court had to consider the scope of Section 171 of the former Act and, in that context, it referred to the conflicting decisions of the High Courts on the question as to whether an application for leave u/s 171 can be made after a suit or other legal proceeding has been instituted without obtaining such leave on the date of the institution. As we have pointed out already, the liquidators prosecuted Second Appeal No. 1380 of 1954, and the Supreme Court observed that there was no evidence on record whether the liquidators obtained sanction of the court u/s 179(1)(a) of the former Act, but that there was no reason to suppose that the liquidators did not obtain the sanction of the court. We have also pointed out the fact that when the decree-holder sought to execute the decree, Bansidhar took up the stand that the execution proceedings could not have been proceeded with, without obtaining the leave of the court and such a contention of Bansidhar was rejected by the subordinate courts as well as the High Court. Dealing with that position, the Supreme Court pointed out two things. One was that the execution petition was only a continuation of the suit and that after the sanction of the High Court had been obtained for the prosecution of the suit, it would be plainly unnecessary to obtain fresh sanction to the institution of the execution proceedings at the instance of the successful party. In this context, the Supreme

Court observed (p. 25) :

" It would be giving effect to a technicality divorced from the true object of the section to hold that, even in a suit filed or prosecuted with the sanction of the court, the decree may not be enforced by a successful party without leave u/s 171 of the Act."

6. The second thing pointed out by the Supreme Court was that failure to obtain leave before institution of the proceedings did not entail dismissal of the proceedings and such leave could be applied for and obtained subsequent to the institution of the proceedings. The Supreme Court observed (p. 25) :

" Even granting that sanction u/s 179 does not dispense with the leave u/s 171 of the Act, to institute a proceeding in execution against a company ordered to be wound up, we do not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of a decree against the company and that failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or proceeding instituted without leave of the court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed instituted on the date of granting leave."

7. While dealing with this position, the Supreme Court also pointed out the object of providing for obtaining such a leave. After extracting Section 171 of the former Act, the Supreme Court observed (p. 24) :

" This section is in terms analogous to Section 231 of the English Companies Act, 1948 11 & 12 : 6 Ch. 38. The object of Section 171 is plain. It is intended to ensure that the assets of a company ordered to be wound up by the court shall be administered for the benefit of all the creditors, and that some creditors only shall not obtain an advantage over others by instituting or prosecuting proceedings against the company. The section is intended to maintain control of the court which has made an order for winding up on proceedings which may be pending against the company or may be initiated after the order of winding up, and the court may remain seized of all those matters so that its affairs are administered equitably and in an orderly fashion."

8. The Supreme Court extracted with approval the following observation contained in Buckley on the Companies Acts, 13th edn., at page 490 :

"Leave to continue after winding up a debenture-holder's action, whether, previously or subsequently commenced, will be given unless the liquidator is able and willing to give in the winding up the relief which could be obtained in the action."

9. In the present case, the suit has been instituted after the winding up of the company has been ordered and as a matter of fact the plaint itself refers to the same. But no leave of the court was obtained before the institution of the suit. If Section 171 of the former Act was in force, the decision of the Supreme Court

referred to above makes it clear that the appellant herein can apply for .and obtain the leave of the court for continuing, the suit even though leave was not obtained before its institution and the failure to obtain leave before the institution of the suit will not entail dismissal of the suit and the suit will be regarded only as ineffective until leave is granted. There is no controversy on this aspect as between the parties before us.

10. The only other question is whether Section 446 of the present Act, which replaced Section 171 of the former Act, made any difference or departure in this legal position.

11. In the first place, we shall deal with the two decisions of Palaniswamy J. which have been mentioned by us already. The earlier decision of Palaniswamy J., namely, *K. Vadivelu v. Official Liquidator, Madras* : *K. Vadivelu and Others Vs. The Official Liquidator, Madras*, , related to a case where the suit was instituted after the order of winding up was made without obtaining the leave of the court and on an objection raised by the official liquidator based on Section 446 of the present Act, the plaintiff filed an application praying for leave with retrospective effect to prosecute the suit. Palaniswamy J. held that such leave could not be granted. For coming to this conclusion, the learned judge referred to certain decisions of this court as well as other courts and also certain decisions bearing on the language contained in Section 17 of the Presidency Towns Insolvency Act and Section 28(2) of the Provincial Insolvency Act, imposing a ban on creditors to whom the insolvent is indebted, from commencing any suit or other legal proceeding against the property of the insolvent in respect of the debt except with leave of the insolvency court. However, the learned judge (Palaniswamy J.) had not dealt with the decision of the Supreme Court to which we have already drawn-attention.

