

## ORIGINAL CIVIL.

1929

Aug. 26.

*Before Buckland J.**In re* KHARKHAREE COLLIERIES, LTD.\*

*Company—Winding-up—Liquidator and receiver, competition between—  
Meaning of the word “assets”—Indian Companies Act (VII of 1913),  
s. 175 (6).*

The intention of sub-section (6) of section 175 of the Indian Companies Act is to avoid any question of competition between a receiver and an official liquidator and to construe it in such a way as to give preference to a receiver, appointed in suit brought by a secured creditor, would defeat its apparent object.

Where there is a question of competition between a liquidator and a receiver appointed by the court, at the instance of debenture-holders or mortgagees, the court will ordinarily, in the exercise of its discretion, give preference to the liquidator.

*In re Joshua Stubbs, Limited, Barney v. Joshua Stubbs, Limited* (1) followed.

*Semble.* The word “assets” in section 175 (6) of the Indian Companies Act must mean the assets of the company, though subject to a charge, of which the amount due to the mortgagee has yet to be ascertained.

## APPLICATION BY mortgagees.

The Kharkharee Collieries were mortgaged to a joint family, of which Ray Mukundlal was the *kartā*. There was a subsequent mortgage in favour of Ray Saheb Harkissendas. The first mortgagees filed a mortgage suit in the court at Dhanbad and, on the 23rd March, 1929, applied for appointment of a receiver. This application was kept on the file, pending the hearing of the suit.

On the 6th May, 1929, a winding-up petition was presented in the High Court and, on the same day, Mr. A. N. Ray was appointed provisional liquidator. On the 11th May, Ray furnished security and he took possession of the property on the 19th May, 1929.

On the 24th May, 1929, the court at Dhanbad made an order appointing a receiver, and, on the 6th June, the name of the receiver was finally accepted.

\*Ordinary Original Civil Jurisdiction.

(1) [1891] 1 Ch. 475.

On the 10th June, the company was ordered to be wound up and Ray was appointed official liquidator.

*P. C. Ghose* for the petitioners. My client is a secured creditor and, as such, he is entitled to proceed with the suit. In re *David Lloyd & Co. Lloyd v. David Lloyd & Co.* (1). A secured creditor is entitled to have his security realised and to have his own receiver there. He is not concerned with the appointment of a liquidator.

The colliery cannot be said to be an asset of the company, as the company has merely a right of redemption. In re *Henry Pound, Son, & Hutchins* (2).

*Susil Sen* for the Official Liquidator. I do not dispute the plaintiff's right to proceed with the suit.

But, under the Indian Companies Act, no receiver can be appointed of property in the possession of a liquidator. See section 175. This is a departure from the English statute and the matter has been decided by Costello J. in *Baldeodas Rameswar v. Cook & Co., Ltd.* (3). The decision of Costello J. has been confirmed by the appeal court.

Further, even under the English law, the tendency of the court is to appoint, if necessary, the same person as liquidator and receiver. It is unreasonable that there should be two persons acting really for the same purpose. *Campbell v. Compagnie Générale de Bellegarde*. In re *Compagnie Générale de Bellegarde* (4), *British Linen Company v. South American and Mexican Company* (5), In re *Joshua Stubbs, Limited. Barney v. Joshua Stubbs, Limited* (6), *Tottenham v. Swansea Zinc Ore Company, Limited* (7), *Perry v. Oriental Hotels Company* (8).

Even if the receiver has been previously appointed, he will be displaced. *Campbell v. Compagnie Générale de Bellegarde*. In re *Compagnie Générale*

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In re  
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*Collieries, Ltd.*

(1) (1877) 6 Ch. D. 339.

(4) (1876) 2 Ch. D. 181.

(2) (1889) 42 Ch. D. 402.

(5) [1894] 1 Ch. 108.

(3) (1927) Suit Nos. 2314 and 2379

(6) [1891] 1 Ch. 475.

of 1923, decided on 7th July.

(7) (1884) 51 L. T. 61.

(8) (1870) L. R. 5 Ch. 420.

