

(1971) 07 MAD CK 0004
In the Madras High Court

C. Hariprasad and Another and Godavaribai Ghuwalewala and Another APPELLANT

Vs

The Amalgamated Commercial Traders Private Limited and Others
Amalgamated Commercial Traders Private Limited Vs C. Hariprasad and Another RESPONDENT

Date of Decision : 23-07-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Companies Act, 1956 — Section 207

Citation : (1972) 85 LW 91 : (1972) 1 MLJ 330

Hon'ble Judges : R. Sadasivam, J

Bench : Division Bench

Judgement

R. Sadasivam, J.—Appellants Hariprasad and Godavari Bai Ghuwalewala filed Company Petition No. 87 of 1964 to wind up the first

respondent company, Amalgamated Commercial Traders Private Limited (hereinafter referred to as A.C.T. Company). But the company filed

C.A. No. 8 of 1965 under Rule 9 of the Companies (Court) Rules for an injunction restraining (he appellants from proceeding with the petition for

winding up of the Company on the ground that the petition was an abuse of the process of the Court. Venkataraman, J., held that there were no

grounds for winding up the company and that the petition by the appellants was an abuse of the process of the Court. He dismissed Company

Petition No. 87 of 1964 on the ground that it was an abuse of the process of the Court and hence the petitioners therein have preferred these

original side appeals. The A.C.T. Company has preferred Civil Miscellaneous Petitions in these appeals for dismissing the appeals on the ground

that no appeal has been filed against the order on its application C.A. No. 8 of

1965 under Rule 9 of the Companies (Court) Rules.

2. Mr. G. Vasantha Pai raised a preliminary objection that it is not open to the appellants to proceed with the appeals against the decision in C.P.

No. 87 of 1964 inasmuch as they have not preferred any appeal against the order on C.A. No. 8 of 1965. He relied on the decision in *Badri*

Narayan Singh Vs. Kamdeo Prasad Singh and Another, in support of his contention that the decision in Company Application No. 8 of 1965

would operate as *res judicata*. The decision in that case that a judgment is conclusive regarding the points decided between the same parties and

the parties should not be vexed twice over for the same cause is only a reiteration of the well known principle of *res judicata*. The facts appearing

from the head-note of the decision are as follows: B filed Election Appeal No. 7 of 1958 in the High Court of Patna against the order of the

Election Tribunal setting aside his election. The respondent K. also filed another appeal, Election Appeal No. 8 of 1958, against the order of the

Election Tribunal not declaring him to be the duly elected candidate and prayed for a declaration that he had been duly elected. The grounds of

appeal questioned the correctness of the finding of the Election Tribunal that B and respondent 2, who had obtained the next largest number of

votes as *ghatwals*, were not holders of offices of profit and that K could not be declared duly elected. Both the appeals were disposed of by one

judgment by the High Court. The High Court did not accept the finding of the Election Tribunal that B committed any corrupt practice and

accepted the contention on behalf of the respondent ST that B and respondent 2 held offices of profit under the Bihar Government as they were

ghatwalas. It was in this view of the matter that the High Court confirmed the order of the Election Tribunal setting aside the election of B and

allowed the appeal of K and declared him duly elected. Separate decrees were prepared in the two appeals. B filed an appeal by Special Leave

against the order in Election Appeal No. 8 of 1958 and all the grounds of appeal in it related to the finding of the High Court that the office of a

ghatwal is an office of profit. On a preliminary objection raised on behalf of the respondent K that the appeal was incompetent as barred by the

principle of *res judicata* inasmuch as B did not appeal against the order of the High Court in Appeal No. 7, the Supreme Court held that so long as

