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

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

Court: Bombay High Court

Date of Decision: Sept. 28, 1967

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

Citation: (1970) 78 ITR 584

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

Bench: Division Bench

Judgement

Desai, J.
This is an appeal on behalf of the original respondents from the judgment and order of Mr. justice Vimadalal dated September

28, In Re: Colaba Land and Mill Co. Ltd., , granting an order of injunction restraining the original respondents from assessing or reassessing the

Colaba, Land and Mills Company Ltd., hereinafter ter referred to as the "" mills company to Income Tax for the assessment years 1950-51 to

1955-56.

2. It is sufficient to notice that in the Company Petition No. 221 of 1958 the official liquidator was appointed interim liquidator of the mills company

by an order dated May 1, 1959. By an order dated October 7, 1959, the mills company was ordered to be wound up and the official liquidator

was confirmed as liquidator of the mills company with all powers u/s 457 of the Companies Act, 1956. By six different notices dated August 23,

1966, issued u/s 148, the Income Tax Officer, Companies Circle 1(8), Bombay, recorded in respect of the assessment years 1950-51 to 1955-

56 that the mills company had escaped assessment within the meanin, of section 147 of the Income Tax Act, 1961, and that he therefore proposed

to reassess the income of the mills company for these assessment years and called upon the liquidator to deliver to him within thirty days a return in

the prescribed form of the income of the mills company assessable for these years. It was recorded that the said notices were being issued after

obtaining the necessary satisfaction of the Central Board of Direct Taxes.

3. By six different notices for each of the above assessment years dated December 31, 1966, issued u/s 142(1), the Income Tax officer,

Companies Circle, referred to the above six notices and called upon the official liquidator to produce certain documents and give in writing duly

verified in the prescribed manner information called for in the forms attached thereto and on the points or matters specified, to the Income Tax

Office on January 10, 1967.

4. In connection with the above notices, by the judge''s summons dated July 1, 1961, the official liquidator of the mills company claimed that the

notices should be quashed and or set aside and cancelled and also for certain directions and an order of injunction restraining the appellants from in

any way assessing or reassessing the mills company for the above six assessment years. The grounds in support of the claims made in the summons

appear in paragraph 26 of the affidavit in support dated July 1, 1967, made by B. J. Rele, the then official liquidator.

5. The main contentions made before the learned judge on behalf of the mills company were that the reassessment proceedings (under the above

notices u/s 148 of the Income Tax Act, 1961) against the mills company could only be instituted or commenced after first obtaining leave of the

company court u/s 446(1) of the Companies Act, 1956. The consequential submission was that the proceedings having been concerned without

such leave were without jurisdiction and a nullity.

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

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

Act, and

(2) assuming that the reassessment proceedings started under the above notices were ""legal proceedings "" leave of the company court under sub-

section (1) of section 446 of the Companies Act was not necessary, because the Income Tax Officer alone had exclusive jurisdiction to make

reassessment and to determine the tax liability. The proceedings were such as in respect whereof no civil court, including the company court, could

have jurisdiction of any kind.

7. This contention is hereinafter referred to as the. above second contention tion. The learned judge accepted the contentions made on behalf of

the official liquidator and observed that on the plain reading of section 446(1) there was no reason whatsoever for coming to the conclusion that

the expression ""legal proceedings"" would not include a proceeding for assessment or reassessment under the Income Tax Act. In support of that

observation the referred to the decision of the Federal Court in the case of Governor-General in Council v. Shiromani Sugar Mills 1; where also

the question of the true effect and construction of section 171 of the Indian Companies Act, 1913, which is in Pari materia with the provisions of

section 446(1) of the Companies Act, 1956, arose. Reference was also made to the case of Abdul Aziz v. State of Bombay where a Division

Bench ot this court came to, consider the phrase ""legal proceedings "" as contained in the Sales Tax, Act, 1953, and in that connection referred to

the provisions of section 7(e), of the Bombay General Clauses, Act. Reference was also made in that very connection to the-decision of the

Supreme Court in the case of Union of India v. India Fisheries Pvt. Lid., where the Supreme Court came to consider the true effect of section

446(1). The learned judge negatived the submission made by Mr. Joshi for the appellants that the phrase "" legal proceeding "" was synonymous

with judicial proceeding "".

