(1968) 05 CAL CK 0031

Calcutta High Court

Case No: Appeal from Original Order No. 193 of 1956

Bangeswari Cotton Mills Ltd		APPELLANT
	Vs	
Dhanraj Govindram and Others		RESPONDENT

Date of Decision: May 31, 1968

Acts Referred:

- Companies Act, 1956 - Section 163(1), 422, 433, 433(f), 434

Citation: 78 CWN 414

Hon'ble Judges: Sisir Kumar Mukherjea, J; Arun Kumar Mukherjea, J

Bench: Division Bench

Advocate: Somnath Chatterjee, for the Appellant;B. Das with S.B. Mukherjee, for the Respondent

Final Decision: Dismissed

Judgement

S.K. Mukherjea, J.
This appeal is directed against an order of Datta J. made on June 24, 1966 for winding up of the appellant company on the grounds that the company is unable to pay its debts and that it is just and equitable that it should be wound up. The company was incorporated in 1920 to carry on the business of cotton spinners, linen manufacturers, cotton, flax hemp and jute merchants.

2. On January 24, 1963 the Company entered into an agreement with Standard Dyes Private Ltd. whereby Standard Dyes agreed to purchase cotton and pay for the purchases on behalf of and in the name of the company. Under the agreement, Standard Dyes were also to guarantee payment to the suppliers in consideration of commission at one percent on the value of the yarn.

3. On September 4, 1964 in a shareholder''s action. Mr. S.M. Dutt was appointed Receiver of yarn and cloth manufactured by the company. The order was made by consent of parties. As the order is of some importance for deciding this appeal, it may be set out in extenso.

As and by way of interim arrangement for the protection of the defendant company''s interest and without prejudice to the respective rights and contentions of the parties, the following order is made by consent of the parties appearing, to remain effective till the disposal of this application : --

(i) Mr. S.M. Dutt is hereby appointed Receiver of yarn and cloth manufactured by the company with power to sell the same or part and raise money thereon. The Receiver will be at liberty to sell the same to other parties.

(ii) Mr. S.M. Dutt shall have power to purchase stores and raw cotton for the company and pay for the same.

(iii) Mr. S.M. Dutt shall have power to pay all costs, charges and expenses for running the mills including electrical expenses and decretal dues if any and to issue such orders for the administration as he may think necessary.

(iv) Mr. S.M. Dutt shall have power to open new account of the defendant company and to operate thereon.

(v) Mr. Dutt shall have power to receive all monies receivable by the company including those from Mohanlal Hariram and Standard Dyes Pvt. Ltd. and to give discharge therefor.

(vi) Mr. S.M. Dutt will be entitled to take such assistance, financial or otherwise, from such persons as he thinks fit in discharging his duties and exercising his powers under this Order.

(vii) No meeting of the Board of Directors to be held.

(viii) The Receiver is appointed without any remuneration and without any security.

(ix) All parties including Receiver are directed to act on a signed copy of the minutes.

4. It appears that under certain contracts the Receiver purchased large quantities of cotton from the petitioning creditor through Standard Dyes in terms of the agreement dated January 24, 1963. Standard Dyes paid by cheques a total sum of Rs. 4,87,538.53 for these purchases to the petitioning creditor. These payments were presumably made by Standard Dyes under the agreement of January 24, 1963. The cheques were all dishonoured. Thereafter by a letter of March 20, 1965, the respondent asked the Receiver and the company to pay the said sum of Rs. 4,87,588.53 but in vain.

5. On March 20, 1965, the respondent served a notice on the company u/s 434 of the Companies Act

6. The Company did not make any payment nor did it reply to the notice.

7. Thereafter on June 4, 1965, the petition for winding up was presented by the respondent. In the petition, it is said that the company is indebted to the petitioner

in the sum of Rs. 4,87,588.53 with interest at the rate of 6 percent, per annum from due dates till payment is made and the said sum is due and payable in respect of supplies or sales of cotton made by the petitioner to the said company; that the petitioner called upon the company for the payment of the aforesaid dues through its solicitor by a notice which was served on the company on March 23, 1965 by registered post. The company failed and neglected to reply to the said letter, which was a statutory notice as provided by section 434 of the Compapanies, Act; that the company is unable to pay its debts and the petitioner is entitled to present the petition u/s 433 of the Companies Act 1956.

8. In the petition, it is also contended that is any event, it is just and equitable that the company should be wound up under the provisions of the Companies Act. In support of this contention, it is said that the company has, for all practical purposes, stopped carrying on business and the two groups in the management are fighting with each other; that a suit and three appeals are pending in this Court in proceedings brought by the contesting groups and that in those appeals a Receiver has been appointed of the properties and assets of the company; that the parties have failed to supply any funds to the Receiver with the result that the working of the company has totally stopped and even the wages of the workers are in arrears. It may be added, that a copy of the statutory notice on which the respondent relies has been annexed to the petition.

9. In answer to the petition, the Secretary of the company made an affidavit. The company denied its debt. It also denied that the petitioner had sold any cotton to the company as alleged. The company claimed that there never was nor is any privity of contract between the petitioner and the company as will appear from these facts: --

(a) By the agreement of January 24, 1963 entered into between the company and Standard Dyes Ltd. it was provided that Standard Dyes would purchase cotton on behalf of and in the name of the company as per requirements and requisitions of the company and that Standard Dyes would arrange for payment of price of cotton on behalf of the company.

(b) Pursuant to the said agreement Standard Dyes used to purchase cotton from the petitioner and the petitioner used to receive their payments towards the price of cotton so sold from Standard Dyes Ltd.

(c) A suit was filed in this Court being Suit No. 1536 of 1964 by two of the shareholders against the company, some of its directors and against Standard Dyes for certain declarations. In that suit, by a consent order dated September 4, 1964, Mr. S.M. Dutt was appointed Receiver of yarn and cloth manufactured by the company with power to purchase stores and raw cotton for the Company and pay for the same.

(d) By virtue of the said Order, the Receiver purchased cotton from Standard Dyes and paid the price to Standard Dyes as will appear from the accounts submitted by the Receiver.

