
(1980) 05 CAL CK 0003
In the Calcutta High Court

In Re. Sonajuli Tea and Industries Ltd. (in liquidation)

Date of Decision : 22-05-1980

Acts Referred:

Arbitration Act, 1940 — Section 21
Companies Act, 1956 — Section 173, 206, 256, 307(1), 391

Citation : 85 CWN 557

Hon'ble Judges : S.K. Roy Chowdhury, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.K. Roy Chowdhury, J.—This is an application u/s 466 of the Companies Act, 1956, by four contributories being Mahavir Prasad Agarwalla, Basu Deo Prasad Agarwalla both of 41, Iron side Road, Calcutta, and Anand Kumar Agarwalla and Rajendra Kumar Agarwalla both of 40, Iron Side Road, Calcutta alleged to be holding 121920 shares in the Sonajuli Tea & Indus fries Ltd. (now in liquidation) and also alleged that they constitute more than 30% of the total shareholding of the said company. It is alleged that their application is supported by the other contributories who hold balance 20% shareholding. The matter was exhaustively argued on behalf of the petitioners and by the creditors opposing the application particularly the creditor, Prem Chand Jute Mills Ltd., the lessor, whose Jute Mill the said Sonajui Tea & Industries Limited took on lease for a period of 30 years with an option to renew for a further period of 20 years on the terms and conditions contained in a lease deed dated the 14th of July, 1971.

2. Now, in order to appreciate the facts of this case as to whether the Court should exercise its discretion for stay, it is necessary to set out the relevant facts which will clearly show the conduct, intention and motive of the petitioners who are not only the contributories as aforesaid of the Sonajuir Tea & Industries Limited but are also the guarantors of the loans granted by the Punjab National Bank Ltd. to Sonajuli Tea and industries Limited for which a suit for the recovery of about Rs. 21,00,000/- has already been filed in this Court and leave of the Court u/s 466 of the Companies Act, 1956, has been obtained by the Punjab National Bank Ltd. and the Official Liquidator has been appointed Received over

the securities of the Punjab National Bank Ltd.

3. It appears that the owners of the mill being the Prem Chand Jute Mills Limited, Respondent No. 4 herein, for same reasons or rather has not been able to run the said mill and from 1958-1968 and the mill was leased out to one Kanoria and Company. Thereafter, by an alleged agreement for sale dated the 9th of November, 1968, between the petitioner No. 2, Basudeo Prasad Agarwalla as proprietor of Indian Burlup and Prem Chand Jute Mills Ltd was entered into for the sale of the said mill. As the said sale was not approved by the shareholders of Prem Chand Jute Mills Limited the same became void. Thereafter, by an indenture of lease dated the 14th of July, 1971, the said Prem Chand Jute Mills Limited as the lessor and the Sonajuli Tea & Industries Limited as the lessee, a lease was granted of the entire mill to the said company for a period of 30 years with an option to renew for a further period of 20 years and the rent for the first four years was fixed at Rs. 28,000/- per month and thereafter Rs. 32,000/- par month. There were recitals and various terms and conditions of the lease.

4. The relevant portion of the recitals and terms and conditions are set out hereunder :--

AND WHEREAS on the basis of an offer made by one Shri Basudeo Prosad Agarwalla carrying on business under the name and style of "Indian Burlup & Laminating Works" at, No. 8, Lyons Range, Calcutta-1 to purchase the said "Prem Chand Jute Mills" (hereinafter referred to as "the said Mills") the company on the 9th day of November, 1968, through its Board of Directors entered into an agreement with the said Basudeo Prosad Agarwalla carrying on business at No. 8, Lyons Range, Calcutta, for the sale of the said Mills to the said Basudeo Prosad Agarwalla on the terms and conditions and stipulation contained in the said agreement dated the 9th of November, 1968, and vested the management and working of the said Mills on the said Basudeo Prosad Agarwalla and delivered possession of the said Mills to the said Basudeo Prosad Agarwalla on the 11th of November, 1968, on the said basis and in terms of the said agreement dated 9th of November, 1968.

AND WHEREAS pending consideration of the said agreement dated the 9th November, 1968, by the company in general meeting the said company entertained a proposal of the lessee to grant a lease of the said Mills for a period of thirty years to the lessee with option on the part of the lessee for renewal of the lease for a further period of twenty years on the same terms and conditions and covenants contained herein.

AND WHEREAS the company by a resolution duly passed at an Extra ordinary General Meeting of the company held on the 10th day of March, 1969, sanctioned and gave its consent to the said Mills being leased out to the said lessee for the terms and on the terms, conditions and covenants contained herein.

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To hold the said demised premises for a term of thirty years with an option for renewal on the same terms as hereinafter contained commencing from the 31st day of May, 1969, YIELDING AND PAYING therefore unto the lessor the rents following namely first the rent of Rs. 28,000/- (Rupees twenty eight thousand) for each and every month for the first year and the second year of the said term and the rent of Rs. 30,000/- (Rs. thirty thousand) for each and every month for the third and fourth year of the said terms and thereafter the rent of Rs. 32,000/- (Rupees thirty two thousand) for each and every month for the fifth year and each succeeding years of the said terms with proportionate amounts for any part of a year all rents to be paid without any abatement or deduction on any account whatsoever and payable on or before the fifteenth day of the month immediately succeeding the month for which the rent becomes payable.

2. The lessee hereby covenants with the lessor as follows :--

(a) To pay the monthly rent on the day and in the manner aforesaid.

(b) To pay all the rents taxes and outgoings payable in respect of the said demised premises including the rent payable to South Eastern Railways in respect of the Railway plot No. 14 (Railway Siding).

(c) To bear and pay all expenses charges dues and other moneys whatsoever payable in connection with the business to be carried on by the lessee in the Mills premises including electric and all other power charges.

(d) To keep the said demised premises and every part thereof and all additions and improvements thereto in good and tenantable repair and condition and to keep the power plants boilers and all machinery pl-ants looms fixtures and fixed machinery and other apparatus in the demised premises in good working order (Damage by fire, tempest earthquake, air raid or any other force majeure and reasonable wear and tear being excepted) and to replace by suitable articles of similar type and manufacture all such parts thereof as shall become broken lost or wornout through misuse.

(e) To polish or clean or oil with lubricating oil of good quality the said plant machinery fixtures and other fittings at such intervals as is usual and customary so as to keep them clean and free from rust.

.....

(o) Not to transfer assign under let or sublet or part with the possession of or allow any person to use the demised premises including its buildings machinery and the vacant lands or any portion there of provided howsoever the lessee shall be at liberty to sublet the demised premises or any portion there of to any subsidiary company of the lessee on due notice to the lessor but always subject to terms, conditions and covenants contained herein and upon the lessee guaranteeing the due payment of rent and observance and performance of all other terms, conditions and covenants contained herein, and without in any way affecting the liability of the lessee under the lease provided further that the

lessee shall be at liberty to mortgage charge hypothecate or otherwise on number its right title and interest as lessee in the demised premises or any part thereof and or the products of Mills and all other store raw materials semi finished goods etc. In favour of any Bank or financial institution for raising money or for obtaining credit facilities for the purpose of the said Mills.

(t) To yield and deliver up peaceful and vacant possession of the demised premises together with all plants machinery fixtures fittings etc. in proper working condition (reasonable wear and tear excepted) at the expiration or sooner determination of the term hereby created after settling and paying all dues and claims of all the staff and/or employees and or employees and/or workmen employed and or working in the said Mills at the time and after discharging and paying all liabilities touching or concerning the said Mills such deeds claims and liabilities whether arising under any situation or otherwise and lawfully terminating the services of all such staffs employees and workmen as aforesaid.

PROVIDED ALWAYS AND IT IS HEARBY expressly agreed and declared by and between the parties hereto as follows :--

(i) If the rent hereby reserved or any part thereof shall at any time be unpaid for three consecutive months after becoming payable or if the lessee shall fail to perform or observe any of the terms and conditions herein contained and on the part of the lessee to be observed and performed or if any other compulsory winding up is made by a competent court or if any resolution is passed for any voluntary winding up or if the lessee shall suffer any distress or execution is levied in respect of its properties which remain in force for at least a month then and in any of the said cases it shall be lawful for the lessor at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall be absolutely determined.

(x) The lessee or in the event of the demised premises being sublet by the lessee to any subsidiary company of the lessee the rent lessee may mortgage charge hypothecate or otherwise encumber the right title and interest of the lessors in the demised premises namely, the mills or any part thereof in favour of any financial institution for raising money for the purposes of modernisation renovation rationalisation expansion and development of the mills on the terms conditions and covenants as may be approved and accepted will not be unreasonably withheld provided always that all such moneys are invested in the said demised premises for modernisation renovation rationalisation development and expansion of the said mills increasing the value of the said demised premises and or the said mills accordingly and the lessee shall sign and or execute all papers and documents as may be reasonably required by the lessee.