8. In connection with the above second contention Mr. Joshi for the appellants relied before the learned judge and in this appeal on the decision ,of

the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India 1. In that case the Supreme Court had made certain

observations which might have been construed as supporting the second contention made by Mr. Joshi, but the learned judge held these

observations to be Per incuriam and rejected the contention. The learned judge accordingly granted an order of injunction as already recited

above.

9. In this appeal, Mr. Joshi for the appellants once again contends that the proceedings under the Income Tax Act for assessment of Income Tax

liability could not justifiably be held to be "" legal proceedings"" within the meaning of section 446(1) of the Companies Act, 1956. In that connection

he emphasised that the proceedings are under a special Act and are undertaken by a special officer nominated for the purpose in accordance with

the scheme of the Act. Under the Act, a statutory duty is imposed on that officer alone to initiate and proceed further with such proceedings and in

those proceedings to ascertain the quantum of the liability to pay Income Tax in respect of assessees and or matters falling within his jurisdiction.

He submitted that proceedings of the above kind undertaken by a special officer designated and nominated in accordance with the scheme of the

Act for ascertaining liability as prescribed by the Act cannot be "" legal proceedings "" within the meaning of that phrase in the above section. In that

connection he submitted that the observations of the Division Bench of this court in the case of Abdul Aziz v. Slate of Bombay, must be restricted

to the facts of that case and in particular to the provisions in section 48(2)(ii) of the Sales Tax Act, 1953. Towards developing this submission, he

relied upon the decision of a single judge of the Allahabad High Court (Manchanda J.) in the case of Tika Ram and Sons Ltd. v. Commissioner of

Income Tax He sought to distinguish the observations of the Federal Court in the case of Governor-General in Council v. Shiromani Sugar mills 4

by submitting that the true effect of the observations of the Federal Court in that case was that the proceedings for enforcement and recovery of tax

already ascertained in the assessment proceedings were "" legal proceedings "". The prior actions taken by and before the tax officer up to the final

stage of ascertaiiiin"" the quantum of tax, i.e., the assessment proceedings, were not held in that case to be legal proceedings. He strongly relied

upon the observations made by Sen J. sitting singly in the High Court of Calcutta in the unre. ported case of Brahmaputra Tea Co. (India) Ltd. v.

Commissioner of Income Tax disposed of on April 25, 1969. In reply to submissions on the first contention strong reliance was placed on behalf

of the liquidator on the observation regarding the true construction and effect of the phrase ,, legal proceedings "" of the Division Bench of this court

in the case of Abdul Aziz v. State of Bombay. Strong reliance was also placed on the observations of the Federal Court in the case of Governor-

General in Council v. Shiromani Sugar Mills Ltd. as regards the meaning of the phrase "" legal proceedings "" whilst construing that phrase in section

171 of the Indian Companies Act, 1913. Reliance was also placed on the decision in the case of Raizganalha v. Government of Iladras" and it was

submitted that the meaning of the phrase "" legal proceedings "" as ascertained by the Federal Court in the case Shiromani Sugar mills was affirmed

by the Supreme Court in that case. Reliance.was also placed on the observations of the Supreme Court in the case of Union of India v. India

Fisheries Pvt. Lid.,", where the question of the true construction of section 171 of the Indian Companies Act, 1913, had arisen before the

Supreme Court.

10. We do not propose to decide the correctness or otherwise of the arguments advanced on behalf of the parties on the above first contention

made by Mr. Joshi because, as discussed hereunder, having regard to the observations of the Supreme Court in the case of Dainji Valji Shah v.

Life Insurance Corporation of India it would be incorrect to hold that in respect of the assessment proceedings adopted against the mills company

leave of the court was necessary u/s 446(1) of the Companies Act, 1956. It is convenient to deal with the above second contention made on

behalf of the appellants at this stage.

11. It is first necessary to refer to the relevant parts of sections 442, 446, 530 and 537 of the Companies Act, 1956, on which reliance has been

placed by both sides. These sections are in pari materia with the provisions in sections 169, 171, 230 and 232 of the Indian Companies Act,

1913.

12. Section 442 relates to the power of court to stay or restrain proceedings against a company pending the hearing of a petition for winding up

and authorises the winding-up court to stay any suit or proceeding.