10. It was claimed that as the alleged statutory notice was illegal and void, no reply was called for. The company denied that it is unable to pay its debts. Moreover, the suits and appeals have been settled and Mr. Ajit Roy Mukherjee who was appointed Receiver in the Appeals has been discharged. It was denied that it is just and equitable that the company should be wound up as alleged or at all.

11. A copy of an affidavit affirmed by the Receiver Mr. S.M. Dutt on March 1, 1965 in respect of the Accounts from 5th September 1964 to 11th January 1965 filed by him has been annexed to the affidavit. It appears from the Receiver''s Statement of Account with Standard Dyes Private Ltd. that the Receiver received in cash and by raw materials and stores Rs. 11,79,458.56 and paid in cash and by goods Rs. 11,11,543.50 leaving a balance of Rs. 67,915.06 due to Standard Dyes.

12. It also appears that Standard Dyes claimed a commission at the rate of 1 percent on the value of yarn sold.

13. Affidavits were filed in support of the petition by the supporting creditors Gill & Co. Ltd., Jatia Cotton Mills Ltd., and by the Assistant Collector of Central Excise on behalf of the Union of India.

14. Shantilal Shah, in an affidavit made on behalf of Gill & Co said that the company failed to make payment for cotton and to lift large quantities of cotton, awaiting delivery under pending contracts. Mr. Ajit Roy Mukherjee, the Receiver appointed in Appeal No. 244 of 1964, agreed to lift the balance of the goods, pay carryover charges in the manner recorded in a letter of February 9, 1965 and also pay for the goods within 15 days of delivery. Relying on the said agreement, Gill & Co. delivered the goods but payment was not made as agreed upon. Some cheques were given in part payment but they were repeatedly dishonoured on presentation. Some payments were made in driblets. A sum of Rs. 44,172:54 p. is due to Gill & Co. from the company. Mr. A.K. Roy Mukherjee, the Receiver admitted that a sum of Rs. 42,472.54 p. was due by the company. Thereafter, on September 4, 1965 Gill & Co. served a statutory notice on the company for winding up. Messrs. Gill & Co. in their affidavit contended that the company is unable to pay its debts and that it is also just and equitable that it should be wound up.

15. Jatia Cotton Mills Ltd., another creditor of the company made an affidavit in support of winding up. In a suit brought by them against the company, a decree was passed by consent for the inconsiderable sum of Rs. 1,800 which was payable in three equal instalments. The company has failed to pay the decretal debt. In their affidavit, they also contended that the company is unable to pay its debts.

16. The Assistant Collector of Excise, in his affidavit said that a sum of Rs. 1,52,372.87 became payable by the company on account of excise dues which the company agreed to pay in instalments. On the failure of the company to pay these revenue dues, action was taken by the Central Excise Department detaining the tools, implements and machinery of the mills. As the Central Bank of India claimed to be the hypothecates of these assets, no further action could be taken. The company never disputed these revenue dues. The Assistant Collector, on behalf of the Union of India, contended that the company is unable to pay its debts and submitted that a winding up order ought to be made.

17. In answer to the affidavit of the company, the petitioning creditor, who is the respondent before us, denied in an affidavit that there was no privity of contract between the company and the respondent. They relied on the agreement between the company and Standard Dyes, the contracts of sale entered into between the respondent and the company through Standard Dyes. They pointed out that Standard Dyes used to purchase cotton in the name of and on behalf of the company and made payments on behalf of the company. Goods were delivered to the company by the respondent and accepted by the company.

After the Receiver was appointed, the Receiver as also the company continued to employ Standard Dyes as their agents on a commission basis for purchase of cotton from the respondent. On September 4, 1964 Standard Dyes guaranteed to the respondent, due payment by the company of the price of goods sold and delivered. Between September 4 and December 31, 1964 the respondent, at the request of the Receiver and the Company, sold goods to the company of the value of Rs. 6,19,361.18 and the Receiver through his employees signed challans for the same. Under the Court''s order, the company used the goods for manufacture of cotton textiles and therefore, enjoyed the full benefit of the goods. The contracts and the invoices were all addressed by the respondent to the company. The Receiver himself admitted by a letter dated April 29, 1965 that the goods were received by the company.

18. Standard Dyes, as guarantor, have paid the respondent a total sum of Rs. 1,31,172.65 in part payment of price of goods sold and delivered, leaving a balance of Rs. 1,87,588.53 p. The respondent claims that the company as principals are liable to pay the same to the respondent and in any event, the respondent is not bound by any internal arrangement between the company and Standard Dyes.

19. In answer to the respondent''s claim against Standard Dyes as guarantor, it appears that Standard Dyes admitted that the goods were sold to the company and/or to the Receiver by the respondent and that they were the guarantors but they refused to pay on the ground that they were not liable to pay until the respondent obtained a decree against the company. Specimen copies of the contracts between the company and the respondent and relevant invoices, weight notes and correspondence have been annexed to the affidavit.

20. Before going into the merits of the appeal, we may dispose of certain technical objections as to the maintainability of the petition, raised on behalf of the appellant. It was contended that the petition does not disclose any ground for winding up, that no particulars of the debt have been given, and there is no evidence in the petition in support of the debt. Moreover, the statutory notice in which some particulars have been given, has not been verified at all. The petition also does not conform to Forms Nos. 45 and 46 of Appendix IV to the Companies Rules. On these grounds alone, it is said, the petition should have been summarily rejected.

21. Mr. Chatterjee relied on (1) In Re: East Kajoria Collieries Private Ltd., , certain observations of B.C. Mitra J. in (2) In Re: Bengal Luxmi Cotton Mills Ltd., at page 164, (3) Ram Kumar Agarwala and Another Vs. Buxar Oil and Rice Mills Ltd. and Another, (4) Re. Wear Engine Co. 10 Ch. App. 188 and (5) Re. Sleam Stocker Co. Lid. 19 Eq. 416 and contended that the grounds for winding up not having been stated in the petition, the Court should not go into any other evidence or affidavits to ascertain whether grounds for winding up have been made out or not.

