

**(2014) 07 CAL CK 0099**

**In the Calcutta High Court**

**Case No :** CP No. 355 of 1997 and CA Nos. 145, 314 and 326 of 2009, 931 and 975 of 2010, 894, 945 and 1079 of 2011, 245 of 2012 and 453 of 2013

**In Re: Gourepore Co. Ltd. <BR> In Re: Jugal Kishore Yadav**

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**Date of Decision :** 14-07-2014

**Acts Referred:**

Companies Act, 1956 — Section 391, 391(1), 466, 466(1), 536(1)  
Sales of Goods Act, 1930 — Section 2(7)

**Citation :** (2014) 3 CALLT 387 : (2014) 5 CHN 379 : (2015) 1 WBLR 364

**Hon'ble Judges :** I.P. Mukerji, J

**Bench :** Single Bench

**Advocate :** Surajit Nath Mitra, Sr. Adv., Jishnu Saha, Joy Saha, Amitabha Ghosh, Sarbapriyo Mukherjee, Ruma Sikdar, Kedar Nath Yadav, Manju Agarwal, B. Mannot, P. Naskar, Ipsita Banerjee, Rudrajit Sarkar, S. Basu, S.C. Prasad, N. Bhattacharya, S. Dutta, Sutapa Sanyal, S. Banerjee, P.K. Tulsian, Suchismita Chatterjee, S.S. Roy, S. Dutta and A. Agarwala, Advocate for the Appellant

**Final Decision :** Dismissed

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## **Judgement**

I.P. Mukerji, J.—The company Gourepore Company Ltd was directed to be wound up, on 26th November, 1997, by an order of S.K. Sinha J. of this Court. It was at the instance of R.K. Garodia and company, in a winding up application (C.P. 355 of 1997). Several applications are before me for consideration. They have been made by various entities.

2. There is a company by the name of Ashray Vyapar (Pvt.) Ltd. It claims to have obtained assignment of the secured debts of the company towards Industrial Instrument Bank of India Allahabad Bank, Indian Bank and United Bank of India by Deeds of Assignment. This debt close to Rs. 50 Crores was allegedly acquired by Ashray for only about Rs. 9.5 crores. Now, they claim to be in the shoes of these secured creditors. Hence, they say they are the only secured creditor.

3. There is another company by the name of Hilton Vinimay (Pvt.) Ltd. It claims to have bought 32.46% of the paid up capital, of the company in liquidation i.e., 3,11,664 shares after the winding up order. On 25th August, 2011, Ashray

apparently entered into a Memorandum of Understanding with Hilton, as a result of which Ashray is today supporting the cause of Hilton to run the undertakings as a going concern.

4. The company, before liquidation had 3700 workers. They should still be on the rolls maintained by the Official Liquidator. They have six unions. The claim by the workers on account of their unpaid dues is around Rs. 11 crores. Hilton has entered into a Memorandum of Understanding with the workers, also on 3rd September, 2011. As a result of this their learned counsel, Mr. Sarbapriyo Mukherjee submitted that the workers were supporting Hilton to run the company.

5. Other companies and persons have also made applications for orders from this court convening meetings of creditors to consider their respective schemes of arrangement for revival of the company.

6. I will first briefly discuss the nature and scope of the applications before me which are for other reliefs but indirectly connected with the schemes for revival of the company.

1) Hilton Vinimay Pvt. Ltd. (C.A. 145 of 2009)

Hilton made an application on 25th February, 2009 for stay of the winding up order and for appointment of a Special Officer to transfer 3,11,664 equity shares allegedly purchased by them from the Poddar Group.

They also asked for prayers for calling a general meeting of the company for constituting the Board of Directors with the Special Officer as the Chairman, Directions, were also sought, on the Board of Directors to frame a scheme for revival of the company.

2) Hilton Vinimay Pvt. Ltd. (C.A. 326 of 2009)

This application was made by Hilton seeking orders from this Court for validation of 3,11,664 equity shares of Rs. 10/- each in the company, said to be fully paid up, purchased by them subsequent to commencement of winding up. This application has asked for consequential reliefs directing lodging of these shares along with the transfer deeds, with the Official Liquidator for registration thereof. These shares were claimed to have been purchased from Raghuvar Management Pvt. Ltd.

