
(2019) 08 BOM CK 0035

In the Bombay High Court

Case No : Appeal No. 163, 618 Of 2016, Company Application No. 593, 620 Of 2011, Notice Of Motion No. 912 Of 2018, 257 Of 2019

Kamani Employees' Union

APPELLANT

Vs

Official Liquidator And Ors

RESPONDENT

Date of Decision : 08-08-2019

Acts Referred:

Companies Act, 1956 — Section 529, 529A, 441, 441(2), 445(3), 446, 530, 536, 537
Industrial Disputes Act, 1947 — Section 25N, 25O
Factories Act, 1948 — Section 79, 79(3), 80
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20(1)
Companies (Court) Rules, 1959 — Rule 179

Citation : (2019) 08 BOM CK 0035

Hon'ble Judges : R.M. Borde, J;N.J. Jamadar, J

Bench : Division Bench

Advocate : Meena H. Doshi, Anjali Helekar, L.T. Satelkar, Jayesh Desai, Durgaprasad Halwai, S.C. Naidu, B.S. Naik

Final Decision : Partly Allowed/ Dismissed/ Disposed Off

Judgement

N.J. Jamadar, J

1. These appeals assail the legality, propriety and correctness of the common order dated 6th January 2016 passed by the learned Company Judge in Company Application Nos.593 of 2011 and 620 of 2011 in Company Petition No. 778 of 2005.

2. Though the dispute has a long and chequered history, spanning over two decades, the background facts necessary for the determination of these appeals can be summarized as under :-

(a) KMA Limited (in liquidation) (hereinafter referred as "the company") was registered under the Companies Act, 1956. It had two plants. One at Mumbai. Another at Banglore. Kamani Employees Union-Appellant in Company Appeal No.163 of 2016 is registered trade union of the employees of the company. KMA

Workers and Staff Union - respondent No.2 is a rival trade union. It claims to represent the employees at Bangalore Plant. Mrs.Triveni Kulkarni- appellant in Appeal No. 618 of 2016 is a workman of the company.

(b) As the business of the company became unviable, the company was referred to the Board for Industrial and Financial Reconstruction (BIFR) in a suo motu reference. On 16th April 1993, BIFR passed an order approving the scheme of rehabilitation for the company, which provided for the running and management of the company by the workers' cooperative, upon certain terms. The workers' co-operative managed the affairs of the company till December 1998. The wages of the workmen for the month of January 1999 and onwards remained unpaid. By an order dated 6th September 2000, BIFR recommended winding up of the company.

(c) The said recommendation was challenged by the company before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). During the pendency of the said appeal, AAIFR constituted an Asset Sale Committee to sell the assets of the Company under the supervision of AAIFR. Ultimately, the AAIFR was persuaded to dismiss the appeal by order dated 7th February 2005.

(d) The said order of AAIFR was assailed before this Court by the company in Writ Petition bearing No. 1512 of 2002. In the said writ petition, on 20th December 2002, a consent order was passed for sale of movable and immovable assets of the company. The Asset Sale Committee thus sold the factory premises including plants and machineries at Mumbai and Bangalore. This Court confirmed the sale of factory premises by order dated 15th December 2004. Pursuant to the directions of this Court, the sale proceeds of Rs. 81.21 crores were deposited in a no lien account.

(e) By order dated 4th April 2005, directives were issued to adjudicate the claims of the workmen and secured creditors. The Industrial Court, Mumbai, adjudicated the claims of workmen by judgment and order dated 2nd July 2005. The Debt Recovery Tribunal adjudicated claims of the banks and financial institutions by an order dated 17th August 2005. On 29th September 2005, the Official Liquidator came to be appointed, as the Provisional Liquidator.

