
(1972) 04 DEL CK 0016

In the Delhi High Court

Case No : Company Appeal No. 2 of 1972

Gokul Chand D. Morarka and Another

APPELLANT

Vs

Company Law Board and Others

RESPONDENT

Date of Decision : 17-04-1972

Acts Referred:

Citation : (1974) 44 CompCas 173 : (1972) ILR Delhi 369(2)

Hon'ble Judges : V.S. Deshpande, J; S.I. Rangarajan, J

Bench : Division Bench

Advocate : F.S. Nariman, B.R. Aggarwal, S. Pappu, B. Dutt, M.S. Ganesh, B. Rana, P.C. Khanna, Vijay Kishan, K.N. Kataria and J.K. Mehra, for the Appellant;

Judgement

S. Rangarajan, J.

(1) This judgment will dispose of Company Appeals Nos. 3, 4 and 5 of 1972 also. These appeals are against the common orders of the learned Company Judge of this Court dated 7th January, 1972 and 12th January, 1972, the latter flowing from the former. The facts leading to these appeals may be briefly noticed :

(2) The Ganesh Flour Mill's Co. Ltd. (hereinafter referred to as the Company) had its registered office in Delhi with an authorised capital of Rupees two crores divided into equity and preference shares. The issued capital was Rs. 1,02,01,925.00 out of which the subscribed and fully paid up capital was Rs. 99,42,333.00. The Company has two vanaspati manufacturing units, one in Delhi and the other at Kanpur; an electric fan plant and a Food Products Plant, both at Delhi; a Solvent Extraction Plant at Bombay and a Vegetable Products Factory and Flour Mill in West Pakistan. Except the Vegetable Ghee Plant at Kanpur, which is still running, the other factories of the Company were closed. On November, 1968 the Company was looked after by a Board of Directors whose Chairman was S. N. Gupta and Secretary & General Manager was Kripa Narain (who held this position since 1966). His brother Kishan Narain was the Manager of the Kanpur Unit.

(3) The Company had made: Rs. 8.39 lakhs profits in 1964-65; Rs. 5.67 lakhs losses in 1965-66; Rs. 9.67 lakhs profits in 1966-67, and a huge loss of Rs. 1 crore 25 lakh in 1967-68. The assets of the Company, comprise, in addition to the above-said factories, a piece of land in Sabzi Mandi measuring 5600 sq. yards, industrial land at Najafgarh roads measuring 3,000 sq. yards, land in Soiiepat (haryana) measuring 175 bighas (out of which 145 bighas are under acquisition) and a small plot of .084 acres at Kanpur.

(4) Inspection, made in 1969 (under section 209(4) of the Companies Act) of the accounts and other papers of the Company, is stated to have revealed following among other features. The Company was obliged to borrow moneys which were not entirely used for its business; the Secretary-CM/n-General Manager, who was allowed to maintain a personal account with the Company, made over-drawals right from 1962-63 which stood at Rs. 12 lakhs at the end of December. 1968 (the other managerial staff also made over-drawals). The Company borrowed money at high rates of interest which were being allowed to be used by Kripa Narain, his brothers and other officials at nominal rates. The Company was even unable to lift its allotted quota of soyabean oil for want of liquid funds; raw materials were purchased at higher than competitive market prices.

(5) Towards the end of 1968. Kripa Narain approached G. D. Morarka for loans which were ultimately made available by Messrs Belapur Company Limited (hereinafter called Belapur) and Messrs W. H. Brady and Company Limited (hereinafter called Brady). Messrs Armstrong Smith Limited (hereinafter called Armstrong) and Shakti Trading Company (P) Limited (hereinafter called Shakti) were appointed to assist the Company in its sales and purchases at Kanpur on payment of commission at 3/4 per cent on Kanpur sales and purchases: Brady was to assist, on a commission of 3/4 per cent, on all sales and purchases at Delhi. After payments of these commissions the margin of profit, which is already small, is said to be much further reduced. All these companies are said to be the concerns of Morarkas, which have been compendiously referred to by the learned Company Judge as the "Morarka Group". The Morarka Group along with its Directors, Satya Narain Gupta and Om Prakash. are stated to have established a complete strangle-hold on the Company: some of its Directors left while some others, said to be nominees of Morarka Group (A. S. Nariman, Ganga Prasad, K. Morarka and S. K. Diwanii) were brought on the Board. The disbursements and receipts of the Company were made subject to the approval of A.S. Nariman or any of the nominees of Brady or Belapur. The borrowing of the Company further increased in 1968-69 and 1969-70. The Morarka Group is also stated to have purchased shares of the Company in contravention of Section 372 of the Companies Act.

