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Court : Chennai

Decided On : Sep-24-1954

Reported in : AIR1955Mad331

Judge : Rajamannar, C.J. and ;Rajagopala Ayyangar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 22; [Transfer of Property Act, 1882](#) - Sections 69 and 69(3); Trustees and Mortgagee's Powers Act, 1866 - Sections 6; [Companies Act, 1913](#) - Sections 230 and 230(2)

Appeal No. : O.S.A. No. 113 of 1954

Appellant : M.K. Ranganathan and anr.

Respondent : Govt. of Madras, Represented by the Secretary to Govt., Development Department (Fort St. George, Mad

Advocate for Def. : Govt. Pleader, ;K.V. Venkatasubramania Iyer, ;O.T.G. Nambiar and ;C. Venugopalachariar, Advs., ;King and Patridge and ;John and Row

Advocate for Pet/Ap. : S. Mohan, ;Kumaramangalam and ;V. Venkataraman, Advs.

Disposition : Appeal dismissed

Judgement :

Rajagopala Ayyangar, J.

1. This is an appeal against an order of Balakrishna Aiyar J., dismissing Appin. No. 3542 of 1954 in O. P. nO, 419 of 1953. This was an application by the Official Liquidator of the Madras Electric Tramways to set aside a sale effected by a Receiver, appointed by the trustees for the debenture holders of the company, of certain assets of the company of which the latter, had taken possession.

2. It is necessary to set out in some detail the facts of the case giving rise to this application before the points arising for consideration could be properly understood. O. P. No. 419 of 1953 is a petition for the winding up of the Madras Electric Tramways (1904) Ltd., under the Indian Companies Act, 7 of 1913. The company was incorporated in England for carrying on the business of running electric tramways in the city of Madras. The company was ordered to be wound up by this court of order dated 20-1-1954 on its own petition dated December 1953 on the ground that it was unable to pay its debts & the Official Receiver, High Court, Madras, has been appointed as the Official liquidator of the company.

Notwithstanding the winding up order and the appointment of the Official Receiver as the liquidator of the company, no assets came into the possession of the liquidator. The reason was this: In or about October 1924 the company had issued debentures covering a very large sum of money which with interest on the date of the winding up, came to over Rs. 7 lakhs. These debentures were secured by a trust deed charging the fixed assets of the company by a first mortgage and there was also a floating charge by way of first charge in favour of the trustees in respect of the undertaking and all the other property and assets of the company for the time being, both present and future, including its uncalled capital to secure the payment of all monies for the time being owing on the security of the debentures. For reasons which it is unnecessary to state or discuss, the Madras Electric Tramways had to suspend the running of the trams on account of the fact that the company was incurring losses on a large scale for some years in

succession.

There was a default in the payment of interest due to the debenture holders and as in addition, the company suspended its operation in the way of running the trams, the trustees for the debenture holders appointed Mr. P. G. Brookes as receiver under the powers vested in them under the debenture trust deed, to take charge and possession of all the assets of the company which were the subject matter of the first mortgage as well as of the floating charge. Having regard to the comprehensive nature of the assets included in the floating charge which has been summarised above, the entirety of the property of the company was taken possession of by Mr. Brookes as receiver on 11-4-1953.

3. Even before Mr. Brookes took possession of the assets of the company as receiver for the debenture holders, there had been disputes between the workers of the tramways and the company regarding the terms of their employment including bonus etc., and the matter had been referred to the adjudication of an Industrial Tribunal. Subsequent to Mr. Brooke's taking possession of the assets of the company as receiver, he was impleaded in the labour dispute before the Industrial Tribunal in order to bind him also by the adjudication that might be passed in those proceedings. The Tribunal passed an award in July 1953 granting to the workers compensation which totaled about Rs. 7 lakhs. This amount has not yet been paid. Mr. Brookes was eager and desirous of effecting a sale of the assets which had vested in him for the purpose of realising the monies due to the debenture' holders on whose behalf he had taken possession.

Meanwhile, however, the State of Madras filed a suit, C. S. No. 368 of 1953, on the file of this court claiming a sum of Rs. 9,26,183, as due to them for the value of electricity supplied to the Electric Tramways, and they claimed priority for the payment of this sum and they also put forward a contention that the debenture trust deed was legally ineffective to secure the charge in favour of the debenture holders in respect of the entirety of the assets covered by the floating charge, on certain legal 'grounds. Mr. Brookes -was made a defendant to the action and the reliefs were claimed as against him, since the claim was as against the assets in his hands. Immediately after the suit was filed, an application No. 4552 of 1953

was taken out for restraining Mr. Brookes from effecting a sale of the assets but no order of injunction was passed because of an undertaking given by Mr. Brookes on 14-12-1953 that he would not dispose of the assets of the undertaking without the specific orders of court. Mr. Brookes advertised for the sale of the assets in one copy of the Hindu, the Madras Mail, the Swadesamitran, the Hindustan Times, the Time's of India and the Andhra Patrika. These advertisements were inserted on or about the 23rd of the last week of January 1954. In this advertisement it was stated:

'Sales are for the time being subject to the approval of the High Court of Madras and it will be for the undersigned (Mr. Brookes) to obtain such approval for accepted offers, free of all costs to the purchaser.'

