

CALCUTTA HIGH COURT

Official Liquidator

Vs.

Commissioner of Income Tax

Company Petn. No. 208 of 1960

(A.N. Sen, J.)

25.04.1969

ORDER

A.N. Sen, J.

1. This application raises a question of law of some importance. The question is whether the Income-tax Authorities are competent to commence or continue an assessment proceeding against a company in liquidation without obtaining leave of Court.

2. By an order made by this Court on the 16th of June, 1961, the company went into liquidation and the Official Liquidator was appointed Liquidator of the company. The company is now in the process of being wound up by this Court. The Official Liquidator of the company has been served with several notices of assessment in respect of the company by the Income-tax Authorities. He has been served with a notice under Section 142 (I) of Income-tax Act, 1961 in respect of assessment year 1964-65 and he has also received notices under Section 148 of the Income-tax Act, 1961 in respect of assessment years 1965-66, 1966-67 and 1967-68. All these notices are in respect of periods subsequent to the date of the winding up order. These notices have all been issued by the Income-tax Department (which is also hereinafter referred to as the Department) without obtaining any leave of Court. The Official Liquidator has taken out the present summons, complaining to Court about the conduct of the Department in issuing the said notices without obtaining leave of Court under Section 446 of the Companies Act, 1956 and has asked 'that the proceedings under Sections 142 (I) and 148 of the Income-tax Act, 1961, initiated by the Income-tax Authorities against the company be stayed.'

3. Section 142 of the Income-tax Act, 1961 deals with enquiry before assessment and Section 142 (I) provides as follows :

"(1) For the purpose of making an assessment under this Act, the Income-tax Officer may serve on any person who has made a return under Section 139 or upon whom a notice has been served under sub-section (2) of Section 139 (whether a return has been made or not) a notice requiring him, on a date to be therein specified,-

(i) to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require, or

(ii) to furnish in writing and verified in the prescribed manner information in such form and on such points or matters (including a statement of all assets and liabilities of the assessee, whether included in the account or not) as the Income-tax Officer may require :

Provided that-

(a) the previous approval of the Inspecting Assistant Commissioner shall be obtained before requiring the assessee, to furnish a statement of all assets and liabilities not included in the accounts;

(b) the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year."

4. Section 148 of the said Act provides for issue of notice where income has escaped assessment and the said section reads :

"148 (1). Before making the assessment, reassessment or recomputation under Section 147, the Income-tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 139; and the provisions of this Act shall so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) The Income-tax Officer shall, before issuing any notice under this section, record his reasons for doing so." .

5. Section 139 of the Income-tax Act, 1961 referred to both in Sections 142 and 148 deals with procedure for assessment and may also be quoted.

"139. Return of Income - (1) Every person, if his total income or the total in-come of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed-

(a) in the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act, includes any income from business or profession, before the expiry of six months from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year, whichever is later;

(b) in the case of every other person, before the 30th day of June of the assessment year: Provided that, on an application made in the prescribed manner, the Income-tax Officer may, in his discretion, extend the date for furnishing the return -

(i) in the case of any person whose total income includes any income from business or

profession the previous year in respect of which expired on or before the 31st day of December of the year immediately preceding the assessment year and in the case of any person referred to in clause (b) upto a period not extending beyond the 30th day of September of the assessment year without charging any interest;

(ii) in the case of any person whose total income includes any income from business or profession the previous year in respect of which expired after the 31st day of December of the year immediately preceding the assessment year, upto the 31st day of December of the assessment year without charging any interest; and

(iii) up to any period falling beyond the dates mentioned in clauses (i) and (ii), in which case interest at six per cent per annum shall be payable from the 1st day of October or the 1st day of January, as the case may be, of the assessment year to the date of furnishing of the return-

(a) in the case of a registered firm or an unregistered firm which has been assessed under clause (b) of Section 183, on the amount of tax which would have been payable if the firm had been assessed as an unregistered firm; and

(b) in any other case, on the amount of the tax payable on the total income, reduced by the advance tax, if any, paid or by any tax deducted at source, as the case may be.

(1-A) Where as a result of an order under Section 154 or Section 155 or Section 250 or Section 254 or Section 260 or Section 262 or Section 264, the amount of tax on which interest was payable under clause (iii) of the proviso to sub-section (1) has been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded.

(2) In the case of any person who, in the Income-tax Officer's opinion is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income-tax Officer may before the end of the relevant assessment year, serve a notice upon him requiring him to furnish, within thirty days from the date of service of the notice a return of his income or the income of the such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed :

Provided that on an application made in the prescribed manner the Income-tax Officer may, in his discretion, extend the date for the furnishing of the return and when the date for furnishing the return, whether fixed originally or an extension, falls beyond the 30th day of September or, as the case may be, the 31st day of December of the assessment year, the provisions of sub-clause (iii) of the proviso to sub-section (1) shall apply.

(3) If any person who has not been served with a notice under sub-section (2), has sustained a loss in any previous year under the head 'Profits and gains of business or profession' or under the head 'capital gains' and claims that the loss or any part thereof should be carried forward under sub-section (1) of Section 72 or sub-section (2) of Section 73 or sub-section (1) of Section 74, he may furnish, within the time allowed under subsection (1), a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed and all the provisions

of this Act shall apply as if it were a return under sub-section (1).

(4) Any person who has not furnished a return within the time allowed to him under sub-section (1) or sub-section (2) may before the assessment is made furnish the return for any previous year at any time before the end of four assessment years from the end of the assessment year to which the return relates and the provisions of sub-clause (iii) of the proviso to sub-section (1) shall apply in every such case.

(5) If any person having furnished a return under sub-section (1) or sub-section (2), discovers any omission or any wrong statement therein he may furnish a revised return at any time before the assessment is made.

(6) The prescribed form of the returns referred to in sub-sections (1), (2) and (3), shall, in the case of an assessee engaged in business or profession, require him to furnish particulars of the location and style of the principal place where he carries on the business or profession and all the branches thereof, the names and addresses of his partners, if any, in such business or profession and if he is a member of an association or body of individuals, the names of the other members of the association or the body and the extent of the share of the assessee and the shares of all such partners or the members, as the case may be, in the profits of the business or profession and any branches thereof.

(7) No return under sub-section (1) need be furnished by any person for any previous year, if he has already furnished a return of income for such year in accordance with the provisions of sub-section (2).

(8) Notwithstanding anything contained in clause (iii) of the proviso to sub-section (1), the Income-tax Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any person under any provision of this section."

6. An analysis of these sections clearly indicates that these sections deal with matters relating to assessment and the notices which have been issued under Sections 142 (1) and 148 are with regard to question of assessment only.

7. It is the contention of the Official Liquidator that issue of notices by the Department on the basis of the provisions in the said sections or the taking of any steps by the Department on the basis of the said provisions in relation to assessment of a company in liquidation, are legal proceedings against the company within the meaning of Section 446 (1) of the Companies Act, 1956 and the said proceedings cannot be commenced or continued against the company by the Department without obtaining necessary leave of Court, as required under Section 446 (1) of the Companies Act. It will be convenient to set out the said Section 446 of the Companies Act, 1956 in its entirety.

"446. (1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceedings 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, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

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

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under Section 391 by or in respect of the company."

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

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

(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 transferred 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."

8. The Department contends that it is not necessary to obtain any leave from Court to enable the Department to commence or continue the work of assessment against a company which is in liquidation and for taking necessary steps in relation thereto on the basis of the provisions contained in the Income-tax Act, 1961. It is the contention of the Department that any steps taken in relation to assessment of the company and all notices issued in connection therewith are not proceedings within the meaning of Section 446 of the Companies Act. The contention of the Department in substance and essence is that the assessment of the company in liquidation and necessary steps taken in connection therewith in accordance with the provisions contained in Income-tax Act, 1961 are not proceedings within the meaning of Section 446 of the Companies Act and as such there is no question of any leave.

9. The question, therefore, that falls for determination in the present application, as already indicated, is whether the assessment of a company in liquidation by the Income-tax Authorities and steps taken in relation to the same in accordance with the provisions of the Income-tax Act by the Department, are proceedings within the meaning of Section 446 of the Companies Act of 1956 and whether it is open to the Department to commence or continue assessment proceeding against the company without obtaining leave of Court.

10. The question appears to be short and simple, but the answer to the question is not an easy one. The question becomes all the more difficult, as there is conflict of judicial opinion and different Courts have expressed divergent views.

11. The Official Liquidator has appeared in person and has argued the matter himself. In view of

the nature of the question involved, I asked the Official Liquidator whether he would like to engage any counsel in this matter. The Official Liquidator submitted that he was thoroughly ready with the matter and would be prepared to argue the case himself. I wish to observe that Mr. Rao, the present Official Liquidator, who was a practicing lawyer, did his case ably. Mr. Gouri Mitter, learned counsel who appeared on behalf of the Department, argued the matter fully and very fairly, citing all the important authorities on the question, whether the decisions were in his favor or against him.

12. The Official Liquidator has argued that the Official Liquidator is not an officer of the company and he is an Officer of the Court. In support of his contention the Official Liquidator has referred to the decision in the case of *Amritlal Kundu v. Anukul Chandra Das*, reported in¹ and also to the decision in the case of *Commissioner of Income Tax, United Province v. Official Liquidator of the Agra Spinning and Weaving Mills Co. Ltd.*, reported in² He has also drawn my attention to the definition of a 'Principal Officer' as given in Section 2 (12) of the Income-tax Act of 1922 and in Section 2 (35) of the Income-tax Act, 1961 and he contends that the Official Liquidator cannot be considered to be a Principal Officer within the meaning of the said definition. He has contended that a company in liquidation is not liable to any assessment by the Department. It is his contention that the company is only liable to pay the debts and liabilities of the company which existed on the date of the winding up of the company and it is also his contention that there cannot be any question of any assessment to tax in respect of any period subsequent to the winding up order, as the company ceases to carry on business after it is ordered to be wound up. He has argued that as the Official Liquidator is not an officer of the company and is only an officer of the Court, no proceedings can be started or continued against him without first obtaining the leave of Court. He has drawn my attention to the following passage occurring at page 1533 in Mulla's Code of Civil Procedure, Vol. II (13th Edn.) –

"Suit by or against Receiver: Leave of Court. A Receiver cannot sue or be sued except with the leave of Court by which he was appointed Receiver... there is no statutory provision which requires a party to take leave of Court to sue a Receiver. The rule has come down to us as part of the rules of equity, binding upon all Courts of Justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it, the authority of the Court is not to be obstructed by suits designed to disturb the possession of the Court. The institution of such suit is in the eye of law a contempt of the authority of the Court and therefore, the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by a statute, but in exercise of the inherent power which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority."

