BOMBAY HIGH COURT

Bachharaj Factories Ltd

Vs.

Hirjee Mills Ltd

O.C.J. Appeal No. 127 of 1954

(Chagla, C.J. and Dixit, J.)

06.10.1954. 17.12.1954

JUDGMENT

Chagla, C.J.

1. This is an appeal against an order passed by Coyajee J. adjourning the petition for winding up the Hirjee Mills till 15-3-1955, in order to enable certain shareholders to file a suit for the purpose of a declaration that the debentures issued in favour of the petitioners were not valid in law, and the first contention that has been urged in limine is that the appeal is not maintainable.

2. Section 202 of the Companies Act deals with appeals from orders made or decisions given in the matter of the winding up of a company, and it is not disputed that this particular order was made in the matter of the winding up of the Hirjee Mills. That order was made under Section 170 of the Companies Act and that section provides that on hearing the petition the Court may dismiss or adjourn the hearing conditionally or unconditionally or make any interim order or any other order it deems fit. What is urged is that although this is an order under Section 170 and although this is an order in the matter of the winding up, inasmuch as the order was made by Coyajee J. on the Original Side of the High Court, this order does not constitute a judgment within the meaning of clause 15 of the Letters Patent and therefore no appeal lies. It is contended that the right of appeal under Section 202 is conferred subject to the conditions to which appeals may be had from any order or decision of the Court in cases within its ordinary jurisdiction, and it is said that the condition subject to which an appeal lies from a decision of a Judge on the Original Side of the High Court is that the decision must constitute a judgment within the meaning of clause 15 of the Letters Patent. It is therefore said that as that condition is not satisfied, the appeal is not maintainable.

3. Now, before we turn to the authorities let us look at the scheme of the Companies Act and also consider what is the substantive right of appeal conferred by Section 202. It is rather significant

to note that the Companies Act provides for specific appeals against various orders and the provisions of these appeals are to be found in various sections. But Section 202 is general in its nature and it provides for appeals against any order or decision made or given in the matter of the winding up of a company. Therefore the first fact which strikes one is that the Legislature attached particular importance to the winding up of a company and made orders, made in the course of the winding up, subject to appeal. Another important fact that must be borne in mind in construing Section 202 is that it is not only any order in the matter of the winding up which is made appealable but every decision in the matter of the winding up, and the importance of its being made appealable can be realized from the fact that under Section 199 the Act provides that all orders made by a Court may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced. Therefore the Legislature knew the distinction between an order and a decision, and whereas Section 199 talks of how an order should be enforced, Section 202 does not limit the right of appeal merely against an order but also confers that right of appeal against a decision. In our opinion the right conferred is not only a substantial right but a very valuable right and the Court must be anxious not in any way to cut down or impair that right. It is true that under Section 202 a right of appeal is not provided against any procedural order or decision which in no way affects the rights or liabilities of parties. The order or decision given by the Court in its winding up must be such as would in any way deprive or affect the right of a party, which would make the party aggrieved by that order, and which would make him desire to come to a higher Court for getting the order passed by the trial Court rectified.

4. There is a very serious difficulty in accepting the contention put forward that the order of Coyajee, J. is appealable only provided it is a judgment within the meaning of clause 15. The Courts which can deal with winding up petition are not merely the High Courts but also the District Courts. Under Section 3 the Court having jurisdiction under the Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate, and the proviso to that section confers the power upon the Central Government now, and in the past upon the local Government, to empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court.
Now, what is suggested is that if an order is made by a District Court, that order would be subject to conditions of appeal in the sense that that order would only be appealable if it is appealable under the Civil Procedure Code. If an order is made by a Judge on the Original Side of the High Court, then it would be appealable provided it is a judgment within the meaning of clause 15 of the Letters Patent. If this argument were to be accepted, it would result in a very extraordinary situation. Under the Civil Procedure Code under Section 96 an appeal lies only against a decree, and a decree is defined by the Code. Under Section 104 of the Code certain orders are made appealable. Therefore if the Civil Procedure Code were to be applicable to orders made or decisions given by a District Court, then an appeal would only lie against an order of the District Court in the winding up provided the order is a decree within the meaning of the Civil Procedure Code or it is an order made appealable under Order 43. I do not think it is suggested that any

order made in the winding up can fall within the ambit of Order 43. Therefore only those orders passed by the District Court would be appealable which are decrees within the meaning of the Civil Procedure Code. The definition given to the expression "judgment" in clause 15 is much wider. Therefore the position would be this that an order made by a District Court may not be appealable because it dose not satisfy the conditions laid down in the Civil Procedure Code, yet that very order made by a Judge on the Original Side would be appealable because it may constitute a judgment within the meaning of clause 15. Therefore, if we were to accept the contention put forward by Mr. Mathalone on behalf of the company, although the Companies Act confers an identical jurisdiction under the Companies Act upon the High Court and the District Court and Section 202 in conferring the right of appeal makes no distinction whatever between an order passed by the District Court and an order passed by the High Court, yet in certain cases an identical order passed by the District Court would not be appealable and an order passed by the High Court would be appealable. In our opinion it would be erroneous to put a construction upon Section 202 which would result in a situation which the Legislature could never have contemplated.