In the advertisement it was stated that the offers to purchase would be received upto Wednesday the 17th February 1954. Offers were being received by Mr. Brookes in response to this advertisement. Though a time limit was set for the receipt of the offers, offers were coming in even after 17-2-1954. Meanwhile, the ex-employees of the Madras Electric Tramways who had been thrown out of employment by reason of the closure of the Madras Electric Tramways were approaching the Government as well as the Corporation of Madras to take over the concern themselves and re-start the business, so that these workmen could get re-employment. Efforts were being made in this direction by the Government of Madras. Pending all these discussions between the authorities and those interested in the workmen in taking over the assets and reviving the tramways, Mr. Brookes did not effect any sale, notwithstanding that he had received some offers.

These discussions proceeded inconclusively till about July 1954 when there was an informal discussion between Mr. Brookes and the Chief Minister to the Government of Madras. The purport of these discussions is set out in a communication dated 5-7-1954 addressed by Mr. Brookes to the Chief Minister to the Government. The difficulties of reviving the tramways particularly having regard to the attitude of the debenture holders who were not prepared to face further losses, were made clear and he pointed out that unless fresh capital of a substantial amount were raised and the co-operation of the unsecured creditors of

the company and the workers were secured, it would not be possible to revive it. This letter ended with the note that he would be intimating to the Government after consulting the debenture trustee as to whether further negotiations would be fruitful. This was followed by the last letter on the topic dated 16-7-1954 which might be set out in full as it figured prominently during the arguments in the appeal: 'With further reference to the interview which you were kind enough to grant me on 3rd July, and by letter of 5th July, confirming pure conversation, I have now heard from the Trustees in London.

I have to advise you that, as forecast by me, the Trustees do not consider to be in the best interests' of the debenture holders for them to be concerned with the resuscitation and running of the tramways. They have reiterated their instructions to me to accept forthwith an offer already in my hands for the assets in my possession. I have therefore accepted that offer (of which I advised you) and have completed a sale agreement with the tenders.' The offer that is referred to as having been accepted by Mr. Brookes on 16-7-1994 was that of a firm by name Messrs. T. Hasanally & Company of Bombay, who will be hereafter referred to as the Bombay firm, at a purchase price of Rs. 4,01,655-This Bombay firm has been impleaded to the application before Balakrishna Aiyar J., as respondent 2, Mr. Brookes being respondent 1. Only one thing more remains to be stated and that is, that the suit C. S. No. 368 of 1953 has been dismissed, the judgment having been pronounced on 18-3-1954 and the sale by Mr. Brookes of the assets to the Bombay firm was effected without the sanction of the court. After the sale was effected, the Official liquidator took out an application No. 3542 of 1954 in O. P. No. 419 of 1953 for setting aside this sale, and it is the order in this petition that is the subject matter of this original- side appeal.

4. The grounds upon which the sale was sought to be set aside would be apparent from the report of the Official liquidator filed in support of the application. After referring to the advertisement in the Hindu and to the condition as to the approval of the court being obtained before sale was effected to which reference has already been made and the undertaking given by Mr. Brookes in C, S. Jo. 368 of 1963 not to alienate any of the assets in his possession without obtaining orders of court, the report proceeded to indicate certain negotiations which were made for

the purchase of the entire assets of the company by the Corporation, of Madras so that they might run the tramways them selves, as also certain proposals for the acquisition of the entire assets by a group of industrialists in the City who with the co-operation of the Government of Madras contemplated reviving the tramways. The report then went on to state that Mr. Brookes concluded this sale with the Bombay firm with unnecessary haste for a price much lower than the sum offered by higher tenders and 'with-out applying to the court tor leave and without lotice to the liquidator in whom the equity of redemption in the secured property is vested. This portion of the petition concluded with the allegation;

'The statement of affairs filed by a Director of the company shows that the assets of the company are valuable and after paying the amount due to the debenture holders, a surplus will be available to the unsecured creditors. The sale to respondent 2 of such assets for a sum far less than the amount due to the secured creditors requires scrutiny.'

