**BOMBAY HIGH COURT**

Tulsidas Jasraj Parekh

Vs

The Industrial Bank of Western

(Amberson Marten, Kt., C.J. Patkar, J.)

27.02.1930

**JUDGMENT**

**Amberson Marten, Kt., C.J.**

1. These three appeals by the liquidator of the Viramgam Spinning and Manufacturing Company Ltd., (hereinafter called " the company") raise important questions under Section 227(2) of the Indian Companies Act, 1913, which runs as follows:-

(2) In the case of a winding-up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding-up shall, unless the Court otherwise orders, be void.

2. In the present case the winding-up order was made on March 3, 1925, but " the commencement of the winding-up " was June 12, 1924, when the Industrial Bank of Western India, Ahmedabad, (hereinafter called " the Industrial Bank " who are the respondents in Appeal No. 28 of 1928) presented their petition for the compulsory winding-up of the company. At that date the Industrial Bank were unsecured creditors of the company for about Rs. 2,02,187. At that same date the Imperial Bank of India, Ltd., Ahmedabad Branch (hereinafter called " the Imperial Bank", who are the respondents in Appeal No. 29 of 1928), and Dungershi Harilal (who is the respondent in Appeal No. 30 of 1928), were also unsecured creditors of the company, the former for Rs. 3,86,428 and the latter for Rs. 40,278.

3. It is common ground that the petition, Exhibit 15/1, was advertised for hearing 'on July 26, 1924, but Appeal Exhibits AB and AC show that on June 21 the application of the petitioning creditors for a provisional liquidator supported by their affidavit (Exhibit 15/2) came on for hearing and was adjourned to July 26 with a direction to the company to put in certain balance sheets; and that on July 26 this application and also the main petition were adjourned to July 31 after some argument on a preliminary point of jurisdiction. On July 31, the Judge made an

important order adjourning the petition to August 26,1924, and appointing Mr. Sharp, a chartered accountant, to prepare a report on the financial condition of the company and the transactions of its managing agents, Messrs. Whittle, Maganlal and Sons, which report was to be laid before a shareholders' meeting; on August 18 and a creditors' meeting on August 23. This was in the nature of a consent order.

4. Now on this same July 31, 1924, the petitioning creditors (the Industrial Bank) and the respondent Dungershi each obtained security from the company in the shape of a deposit or pledge of debentures of the Whittle Spinning and Manufacturing Company Limited, (hereinafter called "the Whittle Company"). The Industrial Bank thus obtained Es. 1,00,000 and the respondent Dungershi Rs. 25,000 of these Whittle debentures, which in fact formed part of the assets of the company in connection with a debt of over rupees fifteen lacs due to it by the Whittle Company. As regards the remaining respondents, the Imperial Bank, they had obtained similar security, viz., Rs, 2,00,000 Whittle debentures on July 26, which was the date of the order adjourning the petition to July 31. On the same July 26, the Roznama, Appeal Exhibit AC, shows that the Imperial Bank put in their vakalatnama, Exhibit 15/3, which had been executed on July 23. This deposit or pledge of July 26 is alleged by the Imperial Bank to have been effected in pursuance of an agreement of July 24. It purported to be confirmed by a directors' resolution of July 28 (Appeal Exhibit AA.) There is no similar resolution as regards the other two respondents.

5. It is these three dispositions of the company's assets in favour of the Industrial Bank, the Imperial Bank and the respondent Dungershi, which the liquidator now impugns under Section 227 (2) by his three petitions of June S, 1927. Admittedly within the meaning of that section there has been in each case a disposition of the property of the company made after the commencement of the winding-up. Admittedly in each case unsecured creditors at the date of the commencement of the winding-up have thus been converted into secured creditors, if the transactions are allowed to stand. Admittedly the company received no further, advances or other consideration in actual money in return for the security given. But the point in dispute is whether the Court should " otherwise order" so as to prevent these dispositions from being void. It is urged that the Court should make that order because the dispositions were all bona fide and in the ordinary course of business, and because the company thereby gained time to consider schemes of arrangement or a sale as a going concern. As the learned Judge (Mr. Broomfield) accepted that view, it is necessary for this Court to consider and weigh his reasons very closely before arriving at any conclusion different from that which he came to.

6. As regards the subsequent proceedings, Mr. Sharp made his report on August 12 (Exhibit 15/9). On August 25 the Industrial Bank applied for an adjournment which was supported by other parties (Exhibit 15/8). This was granted by the Court by the order of August 27, which

authorised a Mr. Blair to prepare a scheme for the consideration of a creditors' meeting on September 10 and a shareholders' meeting on September 13 and adjourned the petition to September 15, 1924 (Exhibit 15/10). The subsequent proceedings are recited in the order of October 6, (Exhibit 15/11), whereby Rao Bahadur Girdharlal was appointed an officer of the Court for the purpose of inviting schemes under the Court's directions and placing them before creditors and shareholders, and it was intimated that if nothing tangible resulted within a month's time, the company would be wound up. The order states that the creditors and shareholders had disagreed : that Mr. Blair's scheme had been thrown out: that it was difficult for financiers to draw up schemes unless they had access to the company's books, and that accordingly the books were to be lodged with the Nazir of the District Court.

7. Turning next to the winding-up order of March 3, 1925, (Exhibit 15/12), it appears therefrom that further meetings were called for December 2 and 3, 1924, but the managing agents objected to the venue and succeeded in obtaining an interim stay order from the High Court which was subsequently discharged. Eventually all parties except the company supported the petition, and accordingly the order was passed. In giving his reasons the Judge (Mr. Clements) said :-The winding-up proceedings in this matter have been unduly delayed owing to the Court having granted every indulgence to the Agents to enable them to formulate schemes. Their object however was simply to gain time as is abundantly clear from the facts now to be set forth.He also stated that the National Bank of India had a decree for Rs. 2,10,000 and was seeking to execute it: and that they were said to have another claim for over rupees one lac.I have stated the events after July 1924 to show the subsequent history, and that in fact all parties gained ample time for schemes of arrangement or other modes of avoiding a winding-up. That eventually these attempts to save the company all failed, is, I think, immaterial. The company got what it is said to have bargained for, viz., time, although in the initial agreements of July no specific period of time appears to have been granted. I, accordingly, agree with the learned Judge that for the purposes of this case the material dates are the month of June, when the winding-up petition was presented, and the month of July, when the petition came on for hearing and the debentures were delivered to the several respondents.

8. The real point then to my mind is to determine what was right and fair between July 24 and 31, when these securities were given. And as the Court's sanction is now asked for ex post facto, I think it a fair test to consider whether the Court would have sanctioned the giving of these securities, supposing it had been asked to do so at the time as a condition for granting an adjournment under Section 170 of the Indian Companies Act, instead of making a winding-up order to which prima facie the petitioning creditors, the Industrial Bank, were entitled.

9. Applying then that test, what would have been the material circumstances for the Court to

consider if such an application had been made on, say, July 26 or 31 ? In the first place, I think, it is fairly established that on those dates, it was considered in the interests of all parties that the Mill should not then and there be stopped, but that it should be continued as a going concern for a period sufficient to enable it to be ascertained whether the assets were sufficient to pay the debts, and whether a scheme of reconstruction should be adopted or a sale made. A sale as a going concern would prima facie fetch a better price than if work at the Mill had been stopped and all the staff discharged. To this extent then I respectfully agree with what the learned Judge has found.

10. On the other hand, it is in my judgment very pertinent co ask what could the respondents have done if they had not given time, seeing that the winding-up petition by the Industrial Bank was already on the file, and that the credit and the business of the company was already affected to that extent. They could, I think, at most have pressed for an immediate winding-up order, or at any rate for the appointment of a provisional liquidator, as indeed was asked for in the affidavit of the manager of the Industrial Bank dated July 12,1924, (Exhibit 15/2), accompanying the winding-up petition. If, however, either the Imperial Bank or the respondent Dungershi had instead filed a suit and obtained a decree and had attempted to levy attachment, as did another creditor the National Bank of India, they would have been met by Section 232 of the Indian Companies Act, which would prevent any attachment without the leave of the Court. And should a winding-up order have been made, then any pending suit could not be proceeded with except by the leave of the Court, having regard to Section 171 of the Act.

11. Next supposing they had pressed their claims for an immediate winding-up order, yet under Section 170 the Court could adjourn the hearing conditionally or unconditionally or make any interim or any other order that it might deem just. And in this connection it might have regard to the wishes of the creditors or contributories under Section 174, and for that purpose direct meetings to be called of creditors or contributories under Section 239. Further, under Rule 28 of the Rules framed under the Act (which is numbered 646 in the Original Side Rules), a petitioner is not entitled to have a winding-up petition dismissed where any creditor appears and proves his debt and is desirous of taking advantage of the petition.

12. I appreciate that prima facie the Industrial Bank were entitled to a winding-up order, because whether or no the assets of the company, when eventually realized, might be sufficient to meet all its liabilities, yet it was " unable to pay its debts" within the meaning of Sections 162 (v) and 163 of the Act, inasmuch as it had neglected to pay or to secure for the period therein mentioned the debt it owed to the petitioning creditors. So, too, in the case of the Imperial Bank, the company had not only declined on July 2 to pay the debt of rupees three lacs as requested in the Imperial Bank's letter of June 30, but the company and its managing agents had also dishonoured by non-

payment the promissory notes for in all four lacs which were presented by the Imperial Bank on July 2 for payment and had stated by their letters of July 2 (Exhibit A 12/3, Exhibit A 12/5) that they had no cash on hand for immediate payment, and had requested the Imperial Bank to arrange to renew the loans temporarily.