The Official Liquidator argues that although in the case of a company in liquidation, specific provision has been made as to leave of Court being obtained to commence or continue any suit or other legal proceeding against a company which has been ordered to be wound up, the principle on the basis of which leave is necessary to bring a suit against a Receiver, should be applied in construing the provisions of Section 446 of the Companies Act. In other words, it is the contention of the Official Liquidator that the provisions of Section 446 of the Companies Act

should be so construed as will compel every party including the Department who wants to proceed against a company in liquidation in respect of any matter to obtain leave of Court before any such proceeding can be commenced. He submits that the Court is really in possession of a company in liquidation with all its assets through the Liquidator and any proceeding against the

¹20 Cal WN 358 : AIR 1916 Cal 918

²(1934) 2 ITR 79 : AIR 1934 All 170

company in liquidation is likely to interfere with the possession of the Court and as such, no such proceeding can be permitted without leave being first obtained. He had argued that in any event in view of the express provision contained in Section 446 of the Companies Act, leave of Court is clearly necessary and the assessment proceeding cannot be commenced by the Department without obtaining such leave. It is his contention that the proceeding sought to be taken by the Department in the matter of assessment against the company is a legal proceeding within the meaning of Section 446 (1) of the Companies Act, 1956. In support of his contention, he has referred to the decision of the Federal Court in the case of *Governor-General in Council v. Shiromani Sugar Mills Ltd. (in Liquidation)*, reported in³ He has also referred to the decision of the Bombay High Court in the case of *In re Colaba Land and Mills Co., Ltd. (in Liquidation) Official Liquidator v. V. M. Deshpande*, reported in⁴

13. The Official Liquidator relies very strongly on this decision, as the very same question had come up for consideration and the learned Judge had upheld the contention of the Official Liquidator and held that leave of Court by the Department was necessary. The Bombay decision completely supports the case of the Official Liquidator. The Official Liquidator naturally places particular reliance on the same and he has submitted that he is adopting the reasons given in the judgment in the said decision as his main arguments in this case. The Official Liquidator has also referred to the decision of the Supreme Court in the case of *Lalji Haridas v. State of Maharashtra*, reported in⁵ to support the contention that Income-tax Authorities constitute Courts and proceedings before them are, therefore, legal proceedings and as such, are covered by Section 446 of the Companies Act, 1956.

14. Mr. Gouri Mitter, learned counsel appearing on behalf of the Department has submitted that the only question for determination in the present application is whether leave of Court under Section 446 (1) of the Companies Act is necessary to enable the Department to commence or continue assessment proceedings against the company and it is his submission that the other contentions raised by the Official Liquidator are irrelevant and they do not arise on the allegations made in the petition. Mr. Mitter has argued that the question whether the Official Liquidator is a Principal Officer of the company to whom the notices can be properly addressed by the Department or not and whether a company in liquidation is liable to assessment or not, are really questions which relate to the merits of the assessment proceedings and have no bearing on the question whether leave should be obtained from Court to institute or continue such assessment proceedings against the company. He has, however, submitted that the Official Liquidator is the only person competent to represent the company and all notices and communications by the Department to any company in liquidation must necessarily be addressed by the Department to its Liquidator and service of such notice on the Liquidator is good and proper service on the company. It is also his submission that there is no provision in law which exempts a company in liquidation from assessment and it is his further submission that on such assessment whether a company will be found liable to pay any tax or not is a matter relating to merits of the assessment. Mr. Mitter has argued that in view of the specific provision contained in

Section 446 of the Companies Act, there is no question of the Court exercising any inherent jurisdiction and it is his argument that the principles

³ AIR 1946 FC 16

⁵ AIR 1964 SC 1154

⁴(1968) 67 ITR 399 (Bom)

which apply in case of leave in relation to Receivers, has no application in the instant case. He has submitted that whether leave is necessary in respect of assessment proceedings by the Department against a company in liquidation or not, has to be determined on a proper construction of Section 446 of the Companies Act, 1956 and it is his submission that if on a proper construction of the said section assessment proceedings by the Department are held to be covered by the said section, leave of Court will become necessary and if assessment proceedings are not covered by the said section leave of Court will not be necessary. Mr. Mitter contends that on a true construction of Section 446 of the Companies Act assessment proceedings by the Department cannot be said to be covered by the said section and the same do not come within the purview of the said section. Mr. Mitter has argued that for a proper construction of Section 446 (1) of the Companies Act the said section must be read with Section 446 (2) and Section 537 of the Companies Act. It is his submission that the said Section 446 (2) and the Section 537 of the Companies Act indicate the nature of proceedings in respect of which leave is contemplated under Section 446 (1). In support of this contention Mr. Mitter has referred to and relied on the decision of the Federal Court in the case of AIR 1946 FC 16, the case of *M. K. Ranganathan v. Government of Madras, reported in*⁶ and also to the decision of the Supreme Court in the case of *Damji Valji Shah v. Life Insurance Corporation of India, reported in*⁷ Mr. Mitter has argued that leave of Court under Section 446 (1) of the Companies Act will be necessary only in case of those proceedings which the Court in terms of the provisions contained in Section 446 (2) of the Companies Act will be competent to entertain or dispose of. It is his argument that Section 446 (2) of the Companies Act and Section 537 of the Companies Act go to show that the legislature never intended the leave of Court to be necessary in respect of any assessment proceeding by the Department. He has argued that it is not open to, or possible for the Court to entertain or dispose of any assessment proceeding which must be conducted in accordance with the provisions of the Income-tax Act. It is his argument that the power to assess in accordance with the provisions of the Income-tax Act is vested exclusively in the Income-tax Officer and, according to Mr. Mitter, it is a part of the statutory duty of the Officer concerned to proceed to assess in accordance with the provisions of the Income-tax Act. He contends that as the power to assess is exclusively vested in the Officer under the Income-tax Act and as the Court has no jurisdiction or power to assess or to take any steps with regard to assessment, it must follow that the provisions of sub-section (1) of Section 446 of the Companies Act will not apply to any proceeding in assessment which may be pending or sought to be commenced before the appropriate authority under the Income-tax Act. Mr. Mitter has also argued that a liability or debt for payment of tax can only arise after an assessment has been made by the appropriate officer under the Income-tax Act and in accordance therewith and upon such assessment, after a notice of demand has been served. It is his contention that unless an assessment is made in accordance with the provisions of the Income-tax Act and by the appropriate authority and a demand by the Department in accordance with the provision of the Income-tax Act is served, no debt or liability arises at all and he contends that in view of the specific provision of the Income-tax Act it is impossible for the Court to proceed to make any valid assessment in accordance with the provision of the Income-tax Act in exercise of the power or authority conferred upon it under Section 446 (2) of the Companies Act. He submits that it cannot be disputed that the Income-tax Officer is the

⁶ AIR 1955 SC 604

only appropriate authority which has the power and jurisdiction to commence, entertain and decide matters relating to assessment of any company under the Income-tax Act, 1961 and in accordance with the provisions thereof and in view of the provisions contained in the Income-tax Act, the winding-up Court has no jurisdiction or power to entertain an assessment proceeding and it should, therefore, follow that leave of the Court is not necessary in respect of any proceeding relating to assessment of a company in liquidation. Mr. Mitter has argued that it is the statutory duty of the Income-tax Officer to assess in accordance with the provisions of the Income-tax Act and he has argued that the discharge of the duty cast upon the said officer by the statute should not be considered to be subject to any leave of Court. Mr. Mitter further submits that the provisions of Income-tax Act which is a special Act override the provisions of the Companies Act, which according to Mr. Mitter, is a general Act. In support of this contention Mr. Mitter has referred to the following observations of the Supreme Court in the case reported in AIR 1966 Supreme Court 135 at p. 139 - "Further, the provisions of the said Act i. e., L. I. C. Act, will override the provisions of the General Act viz., the Companies Act which is an Act relating to the Companies in general. Mr. Mitter has also drawn my attention to Section 178 of the Income-tax Act which deals specifically with company in liquidation. The said section reads as follows –

"178. Company in liquidation.

(1) Every person -

(a) who is the liquidator of any company which is being wound up, whether under the orders of a Court or otherwise; or

(b) who has been appointed the receiver of any assets of a company (hereinafter referred to as the liquidator) shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Income-tax Officer who is entitled to assess the income of the company.

(2) The Income-tax Officer shall, after making such enquiries or calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the Income-tax Officer, would be sufficient to provide, for any tax which is then or is likely thereafter to become, payable by the company.

(3) The liquidator -

(a) shall not, without the leave of the Commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the Income-tax Officer under sub-section (2); and (b) on being so notified, shall set aside an amount equal to the amount notified, and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands :

Provided that nothing contained in this sub-section shall debar the liquidator from ascertaining with such assets or properties for the purpose of the payment of the tax payable by the company or for making any payment to secured creditors whose debts are entitled under the law to priority of payment over debts due to Government on the date of the liquidation or for meeting such costs and expenses of the winding up of the company as are in the opinion of the Commissioner reasonable,

(4) If the liquidator fails to give the notice in accordance with sub-section (1) or fails to set aside the amount as required by Section (3) or parts with any of the assets of the company or the properties in his hands in contravention of the provisions of that section, he shall be personally liable for the payment of the tax which the company would be liable to pay :

Provided that if the amount of any tax payable by the company is notified under sub-section (2) the personal liability of the liquidator under this sub-section shall be to the extent of such amount.

(5) Where there are more liquidators than one, the obligations and liabilities attached to the liquidator under this section shall attach to all the liquidators jointly or severally.

(6) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force."

15. Mr. Mitter contends that the Income-tax Act, 1961 has been enacted years after the commencement of the Companies Act, 1956 and Section 178 of the Income-tax Act refers to and deals specifically with companies in liquidation. He argues that certain duties and powers have been conferred upon the appropriate authorities under the said Section 178 in relation to companies in liquidation and it is his argument that the discharge of the said duties and the exercise of the said powers have not been made subject to any sanction or leave from Court being obtained. On the other hand, sub-section (6) of the said Section 178 clearly provides that provisions of the said section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force. Mr, Mitter has submitted that with the object of safeguarding the interest of revenue the legislature in its wisdom has thought it fit to make special provisions and the said provisions enacted by the legislature have not intentionally been made dependent on any leave of Court.

16. Mr. Mitter has next contended that assessment and steps taken in connection with assessment by the Department under the Income-tax Act and in accordance with the provisions therewith are really in the nature of administrative Acts. He argues that liability to pay tax is there under Section 4 of the Act which is the charging section. According to Mr. Mitter, assessment and the steps taken in connection therewith under the Income-tax Act and in accordance with the provisions thereof are only modes for ascertaining the quantum of tax payable, if any and it is his contention that the procedure that is followed in accordance with the provisions of the said Act is merely administrative or ministerial for ascertainment of the figure and the same can never be considered to be legal proceeding within the meaning of Section 446 (1) of the Companies Act or any proceeding in respect of which leave of Court is contemplated by the said Section 446 (1).

17. Mr. Mitter has further contended that the Income-tax Act constitutes a complete code by itself and it provides for the machinery by the use of which the total income assessable for any company is to be ascertained and the liability for payment of tax is to be determined; and the assessment cannot be permitted to be questioned otherwise than by use of the machinery expressly provided by the Act itself. In substance it is the contention of Mr. Mitter that as the entire machinery with regard to assessment is contained in the Income-tax Act including the machinery to question the assessment, the Civil Court really does not have any jurisdiction to deal with the matter relating to assessment and in view thereof, there cannot be any question of

leave under Section 446 (1) of the Companies Act in the matter of assessment of the company in liquidation. Mr. Mitter has relied on the following observations of the Privy Council in the case of *Raleigh Investment Co. Ltd. v. Governor-General in Council, reported in*⁸ at p. 81 –

"In conclusion their Lordships would observe that the scheme of the Act is to set up a particular machinery by the use of which alone total income assessable for Income-tax is to be ascertained. The Income-tax exigible is determined by reference to the total income so ascertained and only by reference to such total income. Under the Act (Section 45) there arises a duty to pay the amount of tax demanded on the basis of the assessment of total income. Jurisdiction to question the assessment otherwise than by use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation to pay arising by virtue of the assessment. The only doubt, indeed, in their Lordships' mind, is whether an express provision was necessary in order to exclude jurisdiction in a Civil Court to set aside or modify an assessment."