the order in B's Appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit in the present appeal founded on the contention that that finding was incorrect. It is clear from the reasons given by the Supreme Court that though both Appeals Nos. 7 and 8 before the High Court arose out of one proceeding before the Election Tribunal, the subject-matter of each appeal was different. The subject-matter of Appeal No. 7 filed by the appellant related to the question of his selection being bad or good, in view of the pleadings before the Election Tribunal. It had nothing to do with the question of the right of respondent 1 to be declared as duly elected candidate. If Appeal No. 7 was allowed, the question in Appeal No. 8 would not arise for consideration. The subject-matter of Appeal No. 8 simply did not relate to the validity or otherwise of the election of the appellant. It related to the further action to be taken in case the election of the appellant was bad on the ground that a ghatwal holds an office of profit. It was pointed out by the Supreme Court that the decision of the High Court in the two appeals, though stated in one judgment, really amounted to two decisions and not to one decision common to both the appeals. Though the appellant succeeded in his appeal No. 7 in respect of his contention that he did not indulge in any corrupt practice, the appeal was dismissed on the ground that he was a holder of an office of profit and as he did not challenge that decision by preferring an appeal which he could have done, he had no locus standi to agitate the correctness of the decision in the other appeal before the Supreme Court.

3. The learned Advocate for the appellants relied on the decision in *N.S.T. Lachimi v. M.S.T. Bhulli* ILR (1927) Lah. 384. In the above case, there were two cross suits by two widows A and B each claiming a declaration that she was the owner of the land. The suits were tried together by consent and were disposed of by a single judgment which decided that A was the owner, but B was entitled to hold possession of one half of the land in lieu of maintenance. A separate decree was drawn up in each suit declaring the rights of the plaintiff according to that decision. B appealed to the High Court against the decree in the suit in which she was the plaintiff. At the hearing of the appeal, a preliminary objection was

raised on behalf of the respondent that the appellant could not proceed by reason of B's failure to appeal against the decree that had been passed

against her in A's suit. The preliminary objection was overruled in that case. Tek Chand. J., has pointed out in his judgment in that case that

estoppel is not created by the decree, but it can only be created by the judgment. But as there is ex hypothesi a single judgment disposing of the

two suits, which judgment is under appeal, the plea cannot prevail on that ground. He referred to the Full Bench decision of this Court in

Panchanada Velan Vs. Vaithinatha Sastrial and Others, where it was ruled that where cross suits between the same parties on the same facts were

tried together and judgment was given on the same date and two separate decrees were passed, but only one appeal was preferred, the decree in

the unappealed suit did not operate as a bar u/s 13, Civil Procedure Code, it being decided that the doctrine of res judicata had no application,

when the very object of the appeal, in substance if not in form, was to get rid of the decision which was a bar. The above Full Bench decision of

the Madras High Court was followed by a Bench of this Court which made a reference to the Full Bench on another point in Pappammal alias

Muthu Karuppayee Ammal Vs. Meenammal and Others, . In Narhari and Others Vs. Shankar and Others, , the Supreme Court referred to the

decision of Tek Chand, J. in Mst. Lachimi v. Mst. Bhulli ILR (1927) Lah. 348 and held that there was no scope for the application of the principle

of res judicata on the following facts of that case.

4. A sued B and G for possession and obtained a decree in the trial Court. B and C filed separate appeals, which were heard together. One

judgment was delivered, but two decrees, one in each of these appeals were made. A appealed against one of these decrees. It was held that there

was no scope for the application of the rule of res judicata as there was only one suit.

5. At page 53 of Mulla's Code of Civil Procedure, Thirteenth Edition, the applicability of the principle of res judicata is dealt with, in respect of

suits tried together, when there is only judgment or separate judgments in suits tried together. There is reference to the conflict of decisions as to

whether if two suits involving common issues are disposed of in one judgment and an appeal is filed against the decree in one and not in the other,

the matter decided in the latter suit becomes res judicata so that it cannot be reopened in the appeal and it is stated that the Supreme Court was inclined to the view that the matter would not be res judicata.

6. There is no scope for invoking the principle of res judicata in the present case, Rule 9 of the Companies (Court) Rules is as follows:

Nothing in the Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as

may be necessary for the ends of justice or to prevent abuse of the process of the Court.