Finally, the report concluded that 'though the secured creditors may realise the security, it will be in the interests of the unsecured creditors to see that a fair and proper price is obtained.. In the interest of the unsecured creditors, it is just and necessary to have a fair valuation ascertained and an enquiry held to ascertain whether the sale by respondent 1 in favour of respondent 2 is 'bona fide' and for a proper price. The Corporation of Madras who were one of the prospective purchasers of the assets of the company as a going concern and who are also creditors of the company have. agreed to indemnify me for costs and have also agreed to provide funds for filing this application.'

There was a supporting affidavit filed by the Commissioner of the Corporation in which it was prayed that in the interest of justice the sale of the assets of the company should be made only after extensive notification in the newspapers giving full details and also after giving sufficient time to the Corporation of Madras to come, to a final decision after negotiations with the Government whether the tram service should be undertaken by the Corporation.

Mr. Brookes filed a counter affidavit in the course of which he explained that the offer by the Bombay firm was the highest offer that he had received and that this

had been accepted 'bona fide'. He also explained that in the advertisement the condition as to the previous sanction of the court was inserted because of the undertaking that he had given to the court in C. S. No. 368 of 1953 and that this undertaking lapsed with the dismissal of the suit on 16-3-1954. Though for his part he was intending to apply to the court for previous sanction before tin any detecting the sale, he had been advised by the Solicitors for the debenture trustees in England that it was unnecessary for mm to obtain the sanction of the court and that he had been instructed not to apply for such sanction. At was in consequence of this advice that the sale to the Bombay nine was concluded without placing the matter before the court and obtaining its sanction. He asserted that the sale was 'bona fide' and that he had obtained as good a price as could be obtained.

He also pointed out that the trustees of the debenture holders could not wait indefinitely for the Corporation or the Government of Madras or other individuals making up their minds as to whether they would purchase the assets in order to revive the tramways. Having waited for months and nothing definite being known, he had been instructed to conclude the sale and realise monies for the debenture-holders. He, therefore, pleaded that there were no grounds for setting _ aside the sale which had been properly concluded by him.

5. 'With these allegations by either side, the application came on for hearing before Batakrishna Aiyar J. Before the learned Judge the 'bona fides' of Mr. Brooke's conduct was not impeached nor the statement by him that the offer of the Bombay firm was the highest and the only question considered, by him was whether in the circumstances, the sale to the Bombay firm was or was not the best, even taking into 'account subsequent offers before him.

6. The question was raised at the hearing, which was emphasised in the report of the Official Liquidator, that Mr. Brookes had violated an undertaking given to the court in Appln. No. 4552 of 1953 in effecting the sale without obtaining the sanction, notwithstanding that the suit had reached its termination by dismissal in March 1954, months before the sale was effected. The learned Judge rejected this objection as irrelevant to the issue and stated that the matter might be investigated

when the occasion arose. The learned Judge also repelled a contention that there had not been due publicity before Mr. Brookes effected the sale, the learned Judge stating after referring to the advertisements in the several newspapers 'It cannot, therefore, be said that the sale that was effected was 'sub rosa.' The next question, that the learned Judge considered was whether Mr. Brookes had accepted the best offer made to him. An abstract of all the offers received was placed before the court and there being no allegation that Mr. Brookes had suppressed any offer that had been made, it was proved that the offer of the Bombay firm was the best in the circumstances.

The learned Judge said that this would be sufficient to dispose of the matter, but he also considered whether there were any better offers even at that stage. One such was placed before him and that was an offer by one Ambalavaua Chettiar who offered to purchase the identical assets purchased by the Bombay firm for a sum of Rs. 4,25,000, which would have exceeded the price paid by the Bombay firm by about Rs. 24,000. This Ambalavana Cheltiar was given time to produce a Bank-guarantee that he was in a position to implement his offer to pay the sum and the hearing of the petition was adjourned to enable this Bank-guarantee to be produced. Even on the adjourned date this was not forthcoming, and therefore, this offer at Ambalavana Chettiar was dismissed from consideration,

The learned Judge also heard counsel on behalf of the Corporation of Madras. The Bombay firm agreed to prove that the sale to them was not at an undervalue, by offering to part with what they had bought to the Corporation of Madras at the same price and were willing to give them a fortnight's time within which to make payment. Counsel for the Corporation, however, was not willing to commit himself to the purchase, but merely wanted time to consider whether his clients, would think of purchasing. In the circumstances, the learned Judge thought that no purpose would be served by adjourning the proceedings for the purpose of ascertaining whether they would be in a position to take over these assets. The learned Judge further pointed out that the request for time by the Corporation was not reasonable, since they had really more than a year within which to consider whether they would take over the tramways as a going concern. As the Corporation had merely stated that further advertisements might be inserted with

the offchance of getting a better offer, the learned Judge thought that as there was no guarantee by the Corporation indemnifying Mr. Brookes against any loss, it was not worth while considering the request of the Corporation. In the circumstances, the learned Judge dismissed this application to set aside the sale effected by Mr. Brookes to the Bombay firm.

