

(1936) 09 AHC CK 0044
In the Allahabad High Court

W.T. Henley's Telegraph Works Co. Ltd.	APPELLANT
Vs	
Gorakhpur Electric Supply Co. Ltd.	RESPONDENT

Date of Decision : 02-09-1936

Acts Referred:

Companies Act, 1956 — Section 162(5)

Citation : AIR 1936 All 840 : 166 Ind. Cas. 238

Hon'ble Judges : Iqbal Ahmad, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Iqbal Ahmad, J.—This is an application for the compulsory winding-up of the Gorakhpur Electric Supply Company Limited. The application purports to be an application u/s 162(5), Companies Act, and has been presented by W. T. Henley's Telegraph Works Company, Limited hereinafter referred to as the petitioner. The petition is based on the ground that the company is unable to pay its debts. It was filed so far back as on 31st August, 1934, and the delay in the disposal of the petition has been mainly due to promises being held out, from time to time, by Mr. P. L. Jaitly, the managing agent of the company, that the amount due to the petitioner will be paid at an early date. On this assurance adjournments were prayed for and obtained on various dates. but in the end it was stated that the amount due to the" petitioner could not be paid. In the meantime Mr. Jaitly had been examined in part but his evidence was not concluded. He then avoided attending the Court on the pretext that he was seriously ill and that he could not attend Court without risk to his life. Two medical certificates were produced to substantiate the allegation of illness. These medical certificates however could not be reconciled by the opinion of the Civil Surgeon of Allahabad who certified that Mr. Jaitly was able to attend Court. I therefore examined the two doctors who had given the certificates and their evidence satisfied me that the certificates were untrue, and Mr. Jaitly was deliberately disobeying the order of the Court and was intentionally avoiding the witness-box. I then ordered his arrest and he was produced in this Court.

Thereafter the Court closed for the long vacation. Mr. Jaitly's evidence has now been concluded and the case has been argued on both sides.

2. In the year 1926 the firm of Messrs. P. L. Jaitly & Co., obtained a license from the Government of the United Provinces of Agra and Oudh for the supply of electricity in the town of Gorakhpur. It appears from the evidence of Mr. P.L. Jaitly that he is the sole proprietor of the so-called firm of "Messrs. P.L. Jaitly & Co." It is, therefore, correct to say that the license was granted by the Local Government to Mr. P. L. Jaitly. After obtaining the license, Mr. Jaitly succeeded in promoting the Gorakhpur Electric Supply Co. Ltd., which was registered as a company with limited liability on 23rd May 1927. The object of the company, as stated in the memorandum of association, was to construct and maintain works and appliances for the supply of electricity in the town of Gorakhpur and to acquire from the firm of Messrs. P. L. Jaitly & Co., the license granted by the Local Government, as also to take over from the said firm the contracts which that firm had made for the purchase of plant and machinery for the erection of a power house and the construction of work at Gorakhpur. Messrs. P. L. Jaitly & Co. were named in the prospectus as the Company's first managing agents and became and are its managing agents even now. It is admitted that contract was entered into with the petitioner for the supply and erection of the poles, conductors, wires and other appliances and materials necessary for the overhead transmission of electricity in the town of Gorakhpur, and that the petitioner completed the supply and erection of the said appliances and materials on 24th July 1928.

3. According to the petitioner, on the completion of supply and work in July 1928, a sum of Rs. 35,806-13-3 was due to "the petitioner from the Company. According to the agreement between the parties the amount due to the petitioner should have been paid immediately on or after the supply or completion of work but this was not done, with the result that the petitioner made insistent demands from the month of July 1929. The correspondence that then ensued between the petitioner and the managing agent, of the company is interesting and discloses the determination of the company, acting through Mr. P. L. Jaitly, to avoid payment of the just dues of the petitioner by holding out unfounded excuses. For some time Mr. Jaitly lulled the petitioner into the belief that the amount due to the petitioner was receiving "very serious attention and that the matter has been referred to the Board for settlement at a very early date." But by 20th July 1929 the patience of the petitioner was exhausted and the petitioner then addressed a letter on that date to Messrs., P. L. Jaitly & Co., managing agents, pointing out that the delay in the payment, that ought to have been made long ago, pointed to one or other of the following conclusions:

(1) That the company has no funds with which to meet its liability and in that case liquidation was the only solution; or (2) that the managing agents are deliberately withholding payment in order to finance other schemes. The letter concluded with the following paragraph:

We must say that so far as we can see no-definite progress towards a settlement has been made during the past 10/12 months and unless a cheque for Rs. 10,000 on account is received by us in this office by the 12th August and the remaining balance upon the undermentioned dates, also in this office, we shall have no alternative than very reluctantly to place the matter in the hands of our Solicitors for payment of our dues:

(1) 2nd payment of Rs. 10,000 by 12th September 1929.