18. Mr. Mitter has cited a number of decisions some of which I have already mentioned. I shall now mention the other decisions which have been referred to by Mr. Mitter. According to Mr. Mitter, the following cases appear to support the contention of the Official Liquidator and appear to be against him.

1. *Union of India v. Seth Spinning Mills Ltd. (in liquidation), reported in*⁹
2. *In re Colaba Land and Mills Co., Ltd. (in liquidation), Official Liquidator v. V. M. Deshpandey, reported in*¹⁰
3. *The State v. P. Topno, reported in*¹¹
4. *In re Mysore Spun Silk Mills Ltd. (in liquidation); Official Liquidator v. Commissioner of Income Tax, Bangalore, reported in*¹²

19. Mr. Mitter relies on the following cases in support of his contention :-

1. AIR 1955 Supreme Court 604.
2. AIR 1966 Supreme Court 135.
3. *Tika Ram and Sons Ltd. v. Commissioner of Income Tax, reported in*¹³
4. *S. K. G. Sugar Ltd. v. Ali Hassan, reported in*¹⁴
5. *S. N. Mukherjee v. Krishna Dassi, reported in*¹⁵ (2).
6. *R. G. N. Price v. M. Chandrasekharan, reported in*¹⁶
7. *B. V. John v. Coir Yarn and Textile Ltd., reported in*¹⁷

20. Mr. Mitter points out that only the following cases deal directly with the question involved in the present proceeding.

1. The Punjab case in (1962) 46 ITR 193.
2. The Allahabad case in (1964) 51 ITR 403.
3. The Bombay case in (1968) 67 ITR 399.

21. He has commented that the decisions which are against him are mostly based on the judgment of the Federal Court in the case of AIR 1946 FC 16. He has argued that the decision of the Punjab High Court in the case of (1962) 46 ITR 193 (Punj) does not really state any reason and the decision of the Bombay High Court in *In re Colaba Land and Mills Co. Ltd. (in liquidation)*¹⁸, proceeds on an erroneous interpretation of the decision of the Federal Court in the case of *Shiromoni Sugar Mills*

⁸ AIR 1947 PC 78

¹⁰(1968) 67 ITR 399 (Bom)

¹²(1968) 68 ITR 295 (Mys)

⁹(1962) 46 ITR 193 (Punj)

¹¹(1959) 36 ITR 135 (Orissa)

¹³(1964) 51 ITR 403 (All)

¹⁴ AIR 1957 Pat 722.

¹⁶ AIR 1951 Mad 987 18(1968) 67 ITR 399

¹⁵ AIR 1933 Calcutta 433

¹⁷ AIR 1960 Ker 247 (250)

Ltd., AIR 1946 FC 16. Mr. Mitter has submitted that these decisions should not be followed. With regard to the decisions of the other High Courts, namely, the decision of Orissa High Court in the case of (1959) 36 ITR 135 (Orissa) and the decision of the Mysore High Court in the case of Mysore Spun Silk Mills Ltd, (1968) 68 ITR 295 (Mys), Mr. Mitter seeks to distinguish the said decisions by pointing out that these decisions do not relate to assessment proceedings. He has submitted that these decisions are of no assistance in the present case which is concerned with assessment proceedings. He has contended that the Allahabad High Court in the case of (1964) 51 ITR 403 (All) correctly interpreted the decision of the Federal Court in the case of Shiromoni Sugar Mills and the said interpretation should be accepted by this Court and the interpretation put on the said decision of the Federal Court by the Bombay High Court should be rejected.

22. Before I deal with the main contention of the parties in the present proceeding as to whether leave of Court under Section 446 (1) of the Companies Act, 1956, is necessary or not to enable the Department to commence or proceed with the assessment of the company in liquidation, it will be convenient to dispose of the other contentions raised on behalf of the Official Liquidator. The contention of the Official Liquidator that he is not an officer of the company to whom any notice regarding assessment can be issued by the Department, appears, to my mind, to be irrelevant for the purpose of the present application. Mr. Mitter, in my opinion, rightly points out that this is a question which really relates to the merits of the assessment proceedings. Whether the Liquidator is a competent person to whom notices can be validly addressed for assessment of a company in liquidation is a question to be determined in the assessment proceeding. In view, however, of the definition of the 'Principal Officer' as given in Section 2 (35) of the Income-tax Act, 1961, it appears that it is open to the Income-tax Officer to treat the Liquidator as a 'Principal Officer' of the company. The decision in the case reported in (1934) 2 ITR 79 : AIR 1934 Allahabad 170 and relied on by the Official Liquidator, does not, to my mind, support the contention of the Official Liquidator; and the said decision, on the other hand, supports the view that the Official Liquidator can be called upon by the Income-tax Authorities to submit a return in accordance with the provisions of the Income-tax Act. The contention of the Official Liquidator that there cannot be any question of any assessment of a company in liquidation, also, appears to be of no material consequence in this application and Mr. Mitter, in my view, rightly contends that this question as well relates to the merits of the assessment proceeding. There is no provision, either in the Income-tax Act or in the Companies Act, which exempts a company in liquidation from assessment. On the other hand, Section 178 of the Income-tax Act clearly indicates, to my mind, that a company in liquidation is liable to assessment, as other-wise, there cannot be any question of setting apart any sum of money which may be payable by the company at a later date. Whether as a result of assessment, any liability will, in fact, arise or not is a matter to be determined in the assessment proceeding. It appears that the decision of the Allahabad High Court in the case of (1934) 2 ITR 79 : AIR 1934 Allahabad 170 and the decision of the Mysore High Court in the case of Mysore Spun Silk Mills Ltd. (in liquidation), (1968) 68 ITR 295 (Mys) support this view. The other contention of the Official Liquidator that the Official Liquidator being an officer of the Court cannot be proceeded against in any way and in any matter without leave of Court, is, to my mind, not sound. It may be true that the Official Liquidator is an Officer of the Court, but the position of the Official Liquidator cannot be equated to that of a Receiver; and for the purpose of leave of Court, the Official Liquidator and

the Receiver do not stand on the same footing. In view of the express provisions made in Companies Act including the provision contained in Section 446 (1) of the Companies Act, 1956, there cannot be any question, in my opinion, of exercising any inherent power or jurisdiction by Court and the principle of equitable authority has no application. I, therefore, agree with Mr. Mitter that the only question involved in the present application is whether leave of Court under Section 446 (1) of the Companies Act, 1956, is necessary for the assessment by the Department. The question, therefore, is really one of interpretation of Section 446 (1) of the Companies Act, 1956.

23. Before I deal with this question, it will be convenient to consider the cases cited from the Bar. I propose to take up the decision of the Federal Court in AIR 1946 FC 16 first, as the decision appears to be the root on which many of the other decisions sprout. In Shiromoni's case, AIR 1946 FC 16, the Federal Court was concerned with the question whether leave of Court under Section 171 of the Companies Act, 1913, which was then in force, was necessary in respect of any recovery proceeding by the Department for realization of arrear of income-tax. The company was believed to have made some profits for the year ending 30th May, 1940, but it was not until 25th February, 1943 that an order for assessment of income-tax was made for the year of assessment 1941-42 and the tax was eventually fixed at Rupees 18,493-12-0. In the meantime, however, a petition to wind up the company had been presented on 26th of November, 1941, a provisional Liquidator had been appointed on 7th December, 1941 and finally, on 17th April, 1942, a winding up order had been made by the High Court at Allahabad. It may be noticed, therefore, that the company had been ordered to be wound up at a very considerable time before the assessment was made. On 10th March, 1943, a notice of demand was served on the Official Liquidator of the company under Section 29, Income-tax Act, 1922. On 13th March, 1943, the Official Liquidators pointed out to the Income-tax Department that the proper procedure to be followed was for the Income-tax Department to lodge a claim in the winding up in respect of the arrear of tax alleged to be due from the company. Instead of adopting the procedure suggested, the Income-tax Department decided to adopt the procedure provided by Section 46, Income-tax Act and accordingly, on 8th August, 1944, the Income-tax Department sent an 'arrear demand' to the Official Liquidators with the intimation that the demand was recoverable as arrear of land revenue and that a recovery certificate under sub-section (2) of Section 46 had been forwarded to the Collector of Allahabad. In fact, on 10th July, 1944, the Official Liquidators had already received from the Collector of Allahabad a demand for the recovery of the said amount of Rs. 18,493-12-0 as arrear of land revenue. In these circumstances, the Official Liquidators made an application to the High Court under Sections 171, 228 and 233, Companies Act, 1913 against the Governor-General in Council, asking for an order that the Income-tax Department should be directed to put in a formal claim to the Official Liquidators in respect of the said sum of Rs. 18,493-12-0 and praying for an order restraining the Collector from effecting recovery of the said sum as arrear of land revenue. The High Court made an order directing that the Income-tax Department should be restrained from proceeding without leave of the Court with the subsisting proceeding before the Collector at Allahabad for the recovery of the said sum of Rs. 18,493-12-0 as an arrear of land revenue in accordance with Section 46, Income-tax Act, provided nevertheless that the said injunction should be without prejudice to such application, if any, as the Department may be advised to make under Section 171 of the Companies Act, 1913, for leave to proceed with such recovery. The Department went up on appeal to the Federal Court. The Federal Court, on a construction of Section 171 of the Companies Act, 1913, which corresponds to and is identical with Section 446 (1) of the Companies Act, 1956, held that leave of Court was

necessary under Section 171 of the Act of 1913 and the recovery proceeding sought to be effected by the Department was covered by the said Section 171. The Federal Court held at p. 21: "In our judgment, it need not and therefore should 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 the company in liquidation laid down by the Act. In particular, we would refer to Section 232. Section 232 appears to us to be supplementary to Section 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void. The reference to 'distress' indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law. Moreover, the scheme of the application of the company's property in the pari passu satisfaction of its liabilities, envisaged in Section 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are 'outside the winding up' in the sense indicated by Lord Wrenbury in his speech in 1923 AC 647 at p. 671), are subjected as to their actions against the property of the company to the control of the Court. Accordingly, in our judgment, 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.