22. In the case of (1) East Kajoria Colliery Ltd. the application presented certain peculiar features. The directors who controlled the creditor company also controlled the company which was sought to be wound up. The person who verified the winding up petition was a director of the debtor company. In reply to the statutory notice, the company admitted the debt. In these circumstances, there is no question that the particulars of the debt and how the debt was incurred, ought to have been pleaded in detail in the petition. In (3) Ram Kumar v. Buxar Oil and Rice Mills it was said that the petitioner must affirmatively establish that he is in fact a creditor. In Re. Iangham Skating Rink Company the petition did not contain the necessary allegations. The case of (3) Re. Steam Stocker Co. is of little assistance in this case. In (4) Re. Wear Engine Works Co. it was held that a winding up order will be refused if a sufficient case for winding up does not appear in the petition, though such a case is proved by evidence.

23. In the petition, it has been stated that the company is indebted to the petitioner in the sum of Rs. 4, 87, 588, 53 with interest at 6 percent per annum for sale of cotton; that the petitioner has duly served a notice on the company u/s 434 of the Companies Act; that the company has neither replied to the notice nor paid the debt. There is also the averment that the company is unable to pay its debts. The statutory notice has been annexed to the petition. In the notice, it has been stated that the petitioner''s claim is in respect of balance of price of cotton sold and delivered to the company and its Receiver from September 1964 till December 1964. It is true that the details of the transactions on the basis of which the debt has been incurred have not been pleaded. The nature of the claim, and the period during which the relevant transactions were entered into, have been stated in the notice. Mr. Das rightly contended that where the company does not dispute the debt in reply to the notice or does not reply to the notice at all, the need for pleading details

is not so insistent as it otherwise might have been. After all, the petition is not a plaint in an action for price of goods sold and delivered. The petitioner has to establish, no doubt, that there is a debt exceeding Rs. 500/-owing to him by the company. And when the proceedings are contested, the petition has to be read in the context of the company''s affidavit in opposition. The petitioning creditor''s affidavit in reply has also to be taken into consideration. In these circumstances, it cannot be said that the petition read with the statutory notice which is annexed to the petition does not disclose the grounds or is lacking in the necessary averments and essential particulars. Moreover, it has been stated in the petition that the company has for all practical purposes stopped carrying on its business and the two groups are fighting with each other; that in fact suits and appeals have been brought and preferred by rival groups against each other; that in The appeals, a Receiver has been appointed to take charge of the property and assets of the company; that the parties have failed to supply any funds to the Receiver with the result that the working of the company has totally stopped and even the wages of the workers are in arrears and that in the premises, it is just and equitable that the company should be wound up. Here again, the necessary averments have been made and grounds disclosed in the petition.

The petition is in substantial compliance with Forms No. 45 and 46. In any event, Rule 95 provides that a petition for winding up shall be in Form No. 45, 46 or 47 with such variations as the circumstances may require. Moreover Rule 9 provides that nothing in the Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice. The learned Judge has thought fit not to throw out the petition on the ground that the petition has departed from the prescribed Form in some measure and we do not think that we should interfere with the discretion exercised by the learned judge.

24. As for verification, the service of the statutory notice has been verified as true to knowledge. The statements made in the statutory notice have not been verified but the notice in this case is merely in the nature of amplification of the averments made in the petition which have been verified. The verification is in Form No. 3 as prescribed by Rule 21. That the verification does not comply with the requirements of Order 19 Rule 3 of the CPC is not a valid objection, for as was held in (6) Sarkar Estates (Private) Ltd. Vs. Kusumika Iron Works (Private) Ltd. and Others, , the Company Rules override the general provisions of the CPC in matters where specific provisions have been made by the Rules. It was urged that as there is no provision either in the Companies Act 1956 or in the Rules for filing of affidavits by supporting creditors, the learned judge ought not to have taken those affidavits into consideration. Mr. Chatterjee contended that supporting creditors are entitled to use affidavits only after they are substituted in the place of the petitioning creditor. Moreover, in the present case, the company did not have a chance to deal with those affidavits because no directions were given by the learned judge for reply.

25. Form No. 52 in Appendix IV to the Companies Rules clearly indicates that a creditor who supports the petition is entitled to be heard before the order is made. Form No. 9 which relates to Notice of intention to appear at the hearing is applicable both to the supporting as also to the opposing creditors. The Note provides that grounds of objection or copy of the affidavit, if any, should be served with the notice. Rule 34 speaks of grounds of opposition or affidavits to be used by persons who oppose the petition but does not specifically provide for affidavits to be used by those who support the petition. Rule 36 provides that at the hearing of the petition, the judge may give such directions as may be deemed necessary for the filing of counter-affidavits and reply to affidavits, in if any.

26. It appears from the minutes of February 21, 1966 that Datta J. gave specific directions for filing of affidavits by supporting creditors in the presence of the company. The learned judge had the power to do so and to entertain such affidavits both under Rule 36 and under Rule 9. If the company wished to deal with the affidavits of supporting creditors it could very well have asked for necessary directions at that time or later. It is more likely then not, that the company did not care to deal with those affidavits because the facts stated in those affidavits are incontrovertible. One of the creditors claims under a decree, another in respect of price of goods sold and delivered which the Receiver agreed to pay but did not or could not pay. The claim of the Union of India, which is for a very large sum of money in respect of Excise Duty was not disputed as the Assistant Collector of Central Excise has pointed out. Be that as it may, it is difficult to believe that the company was prevented from answering the affidavits in the absence of necessary directions.

27. In these circumstances, we cannot agree that the learned judge was wrong in taking into consideration the affidavits of the supporting creditors.

