

State of Madras Vs. Madras Electric Tramways (1904) Ltd. and anr.

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Court : Chennai

Decided On : Apr-18-1956

Reported in : AIR1957Mad169; [1955]25CompCas378(Mad)

Judge : Rajamannar, C.J. and ;Panchapakesa Ayyar, J.

Acts : [Electricity Act, 1910](#) - Sections 7; [Evidence Act, 1872](#) - Sections 115; [Contract Act, 1872](#) - Sections 70; [Companies Act, 1913](#) - Sections 109, 109(1), 116, 179, 230 and 230(2); [Companies \(Amendment\) Act, 1956](#) - Sections 125, 126, 134 and 530; Registration Act

Appeal No. : O.S. Appeal Nos. 93 and 168 of 1954

Appellant : State of Madras

Respondent : Madras Electric Tramways (1904) Ltd. and anr.

Advocate for Def. : O.T.G. Nambiar, ;King and ;Patridge, Advs.

Advocate for Pet/Ap. : Adv. General, ;Govt. Pleader and ;V. Ramaswami, Advs.

Judgement :

Panchapakesa Ayyar, J.

1. These are two closely connected appeals against the judgments and decrees of Balakrishna Ayyar J. in C.S. Nos. 191 of 1952 and 368 of 1953. The appellant in

both these appeals is the State of Madras, and the respondent is the Madras Electric Tramways Ltd., (in liquidation), represented by the Official Liquidator, Official Receiver of this Court.

2. The facts are briefly these: By an agreement, dated 15-7-1907, Ex. D-3, entered into between the Madras Electric Supply Corporation Ltd., and the Madras Electric Tramways Ltd. (incorporation to 1904) the former agreed to supply and the latter agreed to receive electrical energy required by the latter, subject to the following main conditions: The Tramways Company was to take all the electrical energy it required from the Electric Supply Corporation. This energy was to be delivered by the Electric Supply Corporation at the switch-board of the Tramway Company, located at its tramway depot in Egmore. The energy was to be delivered as 'direct current' at a pressure of 500 volts (at no load) to 550 volts (at full load).

The entire energy supplied was to be charged as a whole; at a tapering rate, the rate becoming lower as the quantity of the current taken became higher. There was a clause providing for revision of the rates at the instance of either party, after the expiration of every period of 7 years from the date of the agreement, by three months' notice in writing. An engineer appointed by the President of the Institution of Electrical Engineers in England was to determine what the revised rate, if any, should be. The agreement was not to be determined by the Tramway Company or the Electric Supply Corporation, the intention of the parties being that the benefit thereof, subject to the rights, duties and obligations of the parties respectively, should be annexed to, and constitute part of the respective undertakings of the tramway company and the Electric Supply Corporation.

Any dispute or difference between the Tramway Company and the Electric Supply Corporation was to be determined by a single arbitrator to be appointed on the application of either party by the President of the Institution of Electrical Engineers in England. One million units of electrical energy was to be taken by the Tramway Company, unless there was an accident or other unavoidable reason.

3. In 1907, the Tramway company had only one depot, at Egmore. Before 1923, it opened a sub-station at Mount Road. A supplemental agreement, Ex. D. 4. was entered into with the Madras Electric Supply Corporation, providing for the supply

of electrical energy at the Mount Road substation also, in addition to the Tramway Company's depot in Egmore. There was also a 'coal clause', providing for an additional payment by the Madras Tramway company to compensate the Electric Supply Corporation for the fluctuations in the price of coal, from which the Electric Supply Corporation was generating its current.

4. On 7-1-1932, there was also another supplemental agreement, Ex. D.5. Under this agreement, the quantity of electrical energy to be taken by the Tramway company was raised to two million units, instead of one million units, and there was a small reduction in the price charged per unit. There was also a provision for the increase of the maximum demand of 1500 K. V. A. by ten per cent, in order to allow for the estimated conversion loss, incurred by reason of conversion from high tension to low tension current and from A. C. current to D. C. current. The Electric Supply Corporation was to bear the cost of conversion, as before.

5. Some time before 1947, the Tramway Company opened a second sub-station in East George Town. The Electric Supply Corporation agreed to supply electrical energy at the East George Town sub-station also. The entire supply to all the three depots, namely, those at Egmore, Mount Road and East George Town, was treated as one consolidated supply, and charged under the tapering system referred to above.

6. The Madras Electric Supply Corporation was operating under a licence, Ex. P. 2, issued on 21-8-1905. That licence was liable to revocation for any breach of the conditions. There was also control over the price charged for the electrical energy supplied. There was an option given to the Government to purchase the electricity concern at the end of 42 years from 21-8-1905, and at the end of every ten years thereafter. In 1945, the State Government notified the electric supply Corporation of their intention to exercise of the option of purchase given to them by Clause 10 of Ex. P. 2.

7. In anticipation of such taking over, the Chief Engineer to the Government of Madras wrote a letter, Ex. P. 4, to the Tramway Company, as well as to other consumers. It stated;

"The terms and conditions in the agreement now existing between you and the Madras Electric Supply Corporation Ltd. for supply of electricity will be examined by Government after 29th August 1947. Pending final decision of Government and the execution of a fresh agreement, the existing agreement between you and the Madras Electricity Supply Corporation Ltd., will be deemed to continue to be in force.'

A reply was requested. The Madras Tramway Company sent the following reply, Ex. P. 4 (a):

'We hereby signify our acceptance of the agreement specified in paragraph 2 of our letter quoted above in regard to the provisional continuance of the agreements dated as above with the M. E. S. C. Ltd., for supply of electricity.'

8. The Government took over the concern of the Madras Electric Supply Corporation on 29-8-1947, and continued to supply electrical energy to the consumers, including the Tramway Company. On examining the agreements of the Madras Electric Supply Corporation Ltd., with the Madras Tramway Company, the Government found three main discrepancies between their departmental practice and the conditions in the agreement.

The first was that, according to the departmental practice, the supply at each depot was charged for separately on the tapering system, whereas, under the agreements supply to all the three depots of the tramway company at Egmore, Mount Road and East George Town, was consolidated before being charged on the tapering system. The Government were anxious to follow their own departmental practice, especially as it would yield them a higher revenue.

The Tramways were equally anxious to continue the old practice, as they would have otherwise to pay much more. The second sore point with the Government was that, under the departmental practice, the consumer paid for the conversion of high tension current to low tension current and from alternate current to direct current as it costs much, machinery and labour to do the conversion and about 30 per cent of the energy was also being lost in the process.

So, they wanted to charge the Tramway company for such conversion, and revise the old agreements to that effect. The Tramway company naturally did not want to pay anything for the conversion, and stuck to the old agreements. The third difference was this. The Tramway company had installed three Traction panels in the premises of the Electric Supply Corporation for which it paid no rent at all.

The panels were also being operated by the Electric Corporation employees without any extra charge. The Government wanted to charge a rent of Rs. 100 per month for the Traction panels in each of the sub-station, and Rs. 328 per month for each panel as operation charges, or in all Rs. 1284 per month extra. The Chief Electrical Engineer wrote letters to the Tramway Company, proposing to make the above increased charges. The Tramway company did not agree.

9. Two conferences were held between the Government's Officials running the Madras Electric Supply Corporation and the Officials of the Madras Tramway Company to thrash out the matter. The first was on 21st October 1948 and the second on 17th February 1949. Mr. Elphick, for the Tramway company, accepted Rs. 328 per panel per mensem regarding the operation charges, but wanted the rent to be reduced to Rs. 75 per month for each of the three panels.

Regarding the other two matters, namely, separate charging for the energy supplied to each of the three sub-stations, and conversion charges, there was no agreement. The Tramway company would not agree to the increase of Rs. 30,000 to Rs. 46,000 per mensem involved by all these additions, as it would mean an addition of 53 per cent to what they were paying under the old agreements. In the end, the Tramway company officials demurred to any additional charge whatsoever over the old rates, though they said that even if additional charges were legally leviable from them they would never exceed Rs. 4659 per month.