13. I also appreciate that the Court is reluctant to grant long adjournments of a winding-up petition because of the complications that may be caused if afterwards a winding-up order is made. On the other hand, the powers of the Court under Section 170 are clear. It is accordingly stated in Halsbury's Laws of England, Vol. V, p. 412, as follows:-Adjournments for the purposes of enabling evidence to he completed, witnesses cross-examined, compromises arrived at, or reconstructions carried out are of frequent occurrence ; but long unconditional adjournments may do great harm, not only by paralysing the company, but by invalidating intermediate transactions if a winding-up order is ultimately made.

14. So, too, in Palmer, 13th Edn., Part II, p. 135, it is said :- " The Court sometimes directs or allows winding-up petitions to stand over, i.e. when one of the parties has not had time to answer the affidavits of the others, or where it is desired to cross-examine persons who have made affidavits, or where a scheme of arrangement is under consideration .., The Court will not, except in very special circumstances, order a petition to stand over for a lengthened period." Then at p. 136:--

Sometimes a petition is ordered to stand over for some months, in order to give the company an opportunity of raising further funds, or making a further attempt to prosecute its objects....In such a case the company asking for the petition to stand over must, as a rule, show some reasonable prospect of the debt being paid as a condition of the indulgence. Re The General Rolling Stock Co., Limited (1865) 34 Beav. 314.

15. As then the case of the respondents is that it was strongly in the interests of all parties that at any rate a short adjournment should be granted, it may well be that the Court would in any event have granted that adjournment, even though the petitioning creditors and the other two respondents had opposed it. In this connection it may be rioted that according to Mr. Sharp's report the assets of the company were unencumbered, apart from any security now impugned. Further, the past good credit of the company was shown by the fact that the respondent banks made these substantial advances on no security apart from that afforded by the promissory notes of the agents themselves in addition to the liability of the company. Indeed, the real financial difficulty of the company appears to have arisen from the fact that they had advanced large sums to the Whittle Company and three other Mills who were all under the same managing agents as the company itself. These advances totalled no less than eighteen lacs, and if they had been good, there would, on Mr. Sharp's estimate, have been a surplus of assets over liabilities of thirteen lacs.

But his report states that all these four other Mills were known to be financially distressed. He accordingly estimated only a dividend of six annas from the Whittle Company, and still less from the other Mills. His report, therefore, ends : " It would appear from estimation that a winding-up (of the company) would produce approximately fifteen annas per rupee. This figure is based upon a valuation of the company's properties at Es. fifteen lacs and the probability of only a small yield from the sums due by local Mills." The contention, therefore, before us of Mr. Thakor for the Industrial Bank that the business of the company itself was thoroughly a sound one, and that it was only brought down by its unfortunate advances to other companies in which the managing agents were interested, appears to be well founded.

16. But supposing one takes the other alternative and assumes that the Court would have refused any adjournment and made a winding-up order, would that necessarily have involved the immediate stoppage of the Mill, or vitally affected its continuance as a going concern ? The answer, I think, is in the negative, provided any necessary sanction of the Court was obtained. Under Section 179 (6) the official liquidator with the sanction of the Court would have power to carry on the business of the company so far as might be necessary for the beneficial winding-up of the same. And under Sub-clause (g) with the Court's sanction he could raise on the security of the assets of the company any money requisite. Further, under Section 234 he would have power with the Court's sanction to pay any classes of creditors in full, and make any compromise or arrangement with creditors.

17. I quite appreciate that under Section 179 he could only carry on the business so far as it might be necessary for the beneficial winding-up of the same. It might not, therefore, enable him to carry on the business merely for the purpose of reconstructing the company. Thus in In re Wreck Recovery and Salvage Company (1880) 15 Ch. D. 353 the English Court of Appeal held that there was no jurisdiction to sanction a proposed business contract whose object was to facilitate the reconstruction of the company. But to avoid any misunderstanding, I should add that so far as English company law is concerned, there are now far more statutory facilities for reconstruction schemes than existed in 1880, when that case was decided. I may refer for instance to Sections 153-155 of the English Companies Act 1929.

18. On the other hand there are many cases where it is highly desirable that the business should be carried on at any rate for a short time and the present case seems, on the respondents' own showing, to have been one of such cases. Thus, as stated in Palmer, 13th edition, Part II, p. 376 :- But it often happens that the business of the company is its most valuable asset, and in such a case it may be very proper to carry on the business, and sell it as a going concern : to stop it would, impair, if not destroy, its value ; so also it may be proper to carry it on when there are pending contracts which can be carried out without much difficulty, and if not carried out would

involve forfeiture or heavy claims against the company for damages. And so also where the company has partly manufactured materials, it may be proper to carry on the business so far as may be necessary to complete the manufacture, if by BO doing a loss will be avoided or a sale effected.

19. I may also notice that although under Section 172 (3) a winding-up order is to be deemed to be notice of discharge to the servants of the company, yet an exception is made when the business of the company is continued.

20. The next question is whether as a practical matter the business of the company could have been continued if, say, all the three respondents had been hostile. We know that the Mill was carried on for another eight or nine months, and it is not suggested that during that period any of the respondents gave it any financial aid beyond the fact that they did not press for payment of their existing debts. Consequently, the company must have been financed in some way without their aid, and it may be that this was effected by the agents themselves, as was contemplated in the resolution passed at the shareholders' meeting of August 18, 1924, set out in para. 6 of the written statement of the Imperial Bank, which runs :-The shareholders are of opinion that the company should not be wound up and taken into liquidation as the agents Messrs. Whittle Maganlal and Sons are still existing agents of this company and the agents have agreed to hold themselves as security for lending and for borrowing moneys from time to time for Mills concerns and Companies under their control.The shareholders' views as to the financial condition of the agents may have been too optimistic, for we know that the agents had dishonoured their own promissory notes on July 2, and their general conduct had been attacked in the affidavit of June 12 (Exhibit 15/2). Also we were told by counsel that the agent Mr. Naginlal Maganlal eventually became insolvent and was convicted of some criminal offence. The rest of this resolution shows that the shareholders had some hopes of inducing Mrs. Whittle, the widow of the senior partner, "to come back to India and take over the management for the sake of the name of her deceased husband." She at any rate appeared by counsel in the winding-up proceedings.

21. But however that may be, I wish to make it quite clear that the Industrial Bank and the Imperial Bank have laid nothing before us to show that the company ever continued its ordinary current banking account with either of them after July. As far as the Industrial Bank are concerned, it would be extremely improbable that they would do anything of the sort after presenting their winding-up petition in June. And as regards the Imperial Bank there is nothing to show that they continued to act as the bankers of the company in the ordinary way, and that they continued for instance to cash any cheques drawn by the company. As regards the respondent Dungershi he has given no explanation of any sort. He left unanswered the liquidator's letters of March 15 and 11, 1927. He put in no reply to the liquidator's petition of June 8, 1927. His

counsel told us that his debt arose in connection with some cotton transactions with the company. But nothing is really proved in his favour except that he was a creditor, and this mere fact does not discharge the onus of proof that lies on him under Section 227(0) to show why he should be allowed to retain the security he obtained on July 81, 1924, He appears to have filed his vakalatnama in December 1924.

22. I would, therefore, hold on the evidence before us that the company did in fact carry on its business after July 1924 without any further financial aid from any of the three respondents. And I think the proper inference is that the company would also have been able to do this even if a winding-up order had been made, provided only the Judge's sanction was first obtained for carrying on the business and getting any necessary advances. The Industrial Bank's claim that in December 1923 they had a written understanding by the company to keep its property and liquid assets free from any mortgage during the continuance of the bank's loan is not proved, nor is it even mentioned in the winding-up petition and the affidavit in support. And in any event as the bank was the petitioner this alleged undertaking could not, I think, oust the Court's powers under Section 179 (h) and (g).

23. As regards the actual running of the Mill, I quite appreciate that care would have been required to obtain a responsible liquidator. A business of this sort would require a man of experience and ability. It was suggested to us that possibly the Court might have allowed the managing agents to continue the management of the Mill under the supervision of the liquidator. But even if the Court was not prepared to do this in view of the affidavit of June 12, 1924, (Exhibit 15/2), to the effect that the company was heavily involved, and the agents were trying to create further complications which would jeopardise the interests of the creditors, and that in consequence of the financial difficulties of the company the managing agent was remaining out of Virarngam and the affairs of the company were left with subordinates and ordinary clerks and the interests of the creditors were suffering on that account, yet some other person of sufficient business competence might have been appointed as manager.

24. In short then the question whether a winding-up order was to be made did not rest wholly with the Industrial Bank, or the Imperial Bank, and still less with the respondent Dungershi. They were not even a majority of the creditors, for according to Mr. Sharp's report the total liabilities of the company were rupees twenty-five lacs, and of this total only seven lacs were due to the banks (including the National Bank of India already mentioned) and no less than eleven lacs were due on fixed deposits. At the commencement of the winding-up these fixed depositors stood in the same legal position as the three respondents, for they were all unsecured creditors. The result, however, of transactions of July was that these three respondents became secured creditors, and thus obtained priority over the depositors. If then the sanction of the Court had been asked for at

the time, the probabilities are that the depositors would have opposed it, at any rate if their opinion had been asked. It may be that many of them were small investors unlikely to incur the expense of appearance by counsel. But collectively they could have outvoted in value all the three respondents and the National Bank as well, if their wishes had been consulted under Section 174 or 239. It appears from para. 7 of Mr. Sharp's report that several depositors had received advance payments totalling Rs. 1,18,094, but we are not concerned in the present case with the legality of those payments, He says nothing about any security having been given to the Industrial Bank or Dungershi. He indeed describes the Imperial Bank as the only secured creditor, although he does not mention the date. But it would appear that the journal entries, Exhibit 3, in the company's books were not made until August 16, which was after the date of his report.

25. My general conclusion, therefore, is that even if all the three respondents had refused to give time, the strong probabilities are that on July 31, the Court would have given some time, say, at least, a month, before making the winding-up order; and that even if it did subsequently make a winding-up order, it would on Mr. Sharp's report have probably authorised the business to be continued as a going concern with a view to a sale for a further limited period, and that during that period there would be nothing to prevent a scheme for reconstruction being put forward.