That still leaves open the question whether action under Section 46, Income-tax Act, is covered by the phrase 'other legal proceedings'. Clearly it is not a proceeding in an ordinary Court of law. 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'. If it be considered that the effect of the Income-tax authorities putting the machinery of Section 46, Income-tax Act, in motion for the collection of arrears of income-tax is to bring into operation all the appropriate legal enactments relating to the collection of land revenue in the province concerned, it is, in our judgment, very difficult to say that they are not taking a 'legal proceeding'. In fact, in this very case, had the company not been in liquidation, the appellant would have had the choice at his option of (a) proceeding by 'suit' in the ordinary Courts in respect of arrears, or (b) by forwarding (under Section 46 (2), Income-tax Act) to the Collector the requisite certificate, initiating and putting into force collection of the arrears as arrears of land revenue under and in accordance with the appropriate provisions of the U. P. Land Revenue Act (3 of 1901). Surely, such last-mentioned action on the part of the Income-tax authorities would be the adoption of another legal proceeding for the collection of the arrears as opposed to the institution of a suit. The proviso to Section 46 (2) empowers the Collector, if he so chooses, to exercise all the powers which a civil Court may exercise in respect of the attachment and sale of debts due to a judgment-debtor. If the Income-tax Officer will be taking a 'legal proceeding' when he moves the Collector - as we think he must be held to do - to realise the tax by attachment and sale of debts due to the assessee, it can make no difference in principle that the Collector is asked to exercise his summary powers under the land revenue law. Accordingly, we agree with the learned Judges of the Allahabad High Court in holding that the words 'other legal proceedings' in Section 171, Companies Act, 1913, comprise any proceeding by the Revenue authorities under Section 46 (2), Income-tax Act and that accordingly, before forwarding the requisite certificate under Section 46 to the Collector,

which would put the machinery for the collection of the arrears of income-tax as arrears of land revenue into motion, the appellant should have applied in the liquidation under Section 171, Companies Act, for leave of the winding up Court".

24. It may be noted that in coming to this decision, the Federal Court took into consideration the very important fact that in respect of income-tax dues the Crown is not entitled to any prerogative, priority or preferential treatment, save those expressly conferred by the Act itself and the Federal Court observed at pp. 19-20 of the report: "We have no hesitation in coming to a conclusion and holding that the Crown is bound by the provisions of the Indian Companies Act, 1913 and is bound, in regard to the provisions relating to the liquidation of companies, 'to a statutory scheme of administration wherein the prerogative right of the Crown to priority no longer exists'. (Lord Wrenbury in 1923 AC 647, at p. 672.) The Crown is accordingly not entitled, in our judgment, to any prerogative, priority, or preferential rights or treatment, save those expressly conferred and limited by the Act itself, in particular by Section 230 and sub-section (2) of Section 232. Before we turn to the more detailed consideration of Section 171, Companies Act, it may also be noted that the particular arrears of income-tax, which the appellant has endeavored to collect through the machinery of Section 46, Income-tax Act, do not come within the prescribed class of taxes for which the Crown can claim even the limited priority given by Section 230, Companies Act. Having regard to the delay in assessment, these arrears were not due from the company at the date of the winding up order. In respect of them the Crown ranks as an ordinary unsecured creditor. Nonetheless, the appellant claims not only that the appellant is free to exercise in this case the machinery of Section 46, Income-tax Act, but that also the appellant is free to collect these arrears in full without any obligation to account to the liquidators or to bring into Court any excess above what the appellant might receive if a claim as an unsecured creditor had been made. It appears that, excepting the power of the Court under Section 171 to impose a condition at the time of granting leave, there is no machinery or provision in the Act to compel the appellant to account for or bring into Court any such excess. Accordingly, this claim to exercise the machinery of Section 46 would in effect enable the Crown to secure for the arrears set out above, the very priority to which both in England and India the Crown has been held not entitled."

25. The next case that I propose to consider is the case of AIR 1955 Supreme Court 604. The facts of this case in which the position of secured creditors was considered, are not very material. The Supreme Court in this case considered the decision of the Federal Court in Shiromoni's case, AIR 1946 FC 16 and laid down certain principles as to construction of Section 171 of the Companies Act, 1913. The Supreme Court observed at pp. 609-610 of the report: "It may be observed in this connection that Section 171 enacts a general provision with regard to suits or other legal proceedings to be proceeded with or commenced against the company after a winding up order has been made and lays down that no suit or other legal proceedings shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.

This general provision is supplemented by the supplemental provisions to be found respectively in Sections 229 and 232 (1) of the Act. Section 229 speaks of the application of insolvency rules in winding up of insolvent companies and Section 232 (1) speaks of the avoidance of certain attachments, executions, etc., put into force without the leave of the Court against the estate or effects of the company and also of any sale held without the leave of the Court of any of the properties of the company after the commencement of the winding up. Section 229 recognises

the position of the secured creditor generally as outside the winding up enables him in the event of his desiring to take the benefit of the winding up proceedings to prove his debt, to value the same and share in the distribution pro rata of the assets of the company just in the same way as he would be able to do in the case of insolvency under the Presidency Towns Insolvency Act or the Provincial Insolvency Act. Section 232 (1) also has reference to legal proceedings in much the same way as legal proceedings envisaged by Section 171 of the Act and the attachment, distress or execution put in force or the sale held are all of them legal proceedings which can only be resorted to through the intervention of the Court. The word 'held' in connection with the sales contemplated within the terms of the amended section also lends support to this conclusion and this conclusion is further fortified by the terms of Section 232 (2) which says that nothing in this section applies to proceedings by the Government, thus in effect indicating that what are referred to in Section 232 (1) are proceedings within the meaning of that term as used in Section 171 of the Act. The Federal Court also put a similar construction on the provisions of Section 171 read with Section 232 (1) of the Act in AIR 1946 FC 16 at pp. 20-21.

'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. In particular, we would refer to Section 232. Section 232 appears to us to be supplementary to Section 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding-up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void.

The reference to 'distress' indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law. Moreover, the scheme of the application of the company's property in the pari passu' satisfaction of its liabilities, envisaged in Section 211 and other sections of the Act, cannot be made to work in coordination, unless all creditors (except such secured creditors as are 'outside the winding-up' in the sense indicated by Lord Wrenbury in his speech in 1923 AC 647 at p. 671) are subjected as to their actions against the property of the company to the control of the Court. Accordingly, in our judgment, 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.

We are, therefore, of the opinion that the sale effected by respondent 2 as the Receiver of the Trustees of the debenture-holders on 16-7-1954 was valid and binding on all parties concerned and could not be challenged as it was sought to be done by the Official Receiver. The position was rightly summed up by the High Court as under:

"We thus reach the position that no leave of Court was needed before the Receiver appointed by the mortgagee debenture-holders exercised the power of sale..."

26. It will be convenient at this stage to note the decision of the Supreme Court in the case of AIR 1966 Supreme Court 135. In this case, the Supreme Court was concerned with Section 446 of the Companies Act, 1956, the section which is involved in the present proceeding and its scope and effect. The matter came up before the Supreme Court out of a decree passed by the

Life Insurance Tribunal, Nagpur, under Section 15 of the Life Insurance Corporation Act, 1956 (Act 31 of 1956). The company was in liquidation and one of the points raised before the Supreme Court was that the Life Insurance Tribunal had no jurisdiction to proceed with the proceedings on the petition presented by the Life Insurance Corporation without the leave of the High Court in view of Section 446 of the Companies Act, 1956, the company having been ordered to be wound up by the High Court on November 9, 1959. Dealing with this contention the Supreme Court held at p. 139 of the report: Sub-Section (1) of Section 446 of the Companies Act provides that 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. Sub-section (2) provides, inter alia, that the Court which is winding up the company shall, notwithstanding anything contained in any law for the time being in force, have jurisdiction to entertain or dispose of any suit or proceeding and any claim made by or against the company. Sub-section (3) provides that any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court. The question is whether these provisions would affect the proceedings of the Tribunal. In this connection, reference may be made to Section 41 of the Life Insurance Corporation Act which provides that no civil Court shall have jurisdiction to entertain or adjudicate upon any matter which a Tribunal is empowered to decide or determine under that Act. It is not disputed that the Tribunal had jurisdiction to entertain the application of the Corporation and adjudicate on the matters raised thereby. The Tribunal is given the exclusive jurisdiction over this matter.

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 proceeding with such proceedings against a company after a winding-up order has been made. In view of Section 41 of the Life Insurance Corporation 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. It is not disputed that the Tribunal has jurisdiction under the Act to entertain and decide matters raised in the petition filed by the Corporation under Section 15 of the Life Insurance Corporation Act. It must follow that the consequential provisions of sub-section (1) of Section 446 of the Companies Act will not operate on the proceedings which will be pending before the Tribunal or which may be sought to be commenced before it. Further, the provisions of the Special Act, i.e., the Life Insurance Corporation Act, will override the provisions of the general Act, viz., the Companies Act which is an Act relating to companies in general."

27. The decision of the Orissa High Court in the case of (1959) 36 ITR 135 (Orissa) is not of material assistance, as the said decision relates to recovery of tax and is covered by the decision of the Federal Court in Shiromani's case. The decision of the Punjab High Court in the case of (1962) 46 ITR 193 (Punj) deals with a case of imposition of penalty by the Income-tax authorities on a company in liquidation and it was held that imposition of penalty after winding up of the company without leave of Court was not permissible in view of the provisions contained in Section 171 of the Companies Act, 1913. The learned Judge observed at p. 195 - "The Company went into liquidation on 13th January 1956, when passing the penalty order, no notice was given to the Official Liquidator. Section 171 of the Indian Companies Act, 1913, provides that when a winding-up order has been made no suit or other legal proceedings shall be

proceeded with or commenced against the company except by leave of Court and subject to such terms as the Court may impose. The language of this section is wide enough to include proceedings under the Income-tax Act. No leave of the Court has been obtained. In view of this, the claim of the petitioner that Rs. 4,000 on account of penalty order passed on 14th April, 1956 cannot be entertained." The decision of the Allahabad High Court in the case of (1964) 51 ITR 403 (All) is concerned with a case of continuance of assessment proceeding against a company in liquidation without leave of Court and is clearly akin to the case in hand. Manchanda, J., considered Section 446 of the Companies Act, dealt with the case law on the point including the decision of the Federal Court in Shiromoni's case, AIR 1946 FC 16 and held that leave of Court was not necessary for continuing the assessment proceeding against the company in liquidation. The learned Judge observed that the judgment of the Federal Court in Shiromoni's case, AIR 1946 FC 16, made it clear that the expression 'other legal proceedings', so far as it relates to income-tax proceedings was confined to execution or distress proceedings at the recovery stage under Section 46, which is a stage after the assessment has been completed and the learned Judge stated as follows at p. 158 of the report: "The ratio of the decision is that because other Acts - U. P. Land Revenue Act and the Civil Procedure Code - in proceedings under Section 46 of the Income-tax Act come to the assistance of the Collector, those proceedings can be termed as legal proceedings. It was, however, nowhere held that even assessment proceedings which fall under a special Act which is a complete code in itself could be considered to be other legal proceedings." The learned Judge also holds that the provision of subsections (2) and (3) of Section 446 indicate the scope of the words 'other legal proceeding' as used in sub-section (1) and go to show that 'other legal proceeding' must be such proceeding over which the High Court in its ordinary jurisdiction could exercise some original or appellate jurisdiction and control. The learned Judge observes at pp. 410-411 of the report: "The provisions of sub-section (2) and sub-section (3) of Section 446 of the Companies Act, 1956, would also go to indicate the scope of the words 'other legal proceedings' as used in sub-section (1) of that section. Sub-section (2) gives the Court concerned with the winding up of the company the jurisdiction to entertain or dispose of any suit or proceeding by or against the company itself. Sub-section (3) gives such Court the right to transfer proceedings pending before another Court and to dispose it of itself. Income-tax proceedings are certainly not such proceedings which the High Court under Section 446 could possibly entertain and make the assessment itself nor could it transfer any such assessment pending before Income-tax Officer to its own record. Thus, these two sub-sections go to indicate that the words 'other legal proceedings' must be such proceedings over which the High Court in its ordinary jurisdiction can exercise some original or appellate jurisdiction and control. The High Court, under Section 66 of the Income-tax Act, has merely an advisory jurisdiction and no more. It has no original or appellate jurisdiction whatsoever in income-tax matters and much less has it the power to transfer any assessment proceedings to its own record. Income-tax proceedings are also not proceedings for the enforcement of any personal rights against the assets of the company but are proceedings in the interest of public revenues and in the vindication of public interests. Section 446 of the Companies Act, 1956, cannot in my judgment have any application to Income-tax proceedings prior to the stage of assessment."