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

(1) When a winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal

proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company except by leave

of the court and subject to such terms as the court may impose.

(2) The court which is winding up the company shall, nothwithstanding anything contained in any other law for the time being in force, have

jurisdiction to entertain, or dispose of -

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

(c) any application made u/s 391

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

of the company;

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is

proceeding may, notwithstanding anything contained in any other law for the time being in force, be transfer erred to and disposed of by that court.

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

14. Sub-sections (2), (3) and (4) were inserted in section 446 by section 165(2) of the Amending Act (65 of 1960). The provisions of these

subsections do not form part of the provisions in section 171 of the Indian Companies Act, 1913, which was in all respects in Pari materia with

sub-section section (1) of section 446.

15. Section 530 relates to preferential payments and, inter alia, has the effect of providing that in a winding up the ground rent and or debts due,

and tax and or revenue dues will have not any priority unless the same became due within twelve months next before the date of winding-up.

16. Section 537, inter alia, provides that attachment, distress or execution put in force and execution sales held without leave of the winding-up

court shall be void. Sub-section (2) provides :

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

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

18. The facts in the case of Damji Valiji Shah v. Life Insurance Corporation of India may be shortly stated as follows : On or about July 1, 1.95,6,

a surn of Rs. 82,000 was alleged to have been transferred from the life fund of the Vishwabharati Insurance Company, Bombay, to its general

department contrary to the provisions in the Insurance Act, 1938. On January 19, 1956, the Life Insurance Corporation Ordinance was

promulgated and thereafter on July 1, 1956, the Lift Insurance Corporation Act came into force. On November 9, 1959, the Vishwabharati

Insurance Company was ordered to be wound up. Subsequent thereto the Life Insurance Corporation of India instituted a petition before the Life

Insurance Tribunal, Nagpur, claiming the sum of Rs. 82,000 as being payable, under the scheme of the above ordinance and the Act, to the

corporation by the insurance company. u/s 15 of the Act the Tribunal had jurisdiction to deal with the claim made. In fact, the tribunal, while

decreeing the claim of the corporation, negatived the contention made on behalf of the insurance company that the leave ot the High Court of

Bombay as a winding-up court was necessary u/s 446(1) for proceeding with the petition. In the appeal filed in the Supreme Court against the

decree passed by the tribunal, on behalf of the appellants it was contended that the Tribunal had no jurisdiction to proceed with the proceedings on

the petition presented by the corporation without the leave of the High Court in view of section 446 of the Companies Act, the company having

been ordered to be wound up by the High Court on November 9, 1959. We are nor. concerned with the other contentions made on behalf of the

appellants. In paragraph 16 of its judgment the Supreme Court summarised the provisions of section 446 which we have quoted above. In

paragraph 17 the Supreme Court referred to section 41 of the Life Insurance Corporation Act, and to the.fact that the section provided that no

civil court shall have jurisdiction. to entertain or adjudicate upon any matter which the tribunal is empowered to decide or determine under the Act.

It was observed:

The tribunal is given the exclusive jurisdiction over this matter.

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

It is in view of the exclusive jurisdiction which sub-section (2) of section 446 of the Companies Act confers on the company court to entertain or

dispose of any suit or proceeding by or against a company or any claim made by or against it that the restriction referred to in sub-section (1) has

been imposed on the commencement of the proceedings or proceeding with such proceedings against a company after a winding-up order has

been made ..... It must follow that the consequential provisions of subsection (1) of section 446 of the Companies Act will not operate on the

proceedings which mav be pending before the tribunal or which may be sought to be commenced before it.

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

:

In view of section 41 of the L.I.C. Act the company court has no jurisdiction to entertain and adjudicate upon any matter which the Tribunal is

empowered to decide.or determine under that Act.

In paragraph 19 the Supreme Court stated:

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

Act relating to companies in general.