In the Schedule to the said lease, a list of the Jute Mill's machineries has been set out. The said lease was duly registered and signed by Satish Chandra Roy, a Director of the Prem Chand Jute. Mills Limited, the lessor, and Basudeo Prasad

Agarwalla, a Director of Sonajuli Tea & Industries Company Limited, the lessee.

5. It appears that the company Sonajuli Tea & Industries Company Limited was in financial difficulties and the winding up petitions also were started to be filed and first of such was filed by Prem Chand Jute Mills Limited in 1976 in which Sonajuli Tea & Industries Company Limited was directed to furnish security to the extent of Rs. 1,30,000/- and the Prem Chand Jute Mills Limited was relegated to a suit. The claims of Prem Chand Jute Mills Limited was for arrears of rent under the said lease. On the 13th of April 1977, a suit was filed by Prem Chand Jute Mills Limited against the company being Suit No. 211 of 1977 claiming Rs. 6,62,720/- as the arrears of rent from September, 1975 to March, 1977. On the 1st of October, 1977, a letter was written by Sonajuli Tea & Industries Company Ltd. to Prem Chand Jute Mills Limited to take possession of the said lease. By a notice dated the 15th of October, 1977, the said Sonajuli Tea & Industries Limited determined the lease with effect from 1st of October, 1977, and services of all the employees of the Sonajuli Tea Industries Limited were reverted to Prem Chand Jute Mills Limited and all liabilities and obligations were that of Prem Chand Jute Mills Limited. On the 17th of October 1977, Sonajuli Tea & Industries Limited filed a suit against Prem Chand Jute Mills Limited being Suit No. 676 for a decree of Rs. 1,53,40,000/-. The suit was filed on the understanding to pay the Court fees but no Court fees were paid and the writ of summons was not served till April, 1978. The suit was filed on the basis of the lease determined by Sonajuli Tea & Industries Limited by accepting alleged breaches of the terms of the lease by Prem Chand Jute Mills Limited. On the 9th of November, 1977, Prem Chand Jute Mills Limited gave notice to the Sonajuli Tea & Industries Limited, hereinafter referred to as the company (now in liquidation) that it was under no obligation to the said company (now in liquidation) under the said lease as alleged. By a letter dated the 17th of December, 1977, the company (now in liquidation) wrote a letter to Prem Chand Jute Mills Limited withdrawing the termination of the lease. Then again by another letter dated the 30th of December, 1977, the company (now in liquidation) withdrew withdrawal of termination of the lease. On the 18th of July, 1978, the alleged letter by the company (now in liquidation) confirming determination of the lease with effect from 1st of October, 1977. Then on the 23rd of November, 1978, an order in the suit filed by the company (now in liquidation) was passed against the said Prem Chand Jute Mills Limited to run the mill under the Receiver by the Prem Chand Jute Mills Limited and the said Receiver was appointed on the submissions of the company (now in liquidation) that Sonajuli Tea & Industries Limited was no longer in possession after determination of the lease. In January, 1979, second winding up petition was presented by the said Prem Chand Jute Mills Limited being Company petition No. 78 of 1979 claiming rent from April, 1977, to October, 1978, amounting to Rs. 6.08 lakhs and interest of Rs. 54, 720/-. In the affidavit filed by Sonajuli Tea & Industries Limited it was alleged, that the lease stood determined with effect from 1st of October, 1977. Therefore, no sum is payable since then on account of rent under the said Lease. On the 16th of May,

1979, a letter was received from Indian Burlup signed by the Basudeo Prasad Agarwal as B. P. Agarwal that they were entitled to run the mill of Prem Chand Jute Mills Limited. On the 10th of July, 1979, the second petition for winding up against Sonajuli Tea & Industries Limited by Prem Chand Jute Mills Limited was admitted by me by an order and judgment delivered by me on that date. On the 14th of July, 1979, another letter was written by Indian Burlup that they proposed to Work the mill. It may be noted that the said petitioner No. 2 in this application Basudeo Prasad Agarwal is alleged to be the proprietor of Indian Burlup. On the 25th of July, 1979 application by Prem Chand Jute Mills Limited for discharge Receiver and for possession on the basis that the lease was no longer valid or subsisting was made in the said suit filed by Indian Burlup and Sonajuli Tea & Industries Limited as plaintiffs against Prem Chand Jute Mills Limited being Suit No. 676 of 1977. On the 8th of August, 1979, in the appeal by Sonajuli Tea & Industries Limited from the said order of admitting the winding up petition and the Appeal Court granted a stay of advertisement till 13th of August, 1979, on condition of deposit of Rs. 50,000/- and on the 13th of August, 1979, stay continued and directions were given for filing affidavits. In the stay application in which Sonajuli Tea & Industries Limited inter alia alleged that the lease stood determined from 1st of October, 1977, and also stated that there was a lock-out declared with effect from 6th of April, 1977, and the mill was not working since then. Then on the 13th of August, 1979, a winding up order was made in C.P. No. 359 of 1978 being the winding up petition filed by another creditor Ashkaran Chattar Singh after the winding up petition advertised and appeared in the list for disposal. On the 10th of September, 1979, the winding up of the company (now in liquidation) was advertised according to the provisions of the Companies Act, 1956. On the 10th of September, 1979, the stay in the appeal from an order admitting Prem Chand Jute Mills Ltd.'s petition was vacated. On the 13th of September, 1979, appeal preferred by Sonajuli Tea & Industries Limited from an order of winding up dated the 13th of August, 1979, in the Company Petition No. 359 of 1978 an application for stay was made. Leave given by the Appeal Court to Prem Chand Jute Mills Limited to intervene in the said appeal and the application for stay. There was an order of stay by the Appeal Court till 19th of September, 1979. On the 19th of September, 1979 an order of stay was vacated as Sonajuli Tea & Industries Limited failed to comply with the conditions regarding deposit of certain amount and furnishing guarantee. On the 5th of November, 1979 the stay application of Sonajuli Tea & Industries Limited was dismissed for default by the Appeal Court in the appeal preferred from the winding up order dated the 13th of August, 1979, On the 6th of November, 1979 notice by M. P. Agarwal for Indian Burlup that the mill would be run. On the 14th of November, 1979, similar notice was issued by the petitioner No. 2, B. P. Agarwal. On the 19th of November, 1979, application u/s 466 of the companies Act made by Mahabir Prasad Agarwal for stay before the Appeal Court and a conditional order was passed which was made returnable on the 5th of December 1979. On the 5th of December, 1979, further conditions were imposed by the Appeal Court for continuance of the stay on submissions

made by Prem Chand Jute Mills Limited. On the 20th of December, 1979, a letter by Prem Chand Jute Mills Limited to Indian Burlup and on the 28th of November, 1979 reply by Indian Burlup to Prem Chand Jute Mills Limited. In December, 1979, Sonajuli Tea & Industries Limited preferred an appeal to the Supreme Court from the order dated the 5th of December, 1979, made by a Appeal Court directing Sonajuli Tea & Industries Limited to furnish security for the sum of Rs. 6,00,00/- by way of guarantee as a condition for stay. On the 14th of January, 1980, the said appeal in the Supreme Court was dismissed. On the 7th of February, 1980, an application made by the Prasad Agarwal was dismissed by Appeal by Appeal Court on the ground of not being maintainable and also on the ground of not being bonafide. I will refer to the said Appeal Court judgment while giving my reasonings in the order to be made in this application. On the 26th of November, 1980, the SLP to Supreme Court by Sonajuli Tea & Industries Limited was dismissed, end thereafter on the 25th of March, 1980, the present application was moved before me when I directed the application to be advertised in Statesman and Dainik Basumati within a fortnight from date and I also directed the Official Liquidator to file a report u/s 466(2) of the Companies Act, 1956, within 10 days and the matter was directed to appear in the list three weeks thereafter and directions were given to serve the summons with the grounds on the Respondents. Thereafter directions for filing affidavits were given and the creditors including the Prem Chand Jute Mills Limited who are the Respondents and the other petitioning creditors who have been made parties as Respondents appeared and also Jute Corporation of India one of largest creditor appeared before this court and opposed the application for stay.

6. Mr. Some Nath Chatterjee, appearing with Mr. P. C. Sen and Mr. Ranjan Dutta, for the petitioners, submitted after referring to the various paragraphs of the petition and the annexures that the opposing respondent Prem Chand Jute Mills Ltd., being the lessor only with a view to get possession opposed the present application. There is no dispute that a large sum of money has become due and payable by the company to the lessor on account of rent due under the lease but at the same time it is alleged that due to the breaches on the part of the lessor the company has suffered huge losses and, therefore, it has instituted a suit for, recovery of damages for over Rs. 1 crore. Mr. Chatterjee mainly argued on the question of recovery of a Sick Industry and submitted that already sufficient funds are lying with the Official Liquidator pursuant to the order of the Appeal Court and also lying with the Advocate on record of the company pursuant to the various orders of the Appeal Court. He also submitted that all the creditors set out in paragraph 41 of the petition would be paid or provided for and it is for the public interest and to secure, employment for the workmen, stay should be granted so that the company may revive and if necessary, frame a scheme for the working of the said company.

