In case he was declared successful then the University was directed to permit the respondent-petitioner to attend the sixth semster class and on the basis of that admission also allowed him to appear in the next examination. Kurukshetra University, has come up in appeal.

(3) The only incriminating material found from the possession of the petitioner in the examination hall was some matter written by him on the question paper of the subject in which the petitioner was appearing on the date of examination. No other material was found from his possession. The 4th page of the question paper supplied to the respondent-petitioner was blank and he had done some rough work on the blank page of the question paper regarding one of the questions which was to be attempted on the answer-sheet later on. Writing on the back of the question paper was in the hand of the respondent-petitioner himself. Learned single Judge had gone through the entire record of the University and we have also gone through the entire record which has been placed before us by the learned counsel appearing for the University. There is no allegation against the petitioner that he got some outside help or smuggled some material which could be of use to him while attempting the question paper. Respondent-petitioner could not be held guilty of using the unfair means only on the ground that he had done some rough work on the blank space of the question paper supplied to him at the examination centre while sitting in the examination hall. There is no evidence on the record worth the name to sustain the order of disqualification passed by the University.

(4) Accordingly, we concur with the findings of the learned Single Judge and uphold the judgment passed by him. Consequently, this appeal fails and is dismissed with no order as to costs.

J.S.T.

Before : A. L. Bahri & H. S. Bedi, JJ.

IN THE MATTER OF THE COMPANIES ACT, 1956,—*Petitioner.*

versus

UNITED COMMERCIAL BANK, JAMMU,—*Respondent.*

Company Appeal No. 2 of 1988.

29th October, 1991.

(1) *Companies Act (1 of 1956)—S. 446(1)—Meeting of creditors held for voluntary winding up of Company—Even if petition for*

winding up was filed and no order was made or provisional liquidator appointed—Any decree passed in suit or proceedings will not automatically become void.

Held, that even if petition for voluntary winding up was filed but before any order of winding up was made or provisional liquidator was appointed any decree passed in any suit or proceedings pending will not automatically become void.

(Para 9)

(2) *Companies Act* (1 of 1956)—*Ss.* 500 to 509—*Judgment and decree passed by civil Court to be binding on parties whether obtained after contest* or ex parte—*Such judgment and decree would be* prima facie *proof of due debt.*

Held, that a judgment and decree passed by a Civil Court will be binding on the parties whether obtained after contest or otherwise i.e. *ex parte* till the same is set aside either on appeal or in proceedings for setting aside the *ex parte* decree. Such judgment and decree in favour of the creditor would be *prima facie* proof of the debt due and the nature of the debt and as to whether such a creditor-decree-holder would be a secured creditor or not.

(Para 8)

(3) *Companies Act* (1 of 1956)—*Secured creditor—Decree passed to recover decretal amount by sale of mortgaged property and hypothecated goods—Decree-holder armed with such decree would fall in category of secured creditor.*

Held, that copy of the *ex parte* decree shows that a decree of recovery of Rs. 9,56,985.97 was passed in favour of the Bank and against the Company with the further direction to recover the decretal amount by the sale of the mortgaged property and the hypothecated goods. The decree-holder bank armed with such a decree would fall in the category of secured creditor.

(Para 9)

Petition under Section 483 *of the Companies Act,* 1956 *praying that the appeal be accepted, the order dated the* 12*th December,* 1986, *passed by Hon'ble Mr. Justice S. P. Goyal dismissing the* Petition.

Munishwar Puri, Advocate with Miss Deepali Puri, Advocate, *for the petitioner.*

J. S. Narang, Advocate with P. D. Mehta, Advocate, *for the respondent.*

JUDGMENT

A. L. Bahri, J.

This appeal has been filed by the Hindustan Forests Co. Private Ltd. (in liquidation) through its Liquidator Shri B. K. Kapur (hereinafter called the Company) against order of Single Judge, dated

December 12, 1986, dismissing petition filed by the Company under section 446, 512, 518, 526, 528 and 529 of the Companies Act read with Rules 9 and 168 of the Companies (Court) Rules, 1959, wherein a prayer was made for deleting the name of United Commercial Bank (hereinafter to be called as 'the Bank') from the list of creditors submitted by the directors.

(2) The relevant facts for determination of the question raised in the appeal are few and broadly admitted. The Company voluntarily went into liquidation. The directors submitted a list of creditors to the Liquidator. The United Commercial Bank was one of the creditors shown in the list. Notices were issued to the Bank by the Liquidator to satisfy him about the amount due to the Bank. The Bank submitted *ex parte* decree in its favour passed by the Court. The Liquidator avoided the decree saying that the same was obtained in order to get fraudulent preference over other creditors, in exercise of powers under section 528 of the Act. He declared the aforesaid decree as void. In the present petition filed by the Company the name of the Bank was ordered to be deleted from the list of the creditors.