They contended that it was unfair to treat the three sub-stations separately regarding the energy supplied, as if they were three different tramway companies, and that it was also unfair to charge them for conversion of energy contrary to the previous practice, and to charge them panel rent and labour charges when they had not been charged before. The lengthy exchange of letters between the Chief Engineer for Electricity, Government of Madras, and the Tramway company led to

no settlement.

10. On 9th September 1950, the Government issued an order, Ex. P. 22 containing the following passage:

'His Excellency the Governor of Madras hereby directs that the existing agreements with the Madras Electric Tramways should be terminated and a fresh agreement should be entered into with the Tramway company providing for the following terms.'

This provision directed that for the period from 29th August 1947 to 9th May 1948 the Tramway company should pay Rs. 300 per month as rent for the panels and Rs. 984 per month as labour charges for working of the panels. It also directed that for the period from 10th May 1948 the Tramway company should pay a consolidated sum of Rs. 10,000, per month as conversion charges, including losses etc., and that the bills for the supply of energy to the Egmore, Mount Road and East George Town substation should be prepared separately and charged, and instead of being clubbed together and charged as one bill on the tapering system. The Superintending Engineer, Madras Electricity System, sent bills to the Tramway company on the basis of the instructions in the Government's order, Ex. P. 22.

11. The Tramway company had felt highly aggrieved at the proposed additional charges. Its affairs were none too prosperous, and it was heading the rocks. On 29th July 1949, it had submitted a petition. Ex. D. 13, to Sri M. Bhaktavatsalam, the Minister for Public Works, complaining against the proposed increased charges, and pointing out how this company had been carrying 150,000 citizens of Madras daily as passengers for years, at cheap rates, and how it had begun to work at a loss, and was unable to pay any dividend, and how its financial condition had deteriorated progressively, and it was unable to pay the conversion charges demanded of it or to buy the conversion plant required to do the conversion itself and escape paying this unjustifiable levy. The petition yielded no satisfactory result.

12. The Tramway company paid the dues for the period from 29th August 1947 to 31st March 1950. It paid the bills at the enhanced rates from 1st September 1950 to 31st August 1951 under protest, through its solicitors, and without prejudice to its right to claim a refund of the excess. On 26th April 1952 the Tramway company filed C. S. No. 191 of 1952 on the Original Side of this Court against the State of Madras, claiming Rs. 141,432-3-10 from the Government, said to represent the excess paid by it for the period from September 1950 to August 1951, under protest, and subsequent interest.

For the third period, namely, 1st September 1951 to 31st July 1952, though the bills were sent to them at the enhanced rates, the Tramway company paid only at the lower rates as per the agreements with the Madras Electric Supply Corporation before the Government purchased it. For the period from 1st August 1952 the Tramway company did not make any payment at all, at the old rates, or at the new rates, on the ground that it had filed a suit regarding the admissible rates, and was awaiting the decree of court.

13. The Government filed C. S. No. 368 of 1953 on the Original Side of this Court against the Madras Tramway company on 30th October 1953, for recovering Rs. 9,26,186-2-3, the alleged arrears due, with subsequent interest and costs, and for a declaration that it was entitled to a first charge over the assets of the first defendant and to priority in respect of the decree amount, and for declaring that it was entitled to priority of payments out of the assets of the first defendant in preference to all its other debts and liabilities, and, in default of payment of the same, for the sale of the entire assets of the first defendant, the Tramway company, including the specific and floating security in favour of the debenture holders.

We may add that the debenture holders, who had to recover 130,000, or more than 17 lakhs of rupees from the Tramway company, had, through their trustee, the Bearer Trust, appointed the second defendant Mr. Brookes, as Receiver to take over the assets of the company on their behalf, as they claimed specific and floating security over the entire assets under Ex. D. 10, dated 26th March 1925, a mortgage executed by the Tramway company in favour of the Bearer Trust Ltd.,

the trustee for the debenture holders.

Mr. Brookes had resigned his post as Managing Director of the Tramway company on 1st April 1953. He took possession of the Tramway company's properties, moveables and immoveables, on 11th April 1953, as a Receiver for the debenture holders. The Government made Mr. Brbokes a party to its suit, as second defendant, as he was in possession of the Tramway company's properties and was also interested in resisting its claim to priority over the debenture holders,

14. The Tramway company ceased to take electric supply from 11th April 1953 (see Ex. P. 75). Its affairs went from bad to worse, and liquidation proceedings were instituted on 11th December 1953, and the Official Receiver of this court was appointed as Official Liquidator, on behalf of the creditors on 20th January 1954, as it was proved that the company was unable to pay its debts. The Government added the Official Receiver as third defendant in C. S. No. 368 of 1953 on 18th February 1954.

15. Both the suits were strongly contested. The nature of the contentions will be clear from the Issues.

16. The issues framed in C. S. No. 191 of 1952 were:

1. Are the rights and liabilities as between the plaintiff and the defendant in regard to the supply of electric energy by the defendant to the plaintiff governed by the agreements and the course of conduct between the plaintiff and the Madras Electric Supply Corporation referred to in the plaint for the reasons stated therein?
2. Was the plaintiff liable to pay the defendant the amounts shown as excess payments in paragraph 22 of the plaint and were the said amounts wrongly collected by the defendant from the plaintiff?
3. Is the consent of the plaintiff not necessary for the introduction of modified conditions as alleged in paragraphs 6 and 7 of the written statements?
4. Is the plaintiff entitled to a refund of the plaint mentioned amount with interest as claimed therein?

5. Is the plaintiff estopped from questioning the rates approved by the Government as alleged in paragraph 11 of the written statement?

6. To what relief is the plaintiff entitled?

17. In C.S. No. 368 of 1953 the following issues were framed:

1. Is the first defendant liable to pay for the electrical energy supplied in accordance with the revised bills, with panel surcharge and rent as shown in the second schedule to the plaint?

2. Is the electrical energy supplied to be charged for in accordance with and are the rights and liabilities between the plaintiff and the first defendant governed by the agreements between the Madras Electric Supply Corporation Ltd., and the plaintiff and the long course of conduct between the first defendant and the said Corporation as alleged in paragraph 5 of the first defendant's written statement?

3. Is the plaintiff entitled to issue separate bills for the three points of supply as alleged in paragraph 9 of the plaint?

4. Is the defendant liable to pay any charges for electrical energy supplied in question? If so, for what period, and at what rate?

5. Is the first defendant liable, to pay any panel surcharge and, if so, what amount?

6. Is the plaintiff entitled to a decree against any of the assets in the hands of the second defendant?

7. Is the plaintiff entitled to a first charge on all the assets of the first defendant and to a priority over all the liabilities and debts of the first defendant as alleged in paragraph 13 of the plaint?

8. Is the plaintiff entitled to a paramount right of priority of payment as alleged in paragraph 14 of the plaint over, all other creditors of the first defendant including the mortgagee-debenture holders?

9. Is the claim of Rs. 3,30,894-2-0 for the period from 29th August 1947 to 31st August 1950 barred by limitation?

10. To what relief (if any) is the plaintiff entitled?

18. As the suits were very intimately connected, they were tried together, at the request and with the consent of all the parties. The only oral evidence let in consisted of the evidence of Mr. Narayana Rao, who was the Superintending Engineer, Madras Electricity Department from 1941 to 1951. He spoke to the taking over of the Madras Electricity concern on 29th August 1947 and to his correspondence with the Madras Tramway company about the increased rates.

He stated that the Government had to instal 2 separate rectifier stations for transforming A. C. current to D. C. current and high tension to low tension current, for the sake of the Tramway company, at a cost of Rs. 5 lakhs, besides incurring reconditioning charges amounting to Rs. 60,000. He said that these expenses had to be incurred only in order to supply low tension D. C. current to the Madras Tramway company. He added that Mr. Elphic of the Tramway company had telephoned to him that the company would be requiring additional current, as it intended to put more trams. Numerous documents were filed by the Tramway company as well as by the Madras State in support of their respective cases.