(2) 3rd payment of Rs. 10,000 by 12th October 1929.

(3) Balance of Rs. 5,806-13-3, by 12th November 1929.

4. A reply to this letter was sent by Messrs. P. L. Jaitly & Co., on behalf of the Gorakhpur Electric Supply Co. Ltd., on 9th August 1929, protesting against the suggestion contained in the petitioner's letter that either the company had no funds or was deliberately withholding payment. The indebtedness of the company to the petitioner was however clearly admitted and a request was made to the petitioner to let the instalments proposed in the letter of the 20th of July commence from 12th October 1929. The petitioner then sent another letter to the managing agents on 13th August 1929, asking for payment in four instalments by means of post dated cheques the last cheque to be sent to the petitioner's office by 12th November 1929. In reply to this letter the company, by its letter dated 19th August 1929, again admitted that "there is no denying of the fact that there had occurred delays in settlement of your Gorakhpur outstandings" and assured the petitioner that the payments will be made from October 1929. The company also pointed out that the issue of post dated cheques was not the practice of the company. The company paid a sum of Rs. 10,000 to the petitioner in October 1929 and thereafter the usual default by the company followed. The petitioner then put the matter in the hands of Solicitors. When the Solicitors demanded payment, Mr. P. L. Jaitly, for the first time in November 1929, invented a counter-claim against the petitioner and wrote a letter to the Solicitors pointing out that:

We have also to got a substantial amount from their clients (the W. T. Henley's Telegraph Works Co. Ltd.). We made joint efforts in securing various schemes from Government and on this account your clients owe us (P. L. Jaitly & Co.) a considerable amount which can be amicably settled only if your clients are prepared to finish up this matter. It is however regrettable that your clients are intentionally avoiding settlement of these affairs.

5. The suggestion that Mr. P. L. Jaitly had a counter claim against the petitioner was baseless and the insinuation that the petitioner was "intentionally avoiding settlement" was preposterous. After all this, the only alternative left to the petitioner was to seek redress from a Court of law and accordingly the petitioner, in August 1930, filed a suit (Suit No. 54 of 1930) in the Court of the Subordinate Judge of Allahabad against the company and Messrs. P. L. Jaitly & Co for the recovery of the balance of about Rs. 25,000 that was due to the petitioner. The

petitioner claimed a decree primarily against the company and in the alternative against Messrs. P. L. Jaitly & Co. The suit was contested by the defendants who filed two separate written statements through two separate sets of lawyers. The company, while admitting the supply of materials and erection of the overhead transmission line and other works by the petitioner, disclaimed all responsibility for payment on the allegation that there was no contractual relationship between the petitioner and the Company. In this connexion the Company denied having made any previous payments on account of the supplies by the petitioner. It may be noted in passing that this denial was a tissue of lies. P. L. Jaitly & Co. resisted the suit mainly on the allegation

that the answering defendant did not make any further payment to the plaintiff in settlement of the accounts as he honestly believed that a sum of Rs. 13,000 was due to him on account of commission charges and which he has therefore set off against the plaintiff's claim. The defendant above named will file a suit in respect of the above claim.

6. The suit remained pending in the Court of the Subordinate Judge for a period of more than three years and, from what I have seen of the delaying tactics adopted by Mr. Jaitly in the present proceedings, I presume that this inordinate delay in the decision of the suit must have been due to similar tactics being adopted by Mr. Jaitly in the Court of the Subordinate Judge. The suit was decided by the learned Judge on 27th November 1933. He overruled all the pleas raised by the two defendants and passed a decree for a sum of Rs. 25,806-13-3 with pendente lite and future interest and costs against the Company.