26. I would further hold that on the facts of this case the giving of time by these three respondents was not a real necessity to the company, and that substantially the same object could have been attained without giving them any security at all. I would here point out that as regards the Industrial Bank and the respondent Dungershi, there is nothing to show that they were bound to hold their hands for any particular period. As regards the Imperial Bank, their written statement states in para. 3 (g) that the debentures were "deposited with the Bank by the agents of the company as security in consideration of the Bank granting time at its discretion for repayment of the advances." Legally, therefore, it would seem that all the three respondents, notwithstanding the fact that they had obtained security, might nevertheless have pressed for payment of their original debts within at any rate a short time. Probably they never contemplated such a long adjournment as to March 3,1925, but got caught in the confusion caused by the various meetings and counter schemes and High Court litigation. Much the same result might, however, have happened even if the Court had originally granted a month's adjournment despite their opposition.

27. I quite appreciate the force of the argument that whatever may have been the pros and cons of the arrangements arrived at in July, the managing agents rightly or wrongly thought it was in the interests of the company to gain time by giving security, and that in the case of the Imperial Bank the agents are alleged to have mortgaged property of their own as collateral security, and the

directors approved their action in giving security to that bank. But, as I shall presently show, the managing agents were personally interested in this matter, and in any event it is for the Court to decide under Section 227 (S) whether such transaction shall be allowed to stand by way of exception ; and in deciding this there are important questions of principle to be considered, which I will now deal with.

28. Mr. Munshi for the liquidator has rightly laid stress on these questions of principle, and he has indeed urged that if dispositions of this character of a company's assets are to be allowed on the mere pretext of giving time, this would undermine the main principle hitherto governing the distribution of assets in the winding-up of a company or the insolvency of an individual or firm. This fundamental principle is that in a winding-up or insolvency all unsecured creditors are to be paid pari passu, and further that the appropriate date for ascertaining their legal position is in the case of a company the date of the commencement of the winding-up. The object of this is of course to prevent the injustice and scrambles and intrigues which would arise if the company was to be at liberty to prefer one creditor to another. It might also create much uneasiness amongst creditors, if it was thought that any adjournment, however ostensibly reasonable, would really be utilised to enable the petitioning creditors and some other creditors to get payment or security at, in effect, the expense of their fellow creditors. An exception is made by & 230 as regards certain debts due to the Crown or for wages due to clerks, servants or workmen, which are to be given a preference in payment, but this statutory exception would itself be affected by the security given in the present case.

29. As regards petitioning creditors, I think there is all the more reason why the Court should require them to be frank in their proceedings before the Court, if this statutory equality is to be altered after the presentation of their petition. The Court has to exercise a judicial discretion of great importance under Section 170 as to what order it shall pass, and none the less so because it must frequently happen that a large number of persons materially interested are not actually before it, The Court may, therefore, reasonably expect to be told the material facts before coming to a decision, and I think that in a case like the present it might fairly say that this proposed or actual disposition in favour of the Industrial Bank should have been brought to its notice by that bank on or before July 31.

30. Further, as regards petitioning creditors, the Court has always set its face against them utilizing their petition in order to obtain some pecuniary benefit for themselves between the date of the petition and the actual winding-up order. Thus, in In re Liverpool Civil Service Association: Ex parte Greenwood (1874) L.R. 9 Ch. 511 a creditor presented a petition for winding up a company. The company paid a part of the debt, and promised to pay the remainder on a certain day. This was not done, and the creditor proceeded with his petition, and a winding-

up order was made upon that petition and another petition. It was held by the Court of Appeal that the creditor must pay back the money paid to him. There Lord Justice Hellish stated (p. 512):-

I do not mean to express any dissatisfaction with the oases which have been cited by Mr. North, as deciding that all bond fide transactions in carrying on the ordinary business of a company, which take place between the petition and the winding-up order, and have been completed before the winding-up order is made, should be confirmed. But here the question is, whether the very creditor who has prosecuted the petition should be allowed to retain money which he has obtained by means of the petition, when the result of the petition is that the assets of the company are to be divided equally amongst its creditors.It appears to me that it would be contrary to sound principle, and to the principle which has always prevailed in bankruptcy, if that were to be allowed, A company is, according to the 79th section, to be wound up whenever the company is unable to pay its debts, and then the 80th section says, that a company under this Act shall be deemed to be unable to pay its debts whenever a creditor has served his demand for a sum above 50, and has not been paid within a period of three weeks, That happened in this case, and then the creditor presented this petition, asserting that the company was unable to pay its debts. If he had received payment, and had given up his petition, that, in my opinion, would have been a totally different thing. So, too, if the company had performed their promise, and had paid the whole of his debt, and then he had withdrawn his petition, that also would be a different thing. Neither of these events, however, has taken place; but the creditor insists on the Court making a winding-up order on the ground that at the time when he presented his petition the company was unable to pay its debts, and therefore ought to be wound up, and that the assets ought to be divided amongst the creditors. It appears to me that a creditor of this kind avers that he is willing to come in and take an equal share with all the other creditors, and that he should not be allowed to take advantage of the Act, and get payment on the ground that the company is unable to pay its debts, and at the same time receive a greater proportion than the other creditors. In all bankruptcies and winding-up proceedings a creditor who successfully avails himself of those proceedings cannot be allowed to receive more than his share of the assets, and must come in equally with all the other creditors.

31. So, too, in In re Repertoire Opera Co. (1895) 2 Manson 314 the headnote runs :<-In determining whether a payment made by directors pending a winding-up petition is to be validated by the Court under Section 153 of the Companies Act, 1862, the Court will be guided by the analogy presented by the protective sections in bankruptcy, it being desirable that the two systems of insolvent administrations in bankruptcy and winding-up should as far as possible be assimilated.In that case the Repertoire Company had acquired from Boosey & Co. certain rights in an opera on condition of paying over to Boose & Co. a percentage of the gross receipts within

three days of each week of performance. Boose & Co. ' presented a winding-up petition for arrears of royalties. They were paid, and then another petition for winding up the company was presented by one Alias. Next a resolution to wind up voluntarily was passed, and on the same day the directors paid a further sum of 49-6-0 to Boose & Co. in respect of further royalties. Subsequently a winding-up order was made. There Mr. Justice Vaughan Williams said (p. 316):- As to the 49l, the case is different. The directors ought not, in my opinion, to have paid the money. Boose & Co. had presented a petition to wind up the company. They had been paid, their debt, and the petition dismissed by consent...If the directors wished to make a payment like this, they should have come to me and got my sanction. They did not do so, and I am asked to declare the payment void under Section 153... I do not feel disposed to exercise my power of validating this transaction in favor of either Boasey & Co. or the directors. I shall, therefore, order the respondents to repay the 49Z. 8s. to the liquidator.

32. Nor indeed will the Court normally allow the payment of a debt at all pending a winding-up. Thus, in In re Civil Service and General Store Lim (1887) 57 L.J. Ch. 119, on the same day on which a petition for winding up a company was presented, the company agreed to pay a trade creditor, who was ignorant of the presentation of the petition, a sum of 175 being part of a debt of 320 previously due to him, on condition that he should continue to supply the company with goods for cash payment. The 175 was paid after the presentation of the petition, and also 13 for goods supplied. A winding-up order having been made, the payment of the 13 was allowed, but the 175 was ordered to be repaid. There Mr. Justice Chitty said (p. 120):-The argument of the respondents is a somewhat strange one. They say that the part payment of their debt was a condition of their supplying goods, and that they are therefore entitled to treat the transaction as a new and complete transaction. But to affirm a transaction of that kind under the discretion conferred upon the Court by Section 153, would be to exercise such discretion upon a totally erroneous principle. To allow the respondents to retain the 175l. would be to act in the very teeth of the Act of Parliament, the object of which is that creditors should be paid pari passu. Moreover, the respondents, at the least, knew at the date of the agreement that the company was in embarrassed circumstances, although they do not seem then to have had know-ledge of the presentation of a petition. When, however, they actually received the two payments of 100l. and 75l., they were, in my judgment, aware of a petition having been presented. I can only treat the transaction as an attempt to get a preference over other creditors. The proposition that payment by a company, after the commencement of a winding-up, of a bona fide debt previously incurred will be affirmed by the Court under Section 153 is wholly untenable. I therefore hold that the respondents must repay the 175l. The payment, however, of the 13l. for goods supplied is one which can properly be affirmed'.

33. As regards the Imperial Bank and the respondent Dungershi, they were not the petitioning

creditors, and therefore their position is different from that of the Industrial Bank. Now here as regards Section 227 (0) the Court has to steer a middle course between two extremes. On the one hand the words of the section are wide enough to include any sale or payment that a company may make after the date of the winding-up petition. On that basis any business would practically, have to be stopped if Section petition was presented, because it would be unsafe to dispose of any of the company's assets. For instance, a Mill company might not be able to buy a ton of coal for the use of its furnaces, or on the other hand it might not be able to sell any of its goods in the ordinary course of business, Consequently, the Court has very properly laid down that speaking generally any bona fide transaction carried out and completed in the ordinary course of current business will be sanctioned by the Court under Section 227 (#). On the other hand it will not allow the assets to be disposed of at the mere pleasure of the company, and thus cause the fundamental principle of equality amongst creditors to be violated. To do so would in effect be to add to the preferential debts enumerated in Section 230 a further category of all debts which the company might choose to pay wholly or in part. I will illustrate this by reference to further English authorities. I turn to the English authorities because the section we have to deal with is borrowed from, the earlier English Companies Acts, and because unfortunately there appears to be no decided case in India on the point. At any rate no Indian case has been brought to our attention.