3) Hilton Vinimay Pvt. Ltd. (C.A. 314 of 2009)

This application was filed by Vinimoy for referring the matter back to the BIFR for considering the scheme presented by them and Ashray Pvt. Ltd. for revival of the Company.

4) Gourepore Jute Mill Shramik Union (C.A. 975 of 2010)

This is an application by the workers' union to intervene in the winding up petition C.P. 355 of 1997 for stay of order dated 26th November, 1997 and for

constitution of a Board of Directors.

5) Ashray Vyaapar Private Limited

This is an application by Ashray for liberty to provide watch and ward service to the assets of the company.

Provisions of Law:

Now, certain provisions of the Companies Act, 1956 have to be noticed.

The first is section 466(1). It is inserted below:

466. (1) The Court may at any time after making a winding up order, on the application either of the Official Liquidator or of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

7. The right to move the company court is vested in a creditor or a contributory. Under this section the court has the power, on an application by a creditor or a contributory, to stay the winding up proceedings, after a winding up order. The stay of proceedings is to be on such terms and conditions as the Court thinks fit and proper.

8. This section, in my opinion vests the court with the power of entrusting the management of the company (in liquidation) with a person or persons in whom it has confidence, by temporarily keeping the winding up in abeyance. This person or body of person could be asked by the court to run the business of the company, for a limited period of time. The court is to always supervise this activity. This kind of running of the affairs of the company after winding up can only be with a view to its revival. The court should constantly watch this new organisation and ascertain whether it is successfully reviving the company. If it does, by effectively paying off the creditors of the company, the court might eventually order setting aside of the winding up order and entrust its affairs in such hands as it thinks fit and proper. If the Court finds, after a specific period of time that this person or body of persons is unable to revive the company, it might vacate its order staying the winding up and order that the winding up of the company be carried out (see Mahabir Prasad Agarwalla v. Ashkaran Chattar Singh reported in 85 CWN 567 at 581, 582).

9. Another section which was cited, was section 391(1) and (2) of the said Act. It is inter alia in the following terms.

391. (1) Where a compromise or arrangement is proposed--

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up of the liquidator; order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed [under the rules made u/s 643], by, proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors] all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company.

10. This section is about a compromise or arrangement between a company and its creditors or a company and its members. In the case of "a Company which is being wound up" the liquidator is to make an application to the Court to convene a meeting of either of these classes. Ordinarily, any decision taken by 3/4th of the creditors or the members, the percentage being the percentage of share holding value on that date, would be binding on all members of the class taking the decision and the company. For example, a decision taken by a body of creditors would be binding on the company and its creditors whereas such a decision taken by the members would be binding on the company and its members. This binding effect would be subject to sanction by the Court. In the case of a company which is being wound up, it would be binding on the company and its contributories.

11. There is no question of invocation of section 391 of the Companies Act, 1956 because the Official Liquidator has not come up with any application requesting the court to convene a meeting of creditors or members of the company. This section makes it explicit that in the case of a company being wound up a meeting can only be convened at the instance of the Official Liquidator. The section does not say that an application may be made by the Official Liquidator "also". It just says "Official Liquidator", so as to exclude all other persons including creditors and contributories (see S.K. Gupta and Another Vs. K.P. Jain and Another,

12. The other important provisions cited by learned counsel were section 536(1) and (2). They are in the following terms:

536. (1) in the case of a voluntary winding up, any transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void.

(2) In the case of a winding up by or subject to the supervision of the Court, any disposition of the property (including actionable claims) of the company, and any

transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void.

13. The Official Liquidator has filed a most responsible written submission to supplement the submissions of Mrs Sikdar, learned advocate, which is noted at this stage.