5. Therefore, in our opinion, the proper construction to put upon Section 202 is this. The first part of that section confers a substantive right upon a party aggrieved by an order made or a decision given by a Company Judge in winding up. The second part of Section 202 does not in any way cut down or impair the substantive right already conferred by the first part of Section 202. The second part which deals with the manner and the conditions in which an appeal may be preferred only refers to the procedural aspect of an appeal and the forum to which the appeal would lie. If the question is what is the period of limitation, then one must consider what would be the period of limitation if an appeal was preferred from the District Court or from a Judge sitting on the Original Side of this Court. If the question is what procedure has to be complied with before a Court can entertain the appeal, then one must look to the Civil Procedure Code or the High Court Rules depending upon which Court has made the order. With regard to the forum, if the District Judge makes the order, the Civil Procedure Code constitutes the Appellate Side of the High Court the forum of appeal. If the order is made by a Judge on the Original Side of the High Court equally so under the Letters Patent the forum is a division bench of this High Court. But to suggest an argument that the right of appeal conferred under the first part of Section 202 must be construed and interpreted by the second part, which deals with merely the procedural implications of the appeal, would be in many cases practically and substantially to deny the right of appeal to a party affected by an order made in the winding up.

6. Mr. K.K. Desai has urged that if that is the interpretation we put upon Section 202, then we must hold that every order, even if it is purely procedural in character, should be appealable, because otherwise we would be importing the considerations of clause 15 of the Letters Patent or of the Civil Procedure Code in taking the view that procedural orders are not appealable. Now, in deciding that only such order or decision is appealable under Section 202 which affects the rights or liabilities of parties we are not importing any extraneous consideration into the interpretation

of Section 202. What we have to construe is the expression "order or decision" used by the Legislature, and in our opinion in its context and in the juxtaposition in which the two words "order" and "decision" have been used, the Legislature clearly intended that that order or decision should be subject to appeal which was not purely procedural in character but which affected the rights or liabilities of parties. It is then said that even on that view the present order made by the learned Judge is a procedural order. It is pointed out that all that the learned Judge has done is to adjourn the petition and he has not passed any substantive or effective order on the petition. When we look at the judgment of the learned Judge it is clear that after considering the various aspects of the matter he has come to the conclusion on merits that he should not pass an order of winding up on the petition, but he should adjourn it till 15-3-1955. This is not a case of an ordinary adjournment where a Court for convenience either of the Court itself or of the parties postpone the hearing of the matter.

This is a case where the Court after hearing the petition and considering its various implications comes to the conclusion that for reasons recorded it was not a fit case for the passing of an order of winding up, but it was a case for an adjournment. In our opinion, when an order is made by the Company Judge under Section 170 refusing to pass an order of winding up but postponing the petition to a later date when he might consider whether an order of winding up should be made or not, it is not a procedural order but it is an order which affects the rights of the petitioner. It was stated by Mr. K.K. Desai that no party has a right to get an order from a Court at any particular time, that he has no claim or right to the time of the Court, and the Court has every discretion not to grant relief to a party at a particular date but postpone the granting of the relief to a future date. In our opinion that is not the correct way to look at the matter. The petitioners came to Court claiming the relief of a winding up order and according to them if the learned Judge considered the merits of the matter they were entitled to that relief. The learned Judge having considered the merits held that the petitioners were not entitled to that relief and that the proper order that he should pass was to adjourn the petition. Therefore, the petitioners being deprived of the relief which they sought were being deprived of a substantial right. It is hardly necessary to point out what serious consequences a decision refusing to pass an order of winding up may have in certain circumstances. A company may go on functioning, it may go on frittering away its assets, it may go on adding to its liabilities, and serious and irreparable damage may be caused to creditors and even to shareholders.

Therefore, to look upon the order passed by Coyajee, J. as merely a procedural order is really to ignore the serious consequences which that order may have.