(6) On 24.3.1969 the Company created a charge on its land and buildings in favor of Belapur and Brady as security for the payment of the loans advanced by them. The appointment of Brady, Armstrong and Shakti, as selling agents, is also said to be in contravention of Section 294 of the Companies Act. The Company

had a liability to pay Rs. 10 29 621.00 less income tax, as interest, and Rs. 3532,323.74 as commission payable to Bradv. Armstrong and Shakti as against a sum of Rs. 40 lakhs received as short term loans from Belapur and Brady. On account of the poor financial position of the Company it was proposed to issue second debentures of Rs.95 lakhs to get additional finances for liquidating the Company's debts and provide funds as working capital. Sanction to the Contioler or Capital Issues was ob ained from lime to time; the Company was authorised to issue debentures to corporate bodies, individuals and financial ins intuitions through private negotiations. the Company, instead, issued debentures to the face value of Rs.95 lakhs to Beapur, Armstrong and Brady, as collateral security for the repayment of the loan to Rs.30 lakhs and oi Rs.10 lakhs, obtained from Beapur and Brady, respectively, interest thereon and all the commissions payable as noticed above on purchases and sales. The net position was that the initial loan of Rs. 40 lakhs swelled to Rs. 95 lakhs during the short period of 18 months. The Company was released from the mortgages, but all its assets were mortgaged with two members of the Morarka Group the trustees for the debenture holders, who were to be paid remuneration, as decided upon by the Board of Directors. Clause 10 of the trus deed empowered the trustees to enforce the securities on the happening of any of the events enumerated therein; very wide powers were conferred on the trustees. This was regarded by the Company Law Board as a fraud upon the Company and a device to take away the valuable assets of the Company of more than Rs.2 crores for a paltry sum of Rs.40 lakhs which was advanced to the Company as loan.

(7) On 2-11-1970 Kripa Narain died. Thereupon his brother Kishan Narain was appointed as Secretary of the Company. The Company had been unable to deposit the con"tributions either of the employer or of the employees towards the Provident Fund and Employees State Insurance. It had not paid wages to the workers regularly. The outs" anding liability on account of wages and bonus alone amounted to Rs. 1,01,600.00 on 31-12-1970. The Company had not even paid income tax which was deducted from the salary of the staff. The outstanding liability on account of sales tax was Rs. 27,79,900.00. Huge loans had been taken from various other parties and Banks and huge payments had to be made to customers. supliers and other parties. There was no liquid fund lo meet these liabilities.

(8) On 22-3-1971 the Company had stopped production of their vanaspati factory at Delhi and laid off more than 250 workers from that date. On 18-5-1971 the Maharashtra State Finance Corporation, in whose favor a deed of mortgage was executed by the Company on 10-1-1964 to secure Rs. 12 lakhs, had called upon the Comoany to repay the loan which by then amounted to Rs. 13.50 lakhs. On 25-5-1071 the National & Grindlays Bank had filed a suit in this Court to enforce their claim against the Company, in the sum of Rs. 10.41 lakhs, which had been secured by equitable mortgage. In May and June 1971 all the Directors of the Company except Ganga Prasad Morarka had resigned.

(9) It was in these circumstances that Company Petition No. 43 of 1971 was filed by two creditors on 10-6-71 for winding up the Company alleging that Rs. 10.87 lakhs were due to those creditors by the Company who had not paid the money in spite of statutory notices having been given. On 16-6-1971 the Company Law Board filed Company Petition No. 45 of 1971 under Sections 397 and 398 of the Companies Act and on the same day C.A. 254 of 1971 for certain interim reliefs was filed. On 17-6-1971 an ex parte order was passed (1) restraining the Company from disposing of its assets and (2) restraining the debenture trustees from enforcing their rights. On 15-7-1971, C.A. 269 of 1971 was filed by G. U. Morarka to order sale of certain stocks. On 6-8-1971 there was an order for sale of stocks to pay wages subject, however, to the rights of the National & Grindlays Bank. The Bank refused to implement the order which, therefore, became infructuous. C.A. 323 of 1971 dated 14-8-1971 was filed u/s 442 of the Companies Act by Belapur for stay of Company petition 45 of 1971 and all proceedings therein and for vacating and interim orders including the one dated 17-6-1971, restraining the debenture trustees from enforcing their right and their debenture deed. On 19-11-1971 Company petition 89 of 1971 was filed by 125 shareholders under Sections 397 and 398 of the Companies Act. On 3-11-1971 a preliminary mortgage decree was passed in favor of National & Grindlays Bank giving six months time for execution. On 10-11-1971 Company petition 86 of 1971 was filed by the Central Bank of India Ltd. for winding up the Company and claiming a sum of over Rs. 3 lakhs which remained unpaid by the Company.