14. Industrial Security Agency was engaged by the four secured creditor banks to provide security service. The Official Liquidator acknowledges that these banks have left after assigning their debts in favour of Ashray. It appears from the letter of the agency dated 30th June 2011 that a sum of Rs. 3,77,429.31 is outstanding. The Official Liquidator refuses to pay this outstanding for inter alia the reason that he has no funds. Ashray has agreed to bear the security expenses w.e.f. 1st April, 2014. However in the notes of submission he says that his office has paid a sum of Rs 65,58,300/- towards security expenses for the period from 12th January, 2009 to February, 2014. Further, expenses have been made by the Official Liquidator, aggregating to Rs. 68,47,775 in the whole. This sum has been spent from the funds of the Official Liquidator received from the Central government for establishment expenses which is liable to be reimbursed to him.

15. As per the last balance sheet of the company its liability is Rs. 8,14,02,556, including a secured loan of about Rs. 7 crores and unsecured loan of about a crore.

16. The only creditor to have filed its claim before the Official Liquidator, according to his notes is the Provident Fund, authority in the shape of an affidavit of proof of debt.

#### THE SCHEMES

17. The question now is whether this Court should exercise its powers u/s 466 of the said Act.

18. For invocation of powers under this section one has to be a creditor or a contributory.

19. No doubt, there is a considerable body of authorities which says that the court must make a genuine effort, in appropriate cases, to revive or restart a company in liquidation. The object of this exercise is to restore the source of livelihood to the hundreds of workers who have been thrown into unemployment, to restart a stopped industrial activity or a manufacturing process, and to pay off creditors out of the profits of a running business. There is also a belief that industrial undertakings in a state must not shut down by winding up of companies. They must grow and the shut ones should reopen. All this would directly or indirectly result in industrial growth and prosperity for the state.

20. More often than not, after a winding up order is made in relation to a

company, the court is moved with applications by various persons containing proposals for revival of the company in liquidation. Applications are often made by unscrupulous persons with promises to revive the company but without the intent, financial resources and expertise to do so. Once such a person is inducted by the court to reopen a closed enterprise and that person turns out to be a fraud or an incapable person, it becomes a very difficult task for the Court to evict him and restore the status quo ante. In the months or years he is in charge of the affairs, he does no good to the company of its workers other creditors, contributories so on.

21. Hence, the court is given a very onerous task of screening these applications, considering some of them and taking the decision whether to handover the reins of the company to a person or enterprise.

22. Now, let me analyse the merits of the applications for convening meetings of creditors to accept their schemes for revival of the company. I will consider the locus standi issue later.

1) Hilton Vinimay Pvt. Ltd. (C.A. 894 of 2011)

23. The applicant allegedly acquired after winding up of the company, 3,11,664 equity shares of Rs. 10/- each of the company in liquidation from the "Poddar Group". As a result of the winding up order the applicant has not been registered in the register of members of the company as the owner of these shares.

24. The workers are in favour of reopening of the company. They are about four thousand in number. The workers have extended support to the applicant.

25. The applicant has entered into an agreement with the principal trade unions on 3rd September, 2011. The applicant prayed for acceptance of their scheme of rehabilitation which is annexure "I" to the application and constitution of an interim board to manage the company, by this Court.

26. The Scheme has some special features. There is a so called Memorandum of Understanding dated 25th August 2011 between Hilton and Ashray. According to this document after the sanction of the scheme of Hilton it will make a "down payment" to Ashray of a sum of Rs. 10 crores. Then it would make a further payment of Rupees 20 crores to Ashray within two months. Ashray would waive 90% interest; it would be allotted equity for the balance 10%. Then the scheme is appended to the application as annexure I.

27. The whole scheme and the agreement between Ashray and Hilton suffer from the same vice as the other schemes. No fund is immediately brought. There is no fund that is shown to be available to start the mill again. Tall promises are made to pay off the creditors, when there is no credible evidence regarding availability or generation of funds. What is even worse the so called promised down payment would go to Ashray, the collaborator of Hilton together with the subsequent payments.

28. The proposals contained in the scheme are mere dreams. There is no likelihood of their realisation. I reject the scheme outright.