28. The decision of the Mysore High Court in the case of Mysore Spun Silk Mills Ltd. (in liquidation), reported in (1968) 68 ITR 295 (Mys), was essentially concerned with the question whether the company in liquidation was at all liable to be assessed for income-tax. The learned Judge answered the question in the affirmative and incidentally observed at p. 300 of the report: "At the same time, as the issue of any notice, whether under Section 178 of the Income-tax Act

or under any other provision thereof, is in the eye of law the commencement of, or the necessary condition for commencing, proceedings for the purpose of quantification and collection of the taxes, the Income-tax Officer is bound to obtain the leave of the Court under Section 446 of the Companies Act. Any failure to do so would amount to contempt of Court vide (1959) 36 ITR 135 (Orissa)." The learned Judge in consideration of his view granted necessary leave to the Department.

29. The decision of the Bombay High Court in the case of *In re Colaba Land and Mills Co. Ltd. (in liquidation)*, reported in¹⁸ is one exactly on the point involved in the present proceeding. Similar notices under Sections 142 (1) and 148 of the Income-tax Act had been served on the Official Liquidator of the company which was in the process of being wound up by an order of Court. The Official Liquidator made an application before the Court, complaining about the conduct of the Department in issuing the said notices without obtaining any leave of Court and prayed for suitable orders quashing the said notices and restraining the Department from taking any steps in enforcement thereof without obtaining leave of Court. Vimadalal, J., who decided the case, held that it was not open to the Department to proceed to assess the company in liquidation without leave of Court and the learned Judge accordingly made an order of injunction restraining the Department from assessing or re-assessing the company. The learned Judge in his Judgment considered the decision of the Federal Court in the case of *Shiromoni Sugar Mills*, AIR 1946 FC 16, the decision of the Supreme Court in *Damji Valji's case*, AIR 1966 Supreme Court 135, the decision of the Allahabad High Court in *Tika Ram's case*, (1964) 51 ITR 403 (All) and also various other authorities. The learned Judge construed the decision of the Federal Court in *Shiromoni's case*, AIR 1948 FC 16, to lay down that the expression 'other legal proceeding' in Section 446 (1) of the Companies Act, 1956, is wide enough to cover any assessment proceeding by the Department and relying on this decision of the Federal Court, the learned Judge held that leave of Court was necessary. The learned Judge observes at p. 402 of the report: "The question is, however, in my opinion, clinched by one single decision of the Federal Court;" and at pp. 403-404 the learned Judge in interpreting the decision of the Federal Court, holds: "It was held by the Federal Court that the expression 'all other legal proceedings' occurring in Section 171 of the Companies Act, 1913, which, as already stated by me, is identical in terms with Section 446(1) of the present Companies Act, 1956, should not be confined to original proceedings in a Court of the first instance analogous to a suit initiated by a petition

¹⁸(1968) 67 ITR 399 (Bom)

similar to a plaint. The learned Judges proceeded to observe that no narrow construction should be placed upon these words and they should be held to cover distress and execution proceedings in the ordinary Courts, as such proceedings are other legal proceedings against the company as contrasted with ordinary suits against the company. On the same page, the learned Judges then proceeded to state as follows :

"That still leaves open the question whether action under Section 46 of the Indian Income-tax Act is covered by the phrase 'other legal proceedings'. Clearly it is not a proceeding in an ordinary Court of law. 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 the manner prescribed by law and in pursuance of law or legal enactment, cannot properly be described as a 'legal proceeding'. If it be considered that the effect of the Income-tax

authorities putting the machinery of Section 46 of the Income-tax Act in motion for the collection of arrears of income-tax is to bring into operation all the appropriate legal enactments relating to the collection of land revenue in the Province concerned, it is, in our judgment, very difficult to say that they are not taking a legal proceeding'.

The Federal Court, therefore, agreed with the Allahabad High Court in holding that the words 'other legal proceeding' in Section 171 of the Companies Act, 1913, cover any proceeding by the Revenue authorities under Section 46 (2) of the Income-tax Act, 1922 and that accordingly, before forwarding the requisite certificate under Section 46 (2) to the Collector which would put the machinery for the collection of the arrears of income-tax as arrears of land revenue into motion, the Revenue authorities should have applied under Section 171 of the Companies Act, 1913, for leave of the winding-up Court. For the purpose of the present summons, it is unnecessary for me to consider the other points which were decided by the Federal Court in Shiromoni's case. The ratio of the decision of the Federal Court in that case, therefore, is (1) that the expression 'other legal proceeding' in Section 446 (1) of the Companies Act, 1956, need not be confined to an original proceeding in the nature of a suit and (2) that it need not be a proceeding in a Court of law, so long as it is a proceeding taken in pursuance of a legal enactment."

30. The learned Judge in dealing with the decision of the Supreme Court in Damji Valji's case, AIR 1966 Supreme Court 135, refers to the following observation of the Supreme Court: "It is in view of 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 winding-up order has been made;" and the learned Judge then proceeds to hold at pp. 410-411 of the report: "It appears to me that the word 'exclusive', which is to be found in the above passage in the judgment in Damji Valji's case, has occurred there per incuriam, in so far as Section 446 (2) is an empowering provision which confers an overriding controlling power on the Court which is winding-up a company so that liquidation proceedings may not be impeded or delayed in any manner and so as to ensure a fair and equitable distribution of the assets of the company. It is on the latter ground that the Federal Court based its decision on the first question in Shiromoni's case. So construed, the very wide powers conferred by Section 446 (2), which are clearly stated to be 'notwithstanding anything contained in any other law for the time being in force' would not lead to the absurd situations which were placed before me by Mr. Joshi in the course of his arguments for the purpose of testing the meaning of the expression 'other legal proceeding' in sub-section (1) of Section 446. Since sub-section (2) of that section is a mere empowering provision, the Court which is winding up a company would not exercise those powers, except in a proper case. It would not, for instance, interfere in assessment proceedings or undertake them itself unless those proceedings are likely to hold up or delay the liquidation of the company for an inordinate length of time and in such a case it may well decline to grant leave under Section 446 (1) to commence or continue those proceedings before the Income-tax authorities."

31. Dealing with the decision of the Allahabad High Court in Tika Ram's case, (1964) 51 ITR 403 (All), Vimadlal J., observed at pp. 407-409 of the report, (1968) 67 ITR 399 (Bom) - "The

learned Judge then proceeded to deal with the second question that arose before him. After quoting Section 446 (1) of the Companies Act, 1956, Manchanda, J., proceeded to deal with the case-law on the point including the decision of the Federal Court in Shiromoni's case, AIR 1946 FC 16, already discussed by me above and observed that the judgment of the Federal Court made it clear that the expression 'other legal proceedings', so far as it relates to Income-tax proceedings, was confined to execution or distress proceedings, that is, action under Section 46, which is a stage arising after the assessment has been completed. Manchanda, J., then stated as follows at page 158:

"The ratio of the decision is that because other Acts - U. P. Land Revenue Act and the Civil Procedure Code - in proceedings under Section 48 of the Income-tax Act come to the assistance of the Collector, those proceedings can be termed as legal proceedings. It was, however, nowhere held that even assessment proceedings which fall under a special Act which is a complete code in itself could be considered to be 'other legal proceedings'.

The learned Judge then proceeded to state that the provision of sub-sections (2) and (3) of Section 446 would also go to indicate the scope of the words 'other legal proceeding' as used in sub-section (1) thereof. He stated that sub-sections (2) and (3) of Section 446 go to indicate that 'other legal proceeding must be such proceeding over which the High Court in its ordinary jurisdiction could exercise some original or appellate jurisdiction and control. I am afraid, I do not agree with that statement of Manchanda, J. No such limitation can be imposed on the expression 'other legal proceeding' in sub-section (1) from the language of sub-section (2) of Section 446, in view of the fact that the latter sub-section uses the still wider expression 'proceeding' in clause (a) thereof. Sub-section (3) of Section 446, on the other hand, can be of no assistance for the purpose or construing the expression 'other legal proceeding' occurring in sub-section (1) of that section, in view of the fact that it is expressly confined to a 'proceeding... pending in any Court'. Moreover, to limit the meaning of the expression 'other legal proceeding' in Section 446 (1) in the manner in which Manchanda, J. has limited the same, would be clearly contrary to the view of the Federal Court in Shiromoni's case that the said expression should not be given a narrow construction. In the view that he took of the matter, Manchanda, J., held that Section 446 of the Companies Act, 1956, cannot have any application to income-tax proceedings prior to the stage of assessment. He then went on to observe that it was, however, unnecessary for him to decide as to whether, after assessment was made, the department could or could not proceed to recover the amount found due without the leave of company Judge. I fail to see how he could make that observation in the face of the decision of the Federal Court in Shiromoni's case, which is a direct decision on the point and in which it was held that proceedings for recovery under Section 46 of the Income-tax Act cannot be taken without the leave of the company Judge. Manchanda J., therefore, dismissed the writ petition filed by the company. I do not agree either with the construction placed by him upon the decision of the Federal Court in Shiromoni's case, AIR 1946 FC 16 by Manchanda J. in Tika Ram's case, (1964) 51 ITR 403 (All), or with the construction placed by him upon the expression 'other legal proceeding' in Section 446 (1) of the Companies Act. It is true that the question which arose before the Federal Court in Shiromoni's case related to recovery proceedings under Section 446 of the Companies Act, but the Federal Court has in unambiguous terms construed the expression 'other legal proceeding' as including any proceeding taken in pursuance of a legal enactment which need not be in a Court of law. I do not see how the distinction which Manchanda J., has sought to draw in

Tika Ram's case, (1964) 51 ITR 403 (All), can be drawn at all on a plain reading of the language of Section 446 (1) itself. In my opinion, recovery proceedings are proceedings which are as much under a legal enactment as assessment proceedings, and, in fact, both the proceedings would be proceedings under the same Act, though they relate to different stages, Manchanda J. has sought to distinguish the decision of the Federal Court in Shiromoni's case but I am afraid I am unable to see what is the distinction in principle which he seeks to make. I am bound by the decision of the Federal Court in Shiromoni's case and I also respectfully agree with the same. The first contention of Mr. Joshi based on the decision of Manchanda J. in Tika Rain's case, (1964) 51 ITR 403 (All), must, therefore, be rejected."

32. The following observations of Vimadlal J. at page 411 of the report, while considering the contention of the Department that under the Income-tax Act, the Department enjoys exclusive jurisdiction in the matter of assessment, may also be usefully quoted –

"There is nothing in the judgment of the Federal Court in Shiromanis case, AIR 1946 FC 16, to lead to the conclusion that the expression 'other legal proceeding' should not be held to apply to cases in which proceedings have been taken under a special Act like the Income-tax Act which is a complete code in itself and under which the income-tax authorities are under a statutory duty to assess tax. Proceedings under such Act are, in my opinion, nonetheless proceedings taken pursuant to a legal enactment and the statutory duty to which Mr. Joshi has referred also arises only pursuant to a legal enactment and would, therefore, fall within the ratio of the decision in Shiromani's case."