7. The Company waited for four months and then, on 3rd April 1934, filed an appeal in this Court against the decree of the Subordinate Judge on a court-fee stamp of Rs. 275 only. The deficiency in the court-fee was about Rs. 920 and, though time was allowed on more occasions than one, this deficiency in this Court-fee was not made good. The valuation of the appeal was ultimately reduced to a sum of Rs. 5,000 only and as the court-fee of Rs. 275, that was paid on the memorandum of appeal, covered that amount, the appeal was admitted with the reduced valuation. It is therefore clear that the decree in favour of the petitioner became final as regards at least the sum of about Rs. 20,000 and pen-dente lite and future interest.

8. The appeal with the reduced valuation was not prosecuted and was dismissed for default and I am informed that an application for the restoration of the same is still pending. After the suit was decreed by the Subordinate Judge, the petitioner served a notice on the Company u/s 163(1), Companies Act on 12th, July 1934, demanding payment of a sum of Rs. 33,539-14-6, the amount due to the petitioner under the decree. The managing agents sent a reply to this notice on 3rd August 1934, stating that, as an appeal had been filed in the High Court, the matter was still sub judice and the decree in favour of the petitioner had not become final. After the lapse of the statutory period of three weeks the petitioner filed the present application for the winding up of the Company on the ground

that the Company was unable to pay its debts.

9. The petition for winding up is opposed by the Company and by certain alleged debenture holders. It is urged that the Company is solvent, is able to pay its debts and the application for winding up has been made with a view "to put pressure upon the Company for the realization of the alleged debt of the applicant" and is not bona fide. It is further contended that the debt of the applicant is still disputed, as the appeal has not yet been decided. The validity of the notice u/s 163 is also called into question, and lastly it is contended that "the concern of the company not being transferable under the provisions of Section 9, Electricity Act (1910), without the sanction of the Local Government, and the Company being a Company for public utility, the application for its winding up is not maintainable."

10. Learned Counsel for the petitioner maintained that the debentures were not for consideration and were in any case invalid. But at the hearing of the petition, it was agreed that it is unnecessary in the present proceedings to decide the question relating to the genuineness and validity of the debentures. The plea that the petition for winding up could not be maintained in view of the provisions of Section 9, Electricity Act, was also not pressed. The questions that remain for decision, therefore are: (1) Is the application for the winding up of the Company a bona fide one, or has it been filed to bring pressure on the Company to pay the decretal amount? (2) Is notice u/s 163, Companies Act, in accordance with law? (3) Is it desirable to wind up the Company "considering the objections filed by the Company and persons calling themselves as debenture holders?"

11. The fact that the Company was, and is, indebted to the petitioner cannot be disputed. The decree passed by the Subordinate Judge against the Company has, as already stated, become final with respect to at least a sum of Rs. 20,000. The decree awarded pendente lite and future interest. The total amount due to the petitioner under the decree on the date that the petitioner sent the statutory notice to the Company, was a sum of about Rs. 33,000. As ultimately the valuation of the appeal filed in this Court was reduced to a sum of Rs. 5,000, it must be taken for granted that the Company was, and is, indebted to the petitioner in a sum of at least about Rs. 30,000. The appeal with the reduced valuation was also dismissed for want of prosecution and has not yet been restored. I am therefore bound to proceed on the assumption that the entire decree has become final, and the Company is indebted to the petitioner in a sum of at least Rs. 35,000. The failure of the Company to pay the amount due within three weeks of the receipt of the notice therefore brings the case within the purview of Section 162(5), Companies Act, and I am bound to hold that the Company is unable to pay its debts. This by itself furnishes a valid ground for an order for the compulsory winding up of the company. But it is contended that the notice sent by the petitioner was not in accordance with law and therefore the failure of the company to comply with the notice does not warrant the presumption that the company is unable to pay its debts. In this connexion

reference is made to the provisions in Clause (1), Section 163, that the notice by the creditor must be "a demand under his hand" asking for the payment of the debt. It is said that as the notice in the present case was signed by one Mr. Bland, and there was nothing in the notice to show that Mr. Bland was authorized by some resolution passed by the petitioner company to make the demand and to serve the notice, the notice cannot be deemed to incorporate a demand under the petitioner's hand. It is also pointed out that Mr. Bland was not described in the notice as an officer of the petitioner authorized to demand the payment of the debts due to the petitioner.