19. Balakrishna Ayyar J. discussed the entire evidence, oral and documentary, and the rulings cited on all sides, and the arguments advanced. He, then, gave his findings. On issue 1 in C. S. No. 191 of 1952, and issue 2 in C. S. No. 368 of 1953, which were in substance the same and were the most important issues in the two suits, he found that the Tramway company was liable to pay the Madras Government for the current it consumed at the rates specified in the agreements between it and the Electric Supply Corporation, whose successor was the Madras State, and that in addition, the company was bound to pay the Government charges at Rs. 1284 per month for the housing and operation of the traction panels.

On issue 1 in C. S. No. 368 of 1953, and issue 5 in C. S. No. 191 of 1952, he found that the Tramway company was not estopped from questioning the new and

enhanced rates approved by the Government, and that it was not liable to pay, as per the revised bills, the penal surcharge and rent. On issue 4 in C. S. No. 368 of 1953, he found that the Tramway company was not liable to pay the whole or any part of the enhanced charges on the principle of quantum meruit, or under Section 70 of the Indian Contract Act, or on any principle analogous to Section 70 of the Indian Contract Act.

On issues 7 and 8 in C. S. No. 368 of 1953, he found that the State of Madras was not entitled to a first charge on all the assets of the first defendant and to a priority over all the liabilities and debts of the first defendant, as claimed by it, either on the ground of their being Crown debts, or on the principle of salvage, or on any other principle known to law, and that it was not entitled to a permanent right of priority of payment over all other creditors of the first defendant, and was certainly not entitled to any priority over the debenture holders.

He held that this was a mere mercantile debt, and would not be a tax or cess or revenue, and, so, the Government would only rank as unsecured creditors regarding any decree amount obtained by it in this suit. He discussed Section 230 of the Companies Act and the preferential payments mentioned in it also in this connection. He held that the debenture-holders would be entitled to a charge on all the assets of the company, moveables and immoveables, in preference to all other creditors, since there was "specific security" given in their favour in respect of No. 1 and 2 of Rundall's Road and other immoveable properties covered by valid registration, and there was 'floating security' over all the moveable assets and other immoveable properties, which floating security had become crystallized on the Receiver appointed by the debenture holders taking possession of the properties on 11th April 1953.

Even though the Mylapore immoveable properties, covered by Ex. D. 11, had not been registered under Section 109 of the Companies Act, and were only registered under the Registration Act, as security for the debenture holders to the extent of Rs. 53000 and the learned counsel for the Tramway company had not disputed that Ex. D. 11 would be void as a special mortgage, he held that the floating charge created over the property under the debenture deed as over all the

properties of the company moveables or immoveables, and on the 'undertaking' fastened On. these and other similar properties on 11th April 1953, when the receiver took possession of the properties and crystallised the floating charge.

On issue 3 in C. S. No. 368 of 1953, he held that the Government were not entitled to bill the company separately in respect of each source of supply, and then work out the tapering charges, as it was bound by the agreements entered into by the Madras Electric Supply Corporation, its transferor, On issue 5 in C.s. no. 368 of 1953, he found that the Tramway company was not liable to pay any penal surcharge, but only interest at five per cent per annum, as provided for in the agreements. On issue 6 in C. S. No. 368 of 1953, he found that the Government would be entitled to a decree for the amounts due to them under the original agreements plus the rent and operation charges for the three traction panels.

Issue 9 in O. S. No, 368 of 1953 was not pressed by Mr. Nambiar. In the end, he gave the Government a decree for Rs. 3,41,317-2-9 against the first defendant, the Tramway company, & made the decree amount subject to the claims of the debenture-holders against that company, and directed the third defendant, the Official Receiver-Liquidator, to pay the amount with interest at 6 per cent per annum from 30th October 1953, the date of the plaint, till the date of payment, subject to such priority, and directed the State of Madras and the Tramway company to give and take proportionate costs.

20. On issue 2 in C. S. No. 191 of 1952, he found that the Tramway company was not liable to pay the Government the enhanced charges, and that the Tramway company was entitled to recover the excess paid less the rent and operation charges of the traction panels. He allowed the 'coal charges' to be worked out annually as claimed by the Government, and not monthly, as contained by the Tramway company.

He also rejected the claim of the Tramway company to escape payment regarding the minimum energy which it was bound to take, on the score that it had to stop its business for causes beyond its control, since it was not proved that the stoppage of its business was due to causes beyond its control. On issue 3 in C.S. No. 191 of 1952, he found that the consent of the plaintiff was necessary for the increased

charges, since the old agreements continued to operate and had not been cancelled by the Government or substituted by a new agreement between the parties.

On issue 4, he held that the plaintiff was entitled to a refund of the excess amount claimed minus the traction panels rent and operation charges. In the end, therefore, he gave a decree to the plaintiff in C. S. No. 191 of 1952 for Rs. 1,17,796-9-0, with interest at 6 per cent per annum from the date of plaint, and directed- the Government and the Tramway company to give and take proportionate costs in the suit.

21. O. S, A. No. 93 of 1954 has been filed by the Madras State against the judgment and decree in C. S. No. 368 of 1953, in so far as it went against them and disallowed some of the amounts claimed By them. O. S. A. No, 188 of 1954 has been filed by the State of Madras against the judgment and decree in C. S, No. 191 of 1952.

22. We have perused the entire records and heard the learned Advocate General for the State, & Mr. O. T. G. Nambiar for the debenture-holders, and the arguments adduced on behalf of the Tramway company. The learned Advocate General raised several contentions. The first was that Balakrishna Aiyar J. erred in holding that the rights and liabilities of the appellant and the first respondent were governed by the agreements, that existed prior to the Electricity undertaking being taken over by the State on 29th August 1947, and that he should have held that the old agreements lapsed on 29th August 1947, with the cessation of the licence of the Madras Electric Supply Corporation and that the State could not be held to be the transferee or assignee from the Madras 'Electric Supply Corporation and bound to carry out the terms of the old agreements, especially in view of the circular, Ex. P. 4, dated 4th August 1947, to the Tramway company, and the order in Ex. P. 22 dated 9th September 1950.

We cannot agree. There is absolutely no doubt that the Madras State had merely exercised its option, under Section 7 of the Indian Electricity Act of 1910, to purchase the undertaking of the Madras Electric Supply Corporation. The State did not get the undertaking under the Statute, but only the right to purchase the

undertaking. In other words, it was a purchaser and a transferee from the Madras Electric Supply Corporation and was bound by all the obligations of the Madras Electric Supply Corporation under its existing contract.

Section 7(3)(a) of the Electricity Act itself says 'where a purchase has been effected under Sub-section (1) or Sub-section (2)', making it plain that it is only under the purchase that the State gets title to its undertaking, and not under the Statute itself. In paragraph 3 of the written statement in C. S. No. 368 of 1953, the Tramway company definitely asserted that the Madras Electric Supply Corporation had executed and registered in favour of the State a deed of conveyance conveying and assigning to the State its properties.

That allegation was not controverted by the State in its written statement, and, therefore, the position of the State is that of one who has obtained an assignment from the Madras Electric Supply Corporation of its entire business and undertaking, with all its rights and obligations. The State is certainly-a 'successor' of the Madras Electric Supply Corporation, as held by Balakrishna Aiyar J. In Ex. P. 18, the Tramway company had expressly stated that the State was the successor of the Madras Electric Supply Corporation.

A 'successor' means, as Balakrishna Aiyar J. has rightly remarked 'he that followeth or cometh in another's place.' See Stroud's Judicial Dictionary. So, the Madras State was both the successor and assignee from the Madras Electric Supply Corporation, and was bound by all agreements entered into by that Corporation with the Tramway company till they were validly terminated.

23. After the decision of Balakrishna Aiyar J. the House of Lords has held in *Madras Electric Supply Corporation Ltd. v. Board of Taxation*, 1955 1 All ER 753 that the Madras Electric Supply Corporation has sold its undertaking to the Madras State which had carried it on, so that the trade was not discontinued. We may add here that there is also a reported Bench decision of this court regarding the Madras Tramway Company.