12. In the later decision, namely. *Burmah-Shell Oil Storage and Distributing Co. of India Ltd. and Shankar Service Station Vs. Associated Industrial and Engineering Corporation Ltd.*, the learned judge has expressly dealt with the decision of the Supreme Court. After referring to the decision of the Supreme Court and the language of Section 171 of the former Act, the learned judge proceeded to state (p. 494) :

" The question is whether the aforesaid principle should be applied even to Section 446 of the 1956 Act. In enacting this section, the legislature has made a substantial change in the law contained in Section 171 of the 1913 Act. The difference in the language of Section 446 and that of Section 171 calls for careful examination. In Section 171 of the 1913 Act, the word "commenced" occurred after the expression "proceeded with", but in Section 446 of the 1956 Act that word precedes the expression " or if pending at the date of the winding-up order " and thereafter occurs the expression " shall be proceeded with". It is not merely a case of interchanging the places of the words " commenced " and " proceeded with " as occupied by them in Section 171 of- the 1913 Act, After making this change, the legislature has also added the expression " or pending

at the date of the winding-up order" after the word " commenced". Thus, in effecting this change, the legislature has clearly comprehended two situations. The first is the commencement of a suit or other legal proceeding and the second is proceeding with a suit or other legal proceeding if such suit or proceeding was pending at the date of the winding-up order. In the latter case, the proceeding must be a proceeding pending at the date of the winding-up order. Only in such a case, the leave of the court for further proceeding with the proceeding would arise. But in the case of a proceeding to be commenced, there is no question of a proceeding being proceeded with. If a proceeding is commenced without the leave of the court and subsequent to the commencement, leave is asked for the continuation of that proceeding, it would not be a proceeding pending at the date of the winding-up order within the meaning of Section 446 of the 1956 Act, and obviously no leave can be granted u/s 446 for that purpose. This conclusion is irresistible, having regard to the use of the expression " pending at the date of the winding-up order ". It should be presumed that the legislature deliberately introduced these words in enacting Section 446 even though Section 171 was in the statute book for several decades. Construing the plain language adopted by the legislature, it follows that if a proceeding is commenced without obtaining the leave of the court previously, no leave could be granted for proceeding with that proceeding, as it was not a proceeding pending at the date of the winding-up order. If it were to be held that even if a proceeding is instituted without the leave of the court, it could be permitted to be proceeded with by granting leave, then the expression if pending at the date of the winding-up order" would be without any meaning and rendered purposeless. That could not have been the intention of the legislature in making this change in the law. The obvious intention of the legislature is that leave could be granted to commence a proceeding only if leave is sought for before the commencement of the proceeding and that leave could be granted to proceed with a proceeding only if the proceeding was pending at the date of the winding-up order. That is the only rational way of interpreting the language employed in Section 446. "

13. It is this decision of Palaniswamy J. which has been followed by Ramaprasada Rao J. in the order under appeal.

14. Our attention was drawn to two other decisions dealing with Section 446 of the present Act. One is that of a Division Bench of the Bombay High Court in *Eastern Steamship Private Ltd. v. Pucto Private Ltd*, [1971] 41 Comp Cas 43. This decision, which also did not refer to the decision of the Supreme Court mentioned already, held that Section 446 of the present Act had made a departure from Section 171 of the former Act. The learned judges also relied on decisions interpreting Section 17 of the *Presidency Towns Insolvency Act, 1909*, as well as Section 28(2) of the *Provincial Insolvency Act, 1920*. The learned judges stated (p. 50) :

"We are of the view that Section 446 of the *Companies Act, 1956*, makes a departure from Section 171 of the *Indian Companies Act, 1913*. Section 171

easily lent itself to the interpretation that both in cases of suits commenced before or after the winding-up order leave could be taken after the winding-up order. Section 446, however, separates the two kinds of suits. It provides that only in the case of suits pending at the date of the order of winding-up leave could be taken to proceed with the suit. It further provides that no suit shall be commenced against the company after the winding up order has been made except by leave of the court. In such cases leave could only be granted before the suit is commenced and no leave can be granted to continue it or to proceed with it if it is commenced after the date of the winding-up order. We are also of the view that in India a suit is commenced on the presentation of a plaint in court."