28. It was contended that the Receiver made purchases from Standard Dyes and not from the petitioning creditor and therefore, the Receiver is not liable to the petitioning creditor. Alternatively, it was argued that if the Receiver made purchases from the petitioning creditor and incurred liabilities in that behalf, he did so, not as agent of, or on behalf of the company. In that event, the Receiver is personally liable for the debt and if he has properly incurred those liabilities, he is entitled to be indemnified out of the assets of the company and the petitioning creditor is at the most, entitled to be subrogated to the Receiver''s right of indemnity. As there is no privity of contract between the petitioning creditor and the company, the petitioning creditor cannot directly enforce its claim against the company. The application is therefore not maintainable.

29. If the Receiver made no purchases from the petitioning creditor and incurred no liabilities, no further question can arise. It is nobody''s case that in making the purchases the Receiver acted outside the scope of the Order of September 4, 1964 or that he did not incur the liabilities properly. The contract between the company

and Standard Dyes under which Standard Dyes was to make purchases in the name of and on behalf of the company is not in dispute. On the appointment of the Receiver, the contract between Standard Dyes and the Company did not automatically terminate but remained valid and subsisting. (Kerr on Receivers 13th Edition p. 233). That the Receiver made purchases from the petitioning creditor through Standard Dyes in terms of the contract of January 24, 1963 is borne out by the contracts and challans copies of which have been annexed to the affidavit-in-reply. It is also borne out by the letter of April 29, 1965 in which the Receiver admitted that goods were supplied by the petitioning creditor and advised him to look for payment to the company or to the Receiver who was appointed in his place. The Receiver''s accounts which have been annexed to the company''s affidavit indicate that at least a sum of Rs. 67,915/- is due to Standard Dyes which, in the context of the agreement of January 24, 1963, the contracts and the challans, must mean that the amount is due to the petitioning creditor. Incidentally, the note at the foot of the accounts that Standard Dyes claims a commission of 1% on the value of yarn sold, unmistakably points out that the Receiver was making purchases through Standard Dyes under the old contract.

30. In these circumstances, there is no escape from the conclusion that the Receiver purchased cotton from the petitioning creditor through Standard Dyes for the company under the Court''s Order and a sum considerably exceeding Rs. 500/- is due to the petitioning creditor as balance of price of those purchases

31. It was contended that even if it be held that the Receiver purchased the goods from the petitioning creditor, for the company, it is the Receiver and not the company who is liable to pay for the same. If the liability has been properly incurred by the Receiver, he is entitled to be indemnified out of the assets of the company and if he has made default In payment, the creditor is entitled by subrogation to be paid out of the assets. The Receiver, it was urged, is not an agent of the company. In fact, after the Receiver was appointed, the Company was no longer competent to make contracts or purchases or make payments either as principal or through an agent. In that view of the matter, the petitioning creditor cannot look to the Company for payment of debts incurred by the Receiver.

32. Counsel relied on Halsbury, third edition, vol. 32, Art. 607, 674, 734, 786 and 790 and on statements of the law in Kerr on Receivers at pp. 226, 232, and 235 to 237. In Kerr, at p. 226 it is said :

A receiver appointed by the Court is an officer of the Court; he is therefore not an agent for any person, but a principal, and as such personally liable to all persons contracting with him, irrespective of the amount of assets in his hands, unless his personal liability is excluded by the express terms of the contract, subject to a correlative right to be indemnified out of the assets in respect of all liabilities properly incurred.

Again at p. 232 it is said:

The appointment of a Receiver or manager over the assets and liabilities of a company does not dissolve or annihilate the company but the company is entirely superseded in the conduct of its business and deprived of all power to enter into contracts in relation to the business, or to sell or pledge or otherwise dispose of the property put into the possession or under the control of the receiver and manager. The powers of the director in this respect are entirely in abeyance so far as the company is concerned, and the powers of the company are exercised by the receiver under the discretion of the Court". At p. 238 it is stated: Where a receiver and manager has properly incurred liabilities in the discharge of his duties, his creditors, in the event of his failure to pay them, are entitled by subrogation to claim against the estate direct.

33. In this connection, reliance was placed on the decision of Jessel M.R. in (7) Re. Johnson, Shearman v. Robinson 15 Ch. D. 548, (8) Moss Steamship Co. Ltd. v. Whinney 1912 A.C. 254, and (9) Burt, Boulton & Hayward v. Bull & Anr (1895) 1 Q.B.D. 276.

34. In the case before Jessel M. R., a merchant by his will directed his executor to carry on his trade and employ a portion of his estate for the purpose. Pursuant to the directions in the will, the executors carried on business. In an action brought by a residuary legatee, and order was made for administration of the testator''s estate and it was found that certain monies were due and owing by the executor to the testator''s business as also to his general estate. Some creditors who had supplied goods to the executor in course of his carrying on the business preferred claims against the estate under the judgment and took out summonses for establishing their claims. In disposing of the sumonses, Jessel M.R. said: --

I understand the doctrine to be this; that where a trustee is authorised by a testator or by a settlor for it makes no defference to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say "I had the personal liability of the man I trusted and I also have a right to be put in his place against the assets; that is I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade."

35. The doctrine has been applied to Receivers in (9) Burt, Boulton and Hayward v. Bull & Anr. (1895)1 QBD 276 and in (10) re. British Power Traction & Lighting Co. Lid. (1910) 2 Ch. 470.

36. In (8) Moss Steamship Co. v. Whinney the Plaintiff who was appointed receiver and manager in a debenture holder''s action, and carried on the business of the company, by a letter instructed the defendant Steamship Company to carry some beer to Malta. The letter was signed in the name of the company by the Plaintiff as receiver and manager. The defendants carried the goods under a bill of lading

which showed the company as the consignee and provided that the shipowner should have a lien on the goods shipped not only for the freight due thereon but also for any previously unsatisfied freight ''due either from shipper or consignee to the shipowner''. The defendants had for many years carried beer for the company to Malta under similar bills of lading and they claimed a lien on the beer for certain freight due to them from the company before the plaintiff''s appointment. It was held that the defendants were not entitled to a lien for arrears of freight because in truth the plaintiff and not the company was both shipper and consignee and notice of the fact was conveyed to the defendants by the form of shipping instructions.

