

In Re: Kharkharee Collieries Ltd.

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Court : Kolkata

Decided On : Aug-26-1929

Reported in : AIR1932Cal76

Appellant : In Re: Kharkharee Collieries Ltd.

Judgement :

Buckland, J.

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

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

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

in existence at the time when the company acquired the property and did so subject to such mortgage.

4. The receiver was appointed on 24th May last. It appears that while the petition to wind up the company, which was presented early in May, was pending an order was made which took effect on 11th May provisionally appointing an Official Liquidator, and I apprehend that the Official Liquidator, who is now in possession of the property, took it into his charge shortly after the order was made, as it is now in his possession. How, in those circumstances, having regard to the provisions of Section 175 (6), Companies Act, the receiver came to be appointed is not clear. I do not know however that the application requires that I should construe that section, but if it should be necessary, I am not impressed with the argument that the word 'assets' means the assets of the company, and that property which is subject to a charge, cannot be within the section as not being assets of the company. It appears to me that the assets in this case are and must be held to be assets of the company, though subject to a charge, of which the amount due to the mortgagee has yet to be ascertained, a view for which support is to be found in a passage of the judgment of Lindley, L.J. in the case to which I shall refer later. The subsection is one which is not, as are very many of the sections of the Companies Act, taken from the Companies Consolidation Act, 1908, and therefore 'English authorities in which it has been interpreted are not 'available. It is however very definite 'and clear, and I apprehend that its intention is to avoid any question of competition between a receiver and an Official Liquidator, and to construe it in such a (way as to give preference to a receiver [appointed in a suit brought by a secured (creditor would result in defeating its apparent object.

5. My learned brother Costello, J., by an order made in the suit Baldeodas Barnes-war v. Cook & Co., Ltd. Suit Nos. 2314 and 2379 of 1923 decided on 7th July 1927 held that this subsection precluded him from appointing a receiver to oust the possession of the liquidator at the instance of a secured creditor. I have been informed that that order was affirmed on appeal.

6. I doubt whether this section need be considered, and I think I should find myself on more solid ground in basing myself upon the principle of *In re: Joshua Stubbs*,

Limited. *Barney v. Jo-shua Stubbs, Limited* [1891] 1 Ch. 475 from which it appears that where there is a question of competition between a liquidator and a receiver appointed by the Court at the instance of the debenture-holders or mortgagees, the Court will ordinarily, in the exercise of its discretion, give preference to the liquidator.

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

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

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