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

the facts in the case of Da ""i Valji Shah v. Life Insurance Cortoration of India in so far as the question as regards the application of the provisions in

sub-section (1) of section 446 arises. His submission is that the Income Tax Act, like the Life Insurance Corporation Act has created machinery of

a complete code providing for assessment of Income Tax dues. The provisions of the Act in all respects are such that no civil eourt could eve'' be

constituted as an officer to set in motion proceedings for assessment of Income Tax dues. His submission is that, apart from the Income Tax

Officer who is under the scheme of the Act authorised to set in motion machinery for assessment of Income Tax dues, none other could in law

have the authority to commence or deal with the question of assessment of Income Tax. dues. Re has in that connection strongly relied upon the

analysis of the provisions in the Income Tax Act as appearing in the case of Commissioner of Income Tax v. Tribune Trust, Lahore '' decided, by

the Judicial Committee. It is sufficient to state that in connection with the provisions of the Income Tax Act, 1922, the judicial Committee noticed

chapter by chapter the provisions of the Income Tax law and the scheme thereof, inter alia, in respect of the charging sections, deductions and

assessments, recovery and penalties, refunds and notices, the sections prescribing the duties of the Income Tax authorities and the right of appeal

to the Assistant Commissioner, and such other matters. The judicial Committee also noticed section 67 of the Act which, inter alia, provided that

no suit shall be brought in any civil court to set aside o'' modify any assessment made under that Act. Now the judicial Committee reviewed the

code of Income Tax law for the purpose of showing that it exhaustively defines the obligations and remedies of the taxpayer. The findings read as

follows:

Their Lordships are of opinion that the only remedies open to the taxpayer, whether in regard to appeal against assessment or to claim for refund,

are to be found within the four corners of the Act. This view of his rights harmonises with the provision of section 67, to which reference has

already been made, that no suit-shall be brought in any civil cotirt to set aside or modify any assessment ATade under the Act. It is the Act which

Prescribes both the remedy and the manner in which it may be enforced.

Mr. Joshi is right in his submission that the distinction sought to made by Mr. Chagla in the scheme of the Income Tax Act and the Insurance

Corporation Act which was before the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India 1, that the Income

Tax Act does not contain any provision like that contained in section 41 of the Life Insurance Corporation Act ousting the jurisdiction of civil

courts is a distinction of no consequence at all. It is quite clear that in connection with the assessment to ascertain the quantum of Income Tax a

separate iridepeiident machinery and or a complete code is provided in the Income Tax Act. It is not possible to make a study of dach and every

relevant provision of that Act in this judgment. That the Act provides for assessment of the quantum of Income Tax dues by the Income Tax

Officei%and further provides for an appeal to the Appellafe Assistant Commissioner and provides for a reference only on questions of law to High

Courts is well-known. There are detailed provisions in the Act in respect of commencing proceedings for reassessment of escaped income with the

sanction of the Income Tax Commissioner. The right of appeal is also circumscribed and there is a provision for deposit of tax before any appeal

could be filed. Now it is true", that in sub-section (2) of section 446 it is provided that,"" notwithstanding anything contained in any!other law for the

time being in force "", the winding-up court would have jurisdiction to entertain any proceeding by or against the company. It is also true that, having

regard to the language in this sub-section, an argument that the winding-up court has acquired jurisdiction to assess Income Tax liability of the

company in winding up could be advanced and has been advanced on behalf of the original applicant. Reliance has been placed in that connectioij

on the phrase "" notwithstanding anything contained in any law for the time being in force "". Now it appears to us that the constitution of the civil

court acting as a winding-up court is such that it would be impossible for such court to act as Income Tax Officer 1 and commence assessment

proceedings. In this connection we are not called upon to find out the limitations on the powers of the winding-up court in respect of proceedings

referred "to in sub-section (2). It is quite clear that, having regard to the scheme for assessment for quantum of Income Tax contained in the

Income Tax, Act, a, civil court and or a winding-up court could not ""entertai nor dispose of"" assessment proccedings The procedure prescribed is

altogether, so foreign to the proceedure prescribed for it that a civil court would not, be able to put into,effect the machinery prescribed by the

Income Tax Act. This discussion has the effectof holding that the absence of a provisioiri like section 41 of the Life, Insurance Corporation Act in

the Income Tax Act does not alter oraffect the established position that the Income Tax Act, in so far as the proceedings for assessment are

concerned, provides for a scheme of a complete code. This part of the scheme of the Act is such as can never be enforced through the machinery

of a civil court. It is this reason that we have not been able to appreciate Mr. Chagla"s contention that the absence of a provision like section 41 of

the Life Insurance Corporation Act in the : Income Tax Act is an important distinction and that for that reason thelobservations in paragraph,18 of

the judgment of, the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India are not applicable to the facts of the

present case.