(3) The stand taken by the Bank is that the decree was passed after following necessary procedure and could not be declared void by the Liquidator. The Bank is a secured creditor. The following issue was framed which has been decided by the Single Judge :

> On the facts stated, does the present petition not lie under sections 446, 512, 518, 526, 528 and 529 of the Companies Act?

Shri Munishwar Puri, Advocate appearing on behalf of the appellant, has argued that the issue as framed required the Bank to produce evidence of being a secured creditor and no presumption could be drawn in favour of the Bank. It is in this context it has further been argued that no opportunity to produce evidence was given to the parties in the proceedings pending before the Single Judge. There is no force in these contentions. The record of the case shows that on September 24, 1982, the aforesaid issue was framed by the Single Judge. The second issue framed related to relief. It was pointed out by the Judge that counsel for the parties did not wish to lead evidence and thus the case was adjourned for arguments. In view of the statements of the counsel for the parties referred to at the stage of framing the issues as aforesaid, now

counsel for the appellant cannot make a grouse that no evidence was allowed to be led by the Single Judge on the issue framed either to the appellant or to the respondent.

(4) In the petition filed by the Company it was specifically stated that there was an *ex parte* decree in favour of the Bank. This fact stands admitted in the written statement filed by the Bank. The fact which is admitted is not required to be proved by producing evidence. Learned Single Judge rightly pointed out in the impugned order that the factum of passing of the *ex parte* decree in favour of the Bank stood admitted. Contention of Shri Munishwar Puri, Advocate, that there was no admission made by the counsel for the appellant before the Single Judge has no significance, when in the pleadings of the parties this fact stands admitted.

(5) Just to specify the nature of the decree passed copy of the same was shown during arguments. The amount of the decree was required to be satisfied after selling the mortgaged property and the hypothecated goods. A decree-holder who has secured a decree for recovery of money which is made charge over the mortgaged property or over the hypothecated goods would be a secured creditor. Position of a secured creditor has been discussed fully by the Supreme Court in *M. K. Ranganathan and another* v. *Government of Madras and others* (1), wherein in para 20 of the judgment it was observed as under :—

> "The secured creditor is outside the winding up and he can realise his security without the intervention of the Court by effecting a sale of the mortgaged premises by private treaty or by public auction. It is only when the intervention of the Court is sought either by putting in force any attachment, distress or execution within the meaning of Section 232 (1) or proceeding with or commencing a suit or other legal proceedings against the company within the meaning of Section 171 that leave of the Court is necessary and if no such leave is obtained the remedy cannot be availed of by the secured creditor."

In para 21 of the judgment it was observed as under :—

> "The words "any sale held without leave of the Court of any of the properties" inserted in section 232 (1) by Act 22 of

(1) A.I.R. 1955 S.C. 604.

1936 refer only to sales held through the intervention of the Court and not to sales effected by the secured creditor outside the winding up and without the intervention of the Court. Hence such a sale is valid and binding on all the parties concerned."

The aforesaid case dealt with by the Supreme Court was under the old Companies Act. In 1956 the Parliament enacted the Companies Act No. 1 of 1956. The ratio of the decision of the Supreme Court would continue to operate while interpreting different provisions of the Act of 1956 as there is no material Change in the relevant provisions dealing with the subject.

(6) Part VII Chapter I Section 425 of the Act provides for three modes of winding up of Company i.e. (a) by the Court; or (b) voluntary; or (c) subject to the supervision of the Court. Under section 425(b) of the Act, the provisions of the Act with respect to winding up apply in any of those modes of winding up unless the contrary appears. Chapter II deals with the subject of winding up of a Company by the Court and section 446 occurs under the aforesaid Chapter. It is Chapter III which deals with voluntary winding up of a company. This process starts with special resolution passed by the Company under section 484 which is required to be published under section 485. Under section 486 the process of winding up starts with the passing of the aforesaid resolution. Provision of sections 490 to 498 applicable to members of voluntary winding up of a Company and provisions of sections 500 to 509 are applicable to creditors voluntary winding up. Provisions of sections 511 to 521 are applicable to every voluntary winding up. Section 518 empowers the Liquidator for moving Court for passing an appropriate order and for setting aside any order of attachment, distress or execution against the estate or effects of the Company after the commencement of winding up. Under section 518 (4) passing of such an order is contemplated. The passing of a resolution for a voluntary winding up does not, like an order for winding up by or under the supervision of Court, stay any proceeding or prevent suits or proceedings being brought or continued against the company without the leave of the Court. But on an application being made under section 518, the Court has jurisdiction to stay any action, proceeding, attachment, etc., against the company or its assets. Until a stay is obtained any proceeding against the company may be commenced or proceeded with.

(7) Counsel for the parties have also relied upon section 446 of the Act. Section 446 (1) of the Act reads as under :-

> "When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order, shall be proceeded with, against the Company, except by leave of the Court and subject to such terms as the Court may imposed."