(10) The petitions for winding up are still pending. The learned Company Judge heard Company Application Nos. 254 and 323 of 1971 together and passed common orders in both of them. In the former relief was restricted to prayers (a) and (b), viz., removal of Director and constitution of a Board to manage the Company. On 10-9-1971, without prejudice to the rights of the parties, a feasibility report was required to be filed. The same was filed by Krishan Narain on 1-10-1971. The report was that the Company was in a position to meet its liabilities, that funds could be raised by sale of assets and the scheme could be worked under which creditors would receive payments after some time. The learned Company Judge passed an order on 7-1-1972 holding that the financial position of the Company was bad and that it had no liquidity of funds. He was of the view that it would be in the interest of all concerned if the Company were allowed to effect sales of other assets except the Kanpur unit, which alone was working and profitably too. Despite the finding that the Company's interests were being conducted prejudicially since vanaspati was an essential commodity and the rights of the shareholders would also be prejudiced by winding up the Company, the prayers (a) and (b) in Company petition 254 of 1971 were granted. This was followed up, on 12-1-1972, by an order constituting a Board consisting of (1) Shri Jindra Lal, retired Judge of the Punjab & Haryana High Court, (2) Shri C. M. Narayanan, Additional Director of Inspection, Department of Company Affairs, and (3) Shri Virendra Prakash, Commissioner of Food and

Supplies. Delhi Administration. Shri Jindra Lal was to act as the Chairman of the Board and he was directed to remain in direct touch with the day to day "administration of the Company. Messrs P. K. Chopra & Co. were appointed internal auditors of the Company and they were required to station one of their officers at Kanpur. The internal auditors as well as the Secretary were to report to the Chairman, who was to keep the Board informed of the Company's affairs. The Board was to meet once a month. The Board had also to prepare a report showing which of the units or other assets of the Company could be immediately disposed of taking into consideration the agreement already stated to have been concluded for the sale of the Solvent Extraction Plant in Bombay.

(11) Preliminary objections have been raised concerning the maintainability of these appeals. It was stated during the arguments, but not in the Memoranda of Appeal, that these appeals were maintainable both u/s 5(1) of the Delhi High Court Act and u/s 483 of the Companies Act or in the alternative either of these provisions. It is also urged that a single appeal against the orders conjointly passed in Company Application 323 and 254 of 1971 was not enough.

(12) The second objection may be disposed of first. It is seen that four appeals have been preferred (C.A. Nos. 2 to 5 of 1972) by G. C. D. Morarka and another, Ganga Prasad Morarka, Brady and Belapur. ^ Each one of these appeals is expressly against the common orders passed in both the above-said applications. C.A. 3 of 1972 is against that part of the order (passed in Company Application 254 of 1971) removing the appellant from the Directorship. The other three appeals are against the reliefs granted in Company Application 323 of 1971. Apart from the format of the order being a common one (in both the said Company Applications) Shri Nariman stated that Company Application 3 of 1972 may be taken as that preferred by the Director against that part of the order removing the Director and the other three appeals as against the order and decision in Company Application 323 of 1971. This preliminary objection is, Therefore, without any force.

(13) The learned Company Judge dealt with reliefs (a) and (b) alone in Company Application 245 of 1971, among the other reliefs which were also prayed for; in other words, those two reliefs alone were argued at the time of the hearing. Those two reliefs, it is worth repeating, pertain to the removal of the Director who continued on the Board and the Constitution of another Board for looking after the affairs of the Company. Company Appeal No. 3 of 1972 is thus against the order removing Ganga Prasad Morarka from Directorship. Section 483 of the Companies Act provides for appeals from any order made, or decision given, in the matter of the winding up of a company; these appeals lie to the same Court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction. It is clear that any order decision made by the Company Judge in the matter of winding up of a company is appealable. The latter part of Section 483 deals with the forum of appeal; the Forum of the appeal will be the

Court to which appeals lie from any order or decision of the Company Court in cases within its ordinary jurisdiction.