Now it is quite clear that the Supreme Court has held in the above paragraph that the provisions of sub-section (1) of section 446 are

consequential to the provisions of sub-section (2) of section 446 and that this is so because under sub-section (2) exclusive jurisdiction is conferred

on the company court to dispose of all suits or proceedings by or against a company and further that the consequential provisions of sub-section

(1) of section 446 are not attracted and cannot be applied to proceedings (like those before the Life Insurance Tribunal) before an administrative

tribunal and or a tribunal which is given exclusive jurisdiction to decide and determine matters arising under the relevant Act. Apparently, in

connection with matters of exclusive jurisdiction triable by special tribunals in paragraph 19 the Supreme Court observed that:

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

relating to companies in general.

It appears that the court formulated a view that in matters which are by special Acts liable to be decided, determined and disposed of by special

tribunal of exclusive jurisdiction, the company court will not have any jurisdiction under sub-section (2) of section 446 and that, consequently, in

connection with such matters or proceedings, even if they are legal proceedings, leave of court would not be necessary under sub-section (1) of

section 446.

Mr. Chagla contended that in this connection we should first notice the scheme of the Companies Act, 1913, and particularly the provisions of

section 171 thereof. He rightly submitted that the phrase "" legal Proceedings "" in section 171 related to the same matter as is contained in sub-

section (1) of section 446. He rightly submitted that spction 171 and this phrase in the section was the subject-matter of decision of the Federal

Court in the case of Governor-General in Council v. Shiromani Sugar Mills 2 and the construction of that phrase as made by the Federal Court has

been "ited with approval by the Supreme Court in the case of Ranganathan v. Government of Madras 3. Though the section was not referred to,

there was some discussion about the jurisdiction of the company court and the Income Tax authorities in the case of Union of India v. Fisheries

Pvt. Ltd. 4 His submission was that the observation of the Supreme Court in the case of Damji Valji Shah v. Lifd Ittsurance Corporation of India 1

had in no way limited or restricted the Incaning of the phrase "" legal proceedings "". He strongly relied upon the fact that sub-section (1) of section

446 was the only part of that section before the Amending Act 65 of 1960 introduced sub-sections (2), (3) and (4). lle therefore was emphatic in

his submission that these newly added sub-sections had not changed the meaning of the phrase "" legal proceedings "" and that the phrase must be

held to have continued to have the same meaning as was ascertained by the Federal Court in the case of Shiromani Sugar Mills. In his submission

the consequence of the observation of the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India was that the

winding-up court would have exclusive jurisdiction under the Indian Income Tax Act and would therefore be entitled to proceed under that Act to

assess the quantum of tax dues of the mills company and he therefore argued that the assessment proceedings against the mills company would

become stayed in accordance with the provisions in section 446(1). In his submission wherever conflict of jurisdiction for disposing of claims

against a company appeared it would be settled by de4ding if the jurisdictional provisions are special and or general. The special would exclude

the general. In his submission the provisions in section 148 of the Income Tax Act where-under the notices in question were issued was a general

provision relating to all assessees. On the contrary, in connection with the very same matter section 446(2) was a special provision applicable only

to companies in winding-up. In the result, the proceedings u/s 148 were liable to be set aside. In this connection he particularly relied upon the

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

In connection with these contentions it first requires to be recorded that in the case of Shiromani Sugar Mills the question related to the

proceedings commenced u/s 46(2) of the Income Tax Act for recovery of already assessed tax. Though the assessment, of the quantum of tax had

taken place subsequent, to the date of the windin ''up, order, the question thatthe assessment proceedings were unauthorised or, invalid because

leave of the court u/s 171 had not been obtained was not raised or decided. In connection with the recovery-proceedings thecourt was called

upon to find out the true, meaning. of the phrase "" legal proceedings as contained in section 171. In that connection the court first noticed that u/s

239 of the Indian Companies Act, 1913, only limited priority was fixed in connection with Crown debts. Ordinarily, Crown debts ranked

for.payment pari Passu with ordinary creditors. The court also noticed that except for the machinery provided in section 171 - for compelling the

de art leave of court before proceeding to make recovery, there was no machinery for having the account of the monies recovered and for securing

the recovered monies into court so that the assets of the company in winding up were duly distributed Pari Passm amongst all the ordinary

creditors. In connection with the meaning of the phrase "" legal proceedings "" the argument on behalf of the revenue was that it must be in the nature

of a suit and reliance was placed in that connection on the observations of the Full Bench of the High Court at Lahore in the''case of Shakuntala v.