34. In In re Wiltshire Iron Company: Ex parte Pearson (1868) L.R. 3 Ch. 443 one Pearson at a date when the company was much in need of money was induced to purchase and pay for certain iron on special terms. This was shortly after the date of a winding-up petition of which he was unaware. It was found by the Court that this transaction was perfectly bona tide and in the usual course of business. But on November 16, when the winding-up order was made, the iron so purchased was in transit, and in the custody of the Great Western Railway Company. Lord Cairns in appeal directed the iron to be delivered up to the Official Liquidator and reversed the order of Vice-Chancellor Stuart to the contrary effect. That was on the ground that the property in the iron had not passed to Pearson. But subsequently Pearson obtained leave to adduce further evidence. On that further evidence it was held by Sir W. Page Wood and Sir C. J. Selwyn that the property in the iron had passed to Pearson; that accordingly the transaction was complete before the winding-up order ; that Pearson was, therefore, entitled to the iron in question, and that consequently the order originally made by the Vice-Chancellor should be affirmed, and that made by Lord Cairns discharged. In the course, however, of his judgment, Lord Cairns made the following observations which have been cited with approval in other cases, viz., (p. 446):-The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding-up (that Is the presentation of the Petition) and the order for winding-up, shall, unless the Court otherwise orders, be void. This is a wholesome

and necessary provision, to prevent, during the period which must elapse before a Petition/can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of every one to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up Petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, 'bona fide' entered into and completed, would be avoided, and would not), in the discretion given to the Court, be maintained, the result would be that the presentation of a Petition, groundless or well founded, would, ipso facto, paralyze the trade of the company, and great injury, without any counter-balance of advantage, would be done to those interested in the assets of the company.On the other band, if before the winding-up order was made there was no change or disposition of property, if the iron remained the property of the company, and all between the company and Pearson continued in contract open and executory, then the 153rd section has no application. Pearson is simply in the. position of any other parson having a claim against the company on a broken contract, and the iron being assets of the company must, under the Act, be applied pari passu for the benefit of all creditors, without any discretionary power in the Court to hand it over in fulfilment of a particular engagement.

35. A very good illustration of what Lord Cairns refers to as "transactions in the ordinary course of its current trade, bona fide entered into and completed" may be found in Park Ward & Co., In re [1926] 1 Ch. 828. There between the date of the presentation of a winding-up petition and the date of the winding-up order a debenture was issued by the company to secure to a Mr. Rowley the repayment of 1,200 advanced by him to enable the company to pay wages due to the staff. It was held that notwithstanding his knowledge of the presentation of the petition he was entitled to a declaration that the debenture was valid. In that case it appears that the company employed many workmen in its business, and that their wages fell due on Friday, December 11, three days after the presentation of the petition. Under these circumstances Mr. 'Rowley was induced to advance to the company moneys sufficient to pay the wages of the workmen on the Friday. Mr. Justice Romer there states (p. 831) :-Had he not done so the wages would not have been paid and the business, temporarily at any rate, would have had to be closed down. The 1,2001. was accordingly advanced by Mr. Rowley, for the purpose of preserving the business as a going concern, The transaction between him and the company was therefore just the sort of transaction which Lord Cairns thought it was the object of the proviso to the section to preserve and which ought to be rendered valid by an order of the Court.Then lower down he says (p. 831):-Lord Cairns evidently regarded the power given to the Court by the section: as one given for the benefit and in the interests of the company, so as to ensure that a company which is made the subject of a winding-up petition may nevertheless obtain money necessary for carrying on its business and so avoid its business being paralysed. If, therefore, I were to hold that no one who

knows of the presentation of a petition can safely enter into any arrangement with the company, I think I should be depriving the company of the benefit which, according to Lord Cairns, the provision of the section was intended to to it.In the present case, however, there is nothing in the shape of any new advance for the purpose of preserving the company's business as a going concern.

36. The main authority relied on by the respondents was the decision of Vice-Chancellor Malins in Gibbs and West's Case (1870) L.R. 10 Eq. 312, which came before the Court of Appeal on another point in In re International Life Assurance Society (1876) 2 Ch. D. 476. The facts of that case require careful statement. In the first place there was an agreement by the Society, in July 1868, to transfer its business, assets and liabilities to the Hercules Insurance Company Ltd, On August 14, 1868, the directors obtained from the Society's bankers a loan of 5,000 secured by a charge made on a call of August 1868, and also by the joint and several promissory note of the directors. In November 1868 a winding-up petition was presented, which came on for hearing in December, but was ordered to stand over. On January 14, 1869, the position between the bankers and the Society appears to have been that only 1,434-10 remained due in respect of the original loan of 5,000 but that there was a further sum of 2,077-3-10 representing an over-draft. These two sums amounted to 3,511-13-10, and in compliance with the demand of the bankers, the directors on January 27 passed a resolution charging the 3,511-13-10 on the call of August 1868 and also on a previous call of April 1868. They also gave their promissory note for this amount, which represented, as pointed out by my brother Paikar, in part old liability and in part new liability of theirs. On February 19, 1869, a winding-up order was made. The Vice-Chancellor held in the first place that the directors had an implied, though not an express, power to borrow under the constitution of the Society, and he accordingly upheld the transaction of August 1868. He next at pages 322-324 dealt with the transaction that this should be upheld too. At p. 324 he ends :-It was, in my opinion, a bona fide transaction, and done with the view of preventing a state of things most disastrous to all parties concerned. I am therefore of opinion that, although the circumstances require very careful consideration, it is a case for the exercise of the power vested in the Court by the 153rd section of the Act, of holding that this transaction should not be void. I cannot acquiesce in the argument of Mr. Glasse as to obtaining the direction of the Court, for it would be almost impossible that directions could from time to time be obtained ; but when the matter is brought before the Court, it must have regard to all the surrounding circumstances, and if from all the surrounding circumstances it comes to the conclusion that the transaction should not be void, it is within the power of the Court, under the 153rd section, to say that the transaction is not void.As regards the learned Vice-Chancellor's reasons, he attached great importance to the necessity for carrying out the sale to the Hercules Company, and also to the fact that the directors had given their personal security to the bank as well. This decision was

never appealed against. (See same case 2 Ch. D. 476 at p. 482),

37. As regards the Vice-Chancellor's conclusion, I respectfully agree with his opinion that the Court must have regard to all the surrounding circumstances, and that counsel's proposition at p. 317 that "the sanction of the Court to such transactions must be obtained at the time of the transaction and cannot be given afterwards," was erroneous, for it was far too widely expressed, But it does not follow that because the Vice-Chancellor arrived at a certain conclusion on the facts of the case before him, we should arrive at a similar conclusion on the facts before us. The case before us is exceptional in that the Industrial Bank and the Imperial Bank were both before the Court on the dates when the securities were given. There was, therefore, no practical difficulty in informing the Court, or in trying to get its sanction. Nor on the facts of the present case was there any running account, which might necessitate further applications to the Court for sanction. On the other hand in the report of Gibbs and West's Case there is nothing to show that the banks) were before the Court, or had even entered an appearance in the winding-up proceedings,

38. There is this further distinction that in Gibbs and West's Case there was an existing agreement to sell and transfer the whole of the company's business, assets and liabilities to the Hercules Company. We are not told the precise terms of that agreement, but it is conceivable that a winding-up order might, have resulted in the contract being broken and becoming unenforceable by the company. It would at any rate hamper the.. performance of that contract. The circumstances, therefore, were very special, and though this does not appear from the report, it may be that the bank having been given this security, continued, to act as the company's bankers and to give it the banking facility of a current account, even although the overdraft of 2,077 was not allowed to be increased. In In re *Hamilton's Windsor Ironworks : Ex parte Pitman and Edwards*[1] Vice Chancellor Malins thus refers to his previous decision at p. 712 :-...and I am very clearly of opinion that one of the incidents of carrying on the business is obtaining money in times of emergency. In Gibbs and West's Case I laid this down, and I do not see any reason for departing from what I then, said.

39. As regards the other cases cited to us, in Re The European Assurance Society: Brown and Tylden's case (1874) 18 S. J. 781, three life policies fell due on February 26, 1871, on the death of B. Proof of death was admitted on April 11, and the day fixed by the society for payment was June 16. On June 10 a winding-up petition was presented, on which a winding-up order was not made until January 12, 1872. The claim not being paid on June 16 the policy holders first threatened proceedings, and then on July 1 took out a writ for the recovery of the amount. On July 8 the entire claim was paid by a cheque. It was held by Lord Romilly that the payment was void and that the money must be refunded.

40. In In re Neath Harbour Smelting and Rotting Works (1887) 35 W. R. 827 the facts were very different from the present case because the company had been found to be a sham and a fraud for the purpose of putting money into the pockets of the vendor to the company and his son-in-law. The company had never really begun business, and the question was whether the directors were liable for moneys paid by them after the beginning of the winding-up.There Mr. Justice Chitty said (p. 82s) :-Directors must be assumed to know the 153rd section ; and having made these payments, as far as I can see, without expressing any opinion upon them at this moment-at least, not upon any individual payment, but speaking of them generally-it appears to me that this was, having regard to the terms of the 153rd section, a most bold course on the part of the directors, because they must be taken to have known that all the payments they were making would be void unless the court should otherwise order. The effect of that section is this-that unless the court sanctions any of those payments they are void.

Later on he said (p. 829):-Now, with regard to Section 153, where the payments are made honestly and in the ordinary course of business, it is usual for the court to allow them, and I should be disinclined in any way to limit the effect of that rule. The presentation of a petition embarrasses a company very much, and principally by reason of this 153rd section, and it becomes important for the directors of a company, when a petition is presented, to be on their guard with respect to what they do. But my decision in the present case will not injuriously affect directors who act honestly and in the ordinary course of business.Further on he says (p. 829):-I will accept, for the present at any rate, the statement of the respondents' counsel that there was nothing dishonest in what the directors did. I will accept that. But still these payments come under the exigencies of Section 153, and on the reasonable construction of that section it is for the directors to justify the payments they have made. The Court will look at all the circumstances, and II shall look, if the matter is ever brought before me again, at all the circumstances fairly, and allow these directors what sums I think I ought to allow them in regard to their payments in the exercise of judicial discretion.Accordingly, an inquiry was ordered as to what payments had been made and which of them were proper to be allowed under Section 153 of the then English Companies Act.