It is *P.G. Brookes v. Industrial Tribunal, Madras* : (1953) 11 LLJ 1 Mad , where it was held that the order bringing on record Mr. Brookes, the Receiver of the debenture

holders, as representing the employers of the Madras Tramway company in an industrial dispute between the Tramway company and its workers, though it might be a wrong order on merits, could not be said to be an order vitiated by an error apparent on the face of the record, and, so, Mr. Brookes' remedy, if any, would be to prefer an appeal to the Labour Appellate Tribunal against the order of the Industrial Tribunal, Madras, bringing him on record on behalf of the employer's, and get it rectified.

Mr. Brookes was in charge of the entire assets of the Madras Tramway company, and it was held that the Industrial Tribunal had acted within its jurisdiction in bringing him on record on behalf of the Tramway Company even though it was conceivable that it was wrong order on merits.

24. The workers of the Tramway company are now claiming some eight lakhs as their dues in liquidation, according to counsel on all sides. It was represented to us by the learned Advocate General) as well as by Mr. O. T. G. Nambiar for the debenture-holders of the Tramway company, that the entire realisable assets of the Tramway company in liquidation would not exceed 8 or 9 lakhs, and that the company's debts due to the debenture-holders, aggregating 130,000, or more than 17 lakhs of rupees, would exceed the entire assets, if the debenture-holders were given the first priority, and the workers and the State of Madras would get nothing in that event except to the extent the preference and priorities under Section 280 of the Companies Act would help them, if that matter is left open.

25. The learned Advocate General next contended that though the Madras State did not expressly cancel the agreements entered into with the Madras Tramway company by the Madras Electric Supply Corporation, an implied cancellation of the old agreements could be inferred by the irresistible inference drawn from the letters, Exs. P. 4 & P. 4 (a), and the G. O. in Ex. P. 22 and urged that after the issue of the G. O. in Ex. P. 22 on 9th September 1950, the old agreements regarding the terms and rates were replaced by a new agreement, embodying the new terms and rates mentioned in Ex. P. 22.

We cannot agree. Ex. P. 4, far from cancelling the previous agreements, expressly stated 'pending the final decision of Government and the execution of a fresh

agreement, the existing agreements between you and the Madras Electric Supply Corporation Ltd., will be deemed to continue in force", thus expressly extending the lifetime of the previous agreements till such time as a fresh agreement was entered into between the Madras State and the Tramway company.

In Ex. P. 4 (a), the Tramway company simply signified their acceptance of the previous agreements till a fresh agreement was entered into. No fresh agreement was admittedly entered into between the Madras State and the tramway company, owing to the dispute regarding the enhancement of rates, threefold division of the energy supplied, rent and operation charges of the traction panels etc., So, it is obvious that the previous agreements continued to be in operation till 11th April 1953.

Under Ex. P-22, dated 9th September 1950, the Governor of Madras directed that the existing agreements with the Madras Electric tramways should be terminated, and a fresh agreement entered into with the tramway company, providing for the new terms and rates embodied in the G. O. He also requested the Chief Engineer of the Madras State Electricity Department to take necessary action to enter into a fresh agreement with the Madras Electric tramways and submit a report to the Government as soon as the agreement was completed.

It is significant that he did not terminate the old agreements, but directed the taking of a fresh ' agreement, which was obviously, in his opinion, necessary to take the place of the old agreements. The learned Advocate-General had to admit that, the old agreements were never terminated in terms, and that the electric supply was not cut off in view of the tramway company's refusing to agree to a new agreement.

Of course, the motive behind the Government's not terminating the old agreements, and cutting off the electric supply, was fear of public commotion in Madras, the capital of the State, by the Tramway company's stopping its trams and leaving 150,000 citizens of Madras to shift for themselves regarding their daily transport. As Balakrishna Aiyar J. has rightly observed, the tramway company would have decided to stop the trams, if the electricity was cut off and might not have used animals or other forms of mechanical power to propel the trams.

It is clear from the Chief Engineer's letters, Ex. P-5 dated 10th May 1948 and Ex. P-8 dated 26th May 1948, requesting the Tramway company to give its concurrence to the terms of a draft agreement, before it was formally drawn up, that he and the States were fully aware that its concurrence to the new terms was essential before a fresh agreement could be substituted.

26. The next contention of the learned Advocate-General was that the Madras State took the old agreements as terminated from 9th September 1950, the date of Ex. P-22, and that the tramway company acquiesced in it. We cannot agree. The fact that the phrase used in the order was "should be terminated" and not "is terminated" and that a fresh agreement was directed to be entered into, will show that the Madras State did not consider that the old agreements were terminated on 9th September 1950, the date of the order.

The mere fact that, under the old agreements, the State had the right to apply for a revision of rates on the expiry of every seven years from the date of the agreements, namely, 15th September 1907, will not help the State, as it did not take action, under that provision of the agreements, and give three months' notice and apply for the appointment of an Engineer by the president of the Institution of Electrical Engineers in England to determine the dispute. ,

The mere opinions of the Madras Governor and the Chief Engineer that the old agreements had been terminated, by directing those agreements to be terminated, or that the new terms and rates in Ex. P-22 had taken the place of the old terms and rates, will not make the slightest difference to the legal position. It has been observed by the Privy Council in *E.H. Battat v. The King*, 1951 AC 519

', . . . It is difficult to see the necessity for inserting words save for the purpose of giving to the section the interpretation contended 'for by the Crown but not borne by the language used in its natural meaning. Giving the words their natural meaning, this appears to be an instance of the principle that an Act of Parliament, and a fortiori delegated legislation, does not alter the law by betraying an erroneous opinion of it. Their Lordships are of the opinion that it would be an unjustifiable strain on the language used in Sections 2 and 42 to give them the interpretation for which the Crown contends."

27. The same remarks will apply a fortiori to the erroneous opinions held by the Government and the Chief Engineer regarding the real meaning of the clauses in the original contracts and the phrases in Exs. P-4, P-4(a) and P-22.

28. It was next urged by the learned Advocate-General that, even so, Balakrishna Aiyar J. should have held that the tramway company, was estopped from contending that the old agreements had not ceased to exist, and the new terms and rates mentioned in Ex. P-22 had not come into force on 9th August 1950, especially in view of their exchanging letters regarding the new terms and rates, and making the Government lose Rs. 5,60,000, by installing two separate rectifier stations and reconditioning the transformers for converting high tension current to low tension current and A. C. current to D. C. current on the representation of the tramway company, that it was not financially able to buy the machinery for conversion, and the telephone conversation of Mr. Elphic with P. W. 1, the Superintending Engineer, that the tramway company required even more electrical energy. We cannot agree.

As Balakrishna Aiyar J. has observed, there can be no question of estoppel based on a mere intention or promise regarding the future. Lord Denman in *Pickard v. Sears*, (1837) 112 ER 179, has stated the principle of estoppel as follows :

'Where one, by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position,' the former is concluded from averring against the latter a different state of things as existing at the same time.'

That principle was amplified and restated by Lord Selborne in *Citizen's Bank of Louisiana v. First National Bank of New Orleans*, (1873) 6 HL 352, in these terms :

'The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to the existing facts, which being stated would affect the contract, and without reliance upon which or without the statement of which the party would not enter into the contract and which being otherwise than as they

were stated would leave the situation after the contract different from what it would have been if the representations had not been made, then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true and shall be compelled to make them good.' Lord Selborne then added an important qualification, 'but these must be representations concerning existing facts' and thereby emphasised the statement of Lord Graworth in the case of *Jorden v. James William Rayley Moner*, 1854 5 HLC 185 to the effect that 'in order to found an estoppel the representation must' be of existing facts and not of mere intentions'. So, the mere expression of the intention of the Tramway company to put more trams on the road, with the need for extra energy, would not bring about estoppels. Nor was the Tramway company estopped from questioning the new and enhanced rates, as they had not agreed to them and were contending that the old agreements, with the lesser rates, were still in full force.