7. Mr. Sen also submitted that if the court is satisfied as to the bonafide of the applicants, it can grant a conditional stay for a limited period directing payment of the creditors or deposit in Court. He submitted that the Presidency Jute Mill

Limited who had been unable to run its factory since 1958 has originally agreed to sell the said mill together with machineries to the Indian Burlup Company, partnership firm of which the petitioner Nos. 1 and 2 are some of the partners and thereafter, as the sale could not be completed in view of violation of the provisions of the Companies Act, it granted a lease in 1971 in favour of the company, the said Sonajuli Tea & Industries Company Ltd., for a period of 30 years with an option of renewal on the terms and conditions set out therein. Now the said lessor the Presidency Jute Mill Limited is opposing the present application with the sole object of getting possession. He also referred to the order of the Interlocutory Court passed in the suit of the Sonajuli Tea & Industries Co. Ltd. (now in liquidation) authorising the said lessor Presidency Jute Mill Limited, to run the factory under the Receiver but the lessor has failed to do so as they have not the financial capacity and technical know-how to run the said mill. It is also alleged, that the said mill has been sub-let to one company which is denied by the said lessor as being contrary to the terms of the lease as no such notice of alleged sub-lease was ever served on the lessor which is an admitted position. Mr. Sen submitted that the said Presidency Jute Mill Limited, the lessor, is trying to get the assistance of the Court to get possession of the jute mill by making an application u/s 535 of the Companies Act, 1956. He submitted that the whole basis of the application for winding up by the Presidency Jute Mill limited is on the basis of the arrears of rent being a debt and as such, the relationship of the lessor and the lessee is admitted and therefore, the unexpired portion of the lease is a valuable assets of the company (in liquidation) and as such, cannot be given up for the interest of the creditors and the contributories. He submitted that the contention of the lessor is the alleged termination by the company (in liquidation) of the said lease is wrongful and illegal and therefore, the same is subsisting. He further submitted that the motive and purpose of opposing the present application in paragraph 48 of the affidavit-in-opposition filed on behalf of the Presidency Jute Mill Limited by one Amar Nath Roy, a Director, makes it quite clear that the whole purpose is to get possession of the jute mill and the disclaimer application is also pending against the company (in liquidation). Mr. Sen submitted that the discretion u/s 466 should be exercised and for that purpose the application u/s 535 by the lessor, the Presidency Jute Mill Limited, is a relevant factor to be considered. He submitted that the conditional stay u/s 466 as specified in the last portion of section 460(1) of the said Act may be granted to enable the company to frame a scheme u/s 391 and take appropriate steps for the same. He submitted that the entire money payable to the creditors would be paid and no vacant possession should be restored to the lessor the Presidency Jute Mill Limited. He also referred to section 535 of the Companies Act and Rules 263 of the Companies (Court) Rules, 1959 and onward. He submitted that in the facts of this case the company should be given an opportunity to revive and the applicants who are some of the contributories are interested in reviving the company by making all arrangements for the same and also come out with a scheme application if a stay is granted.

8. Mr. A. Law, appearing for Manic Ch. Kundulia, a creditor, supported the application for stay and submitted that the company should be revived for the interest of the creditors.

Mr. Sanat Kumar Banerjee appearing for the Watch and Ward Staff, submitted that the company should be revived so that the Watch and Ward Staff may be paid their arrears for whom he was appearing.

Whereas Mr. M. L. Dhar, appearing for Kishan Lal Bangur, whose claim is about Rs. 1,59,087.02 P. opposed the applicant and submitted that the application is malafide and the petitioners are no one else but the Ex-Directors and their relations and partners who were in control and management of the company before it was wound up.

Mr. Pranab Chatterjee, appearing for the Jute Corporation of India, produced documents to show that about Rs. 65,00,000/- is due from the company for the supply of jute and a further jute worth of Rs. 5,00,000/- was in the godown of the Factory (in liquidation) which has been consumed or vanished. The said creditors were appearing pursuant to the direction for advertisement given by me regarding the present application u/s 466 of the Companies Act, for stay so as to enable the creditors or contributories to appear before the Court either to oppose or to support as the case may be.

9. I have already directed the Official Liquidator to submit a report u/s 466(2) of the Companies Act, on the relevant facts according to him so as to enable the Court to assess the position of the company before passing the final order. Such report has been duly filed by the Official Liquidator.

10. It may also be noted that Punjab National Bank Ltd. whose claim is over Rs. 21,00,000/- as the secured creditor has also filed a suit and obtained a leave of this Court after the company was wound up and the said suit is still pending. It also appears that the company has filed its last Balance Sheet in 1974 and the financial position of the company is very bad and it can be said to be an insolvent as would appear from the report of the Official Liquidator to which I will refer to subsequently.

11. Mr. S. B. Mukherjee, appearing with Mr. Sudipta Sarkar for the Presidency Jute Mills Limited, the lessor and one of the largest creditors who has not been paid the rent due under the lease since 1975 and the total amount of the claim would exceed Rs. 6,00,000/-. He first submitted that there is no proper application u/s 466 as the Rules 115-117 read with Rule 11(b) of the Companies (Court) Rules, 1959, the cause title and the judges' summons are not according to the said provisions which are mandatory in nature. Therefore, on the very same ground the application should be thrown out. He referred to paragraphs 1, 2 and 3 of the petition and he submitted that the verification of the petition which is not in proper form and is alleged to be based on the records of the Advocate-on-record of the company before it was wound up, that is, Rajesh Khaitan & Co., and, therefore, he rightly submitted that the present application is

not maintainable although the said questions are technical but it has to be viewed along with the other conducts on the part of the petitioners as disclosed earlier when the facts of this case has been stated and taking together it has to be judged whether the present application can be said to be a bonafide application and should be held to be maintainable or not. There is no notice of petition or judges" summons and, therefore, there is no proper application according to Mr. Mukherjee. Mr. Mukherjee rightly submitted that the Ex-Directors or any other Officers has not filed any statement of affairs as required u/s 454 of the Companies Act, 1956. He also submitted that the company has no assets. Analysing the petition and the reply Mr. Mukherjee rightly commented that there is no material particulars to show that the applicant has the financial solvency or resource to revive the company. It is an admitted fact that the mill has been lying closed since April, 1977. Steps has been taken by filing suit by the Punjab National Bank Ltd. for realisation of its dues against the security of the company"s assets for the sum of Rs. 21,00,000/-. The petitioners are the guarantors and have been made defendants in the said suit of Punjab National Bank Ltd. The company now in liquidation being Sonajuli Tea & Industries Company Limited has taken lease of the jute mill of Prem Chand Jute Mills Ltd. under a lease and no rent have been paid since 1975, and on principal account about Rs. 18,00,000/- has become due and payable together with interest under the said lease to the lesser, Prem Chand Jute Mills Ltd., which is undisputed. The petitioners have not disclosed the financial position of the company up-to-date and there is no material whatsoever on which the Court can come to a conclusion that the present application has got any basis either in fact or in law. He also rightly submitted that there is no verification of the petition as no separate affidavit required under the Rule verifying the statements in the petition has been filed. The said petition has been verified as ordinary petition but not according to the Companies (Court) Rules and practice. There is no evidence according to Mr. Mukherjee that there are supporting contributories. He referred to paragraph 24, 25, 33(1), 41, 43 of the petition and rightly submitted that the materials are not sufficient for granting any stay u/s 466 of the Companies Act, 1956, which is analogous to the English Companies Act, 1948, section 256. Mr. Mukherjee stated the facts of the case and submitted that the conduct of the petitioners are such that merits no consideration and discloses the lack of commercial morality, honesty and probity. He submitted that it will be against public interest to stay the winding up proceeding in the facts and circumstances of this case. He submitted in my view, quite rightly, that there is no particular of financial solvency of the applicants and there is no material to show that the company is viable. It is also submitted that no statement of affairs has been filed u/s 454 of the Companies Act, 1956, by the Ex-Directors, Secretary of Managers of the company (in liquidation). He also referred to the legal position drawing my attention to section 466 and to the decision of S. R. Das, J., as he then was, in East India Cotton Mills Ltd. AIR 1949 Cal 69 at 34 paragraph 50 and 51. He also referred to the root case in Telescript Company Limited 1903 (2) Ch. 174 which has been rolled on in all the authorities including the said decision of S. R. Das, J.

He also referred to Sree Shanmugar Mills Ltd., by Managing Agents Sri Alagai Ltd. Vs. S.K. Dharmaraja Nadar and Another, in support of his proposition that mere payment of the creditors and their consent will not be enough for the Court to grant stay u/s 466, but the commercial morality and public interest has also to be looked into in the facts of a particular case. He also referred to Halsbury's Laws of England Volume 7, 4th Edition, Articles 1375 and 1376 at page 779 where the law as to grant of stay after the winding up has been summarised. Mr. Mukherjee also referred to International Coal Corporation Vs. Pure Sitalpur Coal Concern Ltd., which is a decision under the Arbitration Act where it has been observed by Ramendra Mohan Datta, J. at paragraph 25 at page 50 as follows :--

Rules framed by this Court even though they are procedural in nature are meant to be followed and in the absence of the compliance of such Rules u/s 21 of the Arbitration Act, 1940, the Court cannot be said to have been properly moved and the Court has jurisdiction to determine the suit cannot be taken away except under the said provisions.