7. The 'official liquidator accepted the decision of Balakrishna Aiyar J. and has filed no appeal from his order. But two office-bearers of the Madras Tramways Workers' Association to whom, under the Award of the Industrial Tribunal of June 1953, a large sum of Rs. 7 lakhs was due from the company and who are as such its unsecured creditors but who were no parties to the application before Balakrishna Aiyar J. have preferred this appeal against the order, after obtaining leave of the court for filing the appeal.

8. In the grounds of appeal and during the arguments when the appeal was originally opened, the only point that was urged by Mr. Kumaramangalam, learned counsel for the appellants, was that there was not due publicity before Mr. Brookes effected the sale and that Balakrishna Aiyar J. was in error in holding that there had been such publicity as could call forth the best offers from prospective buyers. It was also conceded that there was no challenge on the 'bona fides' of Mr. Brookes in concluding the sale in favour of the Bombay firm. We must say that we feel impressed with this contention, and if the matter rested merely on a decision of this point, we would have allowed the appeal and set aside the sale. It is clear that there was an advertisement only in one issue of each newspaper before the sale was effected and two things were expressly stated in this advertisement, viz., (1) that offers would be received only till 17-2-1954 and (2) that the sale would be concluded only after obtaining the sanction of the Court.

It was matter of common knowledge that negotiations were proceeding between the Workers Associations with the Government on the one hand and the Corporation on the other, for the revival of the tramways as a going concern. Now and then, information was published in the newspapers, sometimes consisting of press-notes and on other occasions of interviews by correspondents stating the result of the discussions which were proceeding between the parties. Those

negotiations started soon after the date of the advertisement and it is not unreasonable to hold that by reason of this information which was in the possession of the public, even people who would otherwise take any interest in the purchase of the assets which was the subject-matter of the advertisement might not have made tenders because of - their feeling that the sale might not ultimately come off;

As stated before, those negotiations continued right upto 5-7-1954. Mr. Brookes had himself not definitely rejected all ideas in such a direction in the interview with the Chief Minister on 3-7-1954. While so, suddenly on the 16th July without any further notice and without any further advertisement of an intention to the public of the failure of the negotiations and if the intention to sell the assets of the company, the sale was effected by Mr. Brookes to the Bombay firm accepting an offer which had been made to him months earlier. It might very well be that if there had been a fresh advertisement calling for tenders after July 1954, Other people might have been willing to purchase the assets for a higher price. In fact during the hearing of the appeal before us, one Govindarajulu Naidu has made an offer to purchase the identical assets sold to the Bombay firm for a sum of Rs. 4 1/2 lakhs and he has deposited Rs. 2 1/2 lakhs to show his 'bona fides' in the matter.

9. But Mr. Venkatasubramania Aiyar appearing for the Bombay firm raised for our consideration an objection that the court had no power or jurisdiction to set aside this sale, except on the ground that it was vitiated by fraud or by want of 'bona fides' and as in the present case all such allegations were expressly disclaimed by the appellants, the court has no jurisdiction to set aside the sale. The point in this form has not been raised before the learned Judge and in fact the consideration of Ambalavana Chettiar's offer by Balakrishna Aiyar J. proceeded upon a negation of this objection. However, we find nothing in law to preclude the respondent from sustaining the judgment or decree of the court in his favour by supporting it upon this legal ground. The question is one of pure law as to the jurisdiction of a court to set aside the sale and we considered that it was proper to permit the respondent to urge this objection to the petition.

10. The point that was raised was this: Mr. Brookes was functioning here as a Receiver appointed by the debenture-holders. The debenture-holders on whose behalf he is acting are outside the liquidation and if under the terms of the trust deed securing the debt due to them, they have a power to realise amounts due by appointment of a Receiver and the Receiver having entered into possession of the property effects a sale, such sale does not require any sanction of the court and can be impeached by the Official Receiver or by the unsecured creditors of the company only on certain well defined grounds viz., fraud or want of 'bona fides' the fact that there has not been due publicity or that it properly advertised, a higher price might have been realised, is not a ground for setting aside such sale.

11. Before dealing, with this argument, it is only necessary to add that Mr. Nambar appearing for Mr. Brookes stated that he was merely anxious to establish that his client had acted 'bona fide' and in the best interests of the parties and that though as one who had effected the sale his client was naturally interested to support its validity, he was willing to leave the matter in the hands of the court and to abide by any orders it might pass in regard to the sale effected by him. Though this was the attitude of Mr. Brookes, it certainly does not preclude the Bombay firm from insisting upon its legal rights to maintain the sale, and we will next proceed to consider the correctness of the legal position taken up by the learned counsel on its behalf.