7. Turning to the authorities, Mr. Mathalone has reminded us that this Court in-'Sarupchand Hukumchand In re', AIR 1945 Bombay 258, has taken the view that when considering an all-India statute we should fall into line with the view taken by the other High Courts unless we conscientiously felt that it was not possible to do so, and Mr. Mathalone says that the consensus of opinion of the various High Courts is that Section 202 must be construed to mean that the appeal is subject to limitations contained in clause 15 of the Letters Patent when the order is

passed or a decision given by a Judge on the Original Side. For this purpose he has first relied on two decisions of the Calcutta High Court - *'Madan Gopal Daga v. Sachindra Nath Sen'*[1], and 'In the matter of East India Cotton Mills, Ltd., AIR 1949 Calcutta 69. Turning to the first decision, that is a judgment of a division bench consisting of Ghose and Buckland JJ. In that case an appeal was preferred against a judgment of a Judge on the Original Side under Section 195 of the Companies Act directing that two persons who were directors of the company should appear before the Court for examination as to their dealings in respect of the affairs of the company, and the division bench held that as there was no determination of any right or liability in the matter the order did not amount to a judgment within the meaning of clause 15 of the Letters Patent and it was not appealable. When we turn to the judgment, Ghose, J. with respect assumes that the order made in the matter of the winding up of a company to be appealable must come within the meaning of the word "judgment" as used in clause 15 of the Letters Patent. Again with respect, there is no warrant for this assumption. That is the very question that we have to consider. Again, the learned Judge points out that he

was not unmindful of the contention which was advanced on behalf of the appellant that

[1] AIR 1928 Cal 295

the words "same manner" and "same conditions" used in Section 202 of the Companies Act meant that the procedure as regards appeals from orders made in the winding up of a company by the Court must be the same as in the case of orders made in cases within the ordinary jurisdiction of the Court and that nothing further was intended or indicated.

Now, instead of dealing with that argument the learned Judge says, "That may or may not be so", and then he reiterates his view that an order made in the winding up in order to be appealable under Section 202 must satisfy the requirements of clause 15 of the Letters Patent. With respect, therefore, this judgment is not of much assistance to us in construing Section 202.

8. Turning to the second judgment, it is a judgment of a single Judge Das, J., as he then was, and undoubtedly his views are entitled to the Highest respect. The question that really came up for decision before the learned Judge was a very different question. What happened in that case was that an order for winding up was made by a Company Judge on the Original Side. Subsequently another petition was presented to another Judge on the Original Side for setting aside the order of winding up, and what the learned Judge was really concerned to decide was whether under Section 202 an order having been made by one Judge on the Original Side another Judge on the Original Side could re-hear the matter. But undoubtedly there are observations with regard to the construction of Section 202 in the judgment of the learned Judge, and those are to be found at p.74. The learned Judge says (p.74):

> "..... It appears to me that the expression 'manner' indicates the procedure and the expression 'conditions' connotes the essential requirements for maintaining the appeal."

Then the learned Judge confines himself to the proceedings on the Original Side of the High Court and he says that it is quite clear that an order of the High Court in a case within its ordinary

jurisdiction is appealable if it is a judgment within the meaning of clause 15 of the Letters Patent. With respect to the learned Judge, he did not consider how anomalous the situation would be if the order had been made by a District Judge. If the Original Side of the High Court had exclusive jurisdiction in company matters, then perhaps it would have been possible to give to Section 202 the interpretation that the learned Judge has given. But when we have to deal not only with orders made in company matters by a Judge on the Original Side, but also by District Courts, the construction placed by the learned Judge in our opinion with respect, is not correct.

9. The third is a judgment of the Rangoon High Court - *'K.B. Roychowdhury v. Burma Loan Bank, Ltd*[2]*.,'* which again with respect, is not very illuminating. That was again a case of an order made by a Judge of the High Court and the judgment assumes that only an order which is a judgment within the meaning of clause 15 is appealable, and what the learned Judges of the Rangoon High Court held was that where a company Judge orders the public examination of a person under Section 196 of the Companies Act, that order is not a judgment within the meaning of clause 15.

10. Finally there is a judgment of the Allahabad High Court reported in -- *'Vishwapal v. Brijendrapal*[3]*',* That is a judgment of Malik C.J. and Bhargava,

[2] AIR 1936 Ran 166 [3] AIR 1952 All 223

J. Again, the learned Judges were dealing with an order made by the High Court. The learned Chief Justice in his judgment says (p.224).

> "... Appeals to this Court under its ordinary jurisdiction lie only against decrees or against such orders as are appealable under Order 43, Civil Procedure Code Appeals also lie to a Division Bench from a 'judgment' of a learned single Judge. It is now well settled that 'judgment' means not an expression of opinion on a point that was argued before a single Judge but an order which finally determines the rights of the parties so far as the single Judge is concerned".

So the learned Chief Justice was more concerned to define what was the meaning of the expression "judgment" than to consider how Order 43 of the Civil Procedure Code could be fitted in with the scheme of Section 202. The learned Chief Justice would have realised the difficulty of the situation if he had considered orders made by the District Court in the winding up of a company. But fortunately there is not a consensus of opinion on this matter among all the High Courts in India and therefore we have not to appeal to our conscience to decide whether we should agree with the judgments of the Calcutta High Court and the Allahabad High Court or not.