41. In the case of Gaslight Improvement v. Company Terrell (1870) L.R. 10 Eq. 168 the directors had borrowed money bona fide on behalf of the Gas Company, and had given their personal guarantee for the repayment of the loans, and had thus become the creditors of the Gas Company. Subsequently, a creditor sued the Gas Company, and the latter agreed to judgment on July 4, subject to execution not being issued before July 16. On July 17, the directors resolved to assign all the properties of the Gas Company in favour of the directors as creditors of the Gas Company. That document was executed, and a few days afterwards on July 31 a winding-up petition was presented, on which an order was made on November 9. The security there given to the directors,

though given before the date of the commencement of the winding-up, was set aside by the Court as an undue preference. I, however, mention the case because the directors as sureties thereby became actual or contingent creditors of the Gas Company, and because the security subsequently given them by the Gas Company was set aside, although given before any winding-up petition was presented.

42. In the present case the managing agent (who was also a director) was at the date of the commencement of the winding-up a surety for the unsecured debts due to the Industrial Bank and the Imperial Bank by the company and was thus to that extent an unsecured creditor of the company. Therefore when ho subsequently caused the company to give to the respondent banks the securities now impugned, he thereby to that extent benefited himself. Supposing, for instance, no security had been given, and he had as surety paid the debts due to the respondent banks, he could only have stood in their shoes as unsecured creditor of the company. But when security was given by the company, then either on realisation of the security the debt and consequently his liability as surety would protants be reduced, or else if he paid the banks he would be entitled to an assignment of the securities they held, and in this way obtain priority over the ordinary unsecured creditors of the company.

43. I think, therefore, that it cannot always be taken, as has been argued before us in reliance on Gibbs and West's Case, above cited, that merely because a director gives his own personal security, that necessarily establishes the bona fides of the transaction and validates it. In the present case, the transactions in favour of the respondent banks were effected by the managing agent, and I think they were to his own pecuniary advantage as already indicated. As regards the Industrial Bank, there is no directors' resolution before us sanctioning the transaction. As regards the Imperial Bank, the directors' resolution ratifying it was passed after the transaction and at a meeting of three directors at which the managing agent presided. Therefore on the facts of this particular case, I think the personal interest of the managing agent in these two transactions rather tells against their validity than the reverse. In saying this I appreciate that in the case of the Imperial Bank the agent is alleged to have given the Imperial Bank a mortgage upon his own immoveable properties early in July 1924. But having dishonored his own promissory note on July 2, he was then at their mercy. Accordingly the additional security obtained from the company between July 24 and 26 substantially improved the position both for himself and the bank. But the question we have to decide is whether this is to be allowed at the expense of his and their fellow creditors.

44 I will now turn to the conclusions which in my judgment the Court should draw from the principles enunciated in the above authorities as applied to the facts of the present case. As regards the respondent the Industrial Bank, I think it clear that the: dispositions of July 1924 in

their favor ought not to be validated by the Court under Section 227 (2). I respectfully adopt what Lord Justice Mellish stated in In re Liverpool Civil Service Association : Ex parte Greenwood (1874) L.R. 9 Ch. 511, and would hold that having presented a petition and eventually obtained an order for winding up the company on the footing that the company was unable to pay its debts and that all creditors should be paid pari passu, the bank cannot be allowed to receive more than their share of the assets, but must come in equally with all the other creditors. I accordingly reject the argument of the bank that the security was not obtained by means of the petition, but under an independent agreement to give time. It seems to me clear that it was the lever of their petition which enabled the bank to get this security, although by their letter of July 24 they had refused the agents' offer of July 23 of Whittle debentures in full satisfaction or as collateral security, and had insisted on payment in cash. Alternatively, their position has to be considered irrespective of the fact that they were the petitioning creditors. But it is better for me to do this after first considering the position of the Imperial Bank.

45. As regards the Imperial Bank their position is the strongest of the three respondents, because they were not petitioning creditors, and had by their letter of June 10, 1924, called on the company to execute the necessary documents with reference to a renewal of a demand loan as a demand cash credit, and them was subsequently a resolution of the directors in their favor for the Whittle debentures obtained in July. They had also disclosed such security by their letter of October 20, 1926, if not before, and had put in an explanatory answer prior to the hearing of the present application, although when the liquidator claimed these debentures by his letters of March 11 and May 11, 1927, they did not reply till May 27, and even then did not state " the) strong grounds" on which they relied for refusing to give them up. The strongest ground urged before us is the one I have already mentioned, viz., that this security was given to them bona fide in the ordinary course of business, and that we ought to follow Vice-Chancellor Malins' decision in *Gibbs and West's Case*[2] as being closely in point.

46. Now the argument that giving security to its bankers was all part of the ordinary business between this company and its bankers, seems to me to require analysis. There is, I think, a dividing line between what is the ordinary course of business before a winding-up petition is presented, and what is the ordinary course afterwards. Before a petition is presented, it is in the ordinary course of business for a company to pay all its debts, and incidentally to give security to its bankers for any overdraft or loan it may arrange. But after a petition is presented, the situation is different. Prima facie all debts will have to be paid pari passu. Therefore it is no longer in the ordinary course of business to pay one creditor in full to the detriment of his fellow creditors. In the present case it is quite clear that the company was unable to pay its debts. The company's letter of July 2 told the Imperial Bank quite clearly that they had no cash to pay. And the bank filed their vakalatnama in the winding-up proceedings the day before the alleged agreement to

give them security. They, therefore, knew of the contentions put forward by the Industrial Bank as to the insolvent position of the company.

47. I am unable, however, to deduce from Gibbs and West's Case nor do I think it good law that bankers stand in a privileged position from other creditors after a winding-up petition, and that provided they act bona fide and agree to give time, the Court will necessarily uphold any part payment made to them or any security given, however detrimental to their fellow creditors. Fundamentally, bankers trade in money as do many merchants or shopkeepers in goods. If then in the result money is owing to them all at the date of a winding-up petition, why should the bankers be thus allowed by the Court to have a preference in payment or security over the merchants or shopkeepers, if the only reason put forward is the giving of time. Time all the creditors must give, at any rate, if the Court so orders. And it may be in the general interests of all the creditors that time should be given, but that is not necessarily a reason why a particular creditor should receive a special benefit to do what is in the interests of all creditors to do, including himself.

48. I would also lay some stress on the use of the words "current" and "completed" when Lord Cairns speaks of validating " transactions in the ordinary course of its current trade, bona fide entered into and completed." Giving this security to the Imperial Bank in respect of debts incurred in the past hardly seems to me to be in the course of current trade. Nor in one sense is it a completed transaction. All that is completed is the giving of security, and even as to that we have no details as to how precisely this has been effected. If fresh money had been borrowed for a necessary purpose, as in *Park Ward & Co., In re*[3], the case would have been quite different.

49. I should add that before us some attempt was made by counsel for the liquidator to rely on Section 321 as to fraudulent preference. But as that charge was never put forward by him in the Court below, we declined to allow it to be raised here, notwithstanding that the answer of the Industrial Bank had erred technically in denying that charge although not in fact made against them. So too we declined to allow counsel for the Imperial Bank to show us a specimen of the "necessary documents" mentioned in their letter of June 10, 1924, which the agent would have been required to sign if he had called. In fact the documents proposed in that letter were never executed on the evidence before us, nor are the intended documents exhibited. I should perhaps add that at an early stage in his speech for the Imperial Bank, counsel stated they were already seemed creditors in June. But this was an obvious slip, and on the Bench asking to be shown any evidence in support of it the statement was not persisted in, The guarantee of the managing agents did not make the Imperial Bank secured creditors of the company.

50. In the result, after carefully weighing all the surrounding circumstances and the judgment of the learned Judge and the arguments of counsel, I would hold that this disposition of the

company's assets in favour of the Imperial Bank ought not to be validated by the Court under Section 227 (2). In my judgment this disposition was not made bona fide in the ordinary course of the company's business within the principles of the authorities cited, on the point. There was no real necessity to give the Imperial. Bank this security in preference to their fellow creditors when the only benefit to be received by the company was time, whereas time was a concession all the creditors were bound to give in. view of the winding-up petition already on the file and the Court's powers thereunder. Further, the managing agent who effected this security on behalf of the company was himself a contingent but unsecured creditor of the company in respect of the bank's debt, and the result of this disposition was that he obtained a preference for himself as well as for the bank over other creditors. The bank must be taken to have known this, for the agent's debt in question was as surety to the bank for the company, and the correspondence shows that the bank had called on the agent to pay as surety, and he had stated his inability so to do, as the principal debtor, the company, had then no cash. Moreover, the bank having already filed their vakalatnama on July 23 and being before the Court on the hearings on July 26 and 31 could, and, in my opinion, should, have informed the Court of the transaction before it was completed. If the Court had then been asked for its approval in consideration of the bank consenting to an adjournment and generally giving time, in my opinion the Court would have refused it. The fundamental principle is that all unsecured creditors are to be paid pari passu, apart from certain preferential debts stated in Section 230, and in my judgment no adequate reason is shown why on the facts of the present case an exception should be made in favour of this Ahmedabad branch of the Imperial Bank.