(14) The preliminary objection concerning the maintainability of these appeals has, Therefore, to be considered from two angles, namely, (1) whether the impugned order has been passed by the Company Judge in the matter of winding up, (2) whether even independently of Section 483 an appeal would lie, to a Division Bench of this Court, under section 5(1) of the Delhi High Court Act (26 of 1966) which specifically provides that the High Court of Delhi shall have all such original, appellate and other jurisdiction, as under the law in force immediately before the appointed day, exercisable in respect of the said territories, by the High Court of Punjab.

(15) It was contended by Smt Shyamla Pappu, learned counsel for the Company Law Board, that orders passed on an application under Sections 397 and 398 of the Companies Act are not orders pertaining to or made in the matter of winding up of the company. Section 397 and 398, she urged, are included only in Chapter VI (Part VI) of the Companies Act which deal with prevention of oppression and mismanagement whereas provisions relating to the winding up occur in Part VII (Chapter 1) commencing from Section 425 onwards. In order to appreciate this argument it is necessary to notice the specific provision made by Section 397(2) (a) & (b) that if the Court is of the opinion, while considering an application u/s 397, that the Company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any "member or members, even though facts exist which would otherwise justify the making of a winding up order it may make an order other than that of the winding up with a view to bringing to an end the matter complained of; both Section 397(2)(b) and 398(2) empower the Company Judge, in such a context to make such order as he thinks fit. The powers of the Court, seized of an application under Sections 397 or 398, have been mentioned in Section 402; they are without prejudice to the generality of the powers of the Court under Sections 397 or 398. Among others, the Court may order the regulation of the conduct of the Company's affairs in future and terminate or set aside any transfer or other act relating to property made or done by or against the Company within three months before, the date of the "application, which would, if "made or done by or against an individual be deemed in his insolvency to be a fraudulent preference. Section 402(g) enables the Court to provide for any other matter (other than those enumerated) for which, in the opinion of the Court, it is just "and equitable that provision should be made.

(16) A company could be ordered to be wound up in circumstances which have been mentioned in Section 433. It was noticed that at the time when the impugned orders were passed applications (in addition to C.P. 43/71, along with two others Cps 74 and 86/71) for winding up the Company had also been presented and were pending. Section 442 may also be read at this stage :

"At any time after the presentation of a winding up petition and before a winding up order has been made, the company, or any creditor or contributory, may- (a)

where any suit or proceeding against the company is pending in the Supreme Court or in any High Court, apply to the Court in which the suit or proceeding is pending for a stay of proceedings therein; and (b) where any suit or proceeding is pending against the company in any other Court, apply to the Court having jurisdiction to wind up the company, to restrain further proceedings in the suit or proceeding; and the Court to which application is so made may stay or restrain the proceedings accordingly, on such terms as it thinks fit".

(17) It is thus clear that the reliefs pertaining to the stay of proceedings against the company may be obtained by any person after a petition, for winding up has been presented; such an order either granting or refusing stay of any proceeding against the company would obviously be one passed in the matter of winding up of the company.

(18) The Madras High Court had to consider the question whether a scheme u/s 153 of the Companies Act, 1913 (present Section 391) which provided for an alternative mode of winding up of unregistered companies was a provision with respect to winding up within the meaning of Section 271 of the Act of 1913 (present Section 483). The following observations of Venkataramana Rao, J. in *re Travancore National and Quilon Bank, Ltd.* AIR 1939 Mad 318 occurring on page 327, column 2, are helpful and may be set out:

"under section 271, all the provisions of the Act with respect to winding up would apply to an unregistered company and a provision to avert a winding up will be a provision with respect to the winding up. A scheme under S. 153 provides an alternative mode of winding up and it cannot be doubted that S. 153 being a general law as to winding up is as much applicable to the winding up of a foreign company and the corresponding Section of the English Act has always been employed to give effect to a scheme of compromise already arranged in a simultaneous winding up abroad .