Peoples'' Bank of Northern India Ltd. The Federal Court negatived the submission. The court observed that : ""The phrase '' legal proceedings ''

need not be confined to original proceedings in a court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint.

Section 171 must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets

of a company in liquidation laid down by the Act.

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

:..... no narrow construction should be placed upon the words (or other legal proceedings" in section 171. In our judgment, the words can and

should be held to cover distress and execution proceedings in the ordinary courts. In our view, such proceedings are other legal proceedings

against the company, as contrasted with ordinary suits against the company.

21. The further observations were :

"But we see no reason why in British India no "legal proceeding" can be taken otherwise than in an ordinary court of law, or why a proceeding

taken elsewhere than in an ordinary court of law, provided it be taken in a manner prescribed by law and in pursuance of law or legal enactment,

cannot properly be described as a "legal proceeding ".

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

Sales Tax Act, 1953, that "" " legal proceeding" in its normal connotation can only mean a proceeding in accordanc with law, and there can be no

doubt that assessment proceedings under the Sales Tax Act are such prodeedings.

23. The further relevant observation was that "" It must be remembered in this context that the expression "legal proceedings " is not synonymous

with "judicial proceedings". Proceedings may be legal even if they are not judicial proceedings, if they are authorised by law; and Mr. Palkhivala,

by his argument, undoubtedly requires us to equate the expression "legal proceeding " in section 48, sub-section (2)(ii), with judicial proceedings,

for which, our opinion, there is no warrant in law.

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

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

Now Mr. Chagla insisted that having regard to the history of the legislation in section 171 and section 446(1) and the above observations in

connect tion of India, which has affected the above position. In support of that submission he has placed strong reliance on the contents of sub-

sections (3) and (4) of section 446. Now it is quite clear that under sub-section (4) of section 446, in spite of a winding-up order having been

made in connection with proceedings pending in appeal before the Supreme Court or a High Court, leave u/s 446(1) is unnecessary. It is also clear

that under sub-section (3) the winding-up court, in its discretion. may, notwithstanding anything contained in any other law for the time being in

force, transfer to itself any suit or proceeding and dispose of the same. Relying on this part of the section, Mr. Chagla sought to argue that under

sub-section (2) exclusive jurisdiction is created in a winding-up court in connection with the matters mentioned in that sub-section. He, therefore,

argued that the true effect of the observations of the Supreme Court in the case of Damji Yalji Shah v. Life Insurance Corporation of India 1 was

that in each and all proceedings in whi"h a claim is made for or against a company in liquidation the same was within the jurisdiction of the company

court and for that reason the assessment proceeding commenced by the, impugned notices was within the jurisdiction of the company court. We

should, therefore, hold that the order of injunction granted by the learned judge was justified and correct.

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

the reasons following :

(1) The second contention made for the appellants is on an assumption that the notices for reassessment issued under . section 148 of the Income

Tax Act, 1961, were in respect of legal proceeding overed by sub-section (1) of section 446.

(2) In connection with its findings regardin the true meaning and effect of the provisions in sub-sections (1) and (2) of section 446 the Supreme

Court did not find it necessary in the case of Damji Valji Shah v. Life Insurance CorPoration of India 1 to discuss, the connotation of the phrase

legal proceedings "". The Supreme Court further found it entirely unnecessary to refer to the provisions in sub-sections (3) and (4) of section 446

and other relevant sections such as sections 442, 530k and 537.

(3) The Supreme Court arrived at its findings regarding the true effect of the provisions in sub-sections (2) and (3) of section 446 in spite of, and

we must presume with the full and complete knowledge of, the provisions in subsections (3) and (4) of section 446 and all relevant sections,

including sections 442, 530 and 537.