12. In support of this contention reliance has been placed on the decision in *M.A. Kureshi v. Argus Footwear, Ltd.* 1931 9 Bang 323. It was held in that case that the demand contemplated by Section 162(5) of the Act is a demand signed personally by the creditor himself when he is physically able to do so and not by his agent. I agree that the statutory demand under Clause (1), Section 163 must be in strict compliance with the provisions of that clause, and if those provisions are not literally complied with, the demand, though followed by neglect of the company to pay the debt demanded cannot be made the basis of presumption that the company is unable to pay its debts. Clause (1), Section 163, imposes a penal obligation upon the company, and has therefore to be strictly construed. But the demand in the present case was in my judgment a demand under the petitioner's hand. The petitioner is a limited liability company and must necessarily act through its officers and authorized agents. A demand under the hand of its Manager must therefore be deemed to be a demand under its hand. The notice sent by the] petitioner was on a printed form used by the petitioner company for its letters. The name of the petitioner company was mentioned at the bottom of the notice. Then followed the signature of Mr. Bland and thereafter the word "creditor" was typed. The office or the post that Mr. Bland held in the petitioner company was not mentioned in the typed portion of the notice. But on the printed form Mr. Bland is described as "Manager for India." The plea taken in the written statement filed by the company as regards the invalidity of the notice was that the notice was not in accordance with law," No indication was given in the written statement as to in what respects the notice did not comply with the provisions of law. It was however suggested either before or at the time of the settlement of issues that as there was nothing to show who Mr. Bland was, the notice was invalid. The petitioner then filed an affidavit of one Mr. Pilcher that Mr. Bland is the Manager for India of the petitioner company, and that by an oversight below his signature the words "Manager for India" were not typed. The affidavit was filed in this Court on the 19th August 1935, and neither the counsel for the company nor the counsel for the debenture holders made any request then or thereafter for Mr. Pilcher being summoned with a view to being cross-examined as regards the allegations contained in his affidavit. On the conclusion of evidence of Mr. Jaitly however I was asked to summon Mr. Pilcher for cross-examination. I declined to grant this request as I considered that it was a belated request.

13. The facts stated above lead to this irresistible conclusion that Mr. Bland is the Manager of the petitioner company and is in the ordinary course of his duties entitled to demand the debts due to the petitioner. The demand made by him by means of a written notice must therefore be deemed to be a demand by the petitioner company under its hand. The" argument that in the absence of the proof of the fact that the petitioner company by its resolution authorized Mr. Bland to demand the payment of the debt appears to me to be without substance. No plea to this effect was taken in the written statement, or foreshadowed in the examination-in-chief of Mr. P. L. Jaitly. Through out the period that the petition remained pending in this Court, there was never a whisper that in the absence of a resolution authorizing somebody to demand the debt due to the petitioner the notice could not be deemed to be valid. In the course of his argument Sir Wazir Hasan for the first time raised this plea. As I have remarked above, the Manager of a company must unless the contrary is proved be deemed to have the authority to demand and receive payment of the debts due to the company of which he is the Manager, and this presumption must hold good in the present case. The plea of the company about the invalidity of the notice must therefore be overruled

14. It was strongly pressed upon me that there still was a bona fide dispute about the debt alleged to be due to the petitioner and the petitioner was therefore not entitled to get an order for the winding up of the company. If I was satisfied that this argument was well founded, I would have had no hesitation in rejecting the contention of the petitioner based on the provisions of Section 163(1), Companies Act. There is abundant authority for the proposition that the mere service of a notice by a creditor on a solvent company does not entitle the creditor to a winding up order if the company bona fide disputes the existence of the debt: vide *Cadiz Waterworks Co. v. Barnott* (1874) 19 Eq 182; *In Re: London and Paris Banking Corporation* (1874) 19 Eq 444; *Talsidas Lallubhai v. Bharat Khand Cotton Mill Co., Ltd.* 1914 39 Bom 47; *Company v. Rameswar Singh* 23 C WN 844 at p. 857; and *Satyaraju v. Guntur Cotton Jute & Paper Mills & Co.* 1925 48 Mad 267. The reason for this rule is obvious. If a company is solvent and there is a genuine dispute about an alleged debt, the resort by the creditor to the summary proceeding of serving on the company a notice u/s 162, and following the same by petition for winding up, is ordinarily referable to a desire on the part of the creditor to bring pressure on the company in order to induce the company to pay the debt, without having the dispute settled by the civil Court, by which Court the dispute ought to be ordinarily settled. To make an order for winding up in such a case would deprive the company of its right to have the question between it and the petitioning creditor decided in the normal way by the civil Court constituted for the purpose, and this would be opposed to public policy. An application for winding up in such a case must, therefore, be regarded as a vehicle of oppression and an abuse of the process of the Court and be dismissed.