Nor will the inability of the Tramway company to buy the rectifiers costing five lakhs, and recondition the rotaries at an extra cost of Rs. 60,000, when they were asked to do conversion themselves or pay for it, bring about estoppel, since their contention was that the old agreements, with the lesser rates and the liability of the State to convert the energy at its own expense and to give it in one consolidated bill stood and that they could not agree to pay any higher rates.

Nor will their conceding that if higher rates were found to be legally impossible on them there was no justification for levying more than Rs. 4659 a month, bring about estoppel even to that extent, since they were contending vigorously that the old agreements and old rates stood, and that there was no justification for enhancing them to any extent, and had clearly stated this in their letter, Ex. P-9, dated 27th May 1948, followed up by Ex. P-25 and the petition to the Minister.

After all, the company, which was progressively deteriorating in its finances, was faced by a powerful Government, which had the monopoly of the electric supply in Madras, by reason of its purchase of the undertaking from the Madras Electric Supply, Corporation, and it was being given a Hobson's choice. So, their naming Rs. 4659 as the maximum impossible on them, if anything was to be imposed on

them extra, for fear of three times that sum named by the Chief Engineer being imposed on them, will not bring about estoppel of any kind.

Nor will their payment of the bills with the new rates for the period from 1st September 1950 to 31st August 1951 bring about any estoppel, as those payments were made under protest through the company's solicitors and 'reserving the right of the company to recover the excess and was followed by the filing of the suit, C. S. No. 191 of 1953, for recovering the excess.

29. The ruling of the Court of Appeal in *Lyle Meller v. A. Lewis and Co. (Westminster) Ltd.*, 1956 1 All ER 247, relied on by the Advocate-General, will not help him in the facts of this case. There, the payment of royalties to the plaintiff, as per an agreement in writing, was made willingly for two years without any protest, and then sought to be stopped on the ground that the lighters and refills did not embody the plaintiff's invention, and, so, it was held that estoppel would operate. But, here, the payment of the bills with new charges was not made willingly or as per any agreement, but under protest and with a reservation of the right to sue for recovering the excess.

30. The learned Advocate-General then urged that the Government had a right to alter the rates themselves without any agreement on the part of the Tramway company, and that such a right to alter the rates existed in every public utility company. We cannot agree. The Government was bound by the old rates stipulated under the old agreements till they were repudiated or terminated, and had no right to impose an agreement with the higher terms under Ex. P-22, in the guise of a G. O., on the Tramway company.

The Government did not terminate the agreements. They were only undertaking a commercial enterprise in running the Madras Electric Supply Corporation after purchasing it from it. Regarding their commercial undertakings, they could claim no more rights than other commercial undertakings, and would be bound by the terms of the existing contracts till they were validly repudiated or terminated. Assuming the sovereign power of a State in such matters is unjustifiable, to issue a G.O. to the other party to the contract, and claiming that the G. O. will be sufficient to impose new terms on the company, was beyond the State's powers and

jurisdiction and cannot be upheld.

31. The next contention of the learned Advocate-General was that the State could recover at least a reasonable increase over the old rates and terms on the principle of quantum meruit, or on a principle analogous to it, or on the principle embodied in Section 70 of the Indian Contract Act. We cannot agree. The short answer to this is that the principle of quantum meruit has no application to cases where there are specific contracts in operation, and has only application to cases where there is no contract in operation, as held in *D. Vanjeeswara v. District Board, South Arcot*, AIR 1941 Mad 887 ;

'The principle of quantum meruit is often applied, where, for technical reasons, a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person, for whom the work is to be done, contracts to pay the person, who does the work, a reasonable sum for the work done. There is no room however for an implied contract where there is an express contract in existence.'

As we have held that the original contracts with the Madras Electric Supply Corporation were assigned to the Madras State, there is no question of giving the Madras State any increase whatever on the principle of quantum meruit, or under Section 70 of the Indian Contract Act, which cannot be brought into operation at all.

32. It follows from our observations above that the agreements between the Electric Supply Corporation and the Madras Tramway company remained in full force and effect for the periods covered by the suits, and that the claims of the parties must be settled on that basis, except regarding the rent and operation charges of the traction panels to the extent allowed by Balakrishna Aiyar J. So the amounts decreed by Balakrishna Aiyar J, in both the suits were correct, and we confirm them.

33. The learned Advocate-General urged next that, even so, Balakrishna Aiyar J. should have directed the decree amounts to be set off against each other, as the suits were intimately connected together, and the claims and counter-claims

related to the same matter, and should have allowed the State of Madras to set off the amount decreed in favour of the tramway company in C. S. No. 191 of 1952 against the amount decreed to the State against the Tramway company in C. S. No. 368 of 1953.

Though Mr. O. T. G. Nambiar objected to this at the outset, he had to finally agree that the learned Advocate-General's request was just and proper. Balakrishna Aiyar J. we may add, did not consider the question at all and did not, therefore, pass any order either allowing or refusing the set off now requested by the learned Advocate-General. As the decrees stand, the Madras State will have to pay, the Madras Tramway company the amount decreed in C. S. No. 191 of 1952, which will at once be appropriated by the debenture holders towards their dues of 17 and odd lakhs, and the State will have to execute the decree in C. S. No. 368 of 1953, given in its favour for Rs. 3,09,000 against the Tramway company, without any prospect of recovering more than a miserable fraction if at all that.

It may even be that it will only lose its execution costs, as the learned Advocate-General pointed out. Balakrishna Aiyar J. himself has remarked in the very first sentence of his judgment: 'These two suits are so connected that it is convenient to deal with them together'. C. S. No. 191 of 1952 is as already stated, by the Tramway company to recover the excess for the second period out of the four periods covered by C. S. No. 368 of 1953. It is something like a suit by a tenant for recovering the excess rent for a house paid for some months, in view of the fixation of fair rent at a lower rate, and another suit filed by the landlord for the deficit rent or no rent regarding the same house by the same tenant for some other months.

Mr. O. T. G. Nambiar had finally to concede, that, in cases like these, the excess rent payable by the landlord and covered by the decree in one suit should be allowed to be set off against the sum due to him for the same house in the other suit. It is not as if these two suits are concerned with two separate unconnected claims. Indeed, the Train-way company had claimed in its written statement in C. S. No. 368 of 1953 that it was entitled to have the sum claimed in C. S. No. 191 of 1952 set off against any sum found due by it in C. S. No. 368 of 1953.

No doubt, the Government could have filed a counter claim in C. S. No. 191 of 1952, claiming the amounts due to it. Instead of doing so, it filed a separate suit, C. S. No. 368 of 1953. That cannot prevent its claiming a set off before us now. We allow the request of the learned Advocate-General and modify the decree in both the suits by putting a clause in the decree in C. S. No. 191 of 1952 to the effect that the amount decreed thereunder to the Tramvay company could be set off by the State of Madras towards its decree in S. S. No. 369 of 1953, and by adding a clause in the decree in . S. No. 368 of 1953, to the effect that the State could adjust and set off the decree in C. S. No. 191 of 1952 towards the amount due to it under this decree.

34. The learned Advocate-General did not contend and indeed he could not that the amount due to Government should have priority over the debenture holders or secured creditors as a Crown debt. Balakrishna Aiyar J. was right in negating this contention raised before him.

35. The learned Advocate-General urged that Balakrishna Aiyar J, was not justified in discussing in these suits the priority of the decree amount of the State in C. S. No. 368 of 1953 over all other unsecured creditors, as that is a matter not arising in these suits and has to be gone into and decided by the Official Liquidator and the Court dealing With the liquidation proceedings.

He, therefore, wanted the matter to be reserved for being agitated in future. Mr. O. T. G. Nambiar had no serious objection to this, though he pointed out that the matter had been argued exhaustively before Balakrishna Aiyar J. and it was a pity that his decision on this point should be held not to be binding on the State and fit to be reserved and allowed to be agitated again before the Official Liquidator and the Court in seisin of the liquidation proceedings.