51. Nor is the subsequent conduct of that branch bank free from criticism. The transaction in question was clearly void under Section 227 (2) unless the Court passed an order to the contrary. And yet the bank put obstacles in the liquidator's way by delay in answering his letters of demand, and then by not stating their grounds for the proposed order in their favour, and later on by further delay in putting in their written statement. The result >was that although, the bank succeeded in the Court below, the learned Judge ordered them to bear their own costs, and in my opinion rightly so. It should be borne in mind that the liquidator while so acting is an officer of the Court charged with the very duty of investigating the affairs of the company and the acts of its past managing agents and directors, and that he is entitled to be given all reasonable information as to past transactions. Any creditor who refuses does so at his own peril and in the ultimate resort can be summoned before the Court under Section 195, and if necessary arrested. Therefore, it is eminently a case where early and frank disclosure is the best policy, and I regret to find that that was not done in the present case. I have,, however, arrived at my main conclusions against the Imperial Bank, irrespective of this subsequent conduct of their branch at Ahmedabad.

52. My above finding against the Imperial Bank and the reasons therefor apply also to the Industrial Bank, and afford an alternative ground why no order should be made in their favor under Section 227 (2), apart from my above finding against them on the ground that they were the petitioning creditors. Indeed it is an a fortiori case against the Industrial Bank, for theirs is a substantially weaker case on the facts than that of the Imperial Bank. I need not repeat those facts.

53. As regards the remaining respondent Dungershi, he has not ventured to give any explanation of any sort. It is not even shown what was his business with the company, nor how his debt arose. His counsel told us that debt arose out of some cotton transactions. It is not even in evidence that he pressed the company or that he agreed to give time. But even if this should be assumed, his case to my mind falls far short of one deserving an exemption under Section 227 ($), unless the Court is prepared to disregard the fundamental principle of equality amongst creditors and in effect to amend Section 230 by adding to the list of preferential debts all debts which the company or its managing agents may choose to pay. I can subscribe to no such dangerous doctrine, and would accordingly hold that neither in form nor in substance has the respondent Dungershi established any claim to relief under Section 227 ().

54. I would, accordingly, in each of the three appeals allow the appeal, and discharge the order of the learned Judge, and pass an order in terms of the prayer of the liquidator's petition, and direct the respondent thereto to pay the liquidator's costs of the petition throughout, including the costs of this appeal.

**Patkar, J.**

55. These are appeals by the liquidator against the adverse orders under Section 227, Clause (#), of the Indian Companies Act, VII of 1913, of the District Judge of Ahmedabad, validating certain dispositions of the property of the Viramgam Spinning and Manufacturing Company, Limited, after the presentation of the application for winding up the company,

56. On June 12, 1924, an application was made by the Industrial Bank of Western India, the respondent in First Appeal No. 28 of 1928, for winding up the company which culminated in an order for compulsory winding-up on March 3, 1925. The Imperial Bank of India, Limited, the respondent in First Appeal No. 29 of 1928, was a creditor of the company to the extent of four lacs of rupees, two lacs on demand loan No. 3/31, one lac on demand loan No. 8/35, and one lac on cash credit No. 3/7. On June 10, 1924, the Imperial Bank of India, Limited, wrote to the agents of the Viramgam Spinning and Manufacturing Company, Ltd., calling upon Mr. Naginlal Maganlal of the firm of the agents to execute fresh documents for the renewal of the same as a demand cash credit. On June 30, 1924, the Imperial Bank wrote a letter, Exhibit 12/2, calling

upon the payment of the demand loan No. 3/31 for Rs. 2 lacs, and also demand loan No. 3/35, and cash credit No. 3/7 for Rs. one lac each falling due on that date. On July 2 the agents replied that they had no cash in hand for immediate payment and requested to renew the three loans temporarily till the arrangements which were made to raise a loan were complete in order to enable them to make the payment. On July 2 the Imperial Bank of India, Limited, by letter Exhibit 12/4 sent the relative promissory notes due on the three loans and called on the company for payment. On the same day the promissory notes were dishonoured by the company by letter Exhibit 12/5. On July 23, 1924, the Imperial Bank of India, Limited, engaged a pleader in the application for winding-up filed by the Industrial Bank of Western India, Exhibit 15/3. On July 24 the company agreed to give to the Imperial Bank of India, Ltd., debentures of Rs. two lacs out of the debentures of Rs. five lacs which the Whittle Spinning and Manufacturing Company, Limited, gave to the Viramgam Spinning and Manufacturing Company, Limited, in payment of their dues. On July 26, 1924, the agents deposited the debentures with the Imperial Bank. On July 28, 1924, the directors approved and confirmed the action of the agents in pledging the debentures of Es. two lacs as collateral security in consideration of the Imperial Bank granting time for repayment of the advances of Es. four lacs. (See Exhibit AA, admitted in appeal).

57. On July 31 the agents delivered debentures of the value of Rs, one lac of the Whittle Spinning and Manufacturing Company to the petitioning creditors, the Industrial Bank of Western India, as a collateral security for the debt of about Es. 2,02,187 due to them, and similarly handed over the debentures of Rs. 25,000 to Dungershi Harilal, the respondent in First Appeal No. 80 of 1928, as security for his debt of Rs. 40,000. On July 31 the application for winding-up, which was advertised in the papers on June 15 and June 22 and published in the Government Gazette on June 26, came on for hearing, after adjournment on July 26, and with the consent of the petitioning creditor the Industrial Bank of Western India and the shareholders and creditors and the Imperial Bank of India, Limited, the application was adjourned till August 26, 1924, and in the meanwhile Mr. Sharp was appointed to make a report on the financial condition of the company to be laid up before a meeting of the shareholders of the company in order to enable the shareholders to suggest some scheme of reasonable settlement with the creditors, or to support or oppose the winding-up petition. The said suggestions were to be submitted along with the report of Mr. Sharp to the meeting of the creditors on August 23. (See Exhibit 15/7.)

58. Mr. Sharp made a report, Exhibit 15/9, on August 12, 1924, as regards the statement of affairs as on June 30, 1924, mentioning the assets and the liabilities of the company and showing a surplus of assets of about Rs. thirteen lacs and mentioning the pledge of the debentures of Whittle and Company in payment of the debts of the Imperial Bank and making no reference to the pledge of debentures in favour of the Industrial Bank of Western India and Dungershi Harilal, respondents in appeals Nos. 28 and 30, and referring to the Imperial Bank of India, Limited, as

the only secured creditor, and giving an estimate that a winding-up would produce approximately fifteen annas per rupee based upon the valuation of the company's properties at Rs. fifteen lacs and the probability of only a small yield from the sums due by local mills to the extent of about Rs. eighteen lacs mentioned in paragraph 4.

59. On August 27 the matter was adjourned to September 15 by consent of the parties for preparation of a scheme for a reasonable settlement of the creditors. (See Exhibit 15/10). Various schemes were proposed and the case came on before the Court on October 10, and was adjourned by consent of the parties for the purpose of inviting schemes under the Court's directions and placing them before the creditors and shareholders, and eventually on March 3, 1.925, the company was ordered to be wound up as the schemes were not accepted. The liquidator after giving notice to the. creditors with whom the debentures were deposited made the present applications before the District Judge of Ahmedabad for a declaration under Section 227, Clause (#), of the Indian Companies Act, VII of 1913, that the dispositions of the property of the company were void. The learned District Judge ordered otherwise under Section 227, Clause ('), and confirmed the dispositions of the property in favour of the three respondents in the three appeals.

60. Under Section 227, Clause (S), of the Indian Companies Act, 1913, " in the case of a winding-up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding-up shall, unless the Court otherwise orders, be void." Section 227, Clause (2), corresponds to Section 153 of the Companies Act of 1362, Section 205, Clause (2), of the Companies (Consolidation) Act, 1908, and Section 173 of the Companies Act of 1929. The object of Section 227 (2) is to prevent, during the period which must elapse before the petition can be heard, improper alienations and dispositions of the company's property in extremis. Disposition of the company's property, including actionable claims, made after the commencement of the winding-up are void unless the Court otherwise orders. Under Section 168 of the Indian Companies Act " a winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for winding-up."

61. All the three dispositions of the debentures, which the Viramgam Spinning and Manufacturing Company, Limited, held from Whittle and Company, after the date of the presentation of the petition on June 12, 1924, are void under the section. The Court has, however, power to order otherwise. The Court must exercise judicial discretion and the appellate Court can interfere in appropriate cases. I*n Kirani Ahmedula v. Subalhat*[4] it was held that when an appeal against an order based on facts is given from -a subordinate to a superior Court, the discretion

vested in the former is absorbed in the latter, and it is the duty of the superior Court to weigh the facts which form the basis upon which the subordinate Court proceeds and arrive at its own independent conclusion: and this is so notwithstanding that the subordinate Court exercised its discretion after a proper inquiry and due consideration of the facts put before it and not capriciously or with prejudice. To hold otherwise would be to deny to the appellant the usual benefits of an appeal. If the opinion of the appellate Court is hesitating, it would, of course, not be justified in interfering with the exercise of discretion by the Court below.

62. It is urged on behalf of the appellant that the Court should not give special advantage to a creditor after the presentation of the application for winding-up, that there are only two exceptions under which the Court can validate such transactions, first, when a contract is made by the company prior to the presentation of the petition and the subsequent disposition of the property was in fulfilment of the contract, and, secondly, where moneys have been received by the company for carrying on the ordinary business of the company; that the respondents in these appeals were creditors who took security for past advances; and that the disposition of the debentures was not done in carrying on the ordinary business of the company, and, reliance is placed on the case of In re Civil Service and *General Store (Lim.)*[5] Re The *European Society, Brown and Tylden's case*[6] In re *Liverpool Civil Service Association : Ex parte Greenwood*[7] *Gibbs and West's Case*[8] In re Wiltshire Iron Company ; *Eon parte Pearson*[9] *Park Ward & Co., In re*[10] *In re Repertoire Opera Co*[11]*. and In re Neath Harbour Smelting and Rolling Works*[12]

63. The transactions entered into by a creditor in ignorance of the presentation of the petition would be very rare, but knowledge of the presentation of the petition though an element to be considered is not conclusive on the question of bona fides. See *Park Ward & Co., In re*[13] where Romer J. observed (p. 832):-If, therefore, I were to hold that no one who knows of the presentation of a petition can safely enter into any arrangement with the company, I think I should be depriving the company of the benefit which, according to Lord Cairns, the provision of the section was intended to secure to it.