(Emphasis added)

(19) The meaning of the expression "in the matter of" is stated in the Concise Oxford Dictionary to be "as regards". The expression "matter" occurs in the Act in varying contexts. Section 10 states that the Court having jurisdiction under the Act will be the High Court which has jurisdiction in relation to the place where the registered office is situated except to the extent a District Judge exercising jurisdiction in regard to matters falling within the scope of his jurisdiction. Section 2(1)(a) defines "Court" as meaning "with respect to any matter relating to a company (other than any offence against this Act) the Court having jurisdiction under this Act with respect to that matter relating to that company, as provided in Section 10". The "total voting power" "in regard to any matter relating to a body corporate, means the total number of votes which may be cast in regard to that matter on a poll at a meeting of such body" (Section 2(48)). In the case of an unlimited company the Articles should, according to Section 27(3), contain provisions "relating to matters specified"; according to proviso to Section

43ACI) even after a private company becomes a public company its Articles may include provisions relating to "matters specified". Proviso to Section 29 enables a company, not limited by shares, to provide for "additional matters". The certificate on incorporation given by the Registrar shall be conclusive evidence, as per Section 35, that all requirements of the Act have been complied with in respect of registration and "matters precedent and incidental thereto". Provisions in Prospectus or Statement in lieu of it (Sections 5(3) and 44(2)) shall state "matters specified". The books of account of a company have to be kept with respect to all sums of money received and expended and the "matters in respect of which the receipt and expenditure take place" (Section 209(i)(a)). The balance sheet and the profit and loss account shall not be treated as not disclosing a true and fair view of the state of affairs merely by reason of the fact that they do not disclose "matters" not required to be disclosed etc. Section 211(5) (v); failure to take reasonable steps to secure compliance by the company as respects accounts laid before it in general meeting with the provisions of Section 211 and other requirements of the Act as "to the matters to be stated in the accounts" is made punishable by Section 211(7). Section 212(5) requires information to be attached to balance-sheets on certain "matters".

(20) Section 441 states that winding up will be deemed to have commenced when a resolution has been passed for voluntary winding up before the presentation of a petition for winding up. The terms of Section 483 have been already noticed; it employs the expression "in the matter of winding up". In addition to the powers conferred by Section 641 on the Central Government to alter Schedules of the Act; Section 642 enables it to make rules "for all or any of the matters which by this Act are to be, or may be, prescribed by the Central Government". Section 643 (1) (a) enabled the Supreme Court to make rules "providing for all matters relating to winding up" in respect of "itself" as may be prescribed, except those reserved to the Central Government; sub-section (3) provides that until the Supreme Court makes such rules all rules made by the High Court on the "matters" referred to in that section at the commencement of the Act (65 of 1960) shall continue to be in force.

(21) Rule 4 of the Companies (Court) Rules, 1959, framed by the Supreme Court, states that every proceeding shall be entitled "in the matter of the Companies Act, 1956" and "in the matter of the company to which it relates". Form No. 1, framed in accordance with Rule 4, also uses both the said expressions.

(22) It is thus seen that expressions "matter", "matters" or "in the matter of" wherever they occur are of the widest amplitude. We see no force in the contention of Smt. Pappu that orders passed under Sections 397 and 398 of the Companies Act to avoid a winding up are just the contrary of those passed in the matter of winding up and hence cannot fall within the ambit of the expression "in the matter of". It seems to us that the entire scheme and legislative purpose of the Act does not warrant such a limited construction. The contention that the

main orders were not passed in the matter of winding up is without substance for two reasons : firstly, any order passed u/s 397 or Section 398 is one which is passed in lieu of winding up and hence it is obviously in the matter of winding up. Secondly, the orders passed in Company Application 323 of 1971 expressly falls within the scope of Section 442 as the impugned orders had been passed after at least two applications had been filed (not by the Company Law Board but by others) for winding up the company.

(23) Once it is seen that the impugned orders in this case came within the ambit of the expression "in the matter of winding up" there is no further impediment to the maintainability of any of these appeals. Our attention has been invited to the decision of the Supreme Court in *Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others*, wherein Section 202 of the Companies Act, 1913 (corresponding to the present Section 483) was considered. It was held that any judicial order, as distinct from an administrative one, was appealable if it was passed in the matter of winding up of the company. The Supreme Court was concerned in that case with the refusal by the Division Bench of the Calcutta High Court to confirm a sale by liquidators of the assets of a company which was being wound up. The view of Chagla C.J. in *Bachharaj Factories Ltd. Vs. Hirjee Mills Ltd.*, that even an order passed by the Company Judge refusing to wind up the company and adjourning the petition after hearing it on merits to a future date was appealable u/s 202 of the Companies Act, 1913, was approved. It was held by Chagla, C.J. that the first part of the section conferred a substantive right of appeal upon a party aggrieved by an order made or a decision given by a Company Judge in winding up. The second part of the section did not in any way cut down or impair the substantive right already conferred by the first part; it only dealt with the manner and the conditions in which an appeal could be preferred, namely, the procedural aspect of the appeal and the forum to which the appeal lay. The Supreme Court, approving the view of Chagla, C.J., observed that the above section conferring a right of appeal was very wide and excluded only merely procedural orders or those which did not affect the rights and liabilities of the parties.