We agree with the contention of the learned Advocate-General and reserve the right of the State to agitate the matter of priority for its dues over other unsecured creditors before the Official Liquidator, and the Court in seisin of the liquidation proceedings, and set aside the findings of Balakrishna Aiyar J. on this point. We may add here that the question of priority of the workers' dues over other unsecured debts is also left open to be decided by the Official Liquidator and the

Court in seisin of the liquidation proceedings.

36. Mr. O. T. G. Nambiar as well as the learned Advocate-General cited the ruling of the Privy Council in *Ripon Press and Sugar Mills Co. Ltd. v. Gopal Chetti*, for the position that the duty of the liquidator is to act with complete impartiality between the contending creditors, and not to take sides. We agree.

We may add that the Official Liquidator has, in these proceedings, acted with impartiality between the Government, the workers, the debenture holders and the other contending creditors clamouring for their dues. His only difficulty is that he has not enough funds with him to pay all of them in full owing to the bankrupt state of the Tramway company.

37. The learned Advocate General wanted us to reserve also the right of the Government to agitate the question of fraudulent preference, by the Tramway company, in favour of the debenture-holders under Section 231 of the Companies Act. Mr. O. T. G. Nambiar pointed out that neither the Government nor the workers nor any other creditors had brought any petition under Section 231 of the Companies Act for declaring any transfer by the company to the debenture holders to be void.

But that will not conclude the issue. The Government, the workers and other creditors are free to file any petition under Section 251 of the Companies Act, regarding any alleged fraudulent preference, if so, advised, and subject to the rule of limitation etc.

38. Now we come to the claim of the debenture holders to a charge over the specific security and floating security over the assets of the Tramway company under the mortgages Exs. D. 10, D. 11 etc. As remarked by Palmer, Ashburner and other leading writers on company law, a class of securities known as 'floating charge' has been created by limited companies within recent times. A charge by a company on its general 'undertaking' constitutes a floating charge.

Such a charge is an equitable charge on the assets, for the time being, of the company as a going concern. It attaches to the subject charged in the varying

conditions in which it happens to be from time to time. It gives an immediate equitable charge on the assets, subject to the right of the company in the ordinary course and for the purposes of its business, but not otherwise, to dispose of the assets as though the charge did not exist. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person intervenes in whose favour the charge is created.

He may intervene whenever he pleases after default, but his right to intervene may be suspended by agreement. The priority of mortgages and charges made subsequently under such a power is a question of construction. There may be also a power to create a second floating charge ranking in priority. Under the old English law, there was no right to create a charge or interest in after-acquired or future-acquired properties. A person could not create a charge on property in which he had no present vested interest.

39. But Equity made a revolutionary change in this conception. Even as early as 1749 in *Row v. Dawsou*, (1749) 1 White & Tud LC 93 (J), it was held by Lord Chancellor Hardwicke that a chose in action, though not assignable at law, was assignable in equity, and that, no particular form of words was necessary for such assignment. This was the thin end of the wedge, and the beginning of the revolutionary change. In *Holroyd v. Marshall*, (1862) 10 HLC 191 the revolutionary change was carried a huge step further. It was held by Lord Westbury as follows:

'In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of Equity will decree specific performance.

In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one fit to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of Equity would direct to be specifically performed

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of Equity would compel him to perform the contract, and that the contract would in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.'

40. Lord Chelmsford observed;

'At law property, non-existing, but to be acquired at a future time, is not assignable; 'in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after acquired property, no interest is transferred even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.'

41. The reason for these rulings is that equity would treat as done what ought to be done, and, therefore, would enforce a contract regarding after-acquired properties, ignoring the absence of formal sale deeds etc. In *re Panama, New Zealand and Australian Hoyal Mail Co.*, (1870) 5 Ch A 318 Lord Justice Giffard held that the debenture holders acquired a charge upon all the property of the company, present and future, when the company had charged the 'undertaking' in their favour, and that the debenture-holders were entitled to be paid out of the property of the company in priority to the general creditors and that even if the company had not stopped, but had made default, the debenture holders could step in and seize the assets of the company and realise the security.

In *re Florence Land and Public Works Co.*; *Ex parte Moor*, (1878) 10 Ch D 530', Jessel M.R. held that despite the charge on the property in favour of the debenture holders the power of the directors to dispose of any part of such property, in the ordinary course of business, till default was committed and the debenture holders had seized the property, continued to exist. In *re Clarke, Coombe v. Carter*, (1887) 36 Ch D 348 it was held that the assignment of after-acquired property would be enforced in equity.

In *Tailby v. Official Receiver*, (1888) 13 AC 523 the House of Lords held that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business. So 'floating security' came into existence as part from 'specific security.'

42. In *Illingworth v. Houldsworth*, 1904 AC 855 and 358 (P), the Earl of Halsbury observed that the essential characteristic of a floating security was that it was something which was to float and was not to be put into immediate operation, but such that the company was to carry on its business,

'They show an intention on the part of both the parties that the business of the company shall continue to be carried on in the ordinary way that the book debts shall be at the command of and for the purpose of being used by, the company. Of course, if there was an absolute Assignment of them which fixed the property in them, the company would have no right to touch them at all.

The minute after the execution of such an assignment they would have no more interest in them, and would not be allowed to touch them, whereas as a matter of fact it seems to me that the whole purport of this instrument is to enable the company, to carry on its business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if this deed had not been executed at all. That is what we mean by a floating security.'

43. Lord Macnaghten observed in the same case:

'I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its

reach and grasp.'

In *In re Lloyd's Furniture Palace Ltd.; Evans v. The Company*, 1925 1 Ch 858 it has been held, that the claim of the debenture holders does not become voidable when the company goes into liquidation and can be enforced against the liquidator in liquidation proceedings. It was held in *Government's Stock and other Securities Investment Co. v. Manila Railway Co.*, 1897 AC 81 by the House of Lords, that the security for the debentures remained as floating security till the debenture holders took some steps to enforce it and prevented the company from dealing with its property, and that the debenture holders were not entitled to an injunction restraining the company from paying interest to the bond holders.

In *Evans v. Rival Granite Quarries Ltd.*, 1910 2 KB 979, it was held that the demand by the debenture holder would not be of any use against the judgment-debtor under a garnishee order, for there was no equity in a debenture holder whose security was a floating charge arising from merely giving notice to seize a particular asset of the company.

In *Yorkshire Woolcombers Association Ltd., in re; Houldsworth v. Yorkshire Woolcombers Association Ltd.*, 1903 2 Ch 284 (T), Romer L. J. held that a mortgage or a charge by a company which contains the three following characteristics is a floating charge, namely, (1) if it is a charge on a class of assets both present and future; (2) if that class is one which in the ordinary course of the business of the company would be changing from time to time; and (3) if it is contemplated by the charge that, until some future step is taken by or on behalf of the mortgagee, the company may carry on its business in the ordinary way so far as concerns the particular class of assets charged.

Buckley L. J. has observed in 1910 2 KB 979 at p. 999 (S) as follows:

'A floating charge is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee.'

A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security.'

In *re Lind. Industrials Finance Syndicate Ltd. v. Lind*, 1915 2 Ch. p. 345, it was held that the assignment by the next of kin presumptively entitled to a share in his mother's estate would have priority over all other assignments despite bankruptcy, though it was after-acquired property, the principle applied being that, being a court of conscience,' it would enforce all obligations supported by consideration and not tainted by fraud etc., despite the absence of a legal title in law, and that equity would treat as done what ought to be done, and would fasten upon the after acquired property the obligations under the assignment as soon as the assignor had acquired it.

In the Regulation and Control of Radio Communication in Canada, in *re*, 1932 A.C. 304 (V), in *D.N. Banerji v. P. R. Mukherjee* : [1953]4SCR302, and in *R v. Industrial Disputes Tribunal*, 3954 2 All ER 730, the word 'undertaking' with reference to a company has been given a very wide meaning and made to include all present and future properties. In (1870) 5 Ch. A. 318, it had been held to include all the properties of the company, present and future. Even a trustee's savings bank account was included in it by 1954 2 All E.R. 730.