(f) The orders passed by the Industrial Court and Debt Recovery Tribunal are challenged by Kamani Employees Union, the registered trade union, the company as well as and the consortium of banks and financial institutions. During the pendency of the writ petitions, pursuant to negotiations, consent terms were executed between the Union and the banks. Some workmen did not join in the consent terms. Thereupon, a Division Bench, of this Court disposed of the above three writ petitions in accordances with the consent terms, in the presence of the dissenting workmen, by order dated 8th July 2008. It was further provided in the said order that since the winding up petition was pending before the Company Court, the consent terms would require concurrence of the Company Judge.

(g) Eventually, the Company Court ordered winding up of the company on 24th

October 2008. By a further order dated 13th March 2019, the Company Court accepted the consent terms and authorized payments to be made in accordance with the consent terms. An amount of Rs.11.38 crores was kept aside towards adjudication of claims of dissenting workmen.

(h) Several claims were lodged by the dissenting workmen before the official liquidator for adjudication. Resubmitted report, bearing Official Liquidator's Report No. 158 of 2010, was filed by the official liquidator with a prayer that the dissenting workmen be paid their dues in accordance with the consent terms as it was noticed that the amounts payable under the consent terms were higher than the adjudicated amounts.

3. (a) In this backdrop, Mr.Triveni Kulkarni filed Company Application No.593 of 2011 seeking a direction against the Official Liquidator for adjudication of claims of workmen and secured creditors of the company in accordance with section 529-A and 530 of the Companies Act. KMA workers and staff union, preferred Company Application No.620 of 2011 for adjudication of the claims of the workmen. In the said application, the adjudication by the Official Liquidator, as reported in Official Liquidator's Report No.158 of 2010, was questioned and a prayer was made that the claims of the workmen be re-adjudicated on the basis of the judgment and order passed by the Industrial Court in complaint (ULP) No. 144 of 2005, dated 2nd July 2005.

(b) The Company Court partly allowed the aforesaid applications by order dated 2nd February 2012 and directed, inter-alia, the Official Liquidator to adjudicate the claims of dissenting workmen on the basis of the order of the Industrial Court and also the records of provident fund. The said order of the Company Court dated 2nd February 2012 was subjected to appeal before the Division Bench of this Court in Appeal (Lodg.) No. 602 of 2012, at the instance of Kamani Employees Union, the registered trade union. The Division Bench, by its judgment and order dated 30th August 2012, was persuaded to set aside the order of the Company Court dated 2nd February 2012 and restore the applications No. 593 of 2011 and 620 of 2011 to file. The learned company Judge was directed to decide the applications afresh after taking into consideration the objections raised by the registered trade union and after providing an opportunity of hearing to the registered trade union and secured creditors.

4. In adherence to the aforesaid directions, in appeal (Lodg.) No. 602 of 2012, the learned company judge heard the above numbered company applications afresh. By the impugned order dated 6th January 2016, the learned Company Judge professed to determine the issues in principle on the basis of which the Official Liquidator was directed to further adjudicate the claims of the dissenting workmen.

5. The learned Judge, after consideration of the material on record and rival submissions canvassed by the parties, was persuaded to pass the following order :-

(i) The Official Liquidator is directed to adjudicate the claims of the Applicants in the Company Applications herein on the basis of this order and after taking into account the documentary evidence available on record and verifying the respective claims;

(ii) The Official Liquidator shall enlist the assistance of any advocate and / or chartered accountant on his panel for the purpose of such adjudication. The costs of such advocate and / or chartered accountant shall be defrayed from the funds of the Company (in liquidation) available with the Official Liquidator;

(iii) At any time during the course of such adjudication or after adjudication but before disbursement of payment on the basis thereof, the Official Liquidator shall give an option to each of the Applicants to accept their dues in accordance with and on the principles of the consent terms taken on record in Writ Petition Nos.285 of 2006, 196 of 2006 and 459 of 2007 in full and final settlement of their claims against the Company (in liquidation);

(iv) The Official Liquidator shall complete the exercise of adjudication of dues in terms of this order within a period of three months from today and make payment to the Applicants on the basis thereof within four weeks thereafter after adjusting payments, if any, already made to them during the pendency of these Company Applications;

6. In the body of the impugned order, the learned Company Judge, inter alia, spelled out, the principles, as regards the norms in accordance with which the dissenting workmen were entitled to wages, date up to which the dissenting workmen were entitled to the wages, which of the dissenting workmen were eligible for the wages and the specific heads of claim to which they were entitled to.