11. In the first place there is a recent judgment of the full bench of the Lahore High Court reported in - *'Sansar Chand v. Punjab Industrial Bank, Ltd*[4]*.',* That was a case-and the first case we are noticing- where the order was made by a District Judge, and the question submitted to the

full bench was whether a party aggrieved by an order passed in the course of proceedings in liquidation by the District Judge in exercise of his jurisdiction under the Companies Act was entitled to appeal to the High Court irrespective of the provisions of the Civil Procedure Code which restrict the right of appeal to specified orders, and what the Full Bench held was that Section 202 was wide enough to cover appeals against any order made in the matter of the winding up of a company, provided such an order finally decided a dispute between the parties or deprived the appellant of a substantial and important right and is not a mere formal or interlocutory order. At p.709 Broadway J. rightly points out that reference was made to Section 104 and Order 43 of the Civil Procedure Code and it was pointed out that practically no order could be passed by a liquidation Court that could fairly fall within the provisions of that section and Order. The learned Judge also notices the further contention that was urged before him that there was a large number of orders that may be passed under the Companies Act which were not in the contemplation of the Civil Procedure Code and that therefore it was obvious that in enacting Section 202 the Legislature intended to give a general right of appeal, restricted as to the exercise of that right by the procedure laid down for the guidance of the Court in its ordinary jurisdiction. The conclusion to which the Full Bench came therefore was that wide interpretation must be given to the language used in Section 202 and the only limitation which should be imposed upon the right of appeal should be that the order must finally decide a dispute between the parties or deprive the appellant of a substantial and important right and should not be a mere formal or interlocutory order.

12. There is also a judgment of the Madras High Court which seems to have taken the same view as the Lahore High Court and that judgment is in - *'Chockalingam v. Nagarathar National Bank, Ramnad*[5]*,'* That again was an order

[4] AIR 1929 Lah 707 [5] AIR 1944 Mad 87

passed by a District Court and the order was that the appellant and other directors should be examined in liquidation. A preliminary objection was taken before a division bench of the Madras High Court consisting of Lakshmana Rao and Horwill JJ. that no appeal lay.

It is true that the learned Judges give no reason for their decision, but they do hold that the terms of Section 202 are very wide and they were not prepared to say that they were not wide enough to cover the order which was under appeal. If the test of "judgment" had been applied, to this order or if the test laid down in the Civil Procedure Code had been applied, then clearly this order would not have been appealable.

13. There is a judgment of our own Court which, though not directly in point, is of considerable assistance in construing this section, and that is a judgment reported in - *'Nowroji Cooper v. Official Assignee, Bombay*[6]*',* In that case Sir John Beaumont, C.J., and Rangnekar J. were considering the right of appeal under Section 8(2)(b) of the Presidency Towns Insolvency Act. Now, the language of that section though not identical is very similar and that section provides that an appeal from an order made by a single Judge in the exercise of the jurisdiction conferred by this Act shall lie in the same way and be subject to the same provisions as an appeal from an

order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court. It is pointed out to us that this section does not use the expression "subject to the same conditions", but we fail to understand why the expression "provisions" is not wide enough to cover "conditions".
Provisions of the law could not only cover conditions but any other matter that the law might provide for, and therefore in our opinion although this judgment is not on Section 202, it is in pari materia and the construction placed by this bench upon Section 8(2) (b) is of considerable assistance to us in properly construing Section 202. Sir John Beaumont points out (p. 322):

> "...The appeal is to be subject to the same provisions as an appeal from an order made by a Judge in the exercise of ordinary original civil jurisdiction. But that presupposes a proper appeal from such an order, that is to say, an appeal from an appealable order. Unless you presuppose a proper appeal from an order made by a Judge in the exercise of original jurisdiction, you have no standard of comparison for the order appealed against in insolvency.

It is of course plain that an order made in insolvency does not fall within Order 43, Rule 1, which does not deal with orders made in insolvency, and it would be very rare that an order made in insolvency, which usually does not settle any question between parties, would fall within the definition of 'judgment' adopted in this and other Courts." Now, this argument applies in its very terms to the question that we have to consider here. What we are asked to do is to adopt the standard either of Order 43, Rule 1, or of the expression "judgment" used in clause 15 of the Letters Patent in order to decide whether an order passed and a decision given under Section 202 is appealable, and using the language of the learned Chief Justice we can say that neither clause 15 nor Order 43 is an adequate or proper standard to decide whether an order is appealable or not under Section 202.