It should be noted that Company Application No. 8 of 1965 filed by the A.C.T. Company was only for restraining the appellants herein from

proceeding with the petition for winding up of the company. Venkataraman, J., disposed of Company Petition No. 87 of 1964, Company

Application No. 8 of 1965 and other applications by a common judgment. He has referred to the above prayer in Company Application No. 9 of

1965 and proceeded to observe that the law permits the dismissal of the petition itself and stated that there is no point in merely restraining the

petitioners, the appellants herein, from proceeding with the winding up petition as the petition can well be dismissed. Accordingly, he dismissed

Company Petition No. 87 of 1964. It should be noted that Rule 9 of the Companies (Court) Rules corresponds to Section 151, Civil Procedure

Code. It is open to the Court to invoke the inherent powers suo motu without any application by any party. Company Application No. 8 of 1965

filed by the Company before the Company Judge is only a request to invoke the said power. Hence even if there was a finding in Company

Application No. 8 of 1965 that the winding up petition was an abuse of the process of the Court, it is enough for the appellants to prefer an appeal

against the dismissal of the petition for winding up of the Company. Thus even in original suits a party takes a preliminary objection as to

jurisdiction, limitation etc., and the suit is dismissed. It is not necessary for the plaintiff in such a case to file an appeal against the decision on the

preliminary point apart from filing a regular appeal against the dismissal of his suit. The mere fact that the preliminary issue is decided on an

application filed by the defendant in the suit can make no difference in the matter.

7. For the foregoing reasons, we are unable to uphold the preliminary objection

of the Company that the appellants are not entitled to prosecute

the appeals on the ground that the appellants have not preferred an appeal against the decision in Company Application No. 8 of 1965.

8. The main question to be considered in these appeals is whether the petition for winding up filed by the appellants herein is an abuse of the

process of the Court. Venkataraman, J., has referred to a number of decisions, both in England and in India, to show that an application may

always be filed under Rule 9 of the Companies (Court) Rules, or what corresponds to it, invoking the inherent powers of the Court to stay the

further proceedings in the petition for winding up or to dismiss it where sufficient grounds are made out to show that the petition for winding up is

an abuse of the process of the Court. If the finding of Venkataraman, J., that the petition for winding up is an abuse of the process of the Court

cannot be upheld, the matter has to be remanded to enable the Company to file a counter to the petition for deciding the question whether the

Company should be wound up on all or any of the grounds put forward by the appellants.

9. One A.C.K. Krishnaswamy was the Managing Director of the A.C.T. Company from its inception and appellant Hariprasad was its life

Director. The other appellant Godavari Bai Ghuwalewala is the mother of Hariprasad. The company earned substantial profits and declared

dividends which were not less than Rs. 15 per share and, on one occasion, it was as large as Rs. 275 per share. The Company earned a large

commission as selling agents of India Sugars and Refineries Limited and Salar Jung Sugar Mills Limited. But the said companies were controlled by

persons referred to by the appellants and A.C.K. Krishnaswamy as Morarkas. The Morarkas controlled the Company and wanted to advance

moneys to some concerns like Radheshyam Satyanarain and Stressed Concrete Constructions Private Limited, through the channel of A.C.T.

Company. But there were objections by the auditors to these transactions appearing in the books of the A.C.T. Company and this led to the

elimination of these transactions and the filing of C.S. No. 203 of 1952, on the file of this Court, to recover the loan of Rs. 3.45 lakhs from Radhe-

shyam Satyanarain. According to the appellants, Morarkas did not agree to this move on the part of A.C.K. Krishnaswamy and Hariprasad and

so withheld the commission earned by the A.C.T. Company from the Sugar Companies. The agreement between the A.C.T. Company and the India Sugars and Refineries Limited expired on 31st December, 1963. Even the selling agency given by Salar Jung Sugar Mills, Limited also expired on 31st December, 1962. S.P. Parasrampuriah, the present Managing Director, gave a notice on 23rd December, 1960 to the Board of Directors to convene an extraordinary general meeting on the ground that the Company was not managed properly. Thereupon, A. C.K. Krishnaswamy filed Company Petition No. 19 of 1960, on the file of this Court, to wind up the Company alleging that the affairs of the Company were being conducted in a manner oppressive to the minority. But there was a compromise under which A.C.K. Krishnaswamy resigned from the directorship and walked out of the Company after selling his shares to Banks, nominee of S.P. Parasrampuriah. Hariprasad, who was supporting A.C.K. Krishnaswamy, also resigned from the directorship, though he continued to retain 25 shares. Disputes arose in respect of dividends claimed by A.C.K. Krishnaswamy on the shares transferred by him to Banks.