Relying on the said passage Mr. Mukherjee rightly submitted that in the present case admittedly the procedure laid down under the Companies Act and the Rules made thereunder as hereinbefore stated has not been complied with and the petition is not properly verified and, therefore, the present application is not maintainable if it is taken that the conduct of the petitioners who were no one also but the, contributories of the company Ex-Directors of the company and also the partners of Indian Burlup. He also referred to the Appeal Court judgment in a winding up petition which was admitted by the Trial Court from which the company preferred an appeal and he submitted that since the said judgment no further materials has been produced by the petitioners before this Court and, therefore, Mr. Mukherjee submitted that the present application should be dismissed. The authorities cited by Mr. Mukherjee and the Appeal Court judgment referred to above will be dealt with by me subsequently while giving my reasonings for the decision in this matter.

12. Mr. Mukherjee referred me to the affidavit of Amar Nath Roy affirmed on the 3rd of April, 1980, paragraphs 5-17, 20-35, 40, 41, 48, 50 and 61-63 and submitted that from the said facts it would appear that the Prem Chand Jute Mills Limited is the owner of the jute mill at Chengail in the district of Howrah its assets and machineries at material times and still is the owner of the said mill and its assets and machineries. After the agreement for sale with Indian Burlup and Laminated works of which Basudeo Prosad Agarwal as proprietor was entered into for sale with the Prem Chand Jute, Mills Limited for purchase of the said mill but the sale could not effected as the shareholders of Prem Chand Jute Mills Limited did not approve and as such it became unenforceable. Thereafter, the said lease dated the 14th of July, 1971, between Prem Chand Jute Mills Limited and Sonajuli Tea & Industries Limited that is the company (in liquidation) was entered into on the terms and conditions contained in the said lease material terms of which have been mentioned before. Pursuant to that the company (in

liquidation) took possession but failed to pay the rent and as such, the Prem Chand Jute Mills Limited presented first company petition being company Petition No.387 of 1976 in which the Prem Chand Jute Mills Limited was relegated to a suit and the Sonajuli Tea & Industries Limited, the company (now in liquidation) was directed to deposit a sum of Rs. 1,00,000/- as security. The said security amount was received by the Advocate-on-record of the Prem Chand Jute Mills Limited from the Insurance Company on account of a fire at the said mill premises under the Insurance Policy in terms of the said lease between the Prem Chand Jute Mills Limited and Sonajuli Tea & Industries-Limited and thereafter, the Prem Chand Jute Mills Limited instituted a suit for the arrears of the rent under the said lease against Sonajuli Tea & Industries Limited (now in liquidation) for the recovery of Rs. 6,62,720/- for the arrears of rent between September, 1975 to March 1977. As a counterblast to the said suit Sonajuli Tea & Industries Ltd. along with Indian Burlup & Laminated Works as plaintiffs instituted a suit being Suit No. 676 of 1977 against Prem Chand Jute. Mills Limited for a decree of Rs. 1,53,40,000/- and for possession of various plants and machineries lying at the mill premises alleged to be belonging to Sonajuli Tea & Industries Limited. It is alleged that the said suit was filed with ulterior motive and only to prevent the Prem Chand Jute Mills Limited from realising its dues. The said suit was filed without paying any Court Fees and the Court Fees were not paid and the Writ of Summons was not served until sometime in April, 1979, that is about 1.1|2 years after the filing of the suit. In the said suit various interim orders were obtained including an order dated the 23rd of November, 1978, wherein it is recorded that after determination of the lease, Sonajuli Tea & Industries Limited is no longer in possession of the mill premises and, therefore, the Receiver appointed was directed to take possession of the mill and its assets and machineries immediately with liberty to Prem Chand Jute Mills Limited to run the mill under the Receiver. The Receiver was directed not to interfere with day-to-day running of the mill by the Prem Chand Jute Mills Limited and all other interim orders were vacated. The Receiver was directed to make an inventory of the properties stated to be left by Sonajuli Tea & Industries Limited in the mill premises on proper identification being made by the Sonajuli Tea & Industries Limited. From that order no appeal was preferred.

13. Here I may refer to my order and judgment in the second winding up petition filed by the Prem Chand Jute Mills Limited against Sonajuli Tea & Industries Limited admitting the winding up petition and giving direction for advertisement wherein I have analysed the plaint filed by Indian Burlup & Laminated Works along with Sonajuli Tea & Industries Limited against the Prem Chand Jute Mills Limited and expressed my prima facie view therein which would form part of the present judgment and reasonings.

14. In the second winding up petition which Prem Chand Jute Mills filed being Company Petition No. 153 of 1979 and the affidavit-in-opposition was filed on behalf of Sonajuli Tea & Industries Limited by one Puthalur Vaskaran alleged to be the Secretary of the company.

15. After hearing the said winding up petition I made my order and delivered my judgment on the 10th of July, 1979, in the said Company Petition No. 153 of 1979 filed by the Prem Chand Jute Mills Limited admitting the petition and directing advertisement from which Sonajuli Tea & Industries Limited preferred an appeal and obtained a conditional order for stay. In the stay application before the Appeal Court it was stated by the said Secretary, Vaskaran that the workers and the employees of the Jute Mill went on strike from 3rd week of March, 1977, resulting in the stoppage of work and thereafter Sonajuli Tea & Industries Limited declared a lock-out with effect from April, 1977, which was still continuing. In between on the 13th of August, 1979, on the winding up petition of Sri Ashkaran Chattar Singh being Company Petition No. 359 of 1978 an order of winding up was passed by me. The said winding up order was advertised in the Amrit Bazar Patrika on the 10th of September, 1979. On the 10th of September, 1979, the interim order in the Sonajuli's application in the appeal from the order of admitting the winding up petition by my order dated the 10th of July, 1979, was vacated by the Appeal Court. On or about 10th of September, 1979, Sonajuli Tea & Industries Limited preferred an appeal from the said winding up order dated the 13th of August, 1979, and made an application for stay and in that application before the Appeal Court Prem Chand Jute Mills Limited intervened and on the 19th of September, 1979, the interim order was vacated by the Appeal Court and the Official Liquidator was directed to take possession on a signed copy of the minute as the Sonajuli Tea & Industries Limited failed to comply with the conditions imposed by the Appeal Court on the 13th of August, 1979, for stay. On the 5th of November, 1979 the application of Sonajuli Tea & Industries Limited in the appeal from the order of winding up was dismissed with costs. On the 19th of November, 1979, one Mahabir Prasad Agarwal, the petitioner No. 1 herein, as a contributory of Sonajuli Tea & Industries Ltd. made an application u/s 466 of the Companies Act 1956 before the Appeal Court inter alia for recalling the order dated 5th of November, 1979, and for extension of time to make deposit in terms of the said order dated the 13th of September, 1979, and for stay of further proceeding in the winding up. The said application was dismissed by the Appeal Court by an order dismissing the application of Sonajuli Tea & Industries Limited. The Sonajuli Tea & Industries Limited preferred an appeal before the Supreme Court which was disposed of by the order dated 26th of February, 1980.

16. It appears that the petitioner No. 1, Mahabir Prasad Agarwal is a brother of Basudeo Prasad Agarwal who was a Director of Sonajuli Tea & Industries Limited. The said Basudeo Prasad Agarwal verified the plaint of Sonajuli Tea & Industries Limited as such Director. The said Basudeo Prasad Agarwal was the proprietor of Indian Burlup & Laminated Works Limited. It is alleged that this application has been made malafide by Mahabir Prasad Agarwal only to get control and possession of the jute mill belonging to Prem Chand Jute Mills Limited in view of the situation prevailing in the jute market at the present. His sole idea is to get possession of the jute mill by any means. He also had correspondence with the