14. Reference might be made to an earlier judgment which is referred to by Sir John Beaumont in that case, and that is - *'Mahomed Haji Essack v. Abdul Rahman*[7]*',* That again

[6] AIR 1936 Bom 321
[7] AIR 1915 Bom 273

was a case that arose under the Presidency Towns Insolvency Act and the same section came up for consideration before Sir Basil Scott, C.J., and Batchelor J. The learned Chief Justice construes the two expressions "in the same way" and "subject to the same provisions" and he says that "in the same way" would refer inter alia to the filing of a memorandum of appeal in the Prothonotary's office and so forth, as provided by the Original Side Rules, and "subject to the same provisions" would be subject to the law of limitation and other statutes enacting adjective law. He also puts the same limitation upon the appeal ability of an order as the Lahore High Court has done, because he says (p.273):

> ".... Of course there may be orders which are merely orders regulating procedure for the convenience of the Court or for the convenience of the parties. Such orders, we take it, are

not affected by these provisions. The orders made must be judicial orders intended to decide some point judicially."

With respect, we do not understand what the learned Chief Justice means by a judicial order, because even a procedural order is a judicial order. But what the learned Chief
Justice really meant was that it must be an order which must decide some point judicially.

15. Therefore, in our opinion, the order made by Coyajee J. refusing to wind up the company and adjourning the petition after hearing it on merits to a future date is an order which is appealable under Section 202 of the Companies Act.

16. Now, turning to the merits of the matter, it is necessary to state a few facts. The Hirjee Mills were incorporated in 1930 with an authorized capital of Rs. 40,00,000. The issued capital was Rs. 11,50,000 out of which 11,000 shares of Rs. 100 each were issued as fully paid. On 1-5-1953, a creditor of the Mills, Bhagwati Cotton Trading Company, presented a petition for the winding up of the company. On 30-4-1953, an agreement was arrived at between the company and the other creditors. One of the terms of this agreement was that the various creditors mentioned in the agreement agreed to scale down the amounts due to them and to accept debentures in respect of these amounts, and the agreement mentions the debt due to the present appellants as Rs. 14,56,000 and this debt was scaled down to Rs. 8,10,000, and in this agreement the company admits this debt and the appellants agreed to accept the smaller amount in the form of debentures. This agreement came up for the sanction of the Court and the Court sanctioned the scheme embodying this agreement on 13-5-1953, and the scheme mentions the various creditors including the appellants and recites that the company having admitted the claims of the aforesaid creditors the company proposes to pay off the said creditors by issue of second mortgage debentures. Pursuant to this scheme a sum of Rs. 25,00,000 was borrowed from the Bank of Baroda on 21-8-1953, on the first mortgage of the properties of the Mills and also pursuant to this agreement second mortgage debentures were issued to the various creditors including the appellants in the sum of Rs. 32,55,000. On 10-2-1954, the Mills were closed as they were not in a position to carry on owing to lack of finances. On 26-3-1954, the trustees of the debenture holders instituted a suit, Suit No.418 of 1954, for realizing their debentures and a Court Receiver was appointed in that suit. On 12-5-1954, two share- holders and two creditors filed a suit, Suit No.1012 of 1954, challenging the mortgage in favor of the bank. The Bank of Baroda applied in Suit No.418 of 1954 for being put in possession as the first mortgagee. That application was refused, the bank came in appeal and the Appellate Court held that the appointment of a Receiver in Suit No.418 of 1954 cannot prejudice the right of the bank to go into possession under the terms of its mortgage deed. It is not disputed that the interest on the debentures has not been paid as provided in the debenture trust deed and the principal amount of the debentures has become due. The present position of the Mills, which is not disputed by the Mills, is this. The liabilities of the Mills are set out in the petition and at the date of the petition they were Rs. 26,00,000 due to the Bank of Baroda under its mortgage, Rs. 14,50,000 also due to the Bank under its cash credit

account, which account has been operated on a hypothecation of the goods belonging to the Mills, Rs. 40,00,000 due under the second debentures, and Rs. 20,00,000 due to the employees of the Mills. With regard to the employees of the Mills the position is not only serious but tragic. Ever since January of this year nothing has been paid to the employees of the Mills, and Mr. Maneckshaw who appears for them tells us that today about Rs. 36,00,000 are due to these poor people and every month the pay bill is increasing by Rs. 4,00,000. Then there is a liability of Rs. 12,00,000 to the income-tax authorities, Rs. 6,00,000 are due to other creditors, and Rs. 23,00,000 are due to the depositors. So at the date of the petition the debt amounted to Rs. 1,41,50,000, and as we said before this is not disputed by the Mills. The bank has gone into possession under an order of this Court and it has got to discharge certain liabilities. The monthly expenditure which has got to be incurred apart from Rs. 4,00,000 due to the employees is about Rs. 25,000. Rs. 1,33,000 are due to the Municipality for municipal bills between 1-4-1953, and 30-9-1954, and it need hardly be said that every anna that the bank pays in discharging the liabilities of the Mills is added on to its mortgage debt. As against this rather gloomy picture the only assets which the Mills can claim is the value of the Mills and that at the highest has been put by the Mills themselves at Rs. 60,00,000. So the simple balance sheet is a liability of about Rs. 1,41,50,000 as against assets of Rs. 60,00,000. Apart from this probable asset, because one does not know what the sale of the Mills will realize, there is not a sou which the company has in the way of cash or any other asset.