9a. Appellant Hariprasad filed Company Petition No. 42 of 1960 on the file of this Court for Winding up the company. A.C.K. Krishnaswamy and Godavari Bai Ghuwalewala joined with him as supporting creditors in the winding up petition. Appellant Hariprasad claimed Rs. 7,605.62 from A.C.T. Company and Rs. 1,750 as dividend for 1959-60. The dividend was declared on 30th December, 1959, though as already stated, the accrued commission from the sugar companies had been withheld and not received by the A.C.T. Company. It was held by this Court that the declaration of dividend was not invalid on the ground of contravention of Section 207 of the Companies Act. But Veeraswami, J., as he then was, who heard Company Petition No. 42 of 1960, held that the Company did not comply with the demand of Hariprasad for the payment of the dividend on legal advice and that the Company was factually solvent and dismissed the winding up petition, after referring the appellant Hariprasad to a suit for recovering the sum of Rs. 7,605.62. So far as Godavari Bai Ghuwalewala and A.C.K. Krishnaswamy were concerned, the learned Judge pointed out that they were only supporting creditors and that they could not enlarge the ground availed of by Hariprasad.

10. Hariprasad, Godavari Bai Ghuwalewala, and A.C.K. Krishnaswamy preferred appeals, O.S.A. Nos. 18, 37 and 70 of 1962, on the file of

this Court, and they were disposed of by Ramachandra Iyer, C.J., and Ramakrishnan, J., on 19th November, 1963. It was held in the appeals that

the failure on the part of A.C.T. Company to pay the dividend of Rs. 1,750 constituted neglect to pay within the meaning of Section 434(1)(a) of

the Companies Act. They directed the amount of dividends due to Hariprasad and A.C.K. Krishnaswamy to be deposited into Court within three

weeks and stated that in default of such payment, there would be a winding up of the company. They did not make any order as to payment to

Godavari Bai Ghuwalewala as she made no statutory demand. On 6th December, 1963, A.C.T. Company filed petitions for leave to appeal to the

Supreme Court and deposited the entire amount due to A.C.K. Krishnaswamy and Hariprasad to obtain orders of stay. A.C.T. Company

preferred appeals to the Supreme Court against the claims made by A.C.K. Krishnaswamy and Hariprasad and the said appeals, C.A. Nos. 515

and 516 of 1964 were heard on 16th December, 1964. The Supreme Court indicated even on 16th December, 1964 that it was going to allow

the appeals on the ground that the debt in question was a disputed debt on which the winding up petition could not be founded and reserved the

judgment, which was finally delivered on 8th January, 1965.

11. But the appellants Hariprasad and Godavari Bai Ghuwalewala filed the present Company Petition No. 87 of 1964 in this Court on 26th

December, 1964, for winding up the Company. Mr. Vasantha Bai rightly urged that this is clearly an abuse of the process of the Court. There can

be no doubt that, when A.C.K. Krishnaswamy and Hariprasad learnt on 16th December, 1964 that the Supreme Court was going to : allow the

appeals and set aside the; winding up order, they rushed to this Court in the interval before the pronouncement of the judgment by the Supreme

Court with the present petition, Company petition No. 87 of 1964, for winding up of the Company. Venkataraman, J., has rightly pointed out that

there cannot be a second winding up order in Company petition No. 87 of 1964 which will take effect from the date of the petition 26th

December, 1964, when the winding up order passed in O.S.A. Nos. 18, 37 and 70 of 1962 was in force. It would be noted that no leave of the