44. In Halsbury's Laws of England, 3rd Edn. Volume 6, it has been stated that a specific legal mortgage or equitable charge given by a company can be enforced in the same manner as similar securities given by an individual. A debenture-holder may obtain the appointment of a receiver, or receiver and manager and crystallise the floating security. When a floating security upon all the property or assets of the company is thus crystallised or fixed, it constitutes a charge upon all the property or assets then belonging to the company.

It has priority over any subsequent equitable charges and over unsecured creditors and over moneys advanced to the liquidator to carry on the business of the company, although the advances were made with the sanction of the court in

winding up and over the costs of the liquidators other than costs of realisation; but it is subject to all the then existing charges and to the payment of debts which by statute are made payable out of property subject to a floating security in priority to the moneys thereby secured.

It is obvious, therefore, that all existing valid mortgages in favour of other creditors, and even unpaid vendors lien, whether in respect of immoveable properties, or in respect of machinery or move-ables, will take precedence over the claims of the debenture holders regarding the floating security, till the moment of its crystallisation by cessation of the company or the seizing of the property through the receiver appointed by the debenture holders after default has occurred.

45. In *M. K. Ranganathan v. Government of Madras* : AIR1955 Mad331 , a Bench of this court, to which one of us was a party, has held that regarding a floating charge created over the assets of a company other creditors got preferential payment over the debenture holders under Section 230(2) of the Companies Act only it at the moment of the winding up it is still a floating charge, and that once a receiver is appointed by the debenture holders and he takes charge of the assets of the company, that charge ceased to float and becomes crystallised and fixed, and the provisions of Section 230 (2) of the Companies Act cannot apply. We have left the question of preference under Section 230(2) of the Companies Act open, as stated before.

46. The learned Advocate General contended that the rule of equity applied in England may not apply in full in India and may not have application in India regarding after-acquired properties, and regarding the validity of mortgages of immoveable properties or contracts in regard to immoveable property, present or future, unless registered under the Registration Act and also under Section 109 of the Companies Act.

He even doubted whether a 'floating security' is recognised in India in the same manner and to the same extent, as it is recognised in England, as seen from the rulings cited above. He pointed out that in an article in the *Harvard Law Reports* in June 1906, the learned author has observed that mortgages of after-acquired immoveable properties have been held to be invalid in many of the States in U. S.

A.

He had to concede that 'floating security' has been referred to in Section 230(2) of the Companies Act and in some other sections of the Act. Mr. O. T. G. Nambiar pointed out that 'floating security' in favour of debenture holders has been recognised as valid in India by several decisions. We agree. In *Nallaperumal Pillai v. Krishna Aiyangar*, 30 Ind Cas 286: AIR 1916 Mad 7 it has been held by a Bench of this court consisting of Sir John Wallis C. J. and Tyabji J. as early as 1915, that a floating security is valid in India, that the company's right to carry on business did not come to an end automatically on the happening of the default, but continued until the debenture holder intervened to show his desire that it should cease, as by applying for a receiver; that the charges created by the company after default and before the seizure of the assets by the receiver were not void; and that the floating security remained dormant and could not become fixed or crystallised until the company ceased to be a going concern, or until the debenture' holder intervened.

It however stated that a charge created in favour of the officers of a company could not be availed of if it was not registered under the Companies Act, In *Official Assignee, Madras v. Mercantile Bank of India Ltd.*, the Privy Council has' held that delivery of a railway receipt in respect of consigned goods constitutes an equitable charge upon the goods- In *Maheshwari Bros. v. Indra Sugar Works Ltd.* : AIR1938 All574 , a floating security was recognised, though registration was required under the Registration Act and the Companies Act regarding immoveable properties.

In an appeal against that decision, a Full Bench of the Allahabad High Court held in '*Maheshwari Bros. v. Indra Sugar Works Ltd.*, AIR 1942 All 119 , that a floating charge was recognised in India. They added that the principal tests regarding a floating charge were whether it was a charge upon all or a certain class of assets; present or future; whether the assets charged in the ordinary course of business would change from time to time; and whether the company creating the charge had power until such step was taken by the chargees to crystallise the floating charge to carry on the business of the company in the ordinary way.

They also held that a charge would be void for absence of registration under Section 109 of the Companies Act. As already stated, the ruling of a Bench of this

court .In : AIR1955 Mad331 also recognises the validity of a floating charge regarding a limited company in India, and goes on to state how it crystallises and how debts are to be paid In the priority indicated under Section 230(2) of the Companies Act, on the company becoming unable to pay its debts and being put into liquidation.

So it is clear that a floating security or charge, in much the same terms as in England, is recognised regarding limited companies in India, except for the important limitation that a floating charge regarding immoveable properties is to be registered both under the Registration Act and also under Section 109 of the Companies Act after 15th January 1937, when the requirement came into force.

47. The learned Advocate General then contended that, even so the floating charge would enure in favour of the debenture-holders, and subject to the reservation made by us regarding the rights of priority under Section 230(2) of the Companies Act to be agitated before the liquidator and the judge in seisin of liquidation proceedings, only with regard to the moveables.

He urged that with regard to the immoveable properties, present or future, included in such floating charge, there would be no charge in favour of the debenture holders in the absence of registration under the Registration Act and also under Section 109 of the Companies Act, since the rules of equity in England would not be applicable in their entirety in India.

He pointed out that in *Ananda Mohan Roy v. Gour Mohan Mullick*, 50 Ind App 239: AIR 1923 PC 189, the Privy Council has held that a contract by a Hindu to sell immoveable property to which he is then only a reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to 34m, is void. That is so. The Privy Council held that Section 6(a) of the Transfer of Property Act, forbidding the transfer of expectancies, would be futile if a contract of the above description was made enforceable in India.

Of course, this ruling goes quite contrary to the ruling in 1915-2-Ch 345 (y), which held such transfer of expectancy to be valid in England. The reason for this is that in India there is no such conception as legal estates and equitable estates, and,

under Sec. 23 of the Indian Contract Act, a contract will be void if it is opposed to law or to public policy, as observed by a Full Bench of the Calcutta High Court In *Ali Hossain Mian v. Rajkumar Haldar* : AIR1943 Cal417 .

48. It was contended by the learned Advocate General, and we agree with him, that there will be no charge on the immoveable properties covered by Ex. D. 11 and Other immoveable properties of the tramway company where the security was not registered both under the Registration Act and under Section 109 of the Companies Act (after 15th January 1937).

In *In re East Bengal Sugar Mills Ltd.* : AIR1945 Cal137 , it has been held by a Bench of the Calcutta High Court that in order to constitute a valid security in favour of the debenture holders a charge, whether floating or fixed over any immoveable property should be registered according to the provisions of the Indian Registration Act, in addition to being registered under Section 109 of the Companies Act. Derbyshire C.J. has observed at pages 130 and 131 (of ILR Cal):(at p. 42 of AIR):

'The Registration Act is intended to afford warning to people in the district in which the land is situate as regards charges affecting that land so that they may not suffer through lack of knowledge. If we are to say that registration under the Companies Act was sufficient, then it means that the security which the Registration Act has provided for the local man goes and he is left at the mercy of the debenture holder who is elsewhere.

In my opinion, for the reasons I have given, it is necessary that a debenture creating a charge whether floating or fixed, over any immoveable property should be registered according to the provisions of law laid down in Section 17 of the Registration Act, in addition to the provisions of the Companies Act. The provisions of the Companies Act are intended to protect people who have business dealings with companies and to warn them of the extent to which the companies have created obligations over their property. The provisions of the Registration Act are intended to protect all who may have dealings with land so that those persons, particularly, those local persons, may have knowledge of the obligations which have been created over and in respect of the land'.

49. With great respect, we entirely agree with those observations. Before Balakrishna Aiyar J. it was admitted on behalf of the tramway company that registration under the Registration Act was necessary in respect of immoveable properties in order to make the charge in favour of the debenture holders valid. The learned Judge has observed:

'It is incontrovertible that a floating charge in relation to immoveable property must be registered under the Indian Registration Act'.