Lord Loreburn L.C. said:

37. The Company was still alive and its business was still being carried on by Mr. Whinney but he was not carrying on as the Company''s agent. He superseded the company and the transactions upon which he entered in carrying on the old business were his transactions, upon which he was personally liable. He was really a trustee, and the shipowners dealt with the trustee. His Lordship was however careful to add: --

No doubt, there may be cases in which a receiver and a manager is in all senses, the agent of the company and a question may then arise as to the extent of his authority.

38. In (9) Burt, Boulton and Hayward v. Bull & Anr. (1895) 1 QBD 276 the defendants who were receivers and managers of the business or a company appointed by the Court, gave an order to the plaintiffs for goods required for the purpose of the company''s business. The orders were expressed to be given for the company and the words ''receivers and managers'' were all appended to the signatures of the defendants.

39. It was held that when receivers and managers of a business appointed by the Court order goods for the purpose of the business, the inference prima facie is that they pledge their personnel credit looking for indemnity to the assets of the business.

Lord Esher M.R. said :

What is the position of such a Receiver and manager ? He is not the agent of the company. They do not appoint him; he is not bound to obey their directions; and they cannot dismiss him, however much they may disapprove of. the mode in which he is carrying on the business. Only the Court can dismiss him, or give him direction as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business pro perty. The incidents of his relation to the Court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person; but it is of course impossible to suppose that the relation of agent and principal exists between him and the Court. What is the

inference that necessarily arises ? It must be that the intention is that he shall act in pursuance of his appointment on his own responsibility and not as an agent, because otherwise nobody will be responsible for his acts. The company cannot be liable, for he is not their agent, and the Court clearly cannot be liable. Therefore any orders which he may give under such circumstances as manager must prima facie be taken to be orders given on his own responsibility and credit.

40. Our attention was drawn to a decision of Sale J. in Mohari Bibi v. Shyama Bibi ILR 30 Cal. 937.

41. In holding that a creditor is entitled to sue the estate for a debt properly incurred by the Receiver for the purpose of the business carried on by him under an order of Court, the learned judge said :

In the event of a Receiver being sued for acts done by him as such he would doubtless be entitled to rely on his right to indemnity as against the estate; and in order to try this question of indemnity it would be necessary to secure the presence of the beneficiaries or others as parties to the suit who are interested in questioning the authority of the Receiver. But I do not think that it is necessary to resort to the doctrine of the creditor''s right to the benefit of the Receiver''s indemnity as a foundation for the right to sue the estate for a debt incurred by the Receiver. A right to maintain such a suit is, in my opinion, founded on the just and equitable principle that as the acts of a Receiver so long as they fall within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them

42. Sale, J. also expressed the opinion that a Receiver occupies a position towards an estate in his hands different from that of an executor or trustee. The distinction made by Sale, J. is not, as far as we can see, supported by any authority.

43. In support of the view that a creditor is entitled to proceed against the estate for liabilities properly incurred by the receiver, without taking recourse to the receiver''s right of indemnity, Sale, J. relied on an observation of Rigby L.J. in (9) Burt, Boulton and Hayward v. Bull, Rigby L.J., in course of his judgment, said :

The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years and then, owing to failure of the assets, all the creditors should go without payment.

44. The observation of Rigby L.J. as was pointed out by Patanjali Shastri J. in (12) R.M.G. Subramania Aiyar Vs. Ulagalumperumal Sethurayar and Others, , supports the inference that in such circumstances the Receiver intended to pledge and the creditors to trust the Receiver''s personal credit. Patanjali Shastri J. also made it clear that the distinction drawn by Sale J. between a creditor''s dealing with executors and trustees carrying on business for the benefit or the estate in their hands and his dealings with a Receiver acting under Orders of the Court was not recognised by

Rigby L.J. The doctrine that a creditor has only a right of indirect recourse to the estate through the right of indemnity of the person who contracted the liability for the purposes of such estate, has been applied in England also to loans contracted by Receivers. On a careful consideration of the judgment of Sale J. in the light of precedents, Patanjali Shastri J. dissented from the principles laid down in (11) Mohari Bibi v. Shyama Bibi.

45. In (13) Ramnarayan Satyapal Vs. Carey and Another, Buck-land J. held that persons contracting with a Receiver and manager who is carrying on the business of a company and cognizant of his appointment must be taken to know that the Receiver and manager is contracting as principal, not as agent for the company whose powers are paralysed.

46. In (14) Rev. Patrick v. Lyan Hong & Co. AIR 1939 Rang. 12 a single judge of the Rangoon High Court felt unable to follow the decision of Sale J.

47. We do not propose to deal with (15) The Official Receiver Vs. Jogmaya Dassi and Others which was cited at the Bar where S.R. Das J. merely referred to the decision of Sale J. without expressing any opinion on the decision.

48. In our opinion, the Judgment of Sale J. in (11) Mohari Bibi v. Shyama Bibi cannot be supported on principles and is against the current of authority. The case, therefore, must be held to have been wrongly decided.

49. The personal liability of a Receiver appointed by Court on contracts entered into by him in the performance of his duties is recognised in section 369 (2) of the English Companies Act of 1948 which treats a Receiver or Manager of the property of a company appointed under the powers contained in any instrument on the same footing as a Receiver appointed by Court. It provides: --

50. A receiver of the property of a company appointed as aforesaid shall, to the same extent as if he had been appointed by order of a Court, be personally liable on any contract entered into by him in the performance of his functions, except in so far as the contract otherwise provides, and entitled in respect of that liability to indemnity out of the assets.

51. In Section 422 of the Companies Act 1956 it is provided that where a receiver of the property of a company has been appointed, every invoice order for goods or business letter issued by or on behalf of the company, or the receiver of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed. If it were the law that the creditor of a receiver in respect of liabilities properly incurred by him could directly enforce his claim against the company, no useful purpose could have been served by the section. The object of the section is to forewarn the person who enters into a contract with the receiver that he cannot have direct recourse to the company''s assets for enforcing his claim.