Supreme Court was obtained for filing C.P. No. 87 of 1964 on the file of this Court during the pendency of the appeals in the Supreme Court

against the winding up order of this Court. There is no force in the contention that the winding up order made by a Bench of this Court should be

deemed to have been vacated by reason of the payment made by the company. It should be noted that the Company did not make the payment to

avert the winding up, but only to obtain a stay of the operation of the judgment of this Court. In fact the decision of the Supreme Court shows that

the debts due to Hariprasad and A.C.K. Krishnaswamy were bona fide disputed and that the winding up order could not be sustained. If by

reason of the deposit made by the Company the winding up order of this Court ceased to have any force, it would not have been open to the

Company to prefer an appeal to the Supreme Court and there could not have been an order of stay of the winding up order by the Supreme

Court. There can therefore be no doubt that the winding up order passed by a Bench of this Court was in force at the time when Company Petition

No. 87 of 1964 was filed by the appellants and the filing of the said petition for winding up of the Company is clearly an abuse of the process of

the Court.

12. The next question to be considered is whether, in view of the decision of the Supreme Court in C.As. No. 515 and 526 of 1964, the present

Company petition No. 87 of 1964 is maintainable. The two grounds on which the petition is based are that the Company is unable to pay its debts

(Section 433(e) and that it is just and equitable that the Company should be wound up (Section 433(f). So far as the claim of the appellant,

Hariprasad for winding up of the Company on the ground that it is unable to pay his debts is concerned, it is concluded by the prior proceedings

which came to an end in C. As. Nos. 515 and 516 of 1964, on the file of the Supreme Court. So far as the claim made by Godavari Bai

Ghuwalewala is concerned, it is true that she was only a supporting creditor in the prior proceedings. But it is not correct to state that her appeal

against the judgment of Veeraswami, J., O.S. No. 37 of 1962, on the file of this Court, was dismissed on the ground that there was no statutory

demand of her claim. The judgment in O.S.A. Nos. 18, 37 and 70 of 1962, on the file of this Court, shows that it was argued on behalf of the

Company that except the three shareholders, namely A.C.K. Krishnaswamy, Hariprasad, Godavari Bai Ghuwalewala, the other shareholders of the Company have not made demands. But the Bench held that it cannot prevent the winding up of the Company if the amounts due continue to remain unpaid. It is true that directions were given to the Company to pay to the two creditors, A. C. K-Krishnaswamy and Hariprasad, and that no direction was given for payment to Godavari Bai Ghuwalewala as she had not made any statutory demand. But it should be noted that her appeal was not dismissed. In fact, the judgment of the Supreme Court in C. As. Nos. 515 and 516 of 1964 shows that the Division Bench accepted the three appeals and directed the winding up of the Company on the ground of its inability to pay the debts, but at the same time, directed that the order be kept in abeyance for a period of three weeks in order to enable the company to pay dividends to the two creditors, namely, A.C.K. Krishnaswamy and Hariprasad, for the year 1959. No order as to payment to Godavari Bai Ghuwalewala was made as she had not made a statutory demand.

13. On 31st July, 1964, Godavari Bai Ghuwalewala sent a notice to the Company claiming payment of Rs. 63,983.83 made up of Rs. 34,863.83

to her credit in the current account and the balance as unpaid dividends for the years 1958 to 1963. The A.C.T. Company sent a reply on 22nd

August, 1964, stating that the question of payment of dividend would be taken up after the disposal of the appeals in the Supreme Court against

the winding up order and after the decision in C.S. No. 65 of 1964 on the file of this Court. There were certain prohibitory orders at the instance

of the Additional Collector of Bombay. In respect of the amount, claimed, but they were withdrawn prior to the demand made under Exhibit P-27.

14. C.S. No. 65 of 1964, on the file of this Court, is a suit filed by A.C.T. Company on 1st May, 1964, against A.C.K. Krishnaswamy and the

appellants to recover a sum of Rs. 3,15,000 alleged to have been wrongfully appropriated by A.C.K. Krishnaswamy, assisted by the appellants,

for surrendering a lease for mining magnesite taken by the Company from the Magnesite Corporation of India Limited on a wrong claim that the

Company was only a benamidar for A.C.K. Krishnaswamy. The contention of the learned Advocate for the Appellant Godavari Bai is that she

has been impleaded in the suit without any reasonable basis merely to enable the company to put off the payment of the amounts due to her.