(4) The main ratio of the decision of the Supreme Court was, as already discussed above, that the provisions in sub-section (1) of section 446

were consequential provisions for the reasons discussed in the first part of paragraph 18 of the judgment. For that reason the Supreme Court found

that having regard to the special provision conferring jurisdiction on'' a special tribunal u/s 41 of the Life Insurance Corporation Act and the general

provisions of that Act being in a special Act "" will override the provisions of the general Act, viz., the Companies Act."" The Supreme Court must

be held to have held that in the context of a special Act like the Life Insurance Corporation Act the provisions in sub-sections (1) and (2) of

section 446 were provisions of a general Act and provisions in a special Act and or special provision like that in section 41 of the Life Insurance

Corporation Act would override the provisions in sub-sections (1) and (2) of section 446.

We are unable to accept the argument made by Mr. Chagla that the provisions in sections 148 and 142 of the Income Tax Act are general

provisions, and the scheme of those provisions was liable to be overridden by the provisions in sub-sections (1) and (2) of section 446(1) as being

special provisions. The scheme in sections 148 and 142 of the Income Tax Act and the scheme thereof for assessment of quantum of tax must be

considered in Pari malaria with the provisions in section 41 of the Life Insurance Corporation Act. These sections and the above scheme are in a

special Act investing jurisdiction in special tribunals and accordingly such as would "" override the provisions of the general Act, viz., the Companies

Act "".

25. Now it is true that in the case of Union of India v. India Fisheries Pvt. Ltd.", in connection with the recovery proceedings envisaged by section

49E of the Income Tax Act, in the context of the provisions in sections 228 and 229 of the Companies Act, 1913, in consonance with the previous

decision of the Federal Court in the case of Governor-General in Council v. Shiromani Sugar Milis Ltd., the Supreme Court observed :

Section 49E is a general provision applicable to all assessees and in ,all circumstances; sections 228 and 229 deal with the proof of debts and

their payment in liquidation.

26. The Supreme Court decision was on the footing that the provisions of section 49E were overridden by the provisions in section 228 and 229

of the Indian Companies Act, 1913. Similar provisions in the Income Tax Act, 1961, and the Companies Act, 1956, will bear the same effect. It,

however, requires to be noticed that the scheme of the Companies Act in the chapter relating to winding up of insolvent companies as regards

unsecured debts is like that in the Provincial and Presidency Towns Insolvency Acts for satisfaction of these debts Pari Passu, i.e., for distribution

of the available assets between the creditors in the proportion of their claims. Sections 228 and 229 enact the"above scheme. Provisions like these

in respect of companies in winding-up as contained in the chapter relating to companies in liquidation in the Companies Act would always override,

as being special provisions, proceedings for recovery of tax dues and the special provisions like section 49E enact"d in the Income Tax Act. Even

so, the effect of the decision of the Supreme Court in Damji"s case 1 is that where claims arise for decision by special tribunals and or special

officers like Income Tax Officers in the present case under special jurisdiction, the provisions in sub-sections (1) and (2) of section 446 must be

considered as general provisions only. The matter is not res integra. We are, therefore, unable to accept Mr. Chagla"s contention that the

impugned notices were liable to be stayed by issuing an order of injunction because the Supreme Court had not changed or restricted the meaning

of the phrase "" legal proceedings "" as construed by the Federal Court and the Supreme Court in Goveritor-General in Council v. Shiromani Sugar

Mills Ltd. 1 and Union of India v. India Fisheries Pvt. Ltd.

27. The alternative contention in this connection was that in so far as the observations of the Supreme Court in Damji"s case 1 alter and or restrict

the meaning of the phrase legal-proceedings "" the same are casual and or made in :passing. The submission was that the observations were not

relevant to arrive,at the findings which the Supreme Court made. The further submission in the alternative was that the findings of the Supreme

Court in connection with sub-sections (1) and (2) of section 446 were patently in ignorance of the relevant provisions in sub-sections (3) and (4) of

section 446, as also. in sections" 442, 530 and 537 and certain other sections of the Companies Act. These findi"s were made in ignorance of the

above decision of the Federal Court, as also of the, Supreme Court, in the two cases iust mentioned., These findings were therefore Per,incursam

and we are not bound to follow them. In that connection reference was made to Salmond on jurisprudence, 12th edition," page 151, where it is,

inter alia, stated that the precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. ""The rule

apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise

terms of" the statute."" The lower court may refuse "to follow the later decision on the ground chat it was arrived at per incuriam.