15. The other decision is that of a Division Bench of the Gujarat High Court in *Star Engineering Works Ltd. v. Official Liquidator of the Krishna-kumar Mills Company Ltd. (In Liquidation)* [1977] 47 Comp Cas 30. This decision refers to the decision of the Supreme Court as well as the decision of the Bombay High Court to which we have made reference and held that the decision of the Supreme Court applied to a case covered by Section 446 of the present Act and the learned judges differed from the decision of the Bombay High Court. The learned judges observed (page 36) :

"With respect to the learned judges of the Bombay High Court, we are unable to agree with the conclusion reached by them regarding the difference between the provisions of Section 446 of the Companies Act, 1956, and Section 171 of the Indian Companies Act, 1913. What was in a condensed form in Section 171 of the 1913 Act has been expanded in more elaborate language in Section 446 of the 1956 Act, but the substance of both the provisions remains the same and the legal position is not at all changed by the change in the terminology of the new section. We may point out that in the Supreme Court decision in *Bansidhar Shankarlal v. Mohd. Ibrahim* [1971] 41 Comp Cas 21, Shah J., as he then was, delivering the judgment of the court, has observed at page 23 :

The question sought to be raised in the proposed appeal, it was urged, was of general or public importance. In any case it was contended that there is conflict of opinion among the courts in India on the true interpretation of Section 171 of the Indian Companies Act, 1913, and Section 446 of the Companies Act, 1956 (which replaced Section 171 of the Act of 1913)....."

Therefore, this passage of the Supreme Court indicates that, according to the Supreme Court, Section 446 of the 1956 Act replaced Section 171 of the 1913 Act, and the two sections, according to the Supreme Court, were in *pari materia*. Even apart from these observations from the judgment of the Supreme Court which was primarily dealing with the provisions of Section 171 of the 1913 Act, as we have pointed out above, there is no difference in substance between Section 446 of the 1956 Act and Section 171 of the 1913 Act. There is a difference only in framing the language of the section and in putting in more elaborate terms what was in a condensed form in the 1913 Act. Under these

circumstances this contention urged on behalf of the liquidator must be rejected.  
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16. With great respect we are unable to agree with the learned judges of the Gujarat High Court that the extract from the judgment of the Supreme Court indicated that, according to the Supreme Court, the two sections, namely, Section 446 of the present Act and Section 171 of the former Act, were in *pari materia*. In our view, the passage extracted from the judgment of the Supreme Court does not indicate any such thing. As we have pointed out already, the appeal before the Supreme Court was against the order of the High Court refusing to certify a case as fit for appeal to the Supreme Court under Article 133(1)(b) and (c) of the Constitution. In that context, a contention was urged before the Supreme Court and it was that contention which was contained in the passage extracted by the learned judges of the Gujarat High Court. That extract itself will clearly show that the Supreme Court was only referring to a contention that the High Court should have granted the certificate applied for under Article 133(1)(b) and (c) or both the clauses, since there was a conflicting opinion among the courts in India on the true interpretation of Section 171 of the former Act and Section 446 of the present Act. It was the only place where the Supreme Court referred to Section 446 of the present Act and nowhere the court had held that the language of Section 171 of the former Act and that of Section 446 of the present Act was in *pari materia*. But that is not to say that we are not in agreement with the conclusion of the Gujarat High Court on the scope and intendment of Section 446 of the present Act.

17. As we have pointed out already, there is undoubtedly a difference in the language of Section 171 of the former Act and that of Section 446 of the present Act. The only question for consideration is, whether this difference in language has effected a change in the legal position, in other words, whether the legal position continues as interpreted by the Supreme Court with reference to the language of Section 171 of the former Act, notwithstanding the change in the language of Section 446 of the present Act. After a careful consideration, we are of the opinion that the change in the language of Section 446 of the present Act has not effected a change in the legal position gathered by the Supreme Court from the language of Section 171 of the former Act and that the change in the language of Section 446 of the present Act is by way of amplification, clarification or elaboration of the position contained in Section 171 of the former Act, rather than alteration, amendment or departure.

18. For coming to the above conclusion, we have taken into account the purpose of enacting a provision like Section 171 of the former Act or Section 446 of the present Act. The purpose and object of the provision have been set out by the Supreme Court itself in the extract which we have already given from its judgment. For the purpose of achieving that object and effectuating that purpose, it is not necessary to hold that obtaining of leave is a condition precedent to the institution of the suit or other legal proceeding and if such suit

or other legal proceeding is instituted without obtaining leave, the same cannot be rendered effective by subsequently applying for and obtaining leave.