Receiver appointed in the suit filed by Indian Burlup & Laminated Works Limited against Prem Chand Jute Mills Limited as a partner of the Indian Burlup & Laminated Works Limited. It also, appears that the Secretary of the Sonajuli Tea & Industries Limited, the said Puthalur Vaskaran, also affirmed the pleading before the Supreme Court on behalf of Mahabir Prasad Agarwal in the leave application and the appeal whereby the complete identity of Sonajuli Tea & Industries Limited, Mahabir Prasad Agarwal, Indian Burlup & Laminated Works Limited and now another alleged company which has been set up as a sub-lessee under Sonajuli Tea & Industries Limited, there seems to be complete identity and it appears that the said Mahabir Prasad Agarwal and Basudeo Prasad Agarwal and their group have made this application after having failed in all attempts to set aside the winding up order or stay the winding up proceedings in the Appeal Court and also before the Superme Court. Therefore, Mr. Mukherjee rightly submitted that the company being heavily involved circumstances and the conduct of the Mahabir Prasad Agarwal. Basudeo Prasad Agarwal and others are lacking in commercial morality. The company Sonajuli Tea & Industries Limited has no assets except the alleged lease which according to them has already been determined and in these circumstances it must be held that the present application is not bonafide. The Directors have not filed any statement of affairs and there is no material particulars at all as to alleged financial solvency of the petitioners or as to what arrangement has been made with the banker of the company who has already filed the suit and further the jute mill is lying closed since 1977. It is only after the winding up order was passed by taking all sorts of proceeding and the alleged eagerness to revive the company has suddenly cropped up and the proceedings here in before stated and the present proceedings has been started only to delay the winding up proceedings and avoid investigation into the affairs of the company in course of winding up which might disclose various illegal and wrongful acts on the part of the said Agarwalls who are the Directors and share-holders of the company according to their own admission. In any event Mr. Mukherjee submitted that the petitioners should not be allowed to embark on a speculative venture at the expense of the creditor and one of the major creditors being Prem Chand Jute Mills Limited whose assets are sought to be utilised by the petitioners for the purpose of reviving, the jute mills Mr. Mukherjee, in my view, rightly submitted that the petitioners who were the Directors and shareholders of Sonajuli Tea, & Industries Limited have demonstrated beyond any doubt that they are not fit and proper persons to be entrusted with the management of the affairs of a limited company and it is also alleged that the said Agarwallas are connected with various other companies which are doing no business and or on the verge of liquidation. Therefore, Mr. Mukherjee, in my view, rightly submitted that the present application is malafide and an attempt on the part of the petitioners to harass its bonafide creditors including the said Prem Chand Jute Mills Limited.

17. After the present application was made which is practically a last attempt after having failed in his previous attempts before this Court, the Appeal Court

and the Supreme Court to stay the winding up proceedings and thereafter the winding up order and after various proceedings have been taken by the Banker of the company and also the Prem Chand Jute Mills Limited including an application u/s 535 for disclaimer of the lease which is pending in the list.

18. I directed by an order dated the 26th of March, 1980, directing the Official Liquidator to file a report u/s 466(2) and pursuant to the said direction the Official Liquidator has filed dated 3rd of April, 1980 wherefrom it appears that after the winding up order was passed by this Court on the 13th of August, 1979, in the application of M/S. Ashkaran Chattar Singh the Official Liquidator on the 26th of August, 1979, went to take possession of the Registered Office of the Company at No. 10, Clive Row, Calcutta, and on arrival they found that neither any sign board nor any name plate of the company was anywhere of the premises but two sign boards namely M/s. Sita Ram Jute Mill Limited and M/s. Kishan Lal & Sons Pvt. Ltd. were there. The report of the petitioning creditor, that is, M/s. Ashkaran Chattar Singh, persuaded the Official Liquidator to enter the said Registered Office and there the official Liquidator met the said Vaskaran who alleged to be in the staff of M/s. Kishanlal & Sons Pvt. Ltd. and the said Vaskaran stated that the company (in liquidation) was situated there long before and the same has been shifted from that place to another place and the present address of the company was not known to him.

19. I must observe that it appears to be strange that the alleged Secretary of the Sonajuli Tea & Industries Limited who has affirmed so many affidavits before this Court on behalf of the Company is not aware of the present where about of the company. Thereafter, the Official Liquidator from the records of the Registrar of Companies came to know that the Registered Office of the company was shifted at No. 8, Lyons Range, Calcutta and accordingly another attempt was made to take over possession of the Registered Office of the company at the said address with the representative of the said petitioning creditor. There the Official Liquidator's representative found a sign board of the company fixed on the door of one room and some employees including one Sri R. B. Misra were working there. In spite of an attempt by the representative of the Official Liquidator, possession could not be taken on that date as Sri Misra stated that in the absence of the Ex-Director it would not be possible to allow the Official Liquidator's representative to take possession and sale the room. It appears that thereafter the company preferred an appeal from the winding up order for vacating the winding up order before the Appeal Court and by an order dated the 13th of September 1979, a conditional stay was granted by the Appeal Court with a direction on the applicant to keep a sum of Rs. 50,000/- to be deposited with the Official Liquidator subject to further order of the Appeal Court and the Official Liquidator was directed in the mean time to make an inventory and whatever assets there are and the company was directed to give all facilities to the Official Liquidator in the matter of preparation of inventory. The applicant before the Appeal Court was also directed to furnish security to the satisfaction of the Registrar, Original Side, for a sum or Rs. 1,00,000/- by way of bank

guarantee. In the event of the said Bank guarantee being furnished the order for stay would continue and in default of fulfilling any conditions above the order of stay granted by the Appeal Court would stand vacated. As per the said order of the Appeal Court a representative of the Official Liquidator along with the representative of the petitioning creditor went to the Registered office of the company at No. 8, Lyons Range, Calcutta, and saw Mr. R.B. Misra, the ex-employee of the company who told that except some books and records the company has got not assets there. The representative of the Official Liquidator made an inventory of the said books and records but the same could not be completed on that date and the same was completed on the 17th of September, 1979. Subsequently, the stay granted by the Appeal Court was vacated for noncompliance with the orders of the Appeal Court and the Official Liquidator with police help has taken possession of the Registered Office of the company at No. 8, Lyons Range, Calcutta. The Official Liquidator thereafter contacted the Receiver appointed in the suit filed by Indian Burlup & Laminated Works Limited and Sonajuli Tea & Industries Limited (In liquidation) vs. Prem Chand Jute Mills Ltd. for taking possession of the factory. On the 19th of November, 1979, on the application of Mahabir Prasad Agarwal, the petitioner No. 1, herein an order was made by the Appeal Court that upon the petitioner paying a sum of Rs. 50,000/- in cash with the Official Liquidator in course of the day and upon furnishing securities by way of Bank guarantee for the sum of Rs. 1,00,000/- to the satisfaction of the Registrar, Original Side, or paying a sum of Rs. 1,00,000/- in cash to the Official Liquidator on or about 4th of December, 1979, all further proceedings in the winding up will be stayed. In default of deposit of Rs. 50,000/- in cash before being made with the Official Liquidator and in default of furnishing the bank guarantee for the sum of Rs. 1,00,000/- or paying Rs. 1,00,000/- to the Official Liquidator as aforesaid the order for stay will stand vacated. In the event of Rs. 50,000/- being deposited with the Official Liquidator as aforesaid the Official Liquidator will make over possession of the Registered Office to the company and the Official Liquidator will do so on payment of costs, charge and expenses of the Official Liquidator by the company. All parties were directed to act on a signed copy of the minute. The company in terms of the said order deposited with the Official Liquidator Rs. 50,000/- on the 19th of November, 1979, and the Official Liquidator handed over possession of the Registered Office of the company to the representative of the company on the 7th of December, 1979. Thereafter, the matter went up to the Supreme Court at the instance of the said Mahabir Prasad Agarwal as a contributory who made an application u/s 466 before the Appeal Court which was dismissed and the matter was ultimately rejected by the Supreme Court. Thereafter, by an order dated the 29th of February, 1980, the Official Liquidator was directed to take over possession forthwith of all the assets of the company, its registered office, all books, papers and documents whatever the relying including the premises of Prem Chand Jute Mills Limited where the securities of the Punjab National Bank were lying on notices to the Receiver as also Punjab National Bank and the petitioning creditor and M/s. Orr Dignam & Company Solicitors for M/s. Prem

Chand Jute Mills Limited. In terms of the said order the representative of the Official Liquidator has taken possession of the registered office on the 4th of March, 1980, and also one of the factory premises of Prem Chand Jute Mills Limited who on the 3rd of March, 1980, by putting official seal where the goods are lying as per statement of Sri Chandi Charan Chatterjee, the Manager of the Jute Mill. At that time neither the representative of the Bank nor the Receiver was present and thereafter, the present application has been made by Mahabir Prasad Agarwal, Basudeo Prasad Agarwal and others u/s 466 of the Companies Act for stay the liquidation proceedings and for other reliefs. By an order made by this Court on the 5th March, 1980, directions were given for advertisement of the application and also directed the Official Liquidator to file a report u/s 468(2). Then on the 26th of March, 1980 the Official Liquidator brought to the notice of this Court that the assets of which inventory to be made are quite substantial and it will take quite sometime to complete the work of inventory and, therefore, the time to file the report was extended irrespective of the completion of the inventory work as to the financial position of the company and the conduct of the ex-management and any other matter which the Official Liquidator considers necessary to report. Thereafter, the Official Liquidator has inspected the books of account of the company maintained by the Registrar of Companies, West Bengal, and on such inspection it was found that the company has filed its last Balance Sheet as on 31st of December, 1974. Therefore, it appears that the company has defaulted in filing the annual accounts with the Registrar of Companies, W. B. for the subsequent years, i.e., since 1975. It also appears from the Auditor's report on the balance sheet as on 31st of December, 1972, that the company violated certain provisions of the Companies Act, for giving loans to the companies under the same management, payment of commission to a firm in which a Director of the company is a partner. Similarly in the Auditor's report on the balance sheet of 1974 the Auditor has remarked that certain books of account has not been produced before them. The financial position of the company as per Balance Sheet dated 31st December, 1974, appears as follows :

Liabilities

Amount Rs.