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

upon to ascertain the true effect of the provisions of sub-sections (1) and (2) of section 446 as the main important point in the case of Damji. It is

impossible"to imagine that the contents of sub-sections, (1)" and (2) of section 446, on which reliance is sought to be placed by Mr. Chagla, was

not present to the mind of the Supreme Court in deciding the case of Damji. Paragraph 18, gwhich we have already quoted above, contains direct

reasoning of the court for the findings made in paragraphs 18 and 19 for arriving at the true construction and effect of the above two sub-sections.

We are also unable to imagine that the Supreme Court was, whilst dealing with the provisions of these two sub-sections, unaware of the provisions

of sub-sections (3) and (4) of section 446 and the relevant sections or the scheme of the Companies Act. We, therefore, reject these alternative

submissions made by Mr. Chagla.

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

the appellants fail.

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

1967, set aside.

31. Having arrived at the above conclusion on the above second contention made on behalf of the appellants, we do, not fintl it necessary to deal

with the first contention made on behalf of the appellants. It is only necessary to refer in a very summary way to the arguments advanced in support

of that contention.

32. Mr. joshi contended that the proceedings initiated by''the above impugned notices being assessment proceedings, were not covered by the

phrase ""legal proceedings"" as contained in sub-section (1) of section 446. The contention was that up to the stage that the liability to tax was

quantified, assessment proceedings would not be such legal proceedings because to that stage the department does not become creditor of the

company. Up to that stage the debt itself is not ascertained and or quantified. Legal proceedings would be those which would directly affect the

assets and properties of a company in winding-up. This was so because the object of the provision in sub-section (1) of section 446 was to

facilitate protection and realisation of assets and to prevent wasteful litigation in regard thereto. The scheme in winding-up was to have the secured

assets distributed pari Passm among general creditors and to prevent a scramble by creditors of a company in winding up by taking custody and

possession of assets of such company., The argument was that, in respect of proceedings which could not be with drawn by a winding-up court for

trial by itself leave under sub-section (1) of section 446 was unnecessary. The assessment proceedings were proceedings which an Income Tax

Officer undertakes in discharge of a statutory duty irnposed on him as such officer by the Income Tax Act and therefore thes, are not legal

proceedings. The contentions in reply were that the object of winding up was to collect assets of a company in winding up and to satisfy the claims

of all the ordinary creditors pari Passu. Sub-section (1) of section 446 provided for stay of proceedings of every kind which were in the nature of

claims against a company in winding-up. The object of sub-section (1) was to enable the company court to get complete control over all claims

which might arise against the company in wiinding-up. For these reasons the phrase ""legal proceedings"" should be given the widest possible

meaning. This phrase means action to recover any claim which may result into an order or a decree that can be recovered by legal process. The

submission was that the charging section in the Income Tax Act created a debt and the proceedings for quantification thereof must be held to be a

claim for decision of a claim against a company in winding. up. The submission svas that the notices u/s 148 of the Income Tax Act activates the

machinery of taxation law from quantification till recovery of the tax dues. There was accordingly no warrant to distinguish the stage of recovery of

tax dues from the anterior stage for quantification of the tax liability.

33. As already stated in the above discussion in connection with these contentions, there are extremely relevant observations in the decision of the

Federal Court in the case of ''overnor''General in Council v. Shiromani Sugar Mills Lid.'' and of the Supreme Court in the case of Union of India v.

India Fisheries Pvt. Ltd. There are also relevant observations in the case of Abditl Aziz v. State of Bombay. We, however, find it unnecessary to

discuss these decisions and to arrive at any finding as regards these,'' rival contentions, in view of the fact we have accepted the above second,

contention Inade on behalf of the appellants.

34. In the result, the appeal is allowed and the order made by Mr. justice Virnadalal, dated September 28, 1967 is set aside. The judge'' summons

dated July 1, 1967, is dismissed with costs. The respondent to pay the appellants'' costs.