33. The decision of the Patna High Court in AIR 1957 Patna 722, deals with the question whether leave under Section 171 of the Companies Act, 1913 was necessary for the Government to make a reference under Section 10 (1) of the Industrial Disputes Act. The learned Judge did not consider it necessary to decide the question and held on a construction of Section 10 (1) of the Industrial Disputes Act that it was not necessary for the Government to obtain leave of Court. Ramaswami C. J. observed at page 724 of the report -

"A statutory duty is imposed upon the State Government to make a reference if the conditions mentioned in the proviso to Section 10 (1) are satisfied. I see no reason why the power of the State Government under Section 10 (1) or the statutory duty under the proviso of that sub-section should be controlled or that sub-section should be controlled by anything in the language of Section 171 of the Companies Act."

It may be noted that this decision of the Patna High Court came up before the Supreme Court on appeal and the decision of the Supreme Court is reported in AIR 1959 Supreme Court 230. The Supreme Court held that in the facts of the case it was not necessary to consider whether leave of Court under Section 171 of the Companies Act, 1913 was required to be obtained as the company which was in liquidation, was not a party to the reference. The Supreme Court observed at page 236 of the report –

"The company thus not being a party to the reference the proceedings which were commenced on 2nd December, 1954, before the Tribunal were not proceedings against

the company (in liquidation). This being the position on a true construction of the terms of the notification by which the reference was made the question whether the reference was a legal proceeding within the meaning of Section 171 of the Indian Companies Act does not arise for our decision and we prefer not to express any opinion on that part of the question."

This decision of the Patna High Court and also the decision of the Supreme Court in the case of S. K. G. Sugar Ltd., AIR 1959 Supreme Court 230, are not of any real assistance, as the material question involved in the present proceeding was not discussed or decided.

34. In the case reported in AIR 1933 Calcutta 433 (2), the Court had to consider whether a proceeding under Section 145 of the Criminal Procedure Code could be started against a Liquidator without obtaining leave of Court. A Division Bench of this Court held that the provision under Section 171 of the Indian Companies Act, 1913 to the effect that when a winding up order had been made, no suit or other legal proceeding would be proceeded with or commenced against the company except by leave of the Court, was not meant to override an express enactment in Section 145, Criminal Procedure Code by which a Magistrate, if satisfied that the disputes likely to cause a breach of the peace existed, was bound to call on the parties to attend his Court and to put in their claim as regards actual possession. The Court further held that whether the party to the proceeding was not the company, but the Liquidator and though he happened only to be a party to the proceedings by reason of the fact that he was clothed with that character for the purpose of a proceeding under Section 145 he was to be regarded as a separate personality responsible for the action of his men, though he might in fact be acting on behalf of the company. The following observations of Pearson J., who delivered the judgment of the Bench at page 434 of the report may be quoted –

"A further argument before us was that the Magistrate had no jurisdiction to draw up proceedings against the Liquidator without first obtaining the permission of the High Court. This argument is based on Section 171, Companies Act, which provides that when a winding up order has been made no suit or other legal proceeding shall be proceeded with or commenced against a company except by leave of the Court. That is a provision intended to safeguard the company's assets against wasteful or expensive litigation in regard to matters which are capable of determination more expeditiously and more cheaply in the winding up. It would hardly seem reasonable to suggest that a prohibition of that kind is meant to override an express enactment in Section 145, Criminal Procedure Code, by which a Magistrate, if satisfied that a dispute likely to cause a breach of the peace exists, is bound to call on the parties to attend his Court and put in their claims as regards actual possession (the words are mandatory). If it were so, the result would be that in such cases the Magistrate would be powerless to prevent a breach of the peace."

35. The next decision referred to is the decision of the Madras High Court in the case of AIR 1951 Madras 987. In this case the Madras High Court was concerned with a declaration made by the Government under Section 15 (2) of the Industrial Disputes Act after the company had been ordered to be wound up and the Madras High Court held that no leave under Section 171 of the

Companies Act, 1913 was necessary to be obtained by the Government from Court before making the required declaration under Section 15 (2) of the Industrial Disputes Act. The Court observed at page 991 of the report –

"Even if we construe the words 'other legal proceeding' in the widest manner possible, we fail to see how the declaration made by the Government can be held to be a 'legal proceeding'. Section 15 (2) of the Industrial Disputes Act says that on receipt of an award from the Industrial Tribunal, the Government 'shall, by order in writing, declare the award to be binding.' There is no proceeding taken by the Government. The order is a mere mechanical administrative act. The adjudication was really by the Tribunal and the award is the normal expression of that adjudication."

36. The last case cited by Mr. Mitter is the case of AIR 1960 Kerala 247. In this case the Kerala High Court had to consider the question of requirement of leave under Section 446 (1) of the Companies Act, 1956 in relation to proceedings pursuant to a reference under Section 10 of the Industrial Disputes Act and the Court came to the conclusion that no leave of Court was necessary. The Court held that Section 446 of the Companies Act, 1956, could have no application to proceedings pursuant to a reference under Section 10 of the Industrial Disputes Act. In construing Section 446 of the Companies Act, 1956, the Court observed at page 250 –

"In my opinion Section 446 of the Companies Act can have no application to proceedings pursuant to a reference under Section 10 of the Industrial Disputes Act. Giving the term, 'other legal proceedings' appearing in sub-section (1) of the section, the wide meaning given to the same term in the corresponding section, Section 171 of the 1913 Act in AIR 1946 FC 16 and not confining it by an ejusdem generis construction to proceedings analogous to come within the scope of this section, the proceeding must be in the nature of an action against the property of the company.

To put it somewhat differently, the proceeding must be for the enforcement of something in the nature of personal right against the assets of the company and not one in vindication of public interest. As pointed out in the Federal Court decision just referred to, the purpose of Section 446 of the Companies Act is to subject all creditors to the control of the Court in respect of their actions against the property of the company so that the property may be conserved and applied in the pari passu satisfaction of its liabilities. The winding up Court has to see that the administration is carried on to the best advantage of the creditors and the members of the company as a whole, and, for that purpose, Section 446 and other sections of the Companies Act give it wide powers as far as the rights of the creditors and the members of the company are concerned. But, if there are interests that transcend the interests of the creditors and members of the company, it is not reasonable that these interests should be subjected to the control of the winding up Court, a control which it is to exercise for the benefit of the creditors and the members. A criminal prosecution against the company would doubtless be a legal proceeding against it. But I do not suppose that it has ever been said that a criminal prosecution falls within the scope of Section 446 (1) of the Companies Act. and it seems to me that subsections (2) and (3) of Section 446 give some indication of the kind of legal proceeding that comes within the mischief of sub-section (1). For sub-section (2) gives the winding up Court jurisdiction to

entertain or dispose of any suit or proceeding by or against the company, while sub-sec.; gives it the power to withdraw and dispose of any such suit or proceeding pending in any other Court. I am inclined to think that a suit or proceeding for which leave is necessary under sub-section (1) must be a suit or proceeding capable of being withdrawn and disposed of by the winding up Court. In AIR 1933 Calcutta 433 (2), it was observed that Section 171 of the 1913 Act was a provision intended to safeguard the company's assets against wasteful or expensive litigation in regard to matters which are capable of determination more expeditiously and cheaply in the winding up. With due respect I agree."

37. A review of these, decisions, to my mind, indicates that the following propositions can be said to be fairly established :

- (1) Leave of Court is necessary in case of any recovery proceeding by the Department against a company in liquidation.
- (2) Leave of Court is not necessary in respect of any and every proceeding against a company in liquidation.
- (3) Whether leave of Court is necessary or not will depend on the nature of the proceeding.
- (4) If on a consideration of the nature of the proceeding and on proper interpretation of Section 446 (1) of the Companies Act, 1956, the proceeding complained of can be said to be covered by Section 446 (1) and to be within its scope, leave of Court is essential and the proceeding cannot be commenced or continued without obtaining leave of Court.
- (5) If on a consideration of the nature of the proceeding and on proper interpretation of Section 446 (1) or the Companies Act, 1956, the proceeding complained of does not come within the scope of the said Section 446 (1), no leave of Court will be necessary either for the commencement or continuance thereof.

Whether leave of Court is necessary in respect of the notices in question complained of by the Official Liquidator in the present proceeding depends essentially on the nature of the proceeding and on a proper construction of Section 446 (1) of the Companies Act, 1956. The notices complained of, as I have already indicated, relate to assessment of the company and the proceeding in question, therefore, is one in relation to the assessment of the company. Apart from the decision of Allahabad High Court in the case of Tika Ram, (1964) 51 ITR 403 (All) and the decision of the Bombay High Court in the case of Colaba Land and Mills Co., Ltd., (1968) 67 ITR 399 (Bom), the other decisions have no direct bearing on the question involved in the present case, as the other decisions are not concerned with the question of leave of Court in relation to any assessment proceeding, although the other decisions are relevant in construing Section 446 of the Companies Act, 1956 and in understanding its scope and effect. The decision of the Punjab High Court in the case of (1962) 46 ITR 193 (Punj), relates to imposition of penalty and is, therefore, clearly distinguishable. Though the said decision is entitled to great respect, yet it is to be noted that in the said decision there is really no discussion of this aspect and no authorities on this aspect of the matter including even the decision of the Federal Court in Shiromani's case, AIR 1946 FC 16, had been cited or considered by the learned Judge. The learned Judge merely proceeds to observe in dealing with Section 171 of the Companies Act, 1913 that 'the language of the section is wide enough to include proceeding under Income-tax

Act.'

38. The decision of the Mysore High Court in the case of (1968) 68 ITR 295 (Mys), may appear to lay down that leave of Court is necessary in respect of assessment proceedings. It is, however, to be noted that the decision of the Mysore High Court was not really concerned with this aspect of the question and the observations of the Court are based mainly on the decision of the Orissa High Court in the case of (1959) 36 ITR 135 (Orissa). This aspect of the matter does not appear to have been argued or considered and no discussion of this question appears in the judgment. The observations appear to be incidental to the passing of the order and are really in the nature of an obiter. Though the decision and the observations are entitled to every respect, yet no great importance can be attached to the said observations and the order, as this question of leave does not appear to have been canvassed and argued before the learned Judge and properly considered by him.

39. The Allahabad High Court in the case of (1964) 51 ITR 403 (All), considers this aspect of the matter fully, discusses authorities including the decision of the Federal Court in Shiromoni's case, (AIR 1946 FC 16), interprets the said decision and states its reason as to why the decision of the Federal Court in Shiromoni's case, (AIR 1946 FC 16), is not applicable to assessment proceedings and for its decision as to why no leave is necessary in respect of any assessment proceedings.