What orders or decrees in the pending suits or proceedings are declared to be void under the aforesaid provision are those which were passed in such suits or proceedings which were pending at the time of passing of winding up order or appointment of Official Liquidator as provisional Liquidator. The only exception is when leave of the Court is obtained for proceeding with such suit or proceeding. In order to attract the aforesaid provision and apply the same to the decree obtained in the present case, it may be stated that in the petition filed by the Company no plea was taken that the *ex parte* decree was passed after passing of the winding up order or appointment of the provisional Liquidator. Even if petition for voluntary winding up was filed but before any order of winding up was made or provisional Liquidator was appointed any decree passed in any suit or proceedings pending will not automatically become void. It is mentioned in the petition that meeting of the creditors was held on November 8, 1974, wherein decision was taken for voluntary winding up of the Company. That by itself will not attract the provision of section 446(1) of the Act. The provisional Liquidator was appointed on February 27, 1975 in C.P. No. 169 of 1974 (information supplied by counsel for the appellant). The *ex parte* decree dated July 30, 1974 in the present case was passed prior to the aforesaid date of appointment of provisional Liquidator though a petition for winding up was already pending.

(8) The other question for consideration is as to whether the Liquidator had the authority to declare a decree passed by civil Court as void and thus ignore the decree-holder from the list of creditors. Learned counsel for the appellant in support of his contention argued that the Official Liquidator was competent to declare a decree as void, if obtained under some circumstances to cast a doubt and has relied upon a decision of the Allahabad High Court

in *Union of Indian Sugar Mills Co. Ltd. (in liquidation) v. Brij Lal Jagannath* (2). Some observations of the Court do help the appellant. A distinction was drawn in respect of the decrees which were passed after a genuine contest and others which were passed on the admission of the defendant. It was observed as under :—

> "Where there has been a genuine contest between a claimant or a creditor on the one hand and the company which goes into liquidation later on and the parties have fought out the case, *bona fide*, it should not be open to the official liquidator to reopen the case and to have, as it were, a fresh trial or strength. But, on the other hand, where the decree rests on something less than a real trial on the merits of the case, the question would arise whether the official liquidator would not be justified in putting the decree aside and asking for what has been called the "consideration for the judgment."

It was further observed as under :—

> "Where a judgment is obtained on the confession "(admission)" of the insolvent it is open to the liquidator to set apart the decree and to ask for proof of the claim."

It was observed that the judgment would be *prima facie* proof of debt. However, when there are circumstances casting doubt on the correctness of the debt the judgment may be set aside and independent proof may be called for. Although the aforesaid decision is distinguished on facts as judgment in the present case is not based on admission we are of the opinion that a judgment and decree passed by a civil Court will be binding on the parties whether obtained after contest or otherwise i.e. *ex parte* till the same is set aside either on appeal on in proceedings for setting aside the *ex parte* decree. Such judgment and decree in favour of the creditor would be *prima facie* proof of the debt due and the nature of the debt and as to whether such a creditor—decree-holder would be a secured creditor or not.

(9) Copy of the *ex parte* decree shows that a decree of recovery of Rs. 9,65,985.97 was passed in favour of the Bank and against the Company with the further direction to recover the decretal amount by the sale of the mortgaged property and the hypothicated goods.

(2) A.I.R. 1927 Allahabad 426.

The decree-holder bank armed with such a decree would fall in the category of secured creditor. At this stage the name of the bank cannot be deleted from the list of secured creditors. These cases are not relevant in deciding this appeal. In these cases attachment of the properties of the Companies were effected before the Companies went into liquidation and it was held that by merely getting orders of attachment, by passing of the decrees, such decree-holders did not become secured creditors. In the present cases as and when such pleas are raised, the question involved would be decided. No further comment on the subject is necessary in this case. It is stated the separate proceedings for setting aside the *ex parte* decree has already been initiated and thus other questions involved if raised on those proceedings would be separately decided. Otherwise the position of law applicable to the secured creditors has already been set at rest by the Apex Court in *M. K. Ranganatha's* case (supra). Till the *ex parte* decree is set aside the same is binding on the parties and in view of the same the issue was rightly decided by the Single Judge. The name of the Bank cannot be deleted from the list of secured creditors at this stage. This appeal fails and is dismissed. No order as to costs.

J.S.T.

Before : *G. R. Majithia, J.*

CHANDER,—*Plaintiff.*

versus

HARI KISHAN AND OTHERS,—*Respondents.*

Regular Second Appeal No. 358 *of* 1979.

12th November, 1991.

Transfer of Property Act, 1882—*S.* 52—*Rule* of lis pendens—*Partition proceedings—Maintainability of.*

Held, that S. 52 of the Transfer of Property Act embodies in its ambit the term "proceedings" and this term will include partition proceedings also. The sale effected during partition proceedings pending before a Revenue Officer will be hit by the rule of *lis pendens.* Partition proceedings operate as *lis pendens* with the result that a purchaser of undivided share pending partition proceedings takes only that property which is allotted on partition to the vendor. The plaintiff cannot avoid the partition proceedings.

(Para 7)