12. In the present case the facts necessary to be mentioned in regard to this point are that under clause 5 of the Indenture dated 30-10-1924 between the Electric Tramways and the Trustees for the debenture-holders by name the Beaver Trust Ltd. the company covenanted with the trustees ' that they will forthwith effect in favour of the trustees and to their satisfaction a first mortgage of the hereditaments specified in the second schedule thereto and all other freehold property owned by the company in Madras in accordance with the law of Madras'

and in pursuance of this clause a simple mortgage was executed by the company in favour of the Beaver Trust who are the trustees for the debenture-holders. Under Clause 6 of the same indenture, a floating charge was created on the assets of the company, present and future for the payment of the moneys due on

the security of the debentures. Under Clause 8, the security becomes enforceable, 'inter alia', on default in the payment of principal monies or interests or if the company stopped payment or ceased to carry on business or threatens so to do, When the security becomes enforceable, the trustees are given the right to enter upon the premises, and in such an event the trustees may, on their discretion, appoint one or more persons to be a Receiver. Of course both the trustees as well as the Receiver acting on their behalf have powers to realise by sale the assets of the company for the purpose of paying over what is due to the debenture holders.

In pursuance of the powers contained in this behalf, the debenture trustees appointed Mr. Brookes as receiver and he took possession of the company's assets on 11-4-1953 and the sale was effected by him in his character as such Receiver for the purpose of realising the amounts due to the debenture holders. If there had been no liquidation, it is clear and it does not need any authority, that any sale effected by the Receiver could not have been called in question by or on behalf of the mortgagor on the ground that due publicity or notice was not given of the sale and that a smaller sum than. could possibly have been realised was obtained by the sale. It is sufficient in this connection to refer to Section 69(3), T. P. Act, 4 of 1882. After laying down the conditions before which a power of said vested in a mortgagee may be exercised, Sub-section (3) of Section 69 enacts:

'When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper, or irregular exercise of the power, shall have his remedy in damages against the person exercising the power.'

Similarly, the provision in Section 8, Trustees and Mortgagee's Powers Act, 28 of 1866 may be noticed; 'No such sale as last aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed to some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers, hereby conferred, the title of the purchaser shall not be liable to be impeached on

the ground that no case had arisen to authorise the exercise of such power or that no such notice as aforesaid had been given; but any person damnified by any such unauthorised exercise of such power shall have his remedy in damages against the person or persons selling.' There is abundance of authority in favour of the position that a mortgagee's sale in exercise of the power reserved in that behalf is not liable to be impeached on account of want of publicity or want of notice as required either by the instrument of mortgage or by the law. Therefore, if the sale had been effected by Mr. Brookes, as Receiver, without the liquidation supervening, there would have been no possibility of argument that the sale in favour of the Bombay firm could have been set aside, of course, in the absence of fraud or want of bona fides' on the part of the seller, & in which the buyer was also implicated.

13. The question that next arises is whether the supervening of the winding up makes any difference to the rights of the buyer from a mortgagee exercising a power of sale for the realisation of his security. The effect of a winding up order is set out in Section 171, Indian Companies Act;

'When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.'

Under this provision if a mortgagee or a receiver for the debenture holders is obliged to file any suit or take other legal proceedings for the realisation of the security, he has necessarily to obtain leave of the court and subject to such terms as the court may impose. The consequence of a failure to observe the terms of this section is provided by Section 232 which runs thus:

'Where any company is being wound up by or subject to the supervision of the court, any attachment, distress or execution put in force without leave of the court against the estate or effects, or any sale held without leave of the Court of any of the properties of the company after the commencement of the winding, up shall be void.'

These being the relevant provisions, the question that falls to be considered is whether a sale by a mortgagee or receiver for debenture holders effected in pursuance of the power vested in him in that behalf by the mortgage deed or the debenture trust deed as the case may be, without the sanction of the court could be avoided as falling under either Section 171 or 232, Indian Companies Act. The correlation between Sections. 171 and 232, Indian Companies Act has been brought out in the judgment of the Federal Court in -- 'Governor General in Council V. Shiromani Sugar Mills Ltd.', . (A), that it is necessary and sufficient to refer to the observations in this decision. The point that was considered by the Federal Court related to the question whether the proceedings taken by the Government for the realisation of income-tax due to them from the respondent-company in liquidation under Section 46(1), Indian Income-tax Act without applying to the court for sanction under Section 171, Indian Companies Act would or would not render the sale effected in the course of such realisation void under Section 232 of the Indian Companies Act. The question therefore was whether the proceeding under Section 46, Indian Income-tax Act was covered by the phrase 'other legal proceeding' within Section 171 Indian Companies Act. Dealing with this, Spent C. J. delivering the judgment of the Court' said: (page 21)