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*de Bellegarde* (1), *Davis v. House Improvement Supply Association*. In re *House Improvement Supply Association* (2).

BUCKLAND J. This is an application made in the matter of the Kharkharee Collieries, Limited, in liquidation, by certain secured creditors, who have filed a suit in the court of the Subordinate Judge at Dhanbad on their mortgage of the properties of the company, for leave to proceed with the suit and for an order that the official liquidator do make over to the receiver appointed in that suit, the properties mortgaged, of which he is in possession. The suit was filed on the 22nd March, 1929, and the winding-up order was made by this Court on the 10th June.

The winding-up order having been made, section 171 would apply and no suit or other proceeding may be proceeded with against the company, except by the leave of the court.

As regards proceeding with the suit, no objection has been made. The petitioners are secured creditors, and it may be convenient that the amount due to them upon their mortgage should be ascertained in the suit which is in progress. The mortgage, I should mention, was not created by the company but was already in existence at the time when the company acquired the property and did so subject to such mortgage.

The receiver was appointed on the 24th May last. It appears that while the petition to wind up the company, which was presented early in May, was pending, an order was made which took effect on the 11th May, provisionally appointing an official liquidator, and I apprehend that the official liquidator, who is now in possession of the property, took it into his charge shortly after the order was made, as it is now in his possession. How, in those circumstances, having regard to the provisions of section 175 (b) of the Indian Companies Act the receiver came to be appointed is not clear. I do not

(1) (1876) 2 Ch. D. 181.

(2) [1885] W. N. 51.

### Errata.

In Indian Law Reports, Calcutta Series, Volume LVIII, page 286—

at lines 24-25 from top, for "*In the matter of Gooptu Estates, Limited,*"  
please read "*Pannalal Lala v. Abdul Gani*"; and

at footnote (3), for "(1929) I. L. R. 57 Calc. 910," please read "(1930)  
34 C. W. N. 321."



know, however, that the application requires that I should construe that section, but if it should be necessary, I am not impressed with the argument that the word "assets" means the assets of the company, and that property which is subject to a charge, cannot be within the section as not being assets of the company. It appears to me that the assets in this case are and must be held to be assets of the company, though subject to a charge, of which the amount due to the mortgagee has yet to be ascertained, a view for which support is to be found in a passage of the judgment of Lindley L. J. in the case to which I shall refer later. The sub-section is one which is not, as are very many of the sections of the Indian Companies Act, taken from the Companies Consolidation Act of 1908, and therefore English authorities in which it has been interpreted are not available. It is, however, very definite and clear, and I apprehend that its intention is to avoid any question of competition between a receiver and an official liquidator, and to construe it in such a way as to give preference to a receiver appointed in a suit brought by a secured creditor would result in defeating its apparent object.

My learned brother, Mr. Justice Costello, by an order made in suit *Baldeodas Rameswar v. Cook & Co., Ltd.* (1) held that this sub-section precluded him from appointing a receiver to oust the possession of the liquidator at the instance of a secured creditor. I have been informed that that order was affirmed on appeal.

I doubt whether this section need be considered, and I think I should find myself on more solid ground in basing myself upon the principle of *In re Joshua Stubbs, Limited. Barney v. Joshua Stubbs, Limited* (2), from which it appears that where there is a question of competition between a liquidator and a receiver appointed by the court at the instance of the debenture holders or mortgagees, the court will

(1) (1927) Suit Nos. 2314 of 1923 (2) [1891] 1 Ch. 475.  
and 2370 of 1923, decided on  
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ordinarily, in the exercise of its discretion, give preference to the liquidator.

In my judgment, the application so far as it asks for leave to proceed with the suit may be allowed, but so far as it relates to possession by the receiver it should be refused.

As regards costs, it is true that the applicant has had to apply for leave to proceed with the suit, but it is not that which has stimulated opposition on the part of the liquidator. The applicant must pay the liquidator's costs.

Attorneys for petitioner: *Manuel Agarwalla & Co.*

Attorneys for official liquidator: *Dutt & Sen.*

S. M.