Venkataraman, J. has observed that it is not proper in these proceedings to say anything about the merits of that suit, but pointed out that a

straightforward course for Godavari Bai would have been to file a counter-claim for the amount due to her by the Company, instead of resorting to

the winding up proceedings. It is unnecessary to deal with these contentions as Venkataraman, J., has rightly observed that the demand of

Godavari Bai in Exhibit P-27 dated 31st July, 1964 could not be complied with on account of the winding up order then in force and that in any

event the A.C.T. Company bona fide believed that it could not make the payment at any rate without the orders of the Supreme Court.

15. Venkataraman, J., has found that the company's financial position must be considered as quite sound and he has given good reasons for the

same. The Company had been declaring substantial dividends and even at the meeting on 31st October, 1964, presided over by appellant

Hariprasad, a unanimous resolution was passed for declaring a dividend of Rs. 60 per share. Though the appellants made averments in the petition

that the market value of their 129 shares was only Rs. 10,000 they were not willing to part with them for the face value of Rs. 12,900 and even

filed a statement valuing the shares at Rs. 518.73 per share.

16. We shall proceed to consider the other grounds on which Company Petition No. 87 of 1964 was filed, namely, that the substratum of the

Company has been lost and that the affairs of the company are being conducted fraudulently and in oppression of the minority shareholders

assisted by the appellants and solely in order to enrich the Morarkas. It is true that these grounds were not specifically put forward as grounds for

winding up of the Company in the prior petitions. It is true Clause (a) of Article 3 of the Memorandum of Association of A.C.T. Company dealing

with the commission agency of India Sugars and Refineries Limited is the main object with which the Company was formed and it is therefore

urged that with the termination of the said agency, the substratum of the Company has been lost. It is not strictly relevant in these appeals to

determine whether the present Directors of the A.C.T. Company were responsible for the non-renewal of the commission agency of Salar Jung

Mills and India Sugars and Refineries Limited after (he expiry of the original terms of agreement. But it could not be said that merely on account of the loss of the agency of the two Sugar Companies, the substratum of the Company has been lost. Having regard to Clauses (b) to (f) of Article 3 of the Memorandum of Association, the A.C.T. Company can canvass new business. It is quite possible that the Company has not secured any new business on account of the then pending winding up proceedings.

17. The appellants relied on the averments in paragraphs 18 (a) to (e) of their petition in support of their claim that the affairs of the Company were conducted in a manner oppressive to the minority shareholders and in order to enrich the Morarkas. That the appellants were acting in concert with

A.C.K. Krishnaswamy is rendered highly probable by the fact that A.C.K. Krishnaswamy has made corrections in the manuscript of the counter-

affidavit of Hariprasad dated 22nd January, 1965 in C.A. No. 8 of 1965 on the file of the Company Court. One ground of attack relates to the

compromise of the suit C.S. No. 203 of 1952, on the file of this Court, by A.C.K. Krishnaswamy to recover Rs. 3.45 lakhs from Radheshyam

Satyanarain. Venkataraman, J., has pointed out that even on the basis of the affidavit of Hariprasad, Radheshyam Morarka had agreed to pay only

the amount of Rs. 2,18,948.15 and there was nothing to show that he agreed to pay interest of Rs. 89,796 from 1st July, 1952 to 28th April,

1957. The compromise arrangement in C.P. No. 19 of 1960 by which the interest due from Radheshyam Morarka was written off could not be

reopened and the claim against Radheshyam Morarka Would also be barred by limitation, Venkataraman, J., has rightly pointed out that even if

winding up is ordered, the Company can, if at all, recover the amount only from A.C.K. Krishnaswamy and Hariprasad in misfeasance

proceedings as past Directors of the Company u/s 543 of the Companies Act and that under such circumstances, it will not be open to them to

bring forward a winding up petition on their own act of misfesance.