'Section 171 must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act. In particular, we would refer to Section 232. Section 232 appears to us to be supplementary to Section 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it with any attachment, distress, execution or sale, without the previous leave of the court, will find that such steps are void. The reference to 'distress' indicates that leave of the court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary court of law. Moreover, the scheme of the application of the company's property in the 'pari passu' satisfaction of its liabilities, envisaged in Section 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are 'outside the winding up' in the sense indicated by Lord Wrenbury in his speech in -- 'Food Controller v. Cork', 1923 AC 647 (B), are subjected as to their actions against the property of the company to the control of

the court. Accordingly, in our judgment, no narrow construction should be placed upon the words 'or other legal proceeding' in Section 171.' It is necessary to add only one observation. It is not and cannot be contended that a private sale effected by a Receiver or a mortgagee is a 'legal proceeding' which cannot be commenced or con-tinued without the sanction of court under Section 171. If it is not a 'proceeding' within Section 171, it follow on the reasoning of their Lordships of the Federal Court that it would not also be hit at by the avoiding provision, in Section 232. -

14. Some argument was addressed to us on the language of Section 232, Indian Companies Act which avoids any sale held without the leave of the Court after the commencement of the winding up. This section corresponds to Section 228, English Companies Act of 1948 being Section 174, English Companies Act of 1929. In the English enactment the words 'or any sale held without the leave of the Court' do not occur. These words were inserted into the Indian enactment by the Companies Amendment Act of 1936. It was sought to be argued on the basis of this difference in language that there was a real difference in the content of the provisions of India, as contrasted with that in England and that whatever be the law in England, any sale by a mortgagee even if outside Court was within the mischief of Section 232, Indian Companies Act and would be avoided, unless the sale were held with the sanction of Court.

Having examined the matter carefully, we are of the opinion that there is no substance in the point. Section 232 was amended in 1933 by the insertion of the provision referring to sales, in order to get over the decision of the Allahabad High Court in --: 'Kayastha Trading and Banking Corporation Ltd. v. Satnarain Singh', AIR 1921 A11 149 (C), Piggott and Walsh JJ. had held in that decision that though leave of Court was required to put an execution into force under the terms of Section 232 as it then stood, i.e., in order to effect an attachment, where an attachment had been effected prior to the winding up, but a sale was held subsequently, in pursuance of that attachment, the sale was not avoided by reason of the winding Op order. In other words, the reason for the amendment was to make it clear that proceedings in execution continue to be in force and are being put into force right up to the date of the sale. Its effect, however, is not to

affect a sale held without legal proceedings as provided for by Section 171, Indian Companies Act to which we have already referred.

We are clearly of the opinion that the scope of Section 232, Indian Companies Act is not wider than that of Section 171 and the language of the provision is not apt to include within its purview cases where no legal proceedings are at all involved. This is made clear by the use of the expression 'held' occurring after the word 'sale'. When a sale is effected, say by a private treaty, as in the present case, it could not be termed to be a sale held, though it is a sale effected. We are further of the opinion that even in a case where a private sale, i.e., outside Court is held by public auction, it would not be a sale held within the meaning of Section 232, Indian Companies Act. The construction we are adopting would be in accordance with the view expressed by the Federal Court as to the relative scope of Sections 171 and 232 in the decision already referred to.

15. Section 232 being out of the way, the next question that falls to be considered is whether the rights of a secured creditor to proceed to realise his security is affected by liquidation and an order for winding up. The point is summarised thus in Halsbury's Laws of England, Vol. VI, III Edn., para. 968: Dealing with the powers of a debenture holder having a charge of the assets of the company, Lord Cohen, who has contributed the article relating to companies says

'One of these rights is to have a sale of the property charged, either under the power given by the charge or by statute, or with the assistance of the Court. If the company goes into liquidation, the rights of a secured creditor under his security are not prejudiced, and the liquidator cannot obtain an injunction to restrain a sale by the secured creditor except on the usual terms of paying the amount due, or, if it is not agreed, paying the amount claimed, into court.' '