64. With regard to the intrinsic nature of the transactions one principle to be deduced from In re Wiltshire Iron Company : Ex parte Pearson (1868) L.R. 3 Ch. 443 is that the Court will not permit transactions, bona fide entered into in the ordinary course of trade and completed before the date of the winding-up order, to be annulled. In that case Pearson, in ignorance of the presentation of the petition, contracted to buy iron from the company and paid the price, and. subsequently on further evidence it was proved that the property in the iron had passed to him as a purchaser before the order to wind-up had been made, and it was held that the transaction being complete as a disposition of property, the Court-ought, under the discretionary power conferred by Section 153 corresponding to Section 227 of the Indian Companies Act, to confirm the

transaction. The property having passed to the purchaser could not be applied pari passu for the benefit of all the creditors of the company. Lord Cairns L, J., however, observed (p. 446):-This (a. 153) is a wholesome and necessary provision, to prevent, during the period which must elapse before a Petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of every one to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up Petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided, and would not, in the discretion given to the Court, be maintained, the result would be that the presentation of a Petition, groundless or well founded, would, ipso facto, paralyze the trade of the company, and great injury, without any counter balance of advantage, would be done to those interested in the assets of the company.

65. The borrowing of money for payment of wages would be a transaction in the ordinary course of trade. Where a debenture is issued by the company to secure to the debenture holder the repayment of 1,200 advanced to enable the company to pay wages due to the staff as in Park Ward & Co., In re, the transaction would come within the category of the transactions which Lord Cairns thought it was the object of the proviso to the section to preserve, and which ought to be validated by an order of the Court.

66. In the case of the respondents in the three appeals the debentures were given as security for past debts. There was no fresh advance in order to carry on the business of the company. Though borrowing of money in order to pay the wages of the labourers for carrying on the business of the company would be a transaction in the ordinary course of trade, the in vesting of an unsecured creditor with the status of a secured creditor would not be, in my opinion, a transaction in the ordinary course of trade falling within the principle enunciated by Lord Cairns.

67. The second principle to be deduced from In re Civil Service and General Store (Lim.) and the case of In re Neath Harbour Smelting and Rolling Works is that a creditor who receives payment between the petition and the winding-up order is compelled to refund, and the directors who make any improper payments out of the company's assets after the presentation of the winding-up petition are themselves liable to the company for the moneys paid. Similarly, a payment made after presentation of the petition for winding-up and even though under pressure of an action commenced against the company must be refunded. See Re The European Assurance Society, Brown and Tylden's Case. The payment by the company to its creditor) after the presentation for winding-up, of even a bona fide debt of the company is a transaction which will not be upheld by the Court on the ground that it would offend against the cardinal principle of pari passu distribution. The disposition of property in favour of the three respondents would prima facie

offend against the principle enunciated above.

68. The third principle to be deduced from the case of In re *Liverpool Civil Service Association ; Ex parte Greenwood*[14] is that where a creditor, after presenting a petition for the winding-up of the company, receives a part of the debt, and gets a promise to pay the remainder, and failing to secure the payment of the remainder of the debt, brings his petition and obtains a winding-up order he is bound to pay back the money paid to him. Sir G. Hellish L. J. observes at page 512 :- But here the question is, whether the very creditor who has prosecuted the petition should be allowed to retain money which he has obtained by means of the petition, when the result of the petition is that the assets of the company are to be divided equally amongst its creditors.

69. Again at p. 513 he observes :-It appears to me that a creditor of this kind avers that he is willing to dome in and take an equal share with all the other creditors, and that he should not be allowed to take advantage of the Act, and get payment on the ground that the company is unable to pay its debts, and at the same time receive a greater proportion than the other creditors. In all bankruptcies and winding-up proceedings a creditor who successfully avails himself of those proceedings cannot be allowed to receive more than his share of the assets, and must come in equally with all the other creditors.

70. The case of In re Repertoire Opera Co. is to the effect that the principle prevailing in bankruptcy ought to govern in considering such questions.

71. The case of the Industrial Bank of Western India, the respondent in Appeal No. 28, falls in my opinion within this principle.

72. The fourth principle to be deduced from Gibbs and West's Case is that where a charge is created in favour of a bank not only for fresh advances but past advances to enable the company to carry on the business to be eventually sold as a going concern, the transaction can be supported on the ground of preventing a state of things disastrous to all parties concerned. Apart from any specific benefit, the prevention of the ruin of the company is an element to be considered. At page 323 Sir R. Malins V. C. observed :-I can, therefore, only come to one conclusion, namely, that the negotiation with the Heraulea not having come to a final end, these directors-for the present purpose I must assume, actuated by a desire to do their best for all concerned-thought that if they allowed Glyn & Co. to stop the society, it would be disastrous to all ; but if they satisfied Glyn A Co. by giving them a security, and themselves becoming liable, they might be able to carry out the arrangement with the Hercules, and avoid that state of things which would be most detrimental to all concerned.

73. The above principles deduced from decided cases would serve as guides in the exercise of the

discretion vested in the Court under Section 227 (6) to validate the disposition of property after the commencement of the winding-up. The discretion confided to the Court cannot be crystallized in rules of law in view of the varying circumstances of human action.

74. The question as to whether the disposition of the property in favour of the three respondents in the three appeals ought to be validated is to be considered primarily on consideration of the state of affairs between July 26 and July 31, not by the light of subsequent events but solely by the condition of things actually existing at the time when the dispositions were made.

75. In the case of Dungershi Harilal, who was a creditor of Rs. 40,000 and obtained debentures of the value of Rs. 25,000, it appears that he did not even appear on July 31, 1924, when the case was adjourned by the Court by Exhibit 15/7, The handing' over of the debentures is not mentioned in Mr. Sharp's report dated August 12, 1924, and though the debentures were handed over to him on July 31, the entry in the account books of the company is made on August 16 (See Exhibit 3/1 in appeal No. 30). Though the liquidator on March 15, 1927, gave him a notice Exhibit 3/2, and again sent a reminder Ex. 3/3 on May 11, 1927, no reply was given by him to the liquidator. No special circumstances have been proved, in my opinion, on his behalf to validate the transaction of the disposition of the debentures of the company in his favour. The transaction was in respect of a past debt and not for fresh advances, and was not necessary for carrying on the ordinary course of the business of the company. It appears to be a transaction secretly entered into by the company in his favour, and is not mentioned in Mr. Sharp's report and is entered into the books on August 16, some time after Mr. Sharp made his report. I think, therefore, that the discretion exercised by the learned Judge has not been properly exercised, and it follows from the principle mentioned above that a creditor who receives payment between the petition and the winding-up order is liable to refund.

76. I would, therefore, in First Appeal No. 30 of 1928 allow the application of the liquidator and reverse the order of the learned Judge with costs throughout.

77. The case of the Industrial Bank of Western India, the respondent in First Appeal No. 28 of 1928, falls within the principle to be deduced from the case of In re Liverpool Civil Service Association : *Ex parte Greenwood*[15] at page 513, that a petitioning creditor of this kind avers that he is willing to come and take an equal share with all the other creditors, and that he should not be allowed to take advantage of the Act and get payment on the ground that the company in unable to pay its debts, and at the same time receive a greater proportion than the other creditors. It is said that the circumstances in favour of the Industrial Bank of Western India are that they were present at the time when the Court passed the order of adjournment on July 31, and consented to an adjournment in order to enable the shareholders to suggest some scheme for reasonable settlement with the creditors, and thus were instrumental in preventing the immediate

winding-up of the company which might have involved ruin of the company, and further that though the company by Exhibit 15/4 on July 23, 1924, offered to give the debentures of Rupees one lac as collateral security, they declined to accept the debentures by Exhibit 15/5 on July 24, 1924. It is, therefore, urged that they did not obtain the advantage by means of the petition as they declined the offer, made by the company, on July 24, but accepted the offer on July 31 in order to enable the company to stand on its own legs. There was no resolution of the directors, as in the case of the Imperial Bank of India, Limited, sanctioning the action of the agents. The deposit of the debentures is not referred to by Mr. Sharp in his report, and though the deposit was made on July 31, it was not entered into the books of the company till August 16, some time after the report of Mr. Sharp. It, therefore, appears that the other creditors of the company and the shareholders were ignorant of the arrangement between the agents and the Industrial Bank of Western India when the adjournment was granted on July 31, and on subsequent hearings. In my opinion, the Industrial Bank of Western India who were the petitioning creditors were incompetent to receive any benefit after the presentation of the petition for the winding-up of the company. They ought to have applied to the Court to have the arrangement between them and the company validated on July 31,1924, and though the liquidator sent them the letter, Exhibit 3/2, dated March 15, 1927, and the reminder, Exhibit 3/3, on May 11, 1921, they declined to give any information relating to their acceptance of the debentures as security for their past debts. The remarks of Sir G. Mellish L. J. in In re Liverpool Civil Service Association : *Ex parte Greenwood (1874) L.R. 9 Ch. 511, at p. S13(*Supra), :apply with equal force to the Industrial Bank of Western India:-If he had received payment, and had given up his petition, that, in my opinion, would have been a totally different thing. So, too, if the company had performed their promise, and had paid the whole of his debt, and then ha had withdrawn his petition, that also would be a different thing.

78. There would not, in the event of withdrawal of the petition, have been any pending application for winding-up which would have invalidated the disposition of the property in their favour under Section 227, Clause (2). I think, therefore, that in the case of the petitioning creditor the discretion was not properly exercise cl by the learned Judge.

79. I would, therefore, reverse the order validating the disposition of the debentures in favor of the Industrial Bank of Western India and allow First Appeal No. 28 of 1928 with costs on the> respondent throughout.