19. The second circumstance which has influenced us in coming to this conclusion is as follows : As we have indicated already, the commencing of a suit or other legal proceeding under that section, namely, Section 446(1) of the present Act, is envisaged in two contingencies. One is, when a winding up order has been made and the other is when the official liquidator has been appointed as provisional liquidator. As far as the winding-up order is concerned, the consequences of a winding-up order are dealt with in Sections 444 and 445 of the present Act. u/s 445(1) of the present Act, " on the making of a winding-up order, it shall be the duty of the petitioner in the winding-up proceedings and of the company to file with the Registrar a certified copy of the order, within thirty days from the date of the making of the order ". u/s 445(2) of the present Act, " on the filing of a certified copy of the winding-up order, the Registrar shall make a minute thereof in his books relating to the company, and shall notify in the official gazette that such an order has been made ". Consequently, in view of this provision for the notification of the passing of a winding-up order in the Official Gazette, it may be stated that every one must be taken to have notice of such winding-up order, even though such notice can be said to have been taken only on the date when it is notified in the Official Gazette that the official liquidator is appointed as provisional liquidator, and there is no such provision for any notification. It is Section 450 of the present Act which deals with the appointment and powers of provisional liquidator and Section 450(1) states that at any time after the presentation of a winding-up petition and before the making of a winding-up order, the court may appoint the official liquidator to be liquidator provisionally. But there is no provision in the Act for notifying the appointment of official liquidator as provisional liquidator in the Official Gazette, though the contingencies of both the passing of the winding-up order and the appointment of official liquidator as provisional liquidator are treated on the same footing in Section 446(1) of the present Act. Suppose, in a particular case, without the knowledge that the official liquidator has been appointed as provisional liquidator, a person who has got a claim against a company files a suit, can it be contended that such a suit filed without obtaining the leave of the court should be dismissed, because obtaining of such leave was a condition precedent to the institution of the suit. If such a serious consequence is to result, what is the provision or principle on the basis of which one can impute knowledge of such appointment of official liquidator as provisional liquidator to the plaintiff in such a suit ? Could it have been the intention of Parliament that an innocent person's right to institute a suit against a company should be thwarted for no fault of his own ? We may also take another case. A company, though its registered office is situate in one place, may have places of business throughout the country and a person is entitled to institute a suit against such company where a part of the cause of action arises. Suppose a person who lives far away from the place where the court passing an order of winding up is situate and

without any knowledge of the fact that the official liquidator has been appointed as provisional liquidator, institutes a suit in a distant court, can it be contended that such a suit should be dismissed, simply because the plaintiff had not obtained the leave of the court which passed the order winding up the company, for instituting such a suit ? We are clearly of the opinion that no such consequence is intended by Parliament and could be attributed to it. Even with regard to the contingency of passing of a winding-up order, the statute itself contemplates a time lag between the passing of that order and the notification of the same in the Official Gazette. We, have already referred to Section 445(1) of the present Act requiring the petitioner in the winding-up proceedings and the company to file with the Registrar a certified copy of the order within 30 days from the date of the making of the order. The expression "thirty days " was substituted for the expression " one month " with effect from October 15, 1965, by the Amendment Act, Central Act 31 of 1965. However, Sub-section (1A) of the same section provides that in computing the period of thirty days from the date of the making of a winding-up order under Sub-section (1), the time requisite , for obtaining a certified copy of the order shall be excluded. Thus, a certified copy itself may be filed before the Registrar after several days or even months after the court has actually passed the winding-up order. Suppose a plaintiff files a suit on the very next day following the date on which the court has passed the winding-up order, can it be contended that such a suit should be dismissed because no leave to institute a suit had been obtained, even though the plaintiff in the suit had no means of knowing that a winding-up order had been passed. To construe Section 446 of the present Act as dealing only with two categories of suits and legal proceedings, namely, those that are instituted subsequent to the order of winding up of the company and those that are pending at the date of the winding-up order will naturally exclude the suits or other proceedings simultaneously instituted. Suppose, in a particular case, without the knowledge of the pendency of any petition for winding-up, a person happens to institute a suit on the very day on which the winding-up order is passed by the court, a question will arise, into which category the said suit can be classified, namely, whether it can be classified as a suit instituted after the winding-up order has been passed or a suit which was pending at the date of the winding-up order. Really speaking, such a simultaneous suit will not fall within either of the two categories and, therefore, will be outside the scope of Section 446 itself. If so, with reference to such a suit, the very object of Parliament that the court which passes the order of winding up of a company should have control over all such proceedings will be defeated. Under these circumstances, to impute to Parliament a deliberate departure from the legal consequence of Section 171 of the former Act, when it changed the language of Section 446 of the present. Act will certainly lead to such serious and unintended results. It is worthwhile pointing out that if a person's remedy to proceed against a company for the purpose of enforcing his or its rights is sought to be taken away by such an interpretation of Section 446 of the present Act, such a construction will constitute a serious inroad into his or its ordinary legal rights which must be