17. Now, before we consider what is the proper value to attach to these facts in deciding whether an order of winding up should not have been made by the learned Judge, we must deal with another preliminary objection which has been raised by Mr. Mathalone and that objection is that the only privity that exists with regard to the petitioners' claim is between the company and the debenture trustees and therefore the petitioners are not the creditors of the company and they cannot maintain this petition. In support of this objection reliance is placed on a judgment of the English Court reported in - 'Dunderland Iron Ore Co. Ltd., In re' 1909-1 Ch 446. In that case a trust deed for securing debenture stock was made between the company and the trustees for the stockholders. There was a certificate delivered to these stockholders stating the rate of interest and dates of payment, and that certificate certified that the stockholder was the registered holder of the stock which was issued subject to the provisions contained in the trust deed. The stockholders whose interest was in air ear presented a petition for the winding up of the company and Swinfen Eady J., held that they were not entitled to maintain the petition. Now the judgment of the learned Judge turned on this important fact that the certificate of stock which was issued to the petitioners did not contain any direct covenant with the stockholder to pay any interest, and the learned Judge with respect, rightly held that as the covenant was only with the trustees, the petitioners were not the creditors of the company and no debt was due by the company to the petitioners.

Now, in the case before us we have debentures and not a stock certificate issued to the debenture holders including the appellants, and when we turn to the debentures they contain a personal covenant by the Mills to pay to the debenture-holders. Therefore the reason which led Swinfen

Eady, J. to hold that the petition was not maintainable in the case before him is not present in this ease, and that is made clear in two other English decisions to which our attention has been drawn by Mr. Manekshaw. One is the case in - 'In re, Borough of Portsmouth Tramways Co.' 1892-2 Ch 362. There a debenture holder, as in the case before us, presented a petition for the winding up of a company. That debenture-holder had already filed an action to enforce his security and notwithstanding that the Chancery Court held that the exercise of his remedy as a debenture-holder did not deprive him of his right as an ordinary creditor to present a winding up petition and that he was entitled to the order. There is another case also to the same effect reported in - 'In re Olathe Silver Mining Company', (1884) 27 Ch D 278 . There the English Court held that the holder of some of the debentures, the interest on which was overdue, was entitled to petition for the winding up of the company.

18. The principle that emerges from these cases has been clearly stated in Buckley on the Companies Acts (p.465):

> "A holder of debenture stock constituted by trust deed in the ordinary form, under which the debenture stock certificates do not contain any direct covenants with the stockholders to pay the principal or interest of the stock to them, is not, either as to principal or interest, a creditor, either legal or equitable, of the company, so as to be entitled to present a winding up petition, his right of action being only through the trustees".

But where the obligation to debenture-holders was direct by the company to pay the bearer, the bearer could present a petition."

Our case clearly falls in the latter part of the enunciation of the law by Buckley. Palmer's Company Precedents, Part III, 16th edn., also states the law in the same terms (p.437):

> "A secured debenture or debenture stockholder to whom the company is indebted in a sum presently due can demand payment of his debt, and if default be made can present a petition and obtain an order-subject to what is said below-for the winding up of the company, and this remedy he is entitled to pursue whether he be the registered holder of a debenture or the holder of a debenture to bearer."

In our opinion, therefore, there is no substance in this objection.

19. So now we come to the real merits of the matter and we are afraid that there is not much that can be said on the merits. The two grounds on which the winding up is sought by the petitioners are that the company is unable to pay its debts and it is just and equitable that the company should be wound up. Now, I took the view in-'In re Cine Industries and Recording Company, Limited', AIR 1942 Bombay 231, that the insolvency contemplated by the Companies Act was that the company should be commercially insolvent, not in any technical sense but plainly and

commercially insolvent, that is to say, that its assets and existing liabilities must be such as to make the Court feel satisfied that the existing and probable assets will be insufficient to meet the existing liabilities.