2) Sprint Communication Pvt. Ltd and Pradeep Kumar Jhawar (C.A. 1079 of 2011)

29. The second applicant Pradeep Kumar Jhawar was described as an unsecured creditor of the company of the sum of Rs. 1,24,57,500/-. This debt allegedly arose on account of unpaid price of goods. The applicant company Sprint claims to be the assignee of the debt of one Dilip Kumar Maheshwari of a sum of Rs. 14,19,794.10/-. By the application Sprint prayed for convening of a meeting of the unsecured creditors of the company for the purpose of considering and if thought fit approving with or without modification the scheme of arrangement/compromise proposed by the scheme.

30. The least said about this company and its scheme, the better. It is evident from their balance sheet for the year ending 31st March, 2011 that the loan and advances obtained by the company is close to double its shareholders' funds and Reserve and Surplus combined. Its fixed assets after depreciation is less than Rs 10 lacs. It earned a slender profit of only Rs. 4,22,689.98, in the year ending 31st March, 2011 according to the Profit and Loss account for the same period.

31. They have stated in their submissions that they would borrow money from the market but would not charge the assets of the company. One wonders how much money they would be able to borrow on the basis of the above Balance Sheet and Profit and loss account. These applicants have not been able to bring any fund.

32. There are tall promises in the scheme of phase wise payment towards the liabilities of the company. There is nothing to suggest how this jute mill closed down for decades would be started. Nothing about how the static machinery would be set into motion again. One wonders from where the raw materials and other stock in trade would come, who would pay for them. If at all the mill is started, how much would be produced initially, how much when, is not started in the scheme. Nobody has bothered to make a market survey or make a projection.

33. I do not even think it necessary to place this scheme before the creditors. It is so devoid of merit.

3) Sohanlal Chandanmull & Co. (C.A. 931 of 2010)

34. These four applicants claim to be unsecured creditors and want to be added parties in the winding up application. In the said application they have broadly supported the scheme of Hilton to revive the company.

4) Jupiter International Ltd. (C.A. 245 of 2012)

35. Kamal Kumar Patwari, the second applicant claims to be the constituted attorney of the first applicant company Jupiter International Limited. The second applicant is described as an unsecured creditor of the company. He is said to have delivered goods to the company on which his claim is said to be Rs.

4,11,061/-. The first applicant is described as an enterprise with great technical and financial resources. Its directors have a rich experience in the jute and jute products industry of over 40 years, it is claimed.

36. Its scheme sings the same tune as that of Sprint. No fund is infused into the company. Promises are made for payment of the dues of creditors. How the fund would come from and how such payment would be made is not even remotely suggested. No doubt the Profit and Loss Account of Jupiter International Limited is far more respectable than Sprint. It shows a profit of over Rs. 4 crores in the financial year ending 31st March, 2011. A sum of Rs. 27 Crores is carried over to the balance sheet taking into account profit carried forward from the previous year. However, the company has a loan fund of about Rs. 75 crores and a net block of over Rs. 25 crores.

37. The scheme is as bad as that of Sprint. It does not say how the raw-materials will come, who will start the machinery, how production is to commence and continue. It does not tell us anything about the market, sale and so on. The scheme only makes tall promises to the creditors for payment of their dues when no foundation on the basis of which these payments are promised, is disclosed.

38. There is nothing in the scheme to impress the Court.

5) Dolphin Vintrade Pvt. Ltd. and Rakhecha Trading Company (C.A. 453 of 2013)

39. This application is made by Dolphin Vintrade Pvt. Ltd. and Rakhecha Trading Company as applicants. They want an order from this Court convening a meeting of unsecured creditors for the purpose of considering the scheme of arrangement/compromise proposed by the applicants.

40. It is averred in paragraph-9 of the application that the second applicant is an unsecured creditor of the company. The debt of the company towards this applicant was Rs. 16,55,762/-. On 14th March, 2013 the second applicant has assigned Rs. 8,00,000/- of its claim to the first applicant. Hence, both are creditors of the company and have the necessary locus standi to maintain this application, it was submitted.