40. The decision of the Bombay High Court in the case of Colaba Land and Mills Ltd., (1968) 67 ITR 399 (Bom), as already indicated, is another authority exactly on the point. The learned Judge has discussed the question at length and has considered various authorities including the decision of the Federal Court in Shiromoni's case, (AIR 1946 FC 16), the decision of the Supreme Court in Damji Valji's case, (AIR 1966 Supreme Court 135) and also the decision of the Allahabad High Court in Tika Ram's case, (1964) 51 ITR 403 (All). I have already quoted the relevant observations of the learned Judge earlier in my judgment. To my mind, it appears that the learned Judge on his interpretation of the decision of the Federal Court in Shiromoni's case came to the conclusion that the question of leave as to assessment proceeding is covered by the said decision of the Federal Court and in view of this conclusion on his interpretation of the Federal Court decision, the learned Judge held that leave was necessary. In the light of his own interpretation of the decision of the Federal Court and his conclusion based on such interpretation, Vimadalal J. who decided the Bombay case, naturally recorded his disagreement with the views expressed by Manchanda J. of the Allahabad High Court in Tika Ram's case, (1964) 51 ITR 403 (All).

41. The first question that, therefore, requires consideration is whether the decision of the Federal Court in Shiromoni's case, AIR 1946 FC 16, can be said to cover the point involved in the present proceeding. If the decision of the Federal Court can be said to cover the question involved in the present proceeding, the question must necessarily be considered closed and there cannot be anything else to consider, as the decision of the Federal Court is clearly binding.

42. I have already dealt with the decision of the Federal Court in the earlier part of my judgment. On an anxious and very careful consideration of the decision of the Federal Court in Shiromoni's case, I am, however, of the opinion that the said decision does not conclude the question involved in the present proceeding. It is to be noted that in Shiromoni's case, the Federal Court was concerned with the question of recovery proceeding and not with any assessment proceeding.

The point for decision before the Federal Court was whether recovery proceeding by the Department was a legal proceeding within the meaning of Section 171 of the Companies Act, 1913 and the Federal Court held that it was. The conclusion of the Federal Court may best be stated in the words of the learned Chief Justice at page 21 - "Accordingly, we agree with the learned Judges of the Allahabad High Court in holding that the words 'other legal proceedings' in Section 171, Companies Act, 1913, comprise any proceeding by the Revenue Authorities under Section 46 (2), Income-tax Act and that accordingly before forwarding the requisite certificate under Section 46 (2) to the Collector, which would put the machinery for the collection of the arrears of Income-tax as arrears of land revenue into motion, the appellant should have applied in the liquidation under Section 171, Companies Act, for leave of the winding up Court." The question whether leave of Court is necessary or not in respect of any assessment proceeding by the Department was not before the Federal Court and the Federal Court did not consider this question. As the question of leave of Court in relation to assessment proceeding was not before the Federal Court and was not considered by the Federal Court and as the only question the Federal Court decided and was called upon to decide was the question of leave of Court in relation to recovery proceeding by the Department, I am of the opinion that the said decision of the Federal Court cannot be said to conclude the question involved in the present proceeding. Vimadalal J. in the Bombay decision in (1968) 67 ITR 399 (Bom), places particular reliance on the following observations of the Federal Court –

"That still leaves open the question whether action under Section 46, Income-tax Act, is covered by the phrase 'other legal proceeding.' Clearly it is not a proceeding in an ordinary Court of law. 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 'legal proceeding.'"

Relying on these observations Vimadalal J. held at page 404 of the report (1968) 67 ITR) –

"The ratio of the decision of the Federal Court in that case, therefore, is (1) that the expression 'other legal proceeding' in Section 446 (1) of the Companies Act, 1956 need not be confined to an original proceeding in the nature of a suit and (2) that it need not be a proceeding in a Court of law, so long as it is a proceeding taken in pursuance of a legal enactment. In my view, the observations of the Federal Court relied on by the learned Judge must be read in the light of the point for decision before the Federal Court. The Federal Court in this very decision in *Shiromani's case*, AIR 1946 FC 16, while dealing with a decision of the Lahore High Court, itself points out at page 20 of the report -

"But the observations of the learned Judges must of course be read in the light of the point before them for decision, which was a very narrow one." The main consideration which led the Federal Court to its conclusion, to my mind, appears to be, that if the Department would be allowed to go on with the recovery proceeding without obtaining leave of Court, the Department would gain for itself in the matter of realization an advantage over the other creditors of the company, an advantage to which the Department was not otherwise entitled in law. I have already quoted the relevant observations of the Federal Court at pp.

19-20 of the report earlier in my judgment and it may be apposite in this connection to set out the following observations of the Federal Court in Shiromani's case, AIR 1946 FC 16 at page 20-

"It appears that, excepting the power of the Court under Section 171 to impose a condition at the time of granting leave, there is no machinery or provision in the Act to compel the appellant to account for or bring into Court any such excess. Accordingly, this claim to exercise the machinery of Section 46, if successful, would in effect enable the Crown to secure for the arrears set out above, the very priority to which both in England and India the Crown has been held not entitled.

Hitherto, though it may be that demands have been made to collect the arrears of Income-tax due from a company in liquidation through the machinery of Section 46, Income-tax Act, the Income-tax authorities have, upon objection being taken by the Liquidators, submitted to prove their claim in the liquidation like any other creditor, c.f., ILR (1943) 24 Lah 706, above referred to. This they are now not prepared to do and the appellant presses for the sanction of the Court to be given to the right to exercise the machinery of Section 46, Income-tax Act, in respect of arrears of Income-tax due from a company in liquidation uncontrolled by the Court in which the company is being wound up." It is in this background and context, the Federal Court construed Section 171 of the Companies Act, 1913 and made the observations on which Vimadalal J. in the Bombay decision relies and which I have already quoted. These observations, to my mind, were made by the Federal Court in construing Section 171 of the Companies Act to prevent the Department from making an unlawful gain for itself at the expense of the other creditors of the company and in the best interest of justice. It is undoubtedly true that no narrow construction should be placed on the expression 'other legal proceeding' in Section 446 (1) of the Companies Act, 1956. Giving the term 'other legal proceeding' the wide meaning given to the same expression in Section 171 of the Companies Act, 1913 by the Federal Court. I am unable to accept the view of Vimadalal J. in the Bombay case that the ratio of the decision of the Federal Court in that case was that it need not be a proceeding in a Court of law, so long as it is a proceeding taken in pursuance of a legal enactment. If this view of Vimadalal J. be held to be correct, the decision of the other Courts including the decision of the Supreme Court in the case of Damji Valji, AIR 1966 Supreme Court 135, in which leave of Court was held not to be necessary, will have to be considered to be erroneous. In the case of Damji Valji, AIR 1966 Supreme Court 135, the Supreme Court was concerned with a proceeding against the company in liquidation taken in pursuance of the L. I. C. Act, which is undoubtedly a legal enactment and yet the Supreme Court held that no leave of Court under Section 446 (1) of the Companies Act, 1956 was necessary in respect of the said proceeding. Similarly in the case of proceedings against the company under the provisions of the Industrial Disputes Act which again is a legal enactment, the Courts have decided in cases noted earlier, that leave of Court is not necessary. Also in the case reported in AIR 1933 Calcutta 433 (2), a Division Bench of this Court held that no leave of Court was necessary in respect of a proceeding against the Liquidator under Section 145 of the Criminal Procedure Code which is also a legal enactment. The decision of the Supreme Court is binding on all the Courts and the decision of the Division Bench of this Court is binding on me. In view of the said decisions and for reasons already stated, I regret, with great respect to Vimadalal J. my inability to agree with the view expressed by him. It is also important and interesting to note in this connection that even in Shiromani's case before the Federal Court

assessment proceeding had commenced and concluded after the company had gone into liquidation. The winding up petition had been presented on the 26th of November, 1941, a Provisional Liquidator had been appointed on the 7th of December, 1941 and finally the company was ordered to be wound up on the 17th of April, 1942. The order for assessment was not made until the 25th of February, 1943 and as Federal Court itself notices that, "It will be noticed therefore that the company had been ordered to be wound up a considerable time before the assessment was made." The notice of demand was served on the Liquidator on the 10th of March, 1943. As far as can be gathered from the facts stated in the judgment, it does not appear that any leave had been obtained to commence or continue the assessment proceeding against the company. It also does not appear that any objection had been raised with regard to the assessment or its validity. If assessment was not permissible without leave of Court, this aspect of the matter would also undoubtedly have been raised before the Court and it is reasonable to expect that this aspect of the matter would also have been considered by the Court while dealing with the question of the validity of the recovery proceeding, as there could be no question of any recovery if the assessment itself was bad and illegal for want of leave. I am, therefore, of the opinion that the decision of the Federal Court in Shiromani's case, AIR 1946 FC 16, cannot be so construed as to cover the question involved in the present proceeding.

43. The question, therefore, that requires consideration is whether an assessment proceeding under the Income-tax Act can be said to be a legal proceeding within the meaning of 'other legal proceeding' referred to in Section 446 (1) of the Companies Act, 1956. This question, to my mind, relates essentially to the interpretation of Section 446 (1) of the Companies Act, 1956. In construing Section 171 of the Companies Act, 1913 which is similar to Section 446 (1) of the present Act the Federal Court in Shiromani's case, AIR 1946 FC 16, observed at page 21-

"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. In particular, we would refer to Section 232, Section 232 appears to us to be supplementary to Sec, 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void. The reference to 'distress' indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law. Moreover, the scheme and the application of the company's property in the pari passu satisfaction of its liabilities, envisaged in Section 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are 'outside the winding up' in the sense indicated by Lord Wrenbury in his speech in 1923 AC 647 at page 671), are subjected as to their actions against the property of the company to the control of the Court. Accordingly, in our judgment, no narrow construction should be placed upon the words 'or other legal proceeding' 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."

44. The Supreme Court while interpreting the said Section 171 in the case of AIR 1955 Supreme Court 604, referred to and relied on the said observations of the Federal Court and the Supreme Court has held at pp. 609-610:

"It may be observed in this connection that Section 171 enacts a general provision with regard to suits or other legal proceedings to be proceeded with or commenced against the company after a winding up order has been made and lays down that no suit or other legal proceedings shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. This general provision is supplemented by the supplemental provisions to be found respectively in Sections 229 and 232 (1) of the Companies Act. Section 229 speaks of the application of insolvency rules in winding up of insolvent companies and Section 232 (1) speaks of the avoidance of certain attachment, executions., etc., put into force without the leave of the Court against the estate or effects of the company and also of any sale held without the leave of the Court of any of the properties of the company and after the commencement of the winding up."

45. The Supreme Court had occasion to consider and construe the position under the present Act and Section 446 (1) of the Companies Act in the case of Damji Valji Shah, AIR 1966 Supreme Court 135. In interpreting Section 446 of the Companies Act, 1956 the Supreme Court observed at page 139-

"Sub-section (1) of Section 446 of the Companies Act provides that 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. Sub-section (2) provides, inter alia, that the Court which is winding up the company shall, notwithstanding anything contained in any law for the time being in force, have jurisdiction to entertain or dispose of any suit or proceeding and any claim made by or against the company. Sub-section (3) provides that any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court."

Then the Supreme Court proceeds to lay down at the same page-

"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 therestriction 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. 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. It is not disputed that the Tribunal has jurisdiction under the Act to entertain and decide matters raised in the petition filed by the Corporation under Section 15 of the L. I. C. Act. It must follow that the consequential provision of sub-section (2) of Section 446 of the Companies Act will not operate on the proceedings which may be pending before the Tribunal or which may be sought to be commenced before it."

46. These decisions, to my mind, establish :-

(1) Section 446 (1) of the Companies Act, 1956 should be construed with reference to other sections of the Act and the general scheme of administration of the assets of the company in liquidation.