There can be no doubt that even a secured creditor if he is to approach the court for the purpose of realising his security has to obtain the leave of the court under Section 171, Indian Companies Act and Section 231, English Companies Act of 1948. But in a case where he can effect a sale without recourse to the court, he has no necessity to obtain leave of the court before effecting a private sale. It is in this context that the observations of Lord Wrenbury in 1923 AC 647 (B) at 670,

become relevant and important. The learned Lord said at p. 670 dealing with a contention that the Crown was outside the winding up : 'The phrase 'outside the winding up' is an intelligible phrase if used, as it often is, with reference to a secured creditor, say 'a mortgagee. The mortgagee of a company in liquidation is in a position to say the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgagor is in winding up or not I remain outside the winding up' and shall enforce my rights as mortgagee'. This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say I will prove in respect of my debt'. If so, he comes into the winding up.' In view of these observations in the House of Lords,' it would be unnecessary to cite further authority in support of the proposition that a secured creditor realising his security without seeking the assistance of the court is outside the winding up. But if such were necessary, reference may be made to a few decisions of the English Courts. The first case to be referred to is a decision of Court of Appeal in -- 'In re, David Lloyd & Co.'; -- 'Lloyd v. David Lloyd and Co.', (1878) 6 Ch D 339 (D). A mortgagee had instituted an action and this was pending when an order was made to wind up the mortgagor company. The mortgagee made an application to the court under Section 87, Companies Act of 1862 corresponding to Section 171, Indian Companies Act for leave to proceed with the action. Matins V. C. imposed certain terms upon the mortgagee before he should be allowed to proceed with the action. The mortgagee appealed and the appeal was heard by a very strong court consisting of Jessel M. H., James and Cotton L, JJ. The appeal was allowed and the mortgagee was permitted to proceed with the action without any terms being imposed upon him. Jessel M. R. stated:

'As a rule, a mortgagee has a right to realise his security, and of course, as incidental to that, a right to bring an action for foreclosure. Those who say that he should be restrained from bringing or proceeding with such ground for restraining him, or must say, we can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once, without any proceeding in the actionBut, short of that, it appears to me that the court ought not under the 87th section of the Act to interfere with the rights of a mortgagee.'

James L. J. put the matter thus: After referring to the basis of Section 87, Companies Act of 1862, he said:

'That has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property.'

And he added:

'The court would exercise it with a due regard to the rights to third persons, persons who were not members of the company, and who had not to come in and claim to share in the distribution of the company's assets among the creditors, and who were not therefore 'quasi' parties to the winding up proceedings. The court would have due regard to the rights of independent persons. A mortgagee, is to my mind, such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding-up.'

16. The next case to be referred to is another decision of the Court of Appeal in -- 'Re Henry Pount, Son and Butchins', (1889) 42 Ch D 402 (E). The headnote of the case succinctly summarises the facts.

'A company issued debentures constituting a first charge on the whole of their undertaking and property, and empowering the holders, in the event of proceedings for the winding up of the company to appoint a receiver invested with very ample powers of carrying out the company's business, and managing and disposing of their undertaking and property. An order was made for the winding up of the company and an official liquidator was appointed. The debenture holders, under their powers, appointed a receiver and applied to the court, that, notwithstanding the appointment of the liquidator, the receiver might be at liberty forthwith to take possession of all the company's undertaking and property.'

Kay J. before whom the application came on for hearing appointed the official liquidator as receiver on behalf of the debenture holders, directing him to treat himself as the receiver of the debenture holders. The debenture holders filed an

appeal and the question which the court had to consider was whether the right of the debenture holders to appoint their own trustee should not be given effect to by the court notwithstanding the winding up. The appeal was allowed. Cotton L. J. stating:

'I cannot understand, I must say, with great respect, how Mr. Justice Kay could appoint the liquidator receiver, because there was no action in which any receiver could be appointed by the court, and if he did not give to the receiver appointed under this deed what I think, was the right of the debenture holders to take possession of, I cannot see how he could appoint the liquidator to. be a receiver on behalf of the de benture holders.'

To a similar effect are the decisions of the court of Appeal in -- 'Barney v. Joshua Stubbs Ltd'; 1891 1 Ch 475 (F) and -- 'Strong v. Varlyle Press', 1893 Z Ch 268 : (G), so that the question, is not open to controversy at all.

17. The matter is thus summarised in Palmer's Company Precedents, Part II at p. 415:

Sometimes the mortgagee sells, with or without the concurrence of the liquidator, in exercise of a power of sale vested in him by the mortgage, It is pot necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made.'

We thus reach the position that no leave of court was needed before the Receiver appointed by the mortgagee debenture holders exercised the power of sale and that as there is no allegation of want of 'bona fides' or recklessness or, fraud against the receiver in exercising such a power, it would follow that the sale held by the receiver is valid and effectual to convey title to the purchaser and that such a sale cannot be avoided on the ground either of want of due notice given by the receiver before effecting the sale or on the ground of undervalue. One observation remains to be made in connection with this point about undervalue. It will be seen that the price realised by the Receiver at the private sale effected by him in favour of the Bombay firm was for Rs. 4,01,655, while the. price offered by Ambalavana .Chettiar before Baia- krishna Aiyar J. and by Govindarajulu Naidu now in the

appeal before us is in excess of this by about Rs. 24,000. We do not consider that in the circumstances the sale could; be stated to be at any gross undervalue even assuming that it could be set aside on such a ground.