(24) A Full Bench of Five Judges of this Court (to which we were parties) in *University of Delhi & Anr. v. Hafiz Mohd. Said and Anr. (F.A.O.) (OS) 6 of 1968*, decided on 2nd March, 1972) (4) left in tact the position as it existed under the Letters Patent (Punjab) prior to the passing of the Delhi High Court Act. The Full Bench confined itself to the questions falling u/s 5(2) of the Delhi High Court Act and held that in view of the special position of Delhi, where the ordinary original civil jurisdiction previously exercised by subordinate courts has been brought within the ordinary civil jurisdiction of the High Court (with reference to suits of certain pecuniary value) only orders from which appeals lay under Order 43(1) of the CPC from decisions made by civil courts would be appealable even where a single Judge of this Court passed such orders in the exercise of ordinary civil jurisdiction.

(25) In *State of Uttar Pradesh Vs. Dr. Vijay Anand Maharaj*, the Supreme Court considered the expression "judgment" under Cl. 10 of the Letters Patent of the High Court of Allahabad, corresponding to Cl. 15 of the Letters Patent of the High Courts of Calcutta, Bombay and Madras. The cleavage of judicial opinion between the various High Courts was noticed. It was only observed that the definition given by the Madras High Court was wider than that given by the Calcutta and Nagpur High Courts but it was not considered necessary to attempt to reconcile the said decisions. The question turned for consideration before the Supreme Court was whether an appeal would lie against the order of a single Judge of a High Court rejecting an application for review (under the provisions of the U.P. Agricultural Income Tax Act, 1948, to which applied to the said case); it was held that an appeal lay.

(26) In *the Union of India (UOI) Vs. Mohindra Supply Company*, the Supreme Court held that Section 39 of the Arbitration Act codified the law relating to appeals and had made a deliberate departure from the previous law and hence no appeal could lie by invoking Cl. 10 of the Letters Patent (Punjab). In other words, an appeal which otherwise lay under Cl. 10 of the Letters Patent of the High Court from a decision of a single Judge would be curtailed by a specific provision of an enactment like what was noticed namely, the Arbitration Act (even Section 104 of the Code of Civil Procedure). The same was the case under the provisions of the Delhi Rent Control Act *South Asia Industries Private Ltd. Vs. S.B. Sarup Singh and Others*, . There is, however, nothing in section 483 of the Companies Act which takes away or curtails the right of appeal provided by Section 5(1) of the Delhi High Court Act and Cl. 10 of the Letters Patent (Punjab).

(27) As to what are the orders which would be appealable under the Letters Patent of various High Courts in India has been the subject of great debate in India. We consider it sufficient, for the purposes of this case, to refer the Full Bench decision of the Nagpur High Court in *Manohar Damodar Bhoot v. Baliram Ganpat Bhoot* AIR 1952 Nag 357. Hidayatullah, J. (as his Lordship then was) after an elaborate discussion summed up the position as follows :

"A judgment means a decision in an action whether final, preliminary or interlocutory which decides either wholly or partially, but conclusively in so far as the Court is concerned the controversy which is the subject of the action. It does not include a decision which is on a matter of procedure, nor one which is ancillary to the action even though it may either imperil the ultimate decision or tend to make it effective. The decision need not be immediately executable "per se" but if left untouched must result inevitably without anything further, save the determination of consequential details, in a decree or decretal orders, that is to say- an executive document directing something to be done or not to be done in relation to the facts of the controversy. The decision may itself order that thing to be done or not to be done or it may leave that over till after the ascertainment of some details but it must not be interlocutory having for its purpose the ascertainment of some matters or details prior to the determination of the whole

or any part of the. controversy".

(28) We are in respectful agreement with these observations. That the jurisdiction in respect of company matters has been conferred u/s 10 of the Companies Act can be no reason for holding that it is not the ordinary civil jurisdiction of the High Court. This question has been set at rest by the Supreme Court in *Jyoti Bhushan Gupta v. The Banaras Bank Ltd.* Air 1962 S.C. 405 Shah, J, speaking for the Supreme Court, observed as follows:

"THE jurisdiction to deal with the claims of companies ordered to be wound up is conferred by the Indian Companies Act and to that extent the Letters Patent are modified. There is, however, no difference in the character of the original civil jurisdiction which is conferred upon the High Court by Letters Patent and the jurisdiction conferred by special Acts. When in exercise of its authority conferred by a special statute of the High Court in an application presented to it as a court of first instance declares liability to pay a debt, the jurisdiction exercised is original and civil and in the exercise of that jurisdiction does not depend upon any preliminary step invoking exercise of discretion of the High Court, the jurisdiction is ordinary".