80. The case, however, of the Imperial Bank of India, Limited, the respondent in First Appeal No. 29 of 1928, in my opinion, stands somewhat on a different footing. It appears that Mr. Naginlal Maganlal early in July 1924 agreed to give a mortgage of certain of his own immoveable properties and later on July 24, 1924, the company agreed to give the debentures of

Bs. two lacs in question as collateral security for the bank's advances, and as a matter of fact the debentures of Es. two lacs were on July 26 deposited with the Imperial Bank of India, Limited, by the agents of the company as security in consideration of the bank granting time at its discretion for repayment of the advances. It further appears from Exhibit AA that on July 28 the directors approved and confirmed the action of the agents in pledging with the Imperial Bank of India the debentures of Es. two lacs as collateral security in consideration of the bank granting time for repayment of the advances of Rs. four lacs. No fresh advance was made by the bank and the transaction was not entered into by the company for carrying on the ordinary course of the business of the company, nor was any actual payment made for payment of the labourers or any urgent needs of the company to carry on the ordinary course of business. We have, however, to consider the state of affairs not by the light of subsequent events but by the actual condition of things on July 26,1924, when the debentures were handed over to the Imperial Bank of India, Limited. The agents agreed to give in mortgage certain of their immoveable properties and the directors sanctioned and approved the action of the agents. In In re International Life Assurance Society, Gibbs and West's Gasem the directors gave their own promissory note for the balance due on past debts to Messrs. Qlyn and Co., with regard to which they were under no personal liability up to that time, and Glyn and Co. was not in a position to do any harm to the company, as it was observed at page 322, the company had power under the 85th section of the Act to stop their action. Still as it was necessary to run the company in order to carry out the arrangement with the Hercules Company, and the company satisfied Glyn & Co. by giving them a security, the transaction was upheld on the ground that it avoided a state of things which would have been most detrimental to all concerned. With regard to the security which the directors personally gave to them, it was observed at page 323:-

Now this certainly could not have been from any improper motive. No body of men would have rendered themselves liable to pay that considerable sum of money, unless they thought that there was some advantage to be gained.

81. I think, therefore, that the action of the agents early in July in agreeing to give a mortgage of certain of their immoveable properties and later on July 24 agreeing to give debentures of Rs. two lacs as collateral security, and actually handing over the debentures on July 26, five days before the case came on for hearing, and the resolution of the directors confirming the action of the agents on July 28 on the ground of giving time for repayment of the advances, are elements to be considered on the question of upholding the transaction. It would have been more discreet on the part of the Imperial Bank of India, Ltd., to have apprised the Court on July 31 that the bank had obtained a security for their antecedent debts. In In re International Life Assurance Society, Gibbs and West's Case, at page 317, it was argued by Mr. Glasse Q. C. that the sanction of the Court to such a transaction must be obtained at the time of the transaction and cannot be

given afterwards. In dealing with that argument, Sir *R. Malins V. 0.*[16] *observed at page 324:- (1)* I cannot acquiesce in the argument of Mr. Glasse as to obtaining the direction of the Court, for it would be almost impossible that directions could from time to time be obtained ; but when the matter is brought before the Court, it must have regard to all the surrounding circumstances, and if from all the surrounding circumstances it conies to the conclusion that the transaction should not be void, it is within the power of the Court, under the 153rd section, to say that the transaction is not void.

82. It is urged that the case of the Imperial Bank of India, Ltd., ought to be distinguished from that of the Industrial Bank of Western India on the ground, first, that it was not the petitioning creditor, secondly, the fact that the security given to it was mentioned in Mr. Sharp's report, and thirdly, that the agents agreed to give a mortgage of their own properties and that the directors subsequently passed a resolution confirming the action of the agents in giving time to the company in order to formulate a scheme to give an opportunity to the company to stand on its own legs, and it was believed at that time by all concerned that the transaction in favour of the Imperial Bank of India, Ltd. avoided a state of things which would have been disastrous to all concerned.

83. The case of the Imperial Bank of India, Ltd., is said to resemble the case of In re International Life Assurance Society : Gibbs and West's Case, but the resemblance in my opinion is more apparent than real. In Gibbs and West's Case the directors rendered themselves personally liable by giving their promissory note with regard to 2,077 with regard to which sum they were under no personal liability up to" that time. In the case of the Imperial Bank of India, Ltd., the directors as such have not rendered themselves liable, but have approved of the action of the agents who agreed to give the debentures of Rupees two lacs as collateral security for advances made by the bank. In giving the debentures neither the agents nor the directors rendered themselves liable with regard to any debt of the Imperial Bank of India, Limited, with regard to which they were under no personal liability up to that time. The action of one of the agents, Mr, Naginlal, also a director, in agreeing to give a mortgage upon certain of his immoveable properties was due to a desire to avoid a suit by the Imperial Bank on his personal liability on the demand promissory note passed by the agents in favour of the company which was endorsed by the company in favour of the bank. It does not appear from the record whether as ft matter of fact a mortgage was effected by the agents. But even assuming that a mortgage was effected by the agent in favour of the bank the action of the agent can be attributed more to a desire to save himself rather than the Mill. No inference, therefore, can be drawn in favour of the impugned transaction from the action of the directors and agents as was drawn in Gibbs and West's Case. Further in Gibbs and West's Case there was a contract with Hercules Company to sell the concern as a going concern. There is no such contract or offer in the present case from any person to purchase the Mill as a going

concern. If the contract of Hercules Company had been broken, the company would have been further liable in damages. At the time of the transaction in favour of Glyn & Co., it was within the contemplation of all the parties that the contract would be carried out by Hercules Company which was believed to be a solvent concern, and the directors undertook a liability which did not exist before, and the transaction was bona fide and absolutely necessary to prevent Glyn & Co. from stopping the Society, and for avoiding the state of things which would be most detrimental to all concerned. The only advantage obtained by the agents in giving the debentures to the Imperial Bank of India, Limited, was the gaining of time. The District Judge in his order, Exhibit 5/12, for winding-up the company observed that the winding-up proceedings were unduly delayed owing to the Court granting indulgence to the agents to enable them to formulate schemes and their object was simply to gain time.

84. The question for decision is whether the transaction between July 24 and 26, in favour of the Imperial Bank is one which ought to be validated having regard to the circumstances existing at the time. One test to decide the question is whether the Court would have sanctioned the transaction in favour of the Imperial Bank of India, Limited, if an application had been made on July 31, by the Imperial Bank for validating the transaction as a condition precedent to the granting of time. The Court could have, under Section 170 of the Indian Companies Act, adjourned the hearing in order to ascertain the wishes of the creditors or contributories under Section 174, and directed meetings of the creditors and contributories to be called under Section 239. On the other hand, the Court could have acceded to the prayer for appointment of a provisional liquidator, and authorised the official liquidator under Section 179 (6) to carry on the business of the company after the receipt of Mr. Sharp's report so far as might be necessary for winding up of the same, and could have authorised him under Clause (g) of the said section to raise any money on the security of the assets of the company, and would not have been debarred in the meanwhile from considering any scheme for re-construction. As a matter of fact, the Mill's business was carried on without any further advance by the Imperial Bank. If an application had been made by the Imperial Bank on July 31 for validating the transaction in their favour, it would have been opposed by the other creditors and also by the depositors whose fixed deposits were of the value of rupees eleven lacs which were considerably in excess of the debts of seven lacs due to all the banks. Under these circumstances, I think that the Court would have refused to sanction the transaction in favour of the Imperial Bank. In Gibbs and West's Case it does not appear that Glyn & Co. were parties to the winding-up proceedings. The Imperial Bank in this case had engaged a pleader on July 28 and filed an appearance on July 26 and ought to have informed the Court of the disposal of the debentures in their favour. In Gibbs and West's Case the argument of Mr. Glasse that the sanction of the Court to such a transaction must be obtained at the time of the transaction and cannot be given afterwards was negatived by the Court, but I have no doubt that

if sanction had been applied for at the date of the transaction, it would have been granted specially on the ground that there was a valid contract of sale with the Hercules Company a breach of which would have exposed the company to a liability for damages, and that the transaction was fair and bona fide on the ground that the directors undertook a personal liability which did not exist before. The Imperial Bank were actuated more by a desire to safeguard their own interests than to injure the interests of the other creditors, but the agents of the Mill diminished their own personal liability by giving the debentures of the company as security to the Imperial Bank and did not act fairly towards the depositors and the other creditors of the company.

85. Further, the disposition of the debentures in favour of the Imperial Bank was not necessary in order to gain time to formulate a scheme of reconstruction. Even if the Bank had refused to grant time, the Court could have acted under Section 170, and Section 179, Clauses (6) and (g), notwithstanding the opposition of the Imperial Bank, I think, therefore, on consideration of all the circumstances that the disposition of the debentures in favour of the Imperial Bank of India, Limited, ought not to be validated under Section 227, Clause (#), of the Indian Companies Act.

86. I would, therefore, allow First Appeal No. 29 of 1928, allow the application of the liquidator, and reverse the order of the lower Court with costs on the respondent.

Cases Referred.

1(1879) 13 Ch. D. 707
2(1870) L.R. 10 Eq. 312
3[1926] 1 Ch. 828
4(1883) I.L.R. 8 Bom. 28
5(1887) 57 L.J. Ch. 119, s.c. 58 L.T. 220
6(1874) 18 S.J. 781
7(1874) L.R. 9 Ch. 511
8(1870) L.R. 10 Eq. 312
9(1868) L.R. 3 Ch. 443
10[1926] 1 Ch. 828
11(1895) 2 Manson 314
12(1887) 35 W.R. 827, s.c. 56 L.T. 727
13[1926] 1 Ch. 828
14(1874) L.R. 9 Ch. 511)
15(1874) L.R. 9 Ch. 511
16(1870) L.R. 10 Eq. 312