justified only on the basis of unexceptionable public need or interest. Having regard to these consequences, we are inclined to take the view that the change in the language of Section 446 of the present Act is only a drafting change and such a change was not intended to constitute a deliberate departure from the legal consequences flowing from Section 171 of the former Act and in this we respectfully agree with the conclusion of the Gujarat High Court in the decision referred to above and we are unable to agree with the view of the Bombay High Court or to affirm the decision of Palaniswamy J. of this court.

20. Though we have reached the above conclusion purely on the basis of the statutory provision and the object which it intended to achieve, we may also mention in passing that the history behind the enactment of the present Act consolidating and amending the law relating to companies and certain other associations in this country does not also support the theory that by the change of the language in Section 446 of the present Act any change in the legal consequences was intended. The Company Law Committee in its report of 1952 did not recommend any change whatever in Section 171 of the former Act and left the position as it was. The Bill that was introduced in the House of the People on September 2, 1953, namely, Bill No. 46 of 1953, published in the Gazette of India, Extraordinary, Part II, section. 2, dated 2nd September, 1953, simply reproduced Section 171 of the former Act as Clause 409 of the said Bill. Even the Notes on Clauses merely stated :

" Clause 409.--See Section 171 of the existing Act and Section 231 of the English Act" (vide p. 839 of the Gazette). The report of the Joint Committee on the Bill as presented in the Lok Sabha on 2nd May, 1955, and published in the Gazette of India, Extraordinary, Part II, Section 2, dated 2nd May, 1955, in Clause 444(1) merely provided :

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

21. Thus, it will be seen that the only change which the Select Committee made was with reference to the appointment of the provisional liquidator and having made the provision in Clause 446(1)(a) that for the purpose of the Act, so far as it relates to the winding up of the companies by the court, there shall be attached to each High Court, an official liquidator appointed by the Central Government, who shall be a whole-time officer, unless the Central Government considers that there will not be sufficient work for a whole-time officer in which case a part-time officer may be appointed, this change was made. Except for this change, the position remained as found in Section 171 of the former Act. Only during the course of the consideration of the Bill in Parliament, we find an amendment was given notice of by the Government and that amendment was that the expression " shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with" was substituted for "shall be

proceeded with or commenced " and such an amendment was moved and adopted by the Lok Sabha on 7th September, 1955. There was no discussion or comment on this amendment as intending to effect any change in the law. This aspect of the matter also will tend to confirm the conclusion which we have already reached as to the scope of Section 446 of the present Act.

22. Consequently, we hold that the application filed by the appellant herein for obtaining leave of the court for proceeding with the suit which it had already filed, namely, O.S. No. 233 of 1974, was competent and the court had the power to grant such leave so as to render the suit already filed effective from the date of such granting of leave.

23. In the present case, Ramaprasada Rao J. has simply followed an earlier decision of Palaniswamy J. and dismissed the application on the sole ground that obtaining of such leave is a condition precedent for the institution of the suit and that no such leave can be granted after the institution of the suit. It is one thing to hold that such an application is competent and the court has power to grant leave to render effective a suit already filed and it is another thing to come to a conclusion whether leave should be granted or not in a particular case and if leave is to be granted, on what terms and conditions it should be granted. Since Ratnaprasada Rao J. has held that leave cannot be granted by the court at this stage, the learned judge has not considered the merits of the case as to whether leave should be granted or not in this case and, if it is to be granted, on what terms. Once we have reached the conclusion that the application filed by the appellant is competent and the court has got power to grant leave at this stage, we put to the learned counsel for the official liquidator as to what he had to say on the merits of the case as to the grant of leave. The learned counsel for the official liquidator could not raise any valid objection to the grant of leave except to contend that the official liquidator's defence in the suit on merits should not be prejudiced. It is needless to state that the granting of leave as such will not and cannot prejudice the official liquidator's defence on merits in the suit.

24. Therefore, we allow the appeal and set aside the order of Rama-prasada Rao J., and grant leave to the appellant herein to proceed with the suit. The result of this will be that the suit will be effective only from this date, as held by the Supreme Court in the decision referred to above (*Bansidhar Shankarlal v. Md. Ibrahim* [1971] 41 Comp Cas 21. There will be no order as to costs.