52. Mr. Das relied on (16) Wilkinson v. Gangadhar Sarkar 6 BLR 486 where in describing the position of the Receiver Phear J. said :

He has no personal rights in the property, nor can he take any steps with regard to it, without the santion of the Court. If it is necessary for him to take any action of any sort, he should be put in motion by the Court on the application of the parties to the suit; and whatever he rightly does with regard to the property, he does simply as the agent of the owners of the property.

From this, we are invited to conclude that the receiver is the agent of the company. In the case before Phear J. the Receiver was appointed in a partition suit. He had, by order of the Court, executed an agreement for sale in his own name in respect of certain properties in the suit. Leave was given to the Receiver to sue for specific performance and the plaint was admitted with the Receiver as a co-plainaiff.

53. In (17) Paresh Nath Mookerjee v. Omerto Nath Mitter 17 Cal. 614 where a Receiver appointed in a partition suit, had created a charge on the estate for raising money for paying rents, it was held that in a case like that the ordinary law of principal and agency applied. On appeal in affirming the decision, the Court pointed out that having regard to the conditions under which the estates are held in this country one of which is that they are liable to be sold if the rents and revenues due upon them are not paid, it was apparent that the power to take the estate out of the hands of the owners and to place it in the hands of a Receiver with powers to do what is necessary for its protection must include a power to raise money to pay rent of revenue.

54. These principles were applied in (18) Eastern Mortgage and Agency Co. Ltd. and Another Vs. Mahammed Fazlul Karim, and it was held that the payments made by the Receiver of rents justly due, out of the funds in his hands, is equivalent in law to payments made by the owner himself.

55. These were cases of Receivers of immovable properties appointed in partition or mortgage suits with no power to carry on business. That they were treated as agents of the parties can be explained on the principle that they entered into those transactions for the protection of the properties under powers conferred by orders of Court. These cases do not concern themselves with the position of the Receiver vis-a-vis his creditors in respect of liabilities properly incurred by him nor do they concern themselves with the question whether the creditor can have direct recourse to the estate for defaults committed by the Receiver in discharging his obligations under contracts entered into by him. Shorn of their context, the observations of Phear J. appear to be too wide.

56. Mr. Das relied on the organic theory of company and referred to the discussion on the subject in Gower''s Modern Company Law, Second Edition at pp. 134-135 and cited the dictum of Neville J. in (19) Bath v. Standard Land Co. (1910) 2 Ch. 408 at p. 416 that "the Board of Directors are the brains and only brains of the company

which is the body, and the company can and does act only through them". He also relied on the classical Statement of Viscount Haldane L.C. in (20) Lennard''s Carrying Co. v. Asiatic Petroleum Co. Ltd. 1915 A.C. 705 at page 713. The Lord Chancellor said:

My Lords, a corporation is only an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation". Mr. Das also relied on certain observations of Denning L.J. in (21) H.L. Bolton Ltd. v. T.J. Graham & Sons Ltd. 1957 1 QBD 159.

Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers if the state of mind of the company and is treated by the law as such.

57. In the facts and circumstances of this case, Mr. Das argued that the Receiver must be held to be the directing mind and will of the company and therefore its agent. The argument can be answered best in the language of Lord Esher M.R. in (9) Burt, Boulton & Hayward v. Bull:

If the word "manager" had been used alone, it might in business parlance be taken to indicate an agent; but the words are "receivers and managers" who do not, as it seems to me, import managers appointed by the company.

Attractive and picturesque as the theory is, and serve its purpose as it does, by bringing home forcefully the essence of a transaction or of a situation by analogy, the theory has to be applied with caution. If on the appointment of a Receiver, the company is paralysed, if it has no longer any volition of its own, how can it have a directing mind or an ego? In our opinion, it will be unsafe to apply the organic theory in a case like this and hold that the Receiver is the agent of the company on. the basis that the Receiver is the directing mind and ego of the company.

58. It is therefore clear that generally the creditor of a Receiver carrying on business under an order of Court cannot have direct recourse to the estate to enforce his claim; that the Receiver was appointed by consent of parties, makes no difference. Poehm v. Coodall (1911) 1 ch. 155. However there may be circumstances in which he may have recourse to the estate directly as was recognised by Lord Lorebum L.C. in (8) Moss Steamship Co. v. Whinney and by Lord Esher M.R. in (9) Burt, Boulton & Hayuard v. Bull.

Lord Esher, M.R. said:

The question whether credit was given to the defendants (Receivers and managers) personally is one of fact, depending on the circumstances of each case, because

there might be circumstances which would take the case out of the general rule." In the same case, Rigby L.J. said : "I do not say that there might not be very special case in which the intention might be that Receivers and managers should not pledge their personal credit." In (8) Moss Steamship Co. v. Whinney, in holding that under the Bill of Lading the Receiver and not the company was liable, Lord Loreburn remarked that nothing special v/as to be found in the order to justify any other inference

59. In the present case, Clause 2 of the Order provides that Mr. S.M. Dutt, the Receiver shall have power to purchase stores and raw cotton for the company and pay for the same. It was urged that "for the company" means ''for the use of'' and not ''on behalf of'' the company. By the Order, power was given to the Receiver not only to purchase stores and raw cotton for the company but also to pay for the same. There is no question that the Receiver was to make purchase for the purpose of the company and for no other purpose. Moreover if he were to make purchases for the purpose of the company, how was he going to pay for them except out of the company''s funds? Even if the words "for the company" were not in the Order, the inference would have been irresistible that the purchases were to be made for the purposes of the company. In our opinion, the words "for the company" and "pay for the same" are no surplusage. They indicate that the Receiver is to make purchases not only for the use of the company and pay for the same out of the assets of the company in his hands but also that the purchases are to be made by him on behalf of the company and payments are also to be made on behalf of the company.

60. In view of the terms of the Order by which the Receiver was appointed and under which he made purchases from the petitioning creditor the Receiver must be deemed to have incurred the liabilities on behalf of the Company. The Company is therefore liable on the debt.