18. Only one further point remains to be mentioned which was raised at almost the close of the argument in the appeal. The point was this: The security in favour of the debenture holders in the present case consisted of two parts. The first was a regular mortgage on the land and buildings comprised in schedule II to the debenture trust deed and covered by the simple mortgage in favour of the Beaver Trust Ltd., executed by the Directors of the Madras Electric Tramways - Ltd. In addition to this mortgage, the debenture holders had also, as we have seen, a floating charge on all the other assets of the company. The argument that was sought to be raised was based upon this distinction between the two parts of the security by reason of the provision in Section 230(2), Indian Companies Act. The provision is to this effect: Section 230 (1) enumerates the debts which have to be paid in priority in a winding up and Section 230(2)(b) enacts: 'So far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures - under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.'

The argument on this head was this: The receiver for the debenture holders could not sell without the leave of the court because of the provision in Section 230(2)(b) as the bulk of the assets which have been sold were comprised in the floating charge. In this connection reference was also made to Section 129, Indian Companies Act which enacts:

'Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company, is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as

aforesaid in priority to any claim for principal or interest in respect of the debentures.'

Basing himself on those provisions, learned counsel for the appellants contended that the official liquidator would have control over the assets comprised in the floating charge and that consequently the sale by Mr. Brookes held without reference to the court was liable to be set aside. It would have been noticed that this point was never thought of or put forward by the Official Liquidator when he filed Appln. No. 3542 of 1954 before Balakrishna Aiyar J. And this notwithstanding that a contention in about the same form was raised by the State of Madras in the suit, C. Section No. 368 of 1953. The point was decided against the Government by Balakrishna Aiyar J. on the ground that the Madras Electric Tramways Ltd., being a company registered in England, and not being one registered under the Indian Companies Act, the provisions of Section 129 would not apply to such a company (vide Section 276 etc.). As this judgment in C. Section No, 368 of 1953 is now under appeal, we do not wish to say anything about, this which would be prejudging an issue in the appeal by the State. Suffice it to say that if the point were sound, Mr. Brookes would be a trespasser and would have no right to take possession of the properties comprised in the floating charge and the Official Receiver would have been entitled to move the court for a direction that he be put in possession of these properties but he never did so.

19. But apart from this, we have this fact that long before the petition for winding up was filed, the receiver had taken possession of these properties as early as in April 1953. The effect of such an act on the part of the receiver on the floating charge has been considered by Bennett J. in --'Re Griffin Hotel Co. Ltd.'; 'Tetley and Son Ltd. v. Griffin Hotel Co, Ltd.', 1941 Ch 129 (H). The learned Judge considered the effect of the sections corresponding to 129 and 230(2). which are word, for word identical with that in the English enactment in a case where the Receiver appointed by the debenture-holders had taken possession of the security and said:

In my judgment, Sub-section 4(b) of Section 264 (corresponding to Section 230(2)(b), Indian Companies Act) only operates if at the moment of the winding up

there is still floating a charge created by the company and it only gives the preferential creditors a priority over the claims of the debenture holders in any property which at that moment of time is comprised in or subject to that charge. In the present case the debenture held by the plaintiffs contained in floating charge over all the borrowers' property. On 9-12-1938, that charge ceased to float on the property and assets of which Mr. Vealo was appointed receiver. The charge on that day crystallised and became fixed on that property and those assets.' These observations, are, in our opinion, pertinent and make it clear that in the present case also the security ceased to float when Mr. Brookes as receiver took charge of the assets comprised in the floating charge on 11th April 1953. There is no question of any floating charge to which the provisions of Section 230 (2), Indian Companies Act could apply after that date. This point, therefore, even if open to the appellants is without substance and has to be repelled.

20. The result is, that the appeal is dismissed, though we have reached the same result as the learned Judge by a different line of reasoning, having regard to the fresh points raised by the respondents in this appeal. '

21. One further observation remains, to be made and that is regarding the sum of Rs. 21/2 lakhs which has been deposited in court at the time of the filing of the appeal by a prospective buyer one Mr. Govindarajulu Naidu. When the appellants applied for a stay of delivery of the properties to the Bombay buyers, they showed their bona fides by producing a prospective buyer one Mr. Govindarajulu Naidu who stated that he was willing to purchase the identical assets purchased by the Bombay firm for an increased price. For that purpose the prospective buyer deposited in court a sum of Rs. 2 1/2 lakhs. In view of our decision dismissing the appeal, it follows that the sum deposited into court should be refunded to the person making the deposit.

22. There will be no order as to costs.