(29) A Division Bench of the Bombay High Court, consisting of Chainani and Tambe, JJ. held in *Balkrishna Mahadeo Vartak and Others Vs. Indian Association Chemical Industries Ltd.*, that an order made on an application, where the Court considered it necessary to protect the interests of the company and to see that its assets are not wasted on frivolous and unnecessary litigation, was an appealable order. In that case the appeal was filed against an order of a District Judge exercising jurisdiction under the Companies Act refusing to grant leave to certain persons to file a suit against the company and objection was taken that no appeal against such an order lay. According to Section 446 of the Companies Act when a winding up order is made no suit shall be commenced except by leave of the Court and subject to such terms that the Court may impose. The object of the section, it was pointed out, being to save the company, which has been wound up, from unnecessary litigation and to protect the assets for equitable distribution amongst its creditors and shareholders, no suit is possible against the company without obtaining leave of the Court after a winding up order was passed. Refusal to grant such leave, Therefore, is clearly an order or decision in the matter of winding up and hence subject to appeal. It was not a procedural order for it affected the valuable right to obtain relief by filing a suit.

(30) It seems needless, for the purpose of this case, to canvass in the abstract the further contention (based on the Full Bench decision of the Madras High Court in *Central Brokers Vs. Ramnarayana Poddar and Co.*, -but a contrary view, even here, has been taken by a Division Bench of the Calcutta High Court in *Jagannath Gupta and Co. Private Ltd. Vs. Mulchand Gupta*, raised by Smt. Pappu that a refusal to stay proceedings, as distinct from an order staying proceedings, could not be a judgment within the meaning of Letters Patent and hence could not come within Section 5(1) of the Delhi High Court Act. The

present case raises the question of applicability in matters relating to the winding up of a company where there is a special provision, namely. Section 442, enabling the Company Court to stay any suit or proceeding pending against the company (1) in the Supreme Court or in any High Court, or (2) in any other Court, after a winding up petition is filed but before it is ordered. In order to get over the difficulty thus caused by Section 442, Smt. Pappu urged that Section 442 itself would not apply to a secured creditor and Therefore a secured creditor could not take advantage of Section 442 and file an appeal against the impugned orders. Section 439(2) removed the disability, which previously existed, in the matter of a secured creditor filing an application for winding up. But this argument is of no avail since Section 439 (2) deems a secured creditor as a creditor within the meaning of clause (b) of sub-section (1) of Section 439. It will be helpful, at this stage, to read sub-sections (1) and (2) of Section 439:

"439(1)An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section,- (a) by the company; or (b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or (c) by any contributory or contributories; or (d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately; or (e) by the Registrar; or (f) in a case falling u/s 243, by any person authorised by the Central Government in that behalf. (2) A secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (b) of sub-section (1)".

(31) A still further contention, a much feebler one, of Smt. Pappu was that appeals may lie only within matters falling u/s 442(b) and not Section 442 (a) because there is an express reference to the Court having jurisdiction to wind up the company only in clause (b) and not in clause (a). The straight and easy answer to this contention is that the opening words of Section 442 enable an application to be made for stay of proceedings after the presentation of a winding up petition and before a winding up order and these words apply to both (a) and (b); not merely that the dichotomy is only concerning applications being made to (a) the Court where the proceedings, sought to be stayed, are pending and (b) the winding up Court. Company Appeals No. 2, 4 and 5 of 1972 are certainly appealable u/s 483; they directly come within the ambit of Section 442 also, namely, orders passed with reference to stay of proceedings against the company after presentation of a petition for winding up and before the passing of a winding up order. In the view we take (of Section 483 and its scope) even C.A. 3 of 1972, which is without doubt appealable u/s 483 of the Act, is also appealable u/s 5(1) of the Delhi High Court Act.

(32) The Supreme Court observed in *Shankarlal Aggarwala v. Shankarlal Poddar* (noticed above) that since the appeal lay in that case under the Companies Act, the question as to whether that order was also appealable under the Letters

Patent was not decided. In the present case since the impugned orders, removing the sole surviving Director and appointing a Board (and also restraining the secured creditors from enforcing the security) did affect the rights of the persons concerned the appeal (C.A. 3/72) lies also under clause 10 of the Letters Patent Constituting the High Court of Punjab.