61. Once it is established that the debt of the company exceeds Rs. 500/-and it appears that the statutory notice has been duly served on the company but the company has failed and neglected to pay the debt or secure or compound for it to the reasonable satisfaction of the creditor, section 434 (1) of the Act is attracted and the company must be deemed to be unable to pay its debts. Rankin C.J. held in (12) Japan Cotton Trading Company Ld. Vs. Jajodia Cotton Mills Ld., with reference to section 163(1) of the Act of 1913, that the section means that the company to be served must at the time of the service, be in default and that, being in default, it is to be served with a demand under rather special precautions so that if it makes further default for a period of three weeks the question of its inability to pay the debt is set at rest. Similar views were expressed by P.B. Mukherji J. in (23) In the Matter of In Re: Ko-Ku-La Ltd., . His Lordship held that proof to the satisfaction of the debt is not required in those circumstances.

62. It was urged that as the company bonafide disputes the debt, no order for winding up ought to have been made, Mr. Chatterjee relied on the decision of the Supreme Court in (24) Amalgamated Commercial Traders Private Ltd. v. Krishnaswami 35 Company Cases 456. There the appellant company was the sole selling agent of two companies. At a general meting, the shareholders resolved that a dividend of Rs. 100/- per share be paid to the share-holders. Payment was to be made when commission due from those companies were received. Two shareholders demanded payment of the dividends. One of the shareholders served a statutory notice on the company u/s 434. The company did not make any payment but after taking legal advice sent a circular letter to all the shareholders that the resolution "was not a declaration of dividend and or did not constitute a proper or valid declaration of dividend and no liability to pay any dividend arose there under." It was held that the debt in respect of which the notice had been given u/s 434 was bonafide disputed by the company and there could therefore be no neglect to pay within the meaning of section 434 (1) (a) and the company could not be deemed to be unable to pay its debts. In those circumstances, the order was refused.

63. This is a far cry from the illusory dispute raised in the present case. The company does not dispute that the Receiver purchased the goods from Standard Dyes and that at least a sum of Rs. 67,915/- is due by the Receiver to Standard Dyes. It does not dispute that under the agreement with Standard Dyes, Standard Dyes was to make purchases in the name of and on behalf of the company; it does not dispute that the Receiver was making purchases from Standard Dyes in terms of the contract entered into between the company and Standard Dyes; it does not dispute that the contracts, challans were all made in the name of the company through Standard Dyes nor does it dispute the statement in the Receiver''s letter that the petitioning creditor supplied goods to the company. It is true that these documents were annexed to the affidavit-in-reply but the company could have filed an affidavit in answer to the petitioning creditor, with the leave of Court if it chose to do so. Moreover, these documents were not questioned before the trial court or before us. In the result, the company does not in effect, dispute that the Receiver made purchases from the petitioning creditor through Standard Dyes and has incurred a debt at least in the sum of Rs. 67,915/- which is shown as due to Standard Dyes in the Receiver''s accounts.

64. It is true that the company disputes in these proceedings its liability in law to pay for the goods purchased by the Receiver under the Court''s order. As the order stands, and the order is not obscure, the Receiver is to purchase and make payments for the company. No doubt a dispute has been raised, but as Jessel M.R. said in (25)re. the Imperial Hydropathic Hotel Ltd. 49 L.T. 147 it is not because a man says "I dispute the debt" that makes it a disputed debt. Moreover, the fact that the company did not dispute the debt in reply to the statutory notice but chose to remain silent does not strengthen the bona fides of the dispute.

65. The petitioner asked for the order on another ground namely, that it is just and equitable that the company should be wound up. In paragraph 10 of the petition it is said that the company has, for all practical purposes, stopped carrying on business and two groups in the management are fighting with each other, and that suits and appeals have been filed by them and those are pending; that a Receiver has been appointed in these appeals and is in actual charge of the property and assets of the company. It is also said that the parties have failed to supply any funds to the Receiver with the result that the work of the company has totally stopped and even the wages of the workers are in arrears. The Receiver was appointed in a suit filed by some shareholders against some of the directors and other parties for a declaration that those directors have ceased to be directors, that the appointment of the administrative officer is invalid, that the appointment of Standard Dyes as agent is invalid, for refund of monies and for other reliefs. The company in answer to paragraph 10 of the petition has merely denied in very general terms the correctness of the allegations. It is said that the suits and appeals spoken of in paragraph 10 of the petition have been settled; that Mr. Ajit Roy Mookerjee who was appointed Receiver has been discharged. There is no denial that the company has ceased to carry on its business of that the work of the company has completely stopped or that the wages of the workers are in arrears. There is no denial that the Receiver could not carry on the business for lack of funds or that he was not put in funds by any of the parties.

66. Mr. Chatterjee contended that no order for winding up ought to be made on just and equitable grounds on the application of a creditor and in any event, no such order should have been made in the facts and circumstances of this case. He relied on (26) Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India (UOI) and Another, where Chakravartti, C.J., said : "a creditor will not ordinarily be heard to urge that a winding up order should be made because the substratum of the company is gone." The learned Chief Justice however added that the reason is not that the creditor is technically and as a matter of law debarred from taking that ground at ail, but for the reason, that it is not a proper ground for a creditor to urge, except in very special circumstances. In (27) Re. Clandown Colliery Co. (1915)1 Ch. 369 the creditors of a company were induced by the company to supply goods on credit. After decrees had been passed in creditor''s actions for their debts the chairman of the company who held all the debentures and was also unsecured creditor had a Receiver appointed with the result that the decrees became useless. Then the creditors applied for a winding up order. They were supported by some other creditors. The petition was opposed by the chairman and by a large majority of unsecured creditors. It was held that in those circumstances it was just and equitable that the company should be wound up. In course of his judgment Ashbury J. said: "the company for some time past has not been carrying on its own business, but the chairman has really been carrying on business as debenture-holder in the company''s name, and the only suggestion in opposition to the petition is that if the

company is allowed to go on in this way and obtain further credit there is a possibility of better times. This is a state of affairs that is not reasonable or proper in the interests of innocent unsecured creditors and ought not to be allowed to go on." The company was wound up on just and equitable grounds. In (28) Darjeeling Bank Ltd. 52 CWN 414 a creditor presented an application for winding up which was adjourned until the disposal of an application for sanction of a scheme. After the scheme had been in operation for sometime the creditor applied for hearing of his application on the ground that the company had failed to make payments in accordance with the scheme sanctioned by Court. It was held by S.R. Das, J. that the creditor was entitled to proceed with his application if the instalment payable under the scheme in default is more than Rs. 500/-. The Learned Judge said that the creditor is also entitled to do so in a proper case on just and equitable grounds. In (29; Ernest Hugh v. Soobran Partap AIR 1941 P.C. 106 an order for winding up was made on just and equitable grounds in special circumstances on the petition of a contingent and prospective creditor in respect of future rents and royalties.