15. But the principles enunciated above have no application to the case before

me. Far from there being a bona fide dispute about the debt alleged to be due to the petitioner, the denial by the company of its liability is mala fide. Mr. Jaitly, the Managing Agent of the company, went on evading payment of the debt for about two years by holding out false promises and unfounded assertions as regards a counter claim against the petitioner. The question of the indebtedness of the company then formed the subject of a suit and, after contest, the suit was decreed, and the decree, as already stated, has become final. What then is the nature of the dispute about the existence of the debt I fail to appreciate. Under the circumstances I cannot but interpret the denial by the company of the existence of the debt as dishonest. It would further appear from the facts to be presently stated that the company is insolvent. There is, therefore, no escape from the conclusion that all the requirements of Section 163(1) are satisfied in the case before me, and I am bound to presume that the company is unable to pay its debt. There is yet another argument that has been advanced by Sir Syed Wazir Hasan in bar of the petitioner's application. He contends that as the debt due to the petitioner company, on its own showing, is a judgment debt, the case comes within the purview of Clause (ii) and not Clause (i) of Section 163. It may be conceded that all the three clauses of Section 163 are mutually exclusive of each other, but it does not follow from this that Clause (i) of the section does not apply to "a judgment debt. Clause (i) is general in its terms and has application to all sorts of debts, be it a simple money debt, a mortgage-debt or a judgment-debt. In the case of a judgment-debt, if execution for the recovery of that debt has been taken and has remained unsatisfied, the Court is, in accordance with Clause (ii), Section 163, bound to presume that the company is unable to pay its debts. Nevertheless, the decree-holder is not debarred from making a demand for the payment of the judgment-debt by a notice in accordance with Clause (i) without having recourse to execution proceedings. In such a case if the demand remains unsatisfied for three weeks, the presumption enjoined by Section 163 necessarily follows.

16. It would thus appear that the company is unable to pay its debts. This fact, however, does not necessarily entitle the petitioner to an order for the winding up of the company, as the discretion to pass such an order, even in the case of the inability of a company to pay its debts, is by Section 162 vested in the Court. I have, therefore, given most anxious consideration to the question whether or not I should order the company to be wound up. In considering this question I have always kept in view the fact that an order for the compulsory winding up of a company is a very extreme step to take and, that such an order ought not to be lightly passed. But on a consideration of all the circumstances I have been forced to the conclusion that there is no other alternative left but to order the winding up of the company, and to dismiss the present application would be unjust to the petitioner. The authorised capital of the company was Rs. 7,00,000 and it was divided into 70,000 shares of Rs. 10 each. The company started construction work on 30th July 1927, and began to supply electricity in Gorakhpur from 31st May 1928. The first balance sheet issued by the company

was for the period ending with September 1928 (Ex. C-9). A report of the managing agents was appended to the balance sheet. It appears from the balance sheet that 26,172 shares of Rs. 10 each were issued and subscribed before the company commenced its work. The amount received by the company on account of these shares was Rs. 2,61,720. In the very first year a sum of Rs. 75,827 was shown as debt due from the company. Under property and assets various items were shown bringing the total to Rs. 4,93,329. Without further enquiry it is impossible to say whether the value put on the buildings, installations, "charges during construction," stores, etc., was or was not correct. The report of the managing agents held out glowing prospects of a good return to the shareholders and of the expansion of the business of the company. Care was however taken by the managing agents to lay the foundation in this report for the issue of debentures in the immediate future, with a view to clear the debit side of the account.