(33) Smt. Pappu finally contended that the forum of the appeal is only the Supreme Court, if an appeal lies at all against an order passed by the Company Judge, and that it does not lie to a Division Bench of this Court. When an appeal lies u/s 483 of the Companies Act it shall lie to the same court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction. The view of Chagla, C.J. that the second part of the old Section 202 (corresponding to present Section 483) merely regulated the procedure to be followed in the presentation of the appeal, the period of limitation within which it is presented and the forum to which the appeal would lie, was approved by the Supreme Court in *Shankarlal Aggarwala*.⁽²⁾ In the force of it the contention of Smt. Pappu that the appeal could lie, if at all, to the Supreme Court and not to the Division Bench of this Court is without force. As was observed by the Supreme Court in *Union of India v. The Mohindra Supply Company* (cited above) (?) the fact that the High Court exercises jurisdiction in company matters under the Companies Act does not convert the jurisdiction exercised by the Company Judge into any other than ordinary Civil jurisdiction.

(34) In no view of the matter, Therefore, is there any substance in the objections raised regarding the maintainability of all or any of these appeals.

(35) Regarding the removal of the sole surviving Director it is stated by his learned counsel before us that he would not be aggrieved about the removal if a direction of the kind mentioned below is given. The kind of direction to be given was discussed at length at the bar and we consider that the following direction, to which no serious objection was raised by any of the parties, would meet with the requirement of the present situation. We direct that all decisions made by the Board in so far as they affect or are likely to affect the rights of the appellants as secured creditors will be made available to the debenture trustees or their authorised representatives subject to this further condition that if there is any information required by them, which the Board is not willing to give, they will be at liberty to apply to the Company Judge for directions in that regard. The question whether the sole surviving Director was properly removed by the learned Company Judge does not, Therefore, arise for consideration.

(36) The appellants point out that at least a great part of the debt due to the secured creditors is not disputed, but has on the other hand been positively admitted even in the petition filed under Sections 397 and 398 of the Companies Act. Hence the secured creditors are interested in the assets of the Company not being disposed of except in accordance with law, that is to say, by a proper resolution of the members of the Company and that it was not open to the

Company Judge to direct. independently, or by any other mode, sale of any portion of the assets of the Company. As we read the order of the learned Company Judge we are unable to find any particular direction directing the sale of any asset. The only observation bearing on this point seems to have been made in the following terms :

"IT would be in the interest of all concerned if the Company is allowed to effect sales in a proper and planned manner".

(37) It is not correct to say that the learned Company Judge has directed a sale of any particular asset of the Company. The learned Company Judge was only advertng to the need that seems to exist to find the necessary funds for running the Kanpur unit which is functioning and is economically viable. The learned Judge did not say-that is not how we understand his order-that any sale would be permissible except in a manner known to law. In view of the above contention of the appellants it is sufficient for us to clarify that any sale of any asset of the Company would not be effected merely by reason of anything stated in the impugned order dated 7-1-1972; if any such sale is found necessary the same will be dealt with and made according to law.

(38) It has been still further contended before us that by reason of the interim ex parte order which was passed on 17-6-1971 by Dalip Kapur, J. restraining the debenture trustees from enforcing their right which was neither made absolute nor vacated by the learned Company Judge while passing the impugned orders, it had become necessary for the debenture trustees in the appeal to pray for the said interim order being vacated. It seems to us that since the_ learned Company Judge has not dealt with this aspect of the matter and has not said anything about it he will consider this aspect of the matter and pass appropriate orders himself. It would not be appropriate for us in these circumstances to say whether the said interim order should be vacated or confirmed or modified since there has been no expression of opinion on this point by the learned Company Judge. We have also refrained from expressing any opinion on the merits of the several allegations pertaining to the validity of the debentures and creation of security; the learned Company Judge has himself not said anything concerning them.

(39) There has been no complaint made to us concerning the constitution or personnel of the Board. It was at one time suggested to us during the hearing that one of the secured creditors may also be on the Board of Trustees, but when attention was drawn to the fact that Shri Jindra Lal was made Chairman on the suggestion of all the parties this argument was not pursued further.

(40) In the result all the appeals (Company Appeals No. 2 to 5 of 1972), subject to the above clarifications, are dismissed but in the circumstances without costs.