(2) No narrow construction should be placed upon the words 'other legal proceeding' in Section 446 (1) and leave of Court will generally be necessary in respect of any proceeding against a company in liquidation, if the proceeding itself is directed against the estate or effects of the company in liquidation, unless it is, otherwise, specifically provided.

(3) If the proceeding against the company in liquidation be such as not to affect by itself the assets and properties of the company in liquidation and be of such a nature which the Court, notwithstanding the exclusive jurisdiction conferred on it by sub-section (2) of Section 446, is not in a position to entertain or dispose of, leave of Court under Section 446 of the Companies Act will not be necessary to commence or continue such proceeding against the company in liquidation; and such proceedings cannot be construed to be included within 'the other legal proceeding' referred in Section 446 (1) of the Companies Act 1956.

The notices in question and the proceedings to which the same relate, are proceedings for assessment of the company under the provisions of the Income-tax Act. Any proceeding in relation to assessment, at and during the entire stage of assessment till completion, cannot be said to affect the assets or properties of the company and cannot, by itself, be said to be directed against the estate or effects of the company. There will be no valid debt payable to the Government till assessment in accordance with the provisions contained in the Income-tax Act is completed and a notice of demand is served on the basis thereof. The question of recovery by the Department can only arise when there is any valid demand or debt upon conclusion of the assessment proceeding and till a debt validly arises upon conclusion of the assessment proceeding, the Department does not become and cannot be considered to be a creditor of the company. It is only at the recovery stage of the claim, if any, payable to the Department by the company on a proper assessment that the question of the assets of the company being affected and the scheme of administration of the assets of the company being interfered with, may arise. If a valid debt arises, the Department may seek to prove its claim in liquidation and will rank equally in respect of its claim amongst the same class of creditors. The Department may also

seek to have recourse to recovery proceeding under the provision of the Income-tax Act and in that case, the Department must obtain prior leave of Court. The Court while granting such leave, may impose necessary terms and conditions which will prevent the Department from gaining any undue or preferential advantage over the creditors of the same class who are to rank equally with the Department. At and during the stage of assessment of any company, there can, therefore, be no question, to my mind, of any interference with the assets and properties of the company in liquidation or with any scheme of administration thereof.

47. It is a duty of the Income-tax Officer to assess persons which include companies and make no exception in favour of any company in liquidation. This duty is cast upon the Income-tax Officer under the Income-tax Act; and under the provisions thereof, the Income-tax Officer is the only authority competent to make an assessment and the jurisdiction as to assessment is vested exclusively in the Income-tax Officer. The Court has no power or jurisdiction to entertain or dispose of any assessment proceeding or to make any assessment by itself. Under the provision of sub-sections (2) and (3) of Section 446 of the Companies Act, 1956, it is not possible or permissible for the Court to entertain or dispose of any assessment proceeding or to transfer any assessment proceeding to its own record for disposal and to make any assessment by itself, dealing with any such assessment proceeding. Apart from the question of feasibility of any assessment proceeding being entertained by Court and the Court proceeding to make any assessment, it is not open to the Court to entertain or dispose of any assessment proceeding and the Court has no power or jurisdiction to entertain the same, notwithstanding the provisions contained in sub-sections (2) and (3) of Section 446 of the Companies Act, 1956, in view of the exclusive jurisdiction conferred on the Income-tax Officer in the matter of such assessment by the Income-tax Act which is a special Act and makes specific provision as to how any assessment is to be made; and any assessment, if ever sought to be made by Court will not be any valid assessment and will not give rise to any liability or create a valid debt, in view of the particular provisions of the Income-tax Act as to how a liability or debt for payment of taxes may be validly created. Bearing in mind the interpretation of the expression 'other legal proceeding' in Section 171 of the Companies Act of 1913 and in Section 446 (1) of the Companies Act, 1956, enunciated by the Federal Court and the Supreme Court in the decisions which I have already noted and the observations of the Supreme Court in particular in Damji Valji's case, AIR 1966 Supreme Court 135, which I have already quoted, I have to hold that no leave of Court is necessary in respect of any assessment proceeding which does not affect the properties of the company and which the Court is not in a position to entertain or dispose of, notwithstanding the provisions contained in sub-sections (2) and (3) of Section 446 of the Companies Act. In this connection I have to note that Vimadalal J. while dealing with the decision of the Supreme Court in Damji Valji's case, AIR 1966 Supreme Court 135, in his judgment in Colaba's case, reported in (1968) 67 ITR 399 (Bom), observed at page 410-

"It appears to me that the word 'exclusive' which is to be found in the above passage' in the judgment in Damji Valji's case, AIR 1966 Supreme Court 135, has occurred there per incuriam, in so far as Section 446 (2) is an empowering provision which confers an overriding controlling power on the Court which is winding up a company, so that liquidation proceeding cannot be impeded or delayed in any manner and so as to ensure a fair and equitable distribution of the assets of the company."

With due respect to the learned Judge I regret my inability to agree with the view expressed by him that the word 'exclusive' which is to be found in the judgment of the Supreme Court in Damji Valji's case, has occurred there per incuriam. It is stated in Article 1687 at page 800 in Halsbury's Laws of England (Third Edition) Vol. 22-

"A decision is given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow and in the latter it is bound by the decision of the House of Lords.

A decision may also be given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the Court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority."

48. The Supreme Court was considering Section 446 of the Companies Act, 1950 in Damji Valji's case and was construing the said section. Although Section 446 (1) of the present Companies Act corresponds exactly to Section 171 of the Companies Act, 1913, yet in the Companies Act of 1913, there were no provisions similar to the provisions contained in sub-sections (2) and (3) of Section 446 of the present Act. The Supreme Court in the case of AIR 1955 Supreme Court 604, had referred to and considered the decision of the Federal Court in Shiromani's case. I do not think it will be proper for me to come to any conclusion that the Supreme Court, while dealing with Damji Valji's case in which Section 446 of the present Act was directly in question, acted in any ignorance of the provisions of the statute or of its own earlier decision or the decision of the Federal Court. To my mind, the decision of the Supreme Court in Damji Valji's case, does not appear to be, in any way, in conflict with the decision of the Federal Court in Shiromani's case, AIR 1946 FC 16, or of the decision of the Supreme Court in Ranganathan's case, AIR 1955 Supreme Court 604. In any event, the decision of the Supreme Court in Damji Valji's case being a later pronouncement on the question and a direct decision on the construction of Section 446 of the present Act, must necessarily be followed by all the Courts while interpreting the said Section 446 of the Companies Act; 1956.

49. There is another aspect of the matter, the consideration of which, to my mind, leads also to the conclusion that no leave of Court is necessary in respect of any assessment proceeding. The duty of assessment is cast upon the appropriate Officer of the Department under the provisions of the Income-tax Act. Income-tax Act has been enacted in the larger interest of the country, although the provisions thereof may affect the interests of individuals. Income-tax Act is a special Act, containing specific provisions relating to assessment in the larger interest of the country as a whole and the larger interests transcend the interests of the creditors and the members of the company. Income-tax Act, 1961 is also a later enactment than the Companies Act of 1956. To my mind, a duty imposed by a statute on any appropriate authority in the larger interest of the nation, should not be considered to be subject to the control of the winding up Court. In my opinion, it is not reasonable to hold that the statutory duty imposed on the Income-

tax Officer under the Income-tax Act in the larger interests of the country, should be subjected to the control of the winding up Court, as in the event of any such control by Court, there arises a possibility that the Income-tax Officer may not be in a position to discharge the duty entrusted to him by the statute, if the Court, for some reason or other, chooses not to grant leave in exercise of its control. In such a case, there may be no assessment at all, although the company under the Income-tax Act may be liable to be assessed and taxed. Assessment proceedings and recovery proceedings, although both are proceedings under the Income-tax Act, do not, to my mind, stand on the same footing in so far as leave under Section 446 (1) of the Companies Act, 1956 is concerned. So long as the duty or assessment is not performed, the right to recover does not arise at all. Assessment validly done in accordance with the provisions of the Income-tax Act is the only way of creating a debt in favor of the Department and does not affect the assets and properties of the company or the scheme of administration thereof or the winding up of the company in any way. When any debt for payment of taxes arises on an assessment, it is open to the Department to prove the debt in liquidation, claim payment thereof and the debt of the Department will be paid in the same manner as the debt of other creditors of the same class. It may also be open to the Department to seek to enforce its right of recovery of the debt in accordance with the provisions of the Income-tax Act. But the right to enforce recovery by taking recourse to recovery proceeding against the assets of the company in liquidation is and cannot be an unfettered right. This right to recover in enforcement of the recovery proceedings under the Income-tax Act is controlled by Section 446 (1) of the Companies Act, 1956 and is subject to necessary leave of Court, not merely because the recovery proceeding may affect the estate and effects of the company and interfere with the scheme of administration thereof, but also because the Department may otherwise get an undue preference over the other creditors of the same class in violation of the provisions of the Companies Act, 1956. There is nothing in the Income-tax Act which gives any prerogative, privilege or priority to the Department, which may entitle the Department to realize its dues in preference to the creditors of the same class. Section 530 of the Companies Act, 1956 provides for preferential payments of taxes payable by a company in liquidation amongst various other preferential payments to be made by the company. All preferential creditors of the company form a class and rank equally in the matter of payment and no particular preferential creditor of the same class is to receive any discriminatory treatment or payment. To allow the Department to have an unfettered and uncontrolled right to have recourse to recovery proceedings in accordance with the provisions of the Income-tax Act to realize its dues from a company in liquidation, will result in giving the department a prerogative or privilege and preference, not warranted by the provisions of the Income-tax Act, over the other creditors of the company of the same class in clear violation of the scheme and provisions of the Companies Act, 1956 which postulate and lay down that all creditors of the same class, except those who are outside the scope of winding up, must rank equally and not be discriminated against. Both the Acts, in my opinion, should be so construed as will lead to harmonious and smooth working of the provisions of the respective Acts and will not create any conflict between the two. This principle of harmonious construction of the two Acts, namely, the Income-tax Act and the Companies Act, indicates, to my mind, that leave of Court is necessary by the Department in respect of any recovery proceeding and no leave of Court is necessary by the Department in respect of any assessment proceeding of the company.

50. I have to note that the decision of the Supreme Court in the case of AIR 1964 Supreme Court 1154, referred to and relied on by the Official Liquidator is not of any assistance in considering the question involved in the present case. The said decision does not lay down that an Income-tax

Officer constitutes a Court in respect of every proceeding before it and is no authority, in my opinion, for the proposition that every proceeding before the Income-tax Officer is a legal proceeding within the meaning of Section 446 (1) of the Companies Act, 1956. In this case the Supreme Court was concerned with the question whether the proceeding before an Income-tax Officer under Section 37 of the Indian Income-tax Act, 1922 (No. XI of 1922) could be said to be a proceeding in any Court within the meaning of Section 195 (1) (b) of the Code of Criminal Procedure and the Supreme Court by a majority held that Section 37 (4) of the said Act made the said proceedings before the Income-tax Officer judicial proceedings under Section 193, I. P. C. and the judicial proceedings must be treated as proceedings in any Court for the purpose of Section 195 (1) (b), Criminal Procedure Code.

51. This application, therefore, fails and is dismissed. There will be no order as to costs. The Liquidator will, however, retain his own costs of this application out of the assets of the company in his hands.

Application dismissed.