17. The next balance sheet (Ex. C-10) was for the period ending with 30th September 1929. In this balance sheet 50,000 shares of Rs. 10 each were shown as fully subscribed, thus bringing into the coffers of the company, from the sale of the shares, a sum of Rs. 5,00,000. A further sum of Rs. 2,00,000 was shown as having been received by the company by the issue of mortgage debentures carrying interest at 7i per cent per annum. It appears from Jaitly's evidence that out of about 24,000 shares sold between September 1928 and September 1929 shares worth about Rs. 2,00,000, i.e. about 20,000 shares, were purchased by Jaitly himself. The sum of Rs. 2,00,000 was however not brought into the coffers of the company. A sum of Rs. 1,50,000 was shown in the balance sheet as being in fixed deposit (for payment of debentures or for extension to plant and machinery) with the managing agents, and a further sum of about Rs. 26,000 was shown with the managing agents in the current account. It would thus appear that while on the one hand it was held out to the public that shares of the value of Rs. 5,00,000 had been subscribed and fully paid a sum of Rs. 1,75,000 out of the amount that ought to have been realised on account of the sale of the shares was not brought into the coffers of the company but remained with the managing agents. It is easy for Mr. Jaitly to state that he paid for the shares purchased by him in cash, but it is impossible to believe this statement. The entry about the purchase of the shares by him of the value of about Rs. 2,00,000 was a mere paper entry as the substantial portion of the price of the shares remained with him. By this entry the public was made to believe that 50,000 shares of the company had been sold, though the company never got in cash the consideration of the shares purchased by Jaitly. Further Jaitly by this paper entry became the ostensible owner of a large number of shares and thus acquired a controlling voice in the affairs of the company. The matter does not rest there. Without paying a pice in cash for these shares Jaitly as the ostensible owner of those shares, raised large amount of money by a pledge of about 12,000 shares with the Imperial Bank of India. All this was, to say the least, dishonest and highly prejudicial to the interest of the share-holders.

18. The history of the alleged debentures is a bit complicated and it is unnecessary at the present stage to enter into a discussion of the same. Suffice it to say that the prominent figure connected with the debentures is that of Lala Manmohan Das who is himself one of the signatories to the memorandum of association and was one of the directors of the company. But it may be noted that the acquiescence of the debenture holders in the retention by the managing agents of a substantial sum of Rs. 1,75,000 is a bit curious, if the debentures were genuine and for value. In the next balance sheet, viz. for the period ending with September 1930 (Ex. C 11), the amount shown in fixed deposit or in current account with the managing agents was about Rupees 1,57,000. Thus for two successive years Mr. Jaitly succeeded in getting this paper entry passed by the auditors and in inducing the share-holders to believe that the amount was actually with the managing agents in cash, and could be produced by them to be utilised for the purposes of the company at any moment. Mr. Jaitly must however have realised that this state of affairs could not continue for long, and sooner or later somebody was bound to raise objection about such a large amount remaining with the managing agents.

19. He, therefore, proceeded to show this amount of Rs. 1,57,000 in the balance sheet for the next year for the period ending with September 1931 (Ex. C 12) as unsecured loans advanced to the Lower Ganges Jumna Electricity Distributing Co. Ltd. and the Budaun Electric Supply Co. Ltd. of which companies also he was the managing agent. This was also a mere paper entry with a view to deceive the shareholders and to conceal the fraud that he had perpetrated soon after the commencement of the business by the company. That this is so is demonstrated by the balance sheet for the period ending with the 30th September 1932, (Ex. C 13). In this balance sheet a sum of about Rs. 1,56,000 is again shown in fixed and current deposits with the managing agents. It is impossible to believe that a sum of Rs. 1,57,000 was advanced to the two companies as a loan and was repaid by those companies within the space of 12 months. The fact of the matter appears to be that Mr. Jaitly, realising that the continuous entry of a large sum of money as being in deposit with him for a long number of years was calculated to arrest attention and to provoke comment, resorted to the device of shifting the head under which the amount was shown from year to year. The auditors subjected the balance sheet (Ex. C 13) to an adverse criticism and asked the company to publish the balance sheet with the certificate given by the auditors after adding the words "subject to our report." Mr. Jaitly was however the last man to do anything that was calculated to excite suspicion and accordingly the balance sheet was published with the note that the same was examined and found correct by the auditors.