Assets

Amount Rs.

Share Capital

25,00.000-00

Fixed Assets

94,70 042-14

Reserve & Surplus

1,71,398-10

Investment

35,72,000-00

Secured Loan

41,68,211-60

Current Assets

Loans & Advances

2,20.00,901-57

Unsecured Loan Current

1,15,000-38

Mis. Exp. & Losses

Liabilities Provi.

2,16,95,916-39

P/L A/C

21.30,582-76

2,86,50,526-47

2,86,50,526-47

Therefore, from the said latest balance sheet filed with the Registrar of Companies, West Bengal, the financial position of the company is not sound; out of the total share capital of Rs. 25,00,000|- it has already lost Rs. 21,30,582|- and the Official Liquidator in his report submitted that in the absence of the balance sheets of the subsequent years it is not possible to make any observation as to the latest financial position of the company. The said report is tale tell and reflects the conduct of the ex-directors of the, company in the management of the affairs in violation of the Companies Act, as per the Auditors report and the failure of the company to file its balance sheet and Profit & Loss Account and the Annual Returns since 1975. It is also admitted that the company is closed since 1977 and a lock-out was declared. That being the facts as disclosed from the records and the pleading and also from the report of the Official Liquidator u/s 466 (2) and from the conduct of the said Mahabir Prasad Agarwal and the Company's Secretary Mr. Vaskaran it leaves no doubt in my mind that the present application is merely an attempt to avoid the consequences of winding up and the investigation into the affairs of the company as admittedly they have not filed the statement of affairs and complied with the statutory requirements since 1975 as hereinbefore stated. There cannot be any escape from the fact that the company is hopelessly insolvent and large number of creditors including the secured creditor are pressing for their claims, creditors includes the Jute

Corporation of India who appeared before this Court pursuant to the advertisement issued in the paper about this application and intimated through Mr. Pranab Chatterjee that its claim is about Rs. 65.00,000/- which claim it is pressing against the company. The Punjab National Bank, the secured creditor, has already filed a suit for over Rs. 21,00,000/- against Sonajuli Tea & Industries Limited (now in liquidation) and the Official Liquidator has been appointed Receiver in the said suit and obtained leave u/s 446 from this Court. The balance sheet and the Profit & Loss A/c. of the company which has been filed only up to the year 1974 as per report of the Official Liquidator made u/s 466(2) of the Companies Act, 1956, also reveals the utter insolvency of the company. Further, there is no material before me save and except offer to pay the creditors in full by the petitioners who are no other person than the ex directors and the shareholders of the company belonging to the same family for mismanaging the company's affairs and also violating the provisions of the Companies Act, 1956, as per Auditors' report which are mentioned in the report made by the Official Liquidator u/s 466(2) of the Companies Act.

20. The contentions of Mr. Some Nath Chatterjee, leading Mr. Prabir Sen and Mr. Ashutosh Law, appearing for the petitioners, that an industry should be given a chance to revive so as to solve the problem of unemployment as large number of employees will be out of employment, if the company (in liquidation) is not allowed to revive by setting aside the winding up order the socio-economic problem could not be solved. Those submissions have now become very common and common place catch words, but the Court has to act taking into account the entire facts particularly the conduct of the ex-management as to the affairs of the company and whether there is any material to show that the company is in a position to revive both from the financial and administrative point of view. The principles on which the Court is to act u/s 466 which is *pari materia* with section 356 of the English Companies Act, 1948, has been laid down in various decisions and authorities to which I would refer subsequently. The facts that the lessor Prem Chand Jute Mills Limited, is only interested in getting back possession of its properties and assets under the jute mill which was leased out to the company, Sonajuli Tea & Industries Limited in 1971 for a period of 30 years with an option of renewal of further periods as contained in the said lease, are in my view makes no difference as to the power of the Court u/s 466 to exercise its discretion for stay, even the payment of the dues of the creditors is not the sole factor for the Court to act and grant a stay. It is the commercial morality and public interest and particularly the conduct of the ex-management are of material consideration and in this case, I cannot but hold that the petitioners are frantically trying from the very beginning to deprive the creditors of the company of their legitimate dues and make unlawful gain to themselves and have violated the provisions of the Companies Act, 1956, as per the Auditors' report and the mill is closed since 1977 and all the questions of reviving the mill by the present management is not only unreal, highly improbable but mere ruse to mislead the Court with the catch words of reviving an industry and providing employments to

the unemployed workers which involves a socio-economic question of the State. The larger interest of commercial morality and public benefit has to be looked into.

21. I may also mention that Mr. M. L. Dhar, one of the petitioning creditors, to whom the petitioner has offered to pay off being one M/s. Kishan Lal Bangur whose claim amounts to Rs. 1,59,000/- and odd with further costs is also opposing the present application.

22. The principle on which the Court is to act u/s 466 of the Companies Act, 1956, is laid down in the section itself which runs as follows :-

466. Power of Court to stay winding up--(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.

(2) On any application under this section the Court may, before making an order, require the Official Liquidator to furnish to the Court a report with respect to any facts or matters which are in his Opinion relevant to the application.

(3).....

23. The provisions of the 1913 Act, which corresponds to section 466 of the Companies Act, 1956, is section 173 and the decision of the Calcutta High Court of S. R. Das, J, as he then was, in East India Cotton Mills Limited AIR 1949 Cal 69 has been summarised in paragraph 50 at page 84 quoting from the passage of Halsbury's Laws of England, 5th Volume Article 1209 at 724 and also referring to the wellknown decisions in Re : Telescripter Syndicate Limited 1903 (2) Ch. 174 at pages 180.181 where the trenchant observation of Fry, LJ, in the earlier case of Re : Hester 1889 (22) Q. B. D. 632 at 641 has also been referred. The corresponding provisions of the English Companies Act is section 256 which is in pari materia with the Indian Companies Act, section 466. In a recent decision being Re : Calqany Edmonton Land Co. Limited 1975 (1) A. E. R. 1047 where Megarry, J., enumerated the factors to be considered which is neatly put in the Head Note of the said report which is as follows :--

The court would in normal circumstances generally exercise its discretion to grant stay only where the applicant showed (a) that each creditor had either been paid in full or that satisfactory provisions for him to be paid in full was to be made or that he consented to the stay or was otherwise bound not to object to it; (b) that the Liquidator's position was fully safeguarded either by paying him proper amount of his expenses or sufficiently securing payment; and (c) that each member either consented to the stay or otherwise was bound not to object to it, or there was secured to him the right to receive all he would have received if the winding up has proceeded to its conclusion.

24. In the facts of that case the Court held in the application by the Managing Director and contributory of the company who applied on behalf of the shareholders and unsecured creditors who voted unanimously for a stay of the winding up of the company who held at a meeting respectively that the applicant has failed to make out a convincing case of a stay as he has failed to produce any firm and acceptable proposal for satisfying the creditors and the Liquidator and there was nothing binding the other shareholders.

25. In *Palmer's Company Law*, Volume 1. 22nd Edition in Article 81-98 at page 938 the principle is summarised as follows :--

The Court has a discretion, on the application of the liquidator or official receiver, or any creditor or contributory, to stay the proceedings under a winding up order (s. 256). In exercising this discretion the Court will be guided by the analogy of bankruptcy in rescinding a receiving order -- that is to say, it will consider the interests of commercial morality and not merely the wishes of creditors and will refuse a stay if there is evidence of misfeasance or of irregularities demanding investigation.

And also in Article 83-60 at page 1001 which is as follows :

The Court has discretion, on the application of the liquidator or any creditor or contributory, to stay winding up proceedings at any time (s. 256 (1)). A copy of any such order must be sent by the company, or otherwise as the Court may prescribe, to the Registrar of Companies (s. 256 (3)). In exercising its discretion under this section the Court will consider the interests of commercial morality and not merely the wishes of creditors, e. g., if there appear to be irregularities requiring investigation to continue.

Then, again in *Gore Browne on Companies* 43rd Edition in Article 31-31 which has been summarised as follows :--

31-31 Stay of winding up proceedings :--

The Court has jurisdiction u/s 256 to stay proceedings in a winding up by the Court, either altogether or for a limited time on a motion made by the liquidator or the official receiver or any creditor or contributory, but not on the application of the company alone Section 307 (1) and (2) of the Act extend section 256 to a voluntary winding up. Such an application may be made when proceedings are being taken u/s 206 for a reorganisation of the company or where a reconstruction is anticipated; but the court will refuse consent if the director's conduct requires investigation. After an arrangement has been adopted the winding up order may be discharged. Normally, a stay will not be granted in the absence of firm and acceptable proposals for satisfying all creditors and in the absence of consent from or arrangements binding the liquidator and all members.