41. As rightly pointed out by learned counsel for some of the other applicants, the alleged deed of assignment is doubtful. It is on a Rs. 100/- non-judicial stamp paper. The second applicant has not been able to produce any document to establish their claim to the above debt. It has not applied before the official liquidator to adjudicate it.

42. If the claim of the second applicant is dubious, what could be said about the right of the first applicant which asserts an assignment of the said claim in its favour?

43. The first applicant has been able to show a slender profit of Rs. 19,583.50 for the period ending 31st March, 2012. I do not think that this company has any

fixed assets.

44. The scheme proposed by the applicant is equally unimpressive. No fund is brought into the company. Nothing is shown how the mill would be re-opened and run. There is no market survey, projection of sales etc., Only tall promises are made in the scheme, for payment to creditors.

45. This application is as bad as those made by the other applicants.

46. To sum up, I am not at all impressed with the schemes put forward in the applications. None of the schemes is bona fide because the essential elements of a bona fide scheme are lacking. There is no immediate infusion of funds into the company. If there is no infusion of funds into the company, in no way can the company start its operation. The promises in each of the schemes are at best a dream. You cannot expect to restart a company on borrowed capital because by trying to so restart the company you are creating more liabilities.

#### LOCUS STANDI

47. None of the applicants, who made applications for convening meetings of creditors for the purpose of consideration of their respective schemes for revival of the company, impressed me with regard to their locus standi.

48. The applicants who held themselves out to be the creditors of the company could not furnish any proof of the company's debt towards them. No evidence of supply of goods like delivery receipts, challans, contract papers etc between them and the company were produced before the court.

49. It is true that till today the Official Liquidator has not invited claims of creditors under Rules 147, 148(1) and 148(2) of the Companies (Court) Rules, 1959. Hence, there is no settlement of the list of creditors of the company by the Official Liquidator. Even otherwise, some evidence ought to have been produced by the creditors to support their claims against the company. Even the alleged assignment of debts is insufficiently stamped.

50. It was argued before me that a scheme, if supported by the secured creditors should be very appealing to the court. The workers tried to back the scheme of Hilton. Hilton was also supported by Ashray, the alleged assignee of the four secured creditors. These secured creditors seem to have assigned a debt nearly Rs. 50 crores owing to them by the company, to Ashray for a little over Rs. 9 Crores. The assignment certificate touches immovable property. It is strange how this assignment could be made without registration and without proper stamps. This assignment of debts in favour of Ashray by the four secured creditors is dubious in my opinion. No credence can be given to their support for Hilton.

51. Submissions were made before me that shares were goods u/s 2(7) of the Sale of goods Act. 1930. Possession of shares certificate was prima facie evidence of ownership of the shares, u/s 84, of the Companies Act, 1956. But this provision has got nothing to do with section 536(2) of the Companies Act,

1956 which makes it explicit that in the case of winding up any disposition of shares after commencement of winding up shall be void unless otherwise ordered by the court. If the transaction is void there is no value of the shares certificates. Neither can it be said that the property in the shares has passed. The transferee gets no title. Equally flawed is the argument that the transferors" in such cases are trustees for the transferees. If the transfer is void ab initio the relationship of trustee and beneficiary does not arise. Therefore, all these arguments fail.

52. I refuse to pass any order validating any transaction in shares of this company after commencement of its winding up.

53. None of the applicants with schemes has the locus standi to come before the Court.

54. Even on merits, none of the schemes presented before the Court, deserves any consideration, for the reasons given by me above. Each of the applications not disposed of earlier is dismissed. Any stay order on the winding up is vacated. I direct the Official Liquidator to proceed with the winding up of the Company with the greatest despatch, so that it is complete by 31st December, 2015 positively. Security service will continue to be ensured and its expenses continue to be borne by Ashray to be reimbursed by the Official Liquidator, treating the same as expenses of winding up, on a priority basis as and when funds are available. No order as to costs.

Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

LATER

Stay of operation of this judgement and order is prayed for by Mr. Rudrajit Sarkar, learned Advocate. Considering the fact that the winding up process has not even commenced and the winding up process takes a lot of time, there is no need for stay of the winding up. Such prayer is refused.