20. The auditors then brought the various irregularities committed by, and the dishonest action of the managing agents to the notice of the Registrar of Joint Stock Companies by their letter dated the 3rd November 1933, (Ex. C 3). We now come to the last printed balance sheet issued by the company, viz., for the period ending with the 30th September 1933 (Ex. C 14). In this also a sum of

Rs. 1,50,000 was shown in fixed deposit with the managing agents. Mr. Jaitly was put specific questions as regards the amount shown in the balance sheet from time to time in fixed deposit with him and his answers to those questions were deliberately evasive and certainly untrue. When asked if he could produce the amount in Court his answer was as follows: "Yes, in accordance with the arrangement if a notice is given the amount will be available at any time." He was then asked if he had the amount in cash with him and the answer was that the amount was under short term deposit. On a subsequent date he stated that a sum of Rs. 30,000 or 40 000 out of the amount was with him and the rest had been dispersed as shown in the account books since 1933 up to date. He again changed his statement on the 21st April 1936, and when asked if he was able to produce the balance of the fixed deposit that was in his hands, his answer was as follows:

I have already stated that there is no fixed deposit. Please refer to the balance sheet. It is an old story of 1933 or perhaps 1934 and this is 1936. All accounts are since subject to adjustment.

21. Then followed the question whether he had no money of the company in his hands and the answer was that

no money is in my hands. All money had been detained either by the official assignee's order or by the provisional official liquidator's order or by some order. I am totally disconnected since about a year.

22. It is needless to observe that these answers are extremely unsatisfactory and expose the dishonesty of Jaitly. The auditors also adversely criticized the balance sheet Ex. C 14 and took exception to certain interest charged by the managing agents. The report of the auditors was put in the directors' meeting held on the 7th of September 1934. This meeting was attended by three directors, Jaitly, his brother Narottam Lal and Mr. Ramnana Prasad, a nominee of Mr. Jaitly. A formal resolution was passed by these directors accepting Mr. Jaibly's explanation and laying down that the managing agents were entitled to charge interest. The managing agents' protest against "the charges laid at their door by the auditors" was also noted.

23. By this time the auditors themselves were disgusted with the activities of Jaitly and intimated that they did not seek re-election, vide Ex. 0-1. The continued retention of a sum of about Rs. 1,50,000 by Jaitly in his hands naturally excited the suspicion of two of the directors residing in Gorakhpur, viz. Adya Prasad and B. Parshotam Das, and in the meeting of the directors, dated 27th September 1932, a resolution was moved that the managing agents be requested to deposit the money in their hands with the Imperial Bank of India within a week. This was very inconvenient from the point of view of Mr. Jaitly, but luckily for himself, he was the man occupying the chair, and did not fail to utilize his position as the chairman of the meeting to raise all sorts of technical but baseless objections to the resolution and ultimately succeeded in getting the

matter postponed (vide Ex. 0-4). While submitting the balance sheet for the year ending with 30th September, for audit 1932, Mr. Jaitly did not bring the proceedings of this meeting to the notice of the auditors of the company. The two directors named above ultimately sent a letter (Ex. 0-6) dated 14th September 1933, to the Registrar of Joint Stock Companies bringing all these matters to his notice.

24. No printed balance sheet was issued after the year 1933. This was obviously irregular and Jaitly, as usual, was not found wanting in inventing a lie to sail clear of this irregularity. He stated in his examination in chief that a balance sheet for the year 1933-34 had been prepared by the company and was under audit, and produced a typed balance sheet for that year which was marked as Ex. D-I. Jaitly was examined in chief on 5th April 1935, and then the case was postponed on various dates. No audit report has yet been received and this is obviously due to the fact that no balance sheet was even submitted to the auditors. In this typed balance sheet the fixed deposit with the managing agents has disappeared and a sum of Rs. 1,30,750 is shown under "investment." Jaitly's answers to questions concerning this alleged investment were wholly unsatisfactory and he was not able to indicate how this large amount was invested. Jaitly had since been adjudicated insolvent by the Calcutta High Court and in the list of his assets and liabilities, that he filed with the official assignee of that Court, a sum of Rupees 1,30,000 has been shown as due from P. L. Jaitly & Co. to Gorakhpur Electric Supply Co , Ltd. This entry of Rupees 1,30,000 is proof positive of the fact that Jaitly misappropriated this amount, and possibly more, out of the sale consideration of the shares. I am not at present concerned with the question whether the debentures are or are not genuine. But I cannot refrain from observing that the failure of the debenture holders to detect this obvious fraud on the part of Jaitly is curious and points to the imperative necessity of a thorough investigation into the bona fides of the debenture transaction. L. Manmohan Das was one of the directors of the company. He is the holder of debentures of large value. He is said to be a respectable and experienced businessman. He resides in Allahabad where the office of the managing agents of the company is situated. Even he never raised a protest about the so-called fixed deposits and current account with the managing agents, and the present application has been very strongly opposed on his behalf. This to say the least is strange if not suspicious. It has been pressed on behalf of the debenture holders that their wishes, as the biggest creditors of the company, must be consulted by the Court and, as they are opposed to the winding up of the company and "are confident of the company's success, the petition for winding up must be dismissed. Care was however taken at the hearing to impress on me that there was no alliance between Jaitly and the debenture holders and, that the opposition to the petition for winding up by the debenture holders was to protect their own interest. In order to keep up this show the farce of cross-examining Mr. Jaitly was gone through by the learned Counsel for the debenture holders.