Sometimes the stay is only partial, and the winding up is allowed to continue for the purpose of ascertaining and paying debts.

Proceedings in a voluntary winding up can also be stayed.

It is not the practice to grant a stay pending appeal from a winding up order.

Then, again in Buckley on the Companies Act, 13th Edition at page 532, section 256 of the English Companies Act, which is set out hereunder :--

256.--(1) The Court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or 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.

(2) On any application under this section the court may, before making an order require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application.

(3).....

And again commentry thereunder at page 533 which is as follows :--

In the exercise of its jurisdiction to stay proceedings the Court will not act upon the mere assent of the creditors but, acting upon principles similar to those applicable in exercising the jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy, will consider whether the order is justified by all the circumstances, including a proper regard for commercial morality. It would not, even under the Old Acts, which did not contain sub-s. (2) of this section, make an order in the dark, e. g., if the directors had failed to comply with their statutory duty to give information and to furnish a statement of affair.

The jurisdiction may be used to allow in proper circumstances a resumption of business.

The Madras decision cited by Mr. Mukherjee on behalf of the petitioner deals with the said question and the relevant portion is set out hereunder being the decision in Sree Shayam Nagar Milk Ltd. v. S. K. Dharmaraja Nadar & Anr. AIR 1970 Mad 203 at page 210 as follows :--

The principles laid down in England were reiterated in the matter of E. I. Cotton Mills AIR 1949 Cal. 69.

No case has been brought to our notice, and we have not been able to find any, where in a case analogous to the present, the Court stayed the winding up order. On the contrary, the principles laid down in the decided cases forbid us from staying the winding up order, either permanently or for a limited period, on the terms actually put forward before us so far. We need not add that even if we dismiss the appeal now, it will not preclude the shareholders from making an application u/s 466 later with a proper proposal. The only difference will be that the application will have to be made to the company Judge, and not to this

appellate Court, after the disposal of the appeal.

In that case the Division Bench of the Madras High Court Venkataramana J., after summarising all the principles for granting stay u/s 466 in paragraphs 18 (A) 19, 20, 21 and 22 made the above observations and dismissed the application u/s 466 before the Appeal Court. It will also be pertinent to quote from paragraph 18 at page 209 of the said decision where Venkataramana J., observed as follows :--

That is not at all the proper approach in a case of this kind. The Court cannot hand over a commercially insolvent company to the shareholders and let the shareholders loose upon the market, free to raise loans. The court owes a duty to the public in such a matter. This is the principle which has been laid down in the cases decided so far. The cases have been collected in Buckley's Commentary on the Companies Act of England under sec. 256 of the Companies Act, 1948, p. 533 of the 13th Ed., 1957, and in Halsbury's laws of England, in paragraphs 1397 and 1398, Vol. 6 and in Palmer's Companies Precedent, Part II, Chap. 12. The cases lay down that the considerations which should govern the Court in an application for stay of the winding up order are precisely the considerations which would govern the Court when it is asked to stay a receiving order in bankruptcy. These principles are discussed in some cases.

Thus In re : Hester, (1889) 22 QBD 632 a receiving order was made in bankruptcy. The debtor originally wanted to appeal, but later gave tip his intention, and instead, applied to rescind the receiving order on the ground that the creditors consented to the rescission. Many of them had given receipts in full for their dues, but it was not portended that payment in full had, in fact, been made to them. No meeting of the creditors had been held but the consent had been obtained by means of applications made by the debtor to each creditor individually. The Registrar refused to rescind the receiving order. His order was upheld by Cave J., and Charles, J. There was a further appeal to the Court of Appeal, and there also the decision of the Registrar was confirmed. It is pointed out in all the judgments that the consent of the creditors alone will not justify the Court in annulling the adjudication or rescinding the receiving order. Cave, J. observed that it is not right to let a man who is unable to pay his debts in full, loose upon the public to continue his trading without the court having any right of vote. Lower down he observed that the consent of the creditors was not the only thing to be considered and added :

The Court must consider the position of the debtor, the possibility of his getting over his difficulties, and the interests of the public. It is clearly contrary to their interests that a man who is insolvent should be allowed to go on trading. In fact, it is an offence under the Act for a trader to continue trading after he knows that he is insolvent.

Lower down he states :

We should not be doing our duty to the community if we were to sanction the rescission of the receiving order. To my mind, this man is hopelessly insolvent.

Without any estimate, even by himself much less by any competent person, of his present position ? his assets and liabilities -- he asks us to take for granted that, if he is allowed to go on, he will be able to pay his creditors in full. I am perfectly certain that he will not. He will probably succeed in very much enlarging the area of his indebtedness but I am pretty certain he will not diminish it.

18-A. In the Court of Appeal, Lord Esher, M. R. state (p. 639) :

Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The court has gone still further, and, I think rightly so, and has said that under the present Bankruptcy Act it will consider not only whether what is proposed is for the benefit of the creditors but also whether it is conclusive or detrimental to commercial morality and to the interests of the public at large; and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors who must come into existence immediately, in a position of imminent danger. The Court has said this before and I adhere to it now.

26. The principle for granting stay u/s 465 corresponding to section 256 of the English Companies Act, 1948, has been very neatly summarised in the Halsbury's Laws of England, 4th Edition, Volume 7 in Articles 1375 and 1376 at pages 779-780 :

1375. Power to stay winding up proceedings : The Court may at any time after an order for winding up make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as it thinks fit, on the application either of the liquidator or the official receiver or of any creditor or contributory, and on proof to its satisfaction that all proceedings in relation to the winding up ought to be stayed. On any application the Court may, before making the order, require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application. The validity of the winding up order cannot be questioned on such an application. The order to stay may reserve liberty to any dissentient creditor or the official receiver to apply within a limited time to remove the stay. If no creditor objects the proceedings on a compulsory order made after the commencement of a voluntary winding up may be stayed so as to allow the voluntary winding up to continue. Frequently a stay is applied for in pursuance of a scheme of arrangement sanctioned by the Court.

1376. Exercise of power to stay winding up proceedings: In the exercise of its jurisdiction to stay the court, so far as possible, acts upon the principles applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual. The Court refuses, therefore, to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for their benefit but also whether the stay will be conducive or detrimental to commercial morality and to the interests of the

public at large. In particular the Court will have regard to the following facts : (1) that directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement of affairs; (2) that there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the promoter in fully paid shares forming the consideration for the purchase of property by the company on its formation ; (3) that the promoter has made gifts of fully paid shares to the directors ; (4) that there are any other matters connected with the promotion formation or failure of the company or the conduct of its business or affairs, which appear to the court to require investigation. The same principles are apparently applicable whether the company has or has not invited the public to subscribe for its shares except, possibly, in the case of a private company, where all the shareholders have full knowledge of what has been done.

27. Therefore, from the above principles which has been summarised in different authorities and the decision referred to hereinbefore it appears that the discretion for stay u/s 466 can only be exercised by the Court (1) if the Court is satisfied on the materials before it that the application is bonafide (2) the Court would be guided by the principles and definitely come to the finding that the principles are applicable to the facts of a particular case, (3) mere consent of all the creditors for stay of winding up is not enough, (4) that offer to pay in full or make satisfactory provisions for the payment of the creditors is not enough, (5) Court will consider the interest of commercial morality and not merely the wishes of the creditors and contributories, (6) Court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation, (7) a firm and accepted proposal for satisfying all the creditors must be before the Court with material particulars, (8) the jurisdiction for stay can be used only to allow in proper circumstances a resumption of the business of the company, (9) the Court is to consider whether the proposal for revival of the company is for benefit of the creditor but also whether the stay will be conducive or detrimental to commercial morality and to the interest of the public at large, (10) before making any order Court must see whether the Ex-directors have complied with their statutory duties as to giving information to the Official Liquidator by furnishing the statement of affairs, (11) and any other relevant fact which the Court thinks fit to be considered for granting or not granting the stay having regard to the peculiar facts of a particular case.

28. Here the conduct of the petitioners who were at different times and at different stages in different proceedings and in different names have appeared before this Court, the Appeal Court and the Supreme Court was to delay and defer the payments of the creditors and to obstruct the winding up proceedings and prevent the Official Liquidator from taking possession and proceed with the winding up of the company according to the Companies Act, 1956, and the Rules made thereunder.

29. The petitioner No. 1, Mahabir P. Agarwal, made an application before the

Appeal Court for stay of the winding up order dated the 13th of August, 1979, obviously u/s 466 and where practically the identical grounds which are now sought to be put forward were advanced before the Appeal Court and the Appeal Court by the judgment delivered on the 2nd of February, 1980, by CJ & S.C. Ghosh, J. dismissed the said application after dealing with the Various winding up orders against the company and the maintainability of section 466 application before the appeal Court ultimately observed as follows :

The facts and circumstances of this case which I have earlier indicated go to show that no order for stay of the winding up should be made and that the present petition is a malafied one. The facts and circumstances of this case further go to suggest that the appellant company which has not been in a position to run the mill for all these years and is not still in a position to run the mill now, is now trying to have the winding up order stayed not for its own benefit but for the benefit of other parties.