It was also conceded before the learned Judge that regarding the Mylapore immoveable properties of the tramway company, covered by Ex. D. 11, they were only registered under the Indian Registration Act, but not under the Indian Companies Act; and on behalf of the tramway company it was not disputed that, as it was not registered under the Indian Companies Act, it would be void as a special mortgage.

But it was contended on behalf of the debenture holders that by reason of Ex. D. 9 the Trust deed executed by the tramway company in favour of the Beaver Trust Ltd., a floating charge was created over the Mylapore properties also, and that this floating charge fastened on the property on 11th April 1953 when the receiver stepped in and took possession, and that the invalidity of Ex. D. 11 as a special mortgage did not invalidate the floating charge over the property under the earlier document, Ex. D. 9.

Balakrishna Aiyar J. agreed with this argument and considered that the decision in : AIR 1945 Cal 37 would not apply to this case, as, in that case, there was no debenture trust deed accompanying the issue of the debentures, and in the debenture deed itself the only reference to the property charged was its undertaking that all the property whatsoever and wheresoever situate, present and future, was given as security to the debenture holders, and the debenture deed was not registered under the Registration Act, though registered under the Companies Act. The learned Judge relied on the fourth proviso to Section 109(1) of the Companies Act which runs as follows: '

'The holding of debentures entitling the holder to a charge on immoveable property shall not be deemed to be an interest in immoveable property',

and on the fact that Section 109(f) of the Companies Act spoke of 'a floating charge on the undertaking or property of the company'. We are of the opinion that the distinction sought to be made out by Balakrishna Aiyar J. is not valid. We agree with the learned Advocate General that the fourth proviso to Section 109(1) of the Companies Act will only exempt the debenture from being registered, and not the immoveable properties given as security to the debenture holders. Otherwise, the mortgage on the immoveable properties in favour of the debenture holders need not be registered under the Registration Act.

Balakrishna Aiyar J. himself has held that they must be registered under the Registration Act. It is clear from the rulings in *Webb v. Macpherson*, 80 Ind App 238 *Shiva Rao v. Shanmugha Sundaraswami*, ILR 1940 Mad 306: AIR 1940 Mad 140; *Imperial Bank of India v. Bengal National Bank Annamalai Chettiar v. Malayandi Appayya Naik*, ILR 29 Mad 426 *Skinner v. Skinner*, 56 Ind App 363: AIR 1929 PC 269 and 30 Ind Gas 286: AIR 1916 Mad 7, that registration under the Registration Act is essential to make a charge in respect of immoveable properties in favour of debenture holders valid and enforceable.

In *Venkatapathi Garu v. Venkata Subhadrayamma*, 47 Ind Cas 563: AIR 1919 Mad 718 a Bench of this Court, consisting of Ayling and Seshagiri Aiyar JJ. held that non-registration of the security would only deprive the promisee of his right in the immoveable property and would not affect his rights in the moveable property, thus showing clearly that regarding immoveable properties registration under the Registration Act was essential in order to create a valid security. In *Vastavaya Venkata Subhadrayamma v. Venkatapathi* 48 Mad 230: AIR 1924 PC 162, the Privy Council did not dissent from, this observation, obviously because it was settled law.

50. Mr. C. T. G. Nambiar relied on the finding in *Gayadin v. Kashi Gir*, ILR 29 All 163, but had to concede, after looking into it, that there was a registered mortgage in that case, and that the ruling would, therefore, not help him. He then fell back on the English rules of Equity, as laid down in (1862) 10 HLC 191 and other cases,

and urged that all English rules of Equity would apply to India also. We have already stated our opinion to the contrary, and have cited some rulings in support, of our view. We may add that in *Ariff v. Jadunath Majumdar*, Lord Russell has observed as follows:

'Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act, and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible

The matter which was relied upon by the respondent consisted of certain obiter dicta in the course of which English doctrines of equity were described in terms of the law of Scotland and stated to be applicable in India..... Their Lordships cannot find that the facts of this case raise any equity in favour of the respondent. Even if any such equity was established, their Lordships are of opinion that it could not operate to nullify the provisions of the Indian Code relating to property and Transfer of Property'.

In *Ram Kinkar Banerjee v. Satyacharan Srimani* Lord Porter observed as follows:

'Up to the time of the passing of the Transfer of Property Act, the rights of the mortgagors and mortgagees of land in India were subject to much controversy, though, in general, the law of England, subject to such modification as justice, equity and good conscience required, was recognised as law of India also. But whether the English Rules of Equity were applicable to such cases was not certain. Since the passing of that Act, however, the distinction drawn in England between law and equity in such cases does not exist in India.

As George Rankin says in *Bengal National Bank Ltd. v. Janaki Nath* : AIR1927 Cal725, 'The Transfer of Property Act has left no room for such a distinction'. The Indian mortgagor, however, retains some rights, though the English Rules of

equity do not apply'.

51. Mr. O. T. G. Nambiar then raised his last contention in favour of the validity of the security regarding the Mylapore immoveable property and other similar Immoveable properties of the tramway company, not registered under the Companies Act, by urging that they should be deemed to be registered under the Companies Act by the debenture deed, Ex. D. 9, having been registered.

This will not help him, as these immoveable properties were, not the properties of the company at the time of the registration of the debenture deed, Ex. D. 10 dated 26th March 1925 or of Ex. D. 9 dated 13th February 1947. These properties were acquired after 1947, that is, after Ex. D. 9 and Ex. D. 10, and, under the ruling in 50 Ind App 239: AIR 1923 PC 189, such transfer of an after-acquired immoveable property will be futile under the Transfer of Property Act.

Registration both under the Registration Act and the Companies Act would be required after the acquisition of the immoveable properties by the company. The decision of the Federal Court in Governor General in Council v. Shiromani Sugar Mills Ltd. shows how even the Crown or the State is bound by the provisions of the Companies Act. The Rundalls Road properties did not require, registration under the Companies Act, as that was not prescribed at that time (before 15th January 1937). Only the mortgage of the Rundalls road property will constitute valid security for the debenture holders, among the immoveable properties.

52. The learned Advocate General did not contend that the State had any priority for this debt on the ground of salvage. Balakrishna Aiyar J. rightly rejected such a contention raised before him.

53. Ex. D. 9 did not require registration under the Companies Act as this requirement came into being only on 15th January 1937.

54. In the end, therefore, the judgment and decree of Balakrishna Aiyar J. in C. R. No. 368 of 1955, will be modified in three respects: firstly by allowing the decree amount, including the costs, in C. S. No. 191 of 1932, in favour of the Tramway company, to be set off against the decree amount in favour of the Madras State in

C. S. No. 368 of 1953; secondly, by taking out the security of the Mylapore immoveable properties, covered by Ex. D. 11, and other immoveable properties not registered under the Registration Act and the Companies Act (except the Rundalls Road properties) from the security available to the debenture holders in priority to all other creditors, and reducing the debenture holders to the status of unsecured creditors regarding the balance due to them after exhausting the security of the moveable properties covered by the crystallised floating charge and the immoveable properties in Rundalls Road registered under the Registration Act and the Companies Act; and thirdly, by reserving the right of the Madras State to file a petition under Section 231 of the Companies Act, subject to limitation etc., to agitate the question of fraudulent preference by the tramway company in favour of the debenture holders and by reserving the right of the Madras State to agitate for priority of its decree debt in C. S. No. 368 of 1953 over other unsecured creditors before the liquidator and the Judge in seisin of the liquidation proceedings. The judgment and decree of Balakrishna Aiyar J. in C. S. No. 368 of 1953 are confirmed in all other respects.

55. In the circumstances, we direct the Madras State to pay half the costs of the tramway company (to Liquidation) in both these appeals, but allow it to set off such costs also against the decree in its favour in C. S. No. 368 of 1953. The tramway company will bear the rest of the costs itself. The other parties to these appeals will bear their own costs.