67. It is well to remember that the power of the court to wind up a company on just and equitable grounds u/s 433 is not limited to cases analogous to those mentioned earlier in the section. In (30) Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, the Supreme Court held that the words "just and equitable" in section 162 (vi) of the Companies Act 1913, which is similar to section 433(f) of the Act of 1956, are not to be construed ejusdem generis with the matters mentioned in clauses (i) to (v). Same views were expressed nearly half a century ago by the Judicial Committee with reference to the Companies Act of Barbados in (31) Loch & Anr. v. John Blackwood Ltd. (1924) A.C. 783. What is just and equitable must depend inevitably on the facts and circumstances of each case. The categories of just and equitable grounds are never closed.

68. It is abundantly clear that the company is unable to pay its debts. The wages of the workers of the company are in arrears. It has not been able to pay the decretal sum of Rs. 1800/- payable in three instalments. The debt of Gill & Co. Ltd. which was admitted by the company and the Receiver Mr. Roy Mukherjee has not been paid. The very large claim of the Union of India on account of Excise dues has not been satisfied. It is clear from the Receiver''s letter of April 29 that he incurred liabilities which he could not or did not pay. Mr. Roy Mukherjee, the other Receiver was also unable to pay the debts. That internecine disputes have become endemic is proved by the number and variety of proceedings launched by members of the company. It is said that the suits and appeals which were filed by the warring groups have been settled. There is no evidence however that any of the directors or persons interested in the company has taken any concrete or practical step to salvage the company out of ruin. Receivers have been appointed over the assets of the company with power to carry on business. They have failed to retrieve the state of affairs. The company is unable to carry on its business. It is clear that the company cannot function without infusion of substantial finance of which there is hardly any prospect. It was brought

to the attention of the learned judge that an application for sanction of a scheme had been made. He said in his judgment that it appears from some or the averments made in the application that the company is unable to run its business or pay its debts. The company has huge liabilities and no liquid assets. That the company has not paid such small debts as the decretal dues of Rs. 1800/- and that the wages of the workers are in arrears indicate that no liquid assets are indeed available. It was brought to our notice that soon after the winding up order was made, a Receiver was appointed over the assets of the company in a debenture-holders'' action.

69. An application was made by the company in the appellate Court for stay of winding up. The Court granted stay on furnishing security. The company has failed to furnish the security required under the order.

70. Mr. Chatterjee submitted that some of these events are subsequent events and therefore, they ought not to be taken into consideration. The Court may however take notice of subsequent events which have happened and afford relief on the basis of those events where it is necessary to base the decision on the altered circumstances in order to shorten litigation or to do complete justice between the parties, as has been recently held in a Bench decision of this Court in (32) Vidyasagar Cotton Mills Ltd. Vs. Mt. Nazmunnessa Begum, . It is hardly necessary to refer to other decisions in which similar views have been expressed.

71. The application for sanction of a scheme, Mr. Chatterjee submitted, is a creditor''s application. It only indicates that some of the creditors do not desire winding up of the company. He also pointed out that the company did not have any opportunity in the winding up application to deal with the matter. The learned judge has however only referred to the application. He has not gone into the merits of the application because it was not necessary for him to do so. Mr. Chatterjee also submitted that the Court should not take into consideration the inability of the company to furnish security. Once an order for winding up is made, it is very difficult to obtain funds. As for the dues of the Central Excise, he submitted that the Union of India is a secured creditor in respect of the excise dues and is in possession of certain assets of the company. These assets however, as the Assistant Collector of Central Excise pointed out are claimed by the Central Bank as a hypothecates with the result that they have proved to be illusory. If a substantial part of the assets are in possession of secured creditors who are trying to enforce their claims and there are also large unsecured debts and no liquid assets and no prospects of securing fresh finance, it is difficult to see how the creditors'' dues can be paid or how the company can resume its business.

72. It was urged that no order should have been made by the learned trial judge on the ground that alternative remedies are available for redress of the petitioning creditors'' grievances. In our opinion, having regard to the facts and circumstances of the case, no adequate or effective alternative remedy is open to the petitioning

creditor and we do not therefore propose to interfere with the discretion exercised by the learned trial judge.

In (33) Rippon Press and Sugar Mills Co. Ltd. v. Gopal Chetty 58 I.A. 416 an order for winding up was made by the High Court in 1924 with effect from 1922. In an appeal from that order heard by the Judicial Committee in 1931, the Committee although of opinion that the order was not justified when made, upheld the order having regard to the lapse of time and the confusion and expense which would result from setting it aside. In this case the order was made on June 24, 1966 to take effect from June 1965. The company ceased to carry on business before the petition was presented. The Receiver was unable to carry on the business for lack of funds. Debts and revenue dues have remained in arrears for years. There is hardly any prospect of the company''s survival. In our opinion, no useful purpose will be served by prolonging the agony of creditors and shareholders and adding to the confusion and expense. That is one more reason why in any event, we do not propose to disturb the order which has been made by the learned trial judge.

In the result, the appeal fails and is dismussed with costs. The order of the learned trial judge is affirmed. The costs of the petitioning creditor will come out of the assets in the hands of the Official Liquidator. All other parties will bear their own costs. Certified for two counsel.

Arun K. Mukherjee, J.

I agree.