30. The appeal and the application was dismissed by the Appeal Court and the facts since then has not materially changed save and except a formal application u/s 466 has been made before this Court according to the Companies Act, but as I have already observed there is no material on which the Court can rely, there is nothing to show the feasibility or possibility of the petitioners running the said mill, their whole purpose is to obstruct the winding up of the company and prevent the creditors to get their dues, if possible in the winding up of the company. They have not complied with many of the statutory provisions. The mill is closed for a long time as hereinbefore stated and as would appear from the report of the Official Liquidator u/s 466(2) and therefore, it is against public interest and commercial morality to allow the present application. This application is, in my view, has been made solely for the purpose of avoiding the consequences of winding up and the investigation into the company's affairs as the ex-directors and other officers were required to submit its statement of affairs u/s 454 of the Companies Act, has not yet been done so and to avoid preceding against them and instead has launched this application only to delay the matters as long as possible. The company is not only hopelessly insolvent but under the said lease in respect of which the company (now in liquidation has taken contradictory stands as and when it suits the ex-management. Once they have stated that the lease has been determined and as such, the company has no liability to pay and run the mill whereas in other occasion they are alleging that they are still the lessees and entitled to run the said mill and revive the same.

31. Here, I may quote a passage from Williams on Bankruptcy 18th Edition at page 162 regarding the principle of annulment of adjudication order in a bankruptcy which also covers the principle of winding up proceedings u/s 466 as hereinbefore stated and laid down in the said decision in East India Cotton Mills Limited by S.R. Das, J, in AIR 1949 Cal 69. The said passage in William on Bankruptcy is as follows:--

The mere fact that all the creditors consent will no longer entitle the debtor to have the bankruptcy annulled; and where the debts are not paid in full and the adjudication was properly made in the first instance, the court cannot annul except under a scheme u/s 21 (vide supra), or an arrangement is proposed which amounts in substance to such a scheme, even though not complying with the formalities of that section. Even where the debts have been paid in full, the court has a discretion to refuse to annul, and may refuse an annulment on the ground of the bankrupt's misconduct, e. g., concealment of assets; a second application to annul may, however, be made when a reasonable time has elapsed after the refusal of the first. In *Re : McHenry Levita's Claim* (under the 1869 Act, where the consent of creditors was relevant), the bankrupt had procured some of his creditors to sell their debts to trustees, who might consent to the annulment of the bankruptcy, which they did. With one assigning creditor the bankrupt had agreed to pay him a further sum at a future time; it was held that there was no duty to disclose the agreement to the court on the application to annul, nor to the other creditors, there being no common basis of consent. But since, under the present Act, the court has consider all the circumstances of the case, and will not annul merely because the creditors consent, such an arrangement would presumably have to be disclosed to the court on an application to annul.

32. Therefore, applying all the decisions and principle applicable for granting the discretionary order u/s 466 I have no hesitation in holding respectfully agreeing with the Appeal Court that the present application is not at all bonafide and there are no positive, concrete and reliable materials to show that the petitioners are in a position to revive the company to pay the creditors of the company and run the jute mill honestly. The company is in a hopelessly insolvent position and there is no financial resources to run the jute mill and further the misconduct of the petitioners as disclosed in the facts and various proceedings before this Court Appeal Court and the Supreme Court makes it abundantly clear that the whole purpose is not for reviving the company but to deprive the creditors of their legitimate dues and delay the winding up of the company as long as possible. There is another factor which is patent on the face of it being the name of the company, Sonajuli Tea & Industries Limited whereas it is admitted that the leasehold right in respect of the said Prem Chand Jute Mills Limited is the only assets and business of the company and as such, the name is misleading to the public and, therefore, it is for public interest that the winding up should not be stayed and as such a company having a misleading name which has already been wound up by an order of this Court should be dissolved under the Companies Act, 1958, in due course as expeditiously as possible.

33. It also appears that one Mr. Puthalur Bhaskaran, who was alleged to be the Secretary of the company (in liquidation) that is, Sonajuli Tea & Industries Limited, has affirmed an affidavit before the Supreme Court on behalf of the company and also as a constituted attorney of Mahabir Prasad Agarwal and, again, the said Mr. Bhaskaran is alleged to be an employee of M/s. Kishanlal & Sons Pvt. Ltd. at 10, Clive Row, Calcutta, when the Official Liquidator went there

for taking possession of the books, papers, documents and assets of the company (in liquidation) as the said address which was the office of the company (in liquidation) originally. Therefore, it reveals the complete identity of the petitioner, Mahabir Prasad Agarwal, and the company (in liquidation) all through. It is also now disclosed that the company (in liquidation) alleged to have inducted another company as an alleged sub-tenant in respect of the said jute mills of Prem Chand which has been leased out to the company (in liquidation) and the said lessor, Prem Chand Jute Mills Limited has no notice of such alleged subtenant. The said contrivance appears to me to be an attempt on the part of the petitioners to set up at the first instance Indian Burlap & Laminated Works Limited and thereafter an alleged sub-tenant another Limited Company to obstruct and interfere with the winding up proceedings and resist possession of the assets of the company and also the said Prem Chand Jute Mills if possible. On the whole the petitioners clearly demonstrated beyond any reasonable doubt that they lack in commercial morality, probity and honesty and are a real public danger if they are allowed to run the Jute Mills under any circumstances.

34. As I have already observed that there is no positive or concrete material on which the Court can rely and be satisfied that the petitioners have any know how or financial resources to pay off the opposing creditors and the secured creditors and carry on the business of the jute mills with commercial morality and for public interest. Some of the petitioners seem to be delinquent Directors of the company (in liquidation) who have committed gross violations of the provisions of the Companies Act, as disclosed in the report of the Official Liquidator which is based on the records filed with the Registrar of Companies, West Bengal. Therefore, it is not only undesirable but it is positively dangerous on the ground of commercial morality and public interest to stay the winding up. On the other hand, the winding up proceedings should be expedited and efforts should be made to see that the assets of the company are recovered as early as possible without incurring further liability by the company in respect of the said leasehold right of the jute mills under the lessor, Prem Chand Jute Mills Limited. The Court should not be swayed by catch words and gimmick of reviving an industry and providing employment to the unemployed workers on the ground of socio-economic development of the State, but it has to carefully examine whether it applies to a particular case and I have no doubt in my mind on the facts of this case that all these are high sounding words which have been submitted before this Court from time to time only to prejudice and influence the mind of the Court, if possible, to get a favourable order. But the conduct of the petitioners particularly the Ex-Directors and management of the company all though seems to be dubious, wrongful and illegal and violative of the provisions of the Companies Act, 1956.

35. The duty cast on the Court as it appears from the principle laid down in the above authorities and by the cases cited seems to be very responsible one, the matter has to be very seriously and carefully examined from all aspects, particularly in the light of the conduct of the ex-management and the applicant before the Court for stay of winding up petition. As I have already discussed

above I have no doubt in my mind that the applicants who were some of the ex-Directors have adopted various contrivances to hang on others properties and deprive the creditors of their legitimate dues only to carry on business in illegal, dishonest manner and absolutely lacking in commercial morality. It is also the further duty of the Court from the Socio-Economic point of view to eradicate dishonest, and corrupt management of the company affairs and to set up a healthy atmosphere in the industry, particularly the Jute Industry which is foreign exchange earner and passing through a boom having very bright prospects in the near future. Therefore the assets of the company being that of Prem Chand Jute Mills Ltd. together with any machineries if any has been added by the company in liquidation has to be protected and steps should be taken so that it may be restarted under efficient, honest and bonafide management. The present applicants who have tried various sorts of contrivances by setting up and abortive sale to Indian Laminated and Burlup Company by the Prem Chand Jute Mills and thereafter the said lease of 1971 was entered into with the company and now in course of present application it is alleged by the applicant that a sub-lessee to a limited company, which obviously under the same management has been set up to prevent the assess of the company in liquidation and also that of the lessors to be restored to their respective possession in the usual course. Those are only contrivances for creating complications and delay if possible and all these indicate that this is a fit case where the Court must stamp down dishonesty, corruption and commercial immorality by all means and do so promptly as far as possible. The conduct of the applicant has already clearly shown that they have enough resources for carry on litigations to the last stage up to the Supreme Court from every possible order which they allege to be against them. That only indicates that the intention of the applicant to present this application is not at all bonafide but wholly malafide and for making unjust gain at the cost of others and impede administration of companies in winding up, if possible. Therefore, I am satisfied that no grounds whatsoever have been made for any kind of stay of winding up being granted either limited or unlimited. In the result the present application is dismissed with costs.