18. In paragraph 18(b) of the petition, it is stated that an amount of Rs. 6,88,000 has been advanced as unsecured loans to parties who are

nominees of the Morarkas and the rate of interest charged is six per cent, when current interest rate for even secured loans is 9 per cent.

Venkataraman, J., has rightly pointed out that there is no allegation in para. 18

(b) of the petition that the debtors are financially unsound. We have already referred to the fact that the selling agencies of the sugar companies came to an end by efflux of time and there is no substance in the allegation in paragraph (18)(c) that the present Directors of the Company in collusion with the Morarkas allowed the selling agencies to lapse.

Further, these are all matters which were urged in the previous winding up petitions of the appellant Hariprasad.

19. The appellants have alleged in paragraph 18(d) that the Company has wrongly taken over to its own account a bad advance made by

Ramkumar Morarka Sons Private Limited to an associate, the Stressed Concrete Constructions Company Limited. Venkataraman, J., has

referred to the Directors' Report dated 27th December, 1960 for the general meeting and the evidence of the auditor and observed that it is not

possible to say definitely that the transfer was made unauthorisedly by the present Directors, though that is very probable. He however proceeded

to consider the case on the assumption that the transfer to the Stressed Concrete Constructions Private Limited was unauthorised and that the

present Directors were responsible for the same. He has, however, held that the mere misconduct on the part of the Directors in the said

transaction is not a ground for winding up, where it has not affected the finances of the Company.

20. The appellants have alleged in paragraph 18(e) of the petition that every year the Company writes off huge expenses on establishment and car

maintenance in Bombay. Venkataraman, J. has compared the expenses with those in prior years and found no justification in the complaint and

found that the alleged acts of misconduct are hardly sufficient to sustain a petition for winding up.

21. In our opinion, the appeals are liable to be dismissed as there are no grounds to interfere with the proper exercise of discretion by

Venkataraman, J. under Rule 31 of the Companies (Court) Rules for non-compliance with Rule 28 of the said Rules. Rule 28(1) of the Rules is as

follows:

Where a petition is presented against a Company, it shall be accompanied by a notice of the petition in the prescribed Form together with a copy

of the petition for service on the company and an envelope addressed to the

Company at its registered office or its principal place of business and sufficiently stamped for being sent by registered post for acknowledgment. The Registrar shall immediately on the admission of the petition send the notice together with the copy of the petition to the Company by registered post.

Company Petition No. 87 of 1964 was returned by the office for non-compliance with this rule and the learned Advocate for the appellants merely represented it after complying with some of the other objections, with the endorsement other returns complied with. But there is nothing in the records to show that the petitioners in Company Petition No. 87, of 1964 filed envelopes addressed to the Company at its registered office and sufficiently stamped for being sent by registered post for acknowledgment. Rule 31 of the Companies (Court) Rules is as follows:

In default of compliance with the requirements of the Rules or the directions of the Judge or Registrar, as regards the advertisement and service of the petition, the petition shall, on the date fixed for hearing be posted for orders of the Judge and the Judge, may either dismiss the petition or give such further directions as he thinks fit.

It is true that the Company Judge may either dismiss the petition for non-compliance with Rule 28, or give such further directions as he thinks fit.

But Venkataraman, J., has exercised his judicial discretion in dismissing the petition under Rule 31 of the Companies (Court) Rules for non-compliance with Rule 28, as the petition was filed during the pendency of the appeals in the Supreme Court, when the winding-up order was in force. We are unable to state that Venkataraman, J., has erred in the exercise of discretion on the facts and circumstances of this case. Even on this short ground, both these appeals are liable to be dismissed.

22. For the foregoing reasons, O. Section As. Nos. 57 of 1965 and 13 of 1966 are dismissed with costs, one set. Advocate's fee Rs. 200.

C.M.Ps. Nos. 3508 and 3721 of 1966 are dismissed, but, in the circumstances of the case, there will be no order as to costs.