It is difficult to conceive of a stronger case than this where the Mills are not only commercially insolvent but hopelessly insolvent, however the expression "insolvent" may be construed or interpreted. There was not even a suggestion before the learned Judge below as to how the company proposed to meet its liabilities of Rs. 1,41,50,000 with assets at the most aggregating to Rs. 60,00,000. No scheme was proposed, no suggestion was made, no financier came forward to salvage the Mills. Even on the other ground that it is just and equitable that the winding up order should be made, what the petitioners have to satisfy us is that the substratum of the company has disappeared. In that very case I laid down four tests to decide whether the substratum of the company was gone. Two of the tests are clearly satisfied in this ease. One was that it was impossible to carry on the business of the company except by a loss, which meant that there was no reasonable hope that the object of trading at a profit could be attained; and the second was that the existing and possible assets are insufficient to meet the existing liabilities. It is true mat in that case I emphasized the fact that it is not for the Judge to speculate as to whether if a company carried on its business it would make profit or not; that should be left to hard-headed business men who were in the management of the company. But even these hard-headed business men- and I, take it that the managing agents of the Mills are hard-headed business men - have not placed any materials before the Court which would entitle the Court to say that there was some hope, however remote, however vague, that the object of trading at a profit, which can be the only object of running the Mills, could be achieved. Therefore both on the ground of inability to pay debts and also on the ground that it is just and equitable that the winding up order should be made, a clear and emphatic case has been made out by the petitioners for the winding up of the company.

20. Now let us see how the shareholders and the creditors are arrayed on this question. The Mills are managed by managing agents belonging to the family of Bhadani. They are resisting the petition. Mr. K.K. Desai who appears for 16 shareholders also resists the petition. All these shareholders also belong to the family of Bhadani. Mr. Bhabha who appears for the depositors aggregating to Rs. 23,00,000 also opposes the petition. These depositors are also of the same clan, the Bhadani clan. He also appears for creditors to the value of Rs. 3,00,000 who are not connected with this family. As against this there is the imposing array of all the debenture holders of the value of Rs. 37,00,000 supporting the petitioners and asking the Court to pass a winding up order. The Bank of Baroda whose debts amount to Rs. 50,00,000 also supports the petitioners, and the particular class for whom we must have the greatest sympathy, the class of poor labourers whose debts amount to Rs. 36,00,000, strongly support the petitioners and want us to pass a winding up order. Mr. Nathwani appears for some creditors to the value of Rs. 12,000 and he says that these petty creditors actually have supplied goods to the Mills, bills have been submitted, registered notices have been sent, and they have not been paid. It is true and this must be said in fairness to the learned Judge below-that most of the parties who are now appearing

before us with special leave did not appear in the Court below and it may be that that was one of the factors that weighed with the learned Judge in declining to make an order of winding up. But as we read the judgment of the learned Judge, the main reason which has weighed with him is that the petitioners have not come to this Court with clean hands, and Mr. Mathalone wanted to satisfy us that the motive of the petitioners in closing down the Mills was selfish, that they were largely responsible for bringing about an impasse in the affairs of the Mills, and the Court will not make an order at the instance of a party which is guilty of mala fides. We have not permitted Mr. Mathalone to go into the merits of these allegations about the mala fides of the petitioners because in our opinion these allegations are entirely irrelevant. If the petitioners have made out a case for the winding up of the company, if they have placed materials before the Court which satisfy the Court that the company is insolvent, if they have placed materials before the Court which satisfy the Court that the substratum of the company is gone, it is difficult to understand what the motive of the petitioners has got to do with the question whether an order of winding up should be made or hot. If the petitioners were to stand to benefit by the order, undoubtedly the Court would say that a party cannot derive benefit by its own wrong. But when an order of winding up is made and the liquidator is appointed, the Court passes that order in the interest of the company, in the interest of the shareholders, and in the interest of the creditors, and except for the rather doubtful benefit that ordinarily the petitioners' solicitors are in conduct of the proceedings no benefit whatever accrues to the petitioners. Therefore, in our opinion, what the learned Judge should have considered was whether on the materials placed before him by the petitioners-and the materials in this case are overwhelming and they are indisputable-a case had been made out or not for the winding up of the company. The learned Judge should not have taken into consideration how wicked the petitioners were or how evil their actions had been.

21. The other factor that weighed with the learned Judge was that Mr. K.K. Desai on behalf of the shareholders at the very last moment made an application that the petition should be adjourned and no winding up order should be made because they were contemplating filing a suit to challenge the debentures. The learned Judge at one place does say that he has not considered the merits of Mr. Desai' application because it was presented at a very late stage, and yet in the final order that he has passed he stands over the petition to 15-3-1955, in order to enable Mr. Desai's clients to file a suit with expedition. Now, we do not wish to pre-judge any suit that Mr. Desai's clients may file, but it is worthy of note that the debt covered by the petitioners' debentures, as we have already pointed out, was solemnly admitted by the company and certified by this Court, and under Section 153 (2) of the Companies Act every compromise or arrangement sanctioned by the Court is binding on all the creditors or class of creditors, or members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company. Therefore, this compromise which was sanctioned by the Court is binding on the company and on the shareholders. It is pertinent to note that no action has been taken to challenge the sanction given by the Court on the ground that the sanction was brought about by fraud or by any other illegality. Therefore, prima facie, it is difficult to conceive of a more hopeless suit than the one

that Mr. Desai's clients are contemplating and to enable whom to file the suit this petition was adjourned by the learned Judge.