25. If the debentures are genuine, the debenture holders are undoubtedly

entitled to the sympathy of the Court, but so are the unsecured creditors of the company. On Jaitly's own showing the amount of unsecured loan taken by the company amounts to Rs. 1,20,000. Apart from this there is a decree for Rs. 11,000 passed against the company by the Calcutta High Court and the decree for about Rs. 35,000 in favour of the petitioner. In other words the company is indebted at least to the extent of Rupees 1,70,000 to unsecured creditors. According to the balance sheets a sum of about Rs. 4,00,000 to Rs. 5,00,000 has been invested in building and machinery. This amount if realised will be enough to wipe off all the debts, secured and unsecured, even if the debentures are held to be for value. If the debenture holders had shown that there was no possibility of any benefit accruing to the unsecured creditors from an order for the winding up of the company their contention that the company ought not to be wound up would have had force, but as this has not been done their opposition to the petition is without substance. The unsecured creditors are entitled to ask the Court to pass a winding up order so that the question whether the debentures were bona fide issued for value may be enquired into and they may before it is too late be able to realize, if not the whole, at least a portion of their unsecured debts, vide *In Re: Crigglestone Coal Co. Ltd.* (1906) 2 Ch D 327.

26. From the very inception of the company Mr. Jaitly utilized the concern solely for his benefit. The purchase of a large number of shares by him was without consideration and the outcome of deliberate fraud. He abused his position as the chairman of the directors' meeting to practically rule out the resolution calling upon him to deposit the amount in his hands with the Imperial Bank of India. The company has been carrying on its business for a period of about eight years and during this period a dividend of annas four per share was paid only once to the shareholders. No dividend has thereafter been paid. In accordance with the rules under the Electricity Act spare parts had to be maintained in the power house. This was not done and Jaitly was prosecuted and convicted for the same. The Electrical Inspector to Government complained more than once about the unsatisfactory condition of the engine in the power house, and the provisional official liquidators have reported that, unless a large sum is invested forthwith, a breakdown is imminent and the whole of the town of Gorakhpur will be thrown into darkness. The unsecured creditors have not been paid a pice and their demands always fell on deaf ears. The managing agent himself has been declared an insolvent. These being the facts, I find it impossible to come to any other conclusion but that the company ought to be compulsorily wound up. I realize that mere misconduct of directors or of managing agents or the fact that the business of the company has not resulted in profit is not par se a ground for winding up, but the cumulative effect of the facts stated above does demonstrate that the company is insolvent; that its affairs have been mismanaged from the very outset; that debts have been recklessly incurred and never paid; that the machinery requisite for uninterrupted supply of electricity has not been provided for; that the provisions of the Companies Act as regards the maintenance and publication of true balance sheets have been deliberately contravened, and the

information necessary to keep the shareholders cognizant of the true state of affairs has been studiously concealed from them all through. I, therefore, hold that the petitioner is entitled to succeed. Accordingly, I order that the company be compulsorily wound up. This order will be advertised in accordance with Rule 29 framed by this Court under the Companies Act in two consecutive issues of the Pioneer and in two consecutive issues of some vernacular paper printed and published in Gorakhpur. The provisional official liquidators are appointed the official liquidators of the company. The petitioner is entitled to his costs. The fee of the counsel for the petitioner will be calculated according to the scale of fee fixed for suits.