22. The learned Judge also gives other reasons why he has refused to make this order. He first takes into consideration the manner in which the Mills suddenly came to a standstill. As we said before they came to a standstill in February 1954. There is not the slightest possibility of the working ever being resumed under the present dispensation. We take it that the learned Judge was thinking of the allegations of the company that the Mills suddenly came to a standstill because of the machinations of the petitioners. But the stark truth remains, for which there is no answer or no explanation, that the Mills have no money whatsoever which would enable them to be run. Then the second fact is that these are the only Mills that have showed no profits. If anything, this circumstance should be in favor of the winding up of the company rather than against it. If the affairs of the Mills had been so mismanaged that although other Mills in the State of Bombay were earning profits these Mills should not earn profits, that itself should be a ground for winding up and taking away the management from the hands of the present managing agents. The third ground is that a suit has been filed by the trustees on behalf of the debenture holders wherein a receiver was appointed and now the first mortgagees are appointed by the Court to be in charge of the assets of the company. But this does not take away the jurisdiction of the Court to pass a winding up order and appoint a liquidator. What would be the relations between the liquidator and the Court Receiver is another matter altogether with which the Company Judge is not concerned. The final ground to which we have already referred is the anxiety of Mr. Desai's clients to file a suit for the purpose of a declaration that the debentures in favour of the petitioners were not valid. With very great respect to the learned Judge, we are of the opinion that none of the grounds mentioned by him is of any value in deciding whether a winding up order should be made or not.

23. Mr. Mathalone impressed upon us that in refusing to pass a winding up order the learned Judge has exercised a discretion and we should not interfere with that discretion. Normally we are always loath in appeal to interfere with the discretion exercised by the lower Court, but this a case where, as we said before, there is no answer whatever by the company to the allegations made by the petitioners, and if these allegations are admitted, the only order that can be made is an order of winding up. One further thing might be stated with regard to the charges of machinations and mismanagement on the part of the petitioners. Of course this only applies to a director of the petitioners who is also a director of the Mills. It would be open to the liquidator, nay, it would be his duty, to investigate into any charges that the company might make against this director, and we would direct that if he is satisfied he should take out a misfeasance summons against the director and take out a misfeasance summons against any other director who has been responsible for bringing the Mills into this sorry plight. In view of what has been alleged against the director of the petitioners, we feel that perhaps it would be best if the order of liquidation is made in favor not of the appellants but of some other creditor whom we can substitute as a petitioner in place of the appellants. Dinkar Sambhaji Tavde is an employee of the Mills and admittedly more than Rs. 500 are due to him for wages. We therefore substitute Dinkar

Sambhaji Tavde in place of the appellants as the creditor and we will make an order of winding up of the company. The Court Liquidator appointed official liquidator with all powers under Section 179. Powers under Section 179 to be exercised by the Court Liquidator without the sanction of the Court required under Section 180.

24. The appeal will, therefore, be allowed and we will set aside the order of the learned Judge below.

25. With regard to costs of the appeal, the appellants must get their costs out of the assets of the Mills. The company must also get its costs out of the assets. With regard to the creditors, Mr. Manekshaw who appeared for the employees has appeared through the same solicitors as the solicitors of the petitioning creditors. The principle is well settled that if shareholders or creditors appear through the same solicitors as the successful petitioners, then they are not entitled to costs because they choose to brief separate counsel. But this is the ordinary principle which should be followed. The position here is different. Allegations of mala fides were made against the petitioners and therefore it was desirable that this Court should have support to the petition of creditors against whom no allegation whatever was made. Therefore under these circumstances Mr. Manekshaw along with the other creditors would be entitled to one set of costs. Mr. Bhabha and Mr.
Desai having failed in their opposition, no order for costs will be made in their favor.

26. With regard to the costs of the petition, the petitioners would be entitled to the taxed costs of the petition. The company also will be entitled to taxed costs of the petition. Although Mr. Nathwani appeared on the petition for two creditors, as he appeared through the same solicitors I think that the ordinary rule of costs should prevail and the creditors will not be entitled to any costs. We will certify counsel on the petition.

27. Liberty to the petitioners' attorneys to withdraw the sum of Rs. 500 deposited for security of costs.

28. Prothonotary and Liquidator to act on the minutes of the order.
Appeal allowed.