The learned Company Judge articulated the broad issues which arose for consideration before the Company Court as under :-

(a) Whether the dissenting workmen are bound by the consent terms or whether they are entitled to be paid in accordance with Sections 529 and 529A of the Companies Act, 1956?

(b) If they are to be paid according to their entitlement under Sections 529 and 529A, upto what date are they entitled to be paid wages?

(c) Whether they are entitled to any (i) notice pay, (ii) leave wages, (iii) bonus or (iv) gratuity and (v) any interest on these dues?

7. We are of the view that for appreciating the controversy in a correct perspective, it would be apposite to record in brief, at this stage, the findings recorded by the learned Company Judge on the aforesaid issues which constitute the basis of the impugned order, in accordance with which the Official Liquidator was directed to further adjudicate the individual claims.

8. As regards issue (a) above, the learned Judge recorded a categorical finding

that the dissenting workmen were not bound by the consent terms executed by and between Kamani Employees Union-the registered trade union and the creditors since the issue of entitlement of the dissenting workmen was specifically kept open. Thus, the dissenting workmen were held to be entitled to adjudication of their claims in accordance with the provisions contained in section 529 and 529-A of the Companies Act, 1956. It was further ruled that while adjudicating the entitlement of the dissenting workmen in accordance with section 529 and 529-A, the Official Liquidator was not bound by the order passed by the Industrial Court in Complaint ULP/144/2005.

9. As regards the issue No.(b) above, the learned Company Judge was of the view that in view of the provisions contained in section 445(3) of the Companies Act, 1956, the winding up order would operate as a notice of discharge, and thus, the dissenting workmen were entitled to wages up to the date of the winding up order, i.e., 24th October 2008. It was further observed that only those of the dissenting workmen, who became members of the workers' co-operative, by fulfilling the terms of the scheme approved by the BIFR, and worked till 1998, were entitled to the wages up to the date of the winding up order. Other workmen were not entitled to any wages with effect from 20th September 1991.

10. As regards, the entitlement of the workmen to (i) notice pay, (ii) leave wages, (iii) bonus (iv) gratuity and (v) interest on the due amount, as at issue (c) above, the learned Company Judge held that in view of the amended provisions of section 25-O (introduced by the Industrial Disputes Act, i.e., Act No. 46 of 1982), the workmen were not entitled to any notice pay. Construing the provisions of section 79 of the Factories Act, 1948, it was held that the workmen were not entitled for wages in lieu of leave generally but only in the contingencies covered by sub-section (3) of section 79 up to the maximum of thirty days at the rate prescribed under Section 80 of the Factories Act. The workmen were held to be not entitled for bonus as it does not get priority under section 529 and 529-A. The workmen were held to be entitled to gratuity. The claim for interest on the amount of gratuity post winding up order (on the date or which the workmen were entitled to receive gratuity), was held to be governed by Rule 179 of the Companies (Court) Rules, only in the event of there being a surplus after payment in full of all claims admitted to proof. It was further held that the same principle would also govern the claim for interest as regards the other items like notice pay and leave wages.

11. Formulating the terms of entitlement, as above, the learned Company Judge disposed of the applications by passing the operative directions, extracted above. Being aggrieved by and dissatisfied with the impugned order, especially the finding that the dissenting workmen were not bound by the consent terms dated 8th July 2008; that the dissenting workmen were entitled to wages up to the date of the winding up order, i.e. 24th October 2008 and that the dissenting workmen were entitled to exercise an option to claim the dues in accordance

with and on the principles of the consent terms, Kamani Employees Union-the registered trade union, has preferred the appeal being Appeal No. 163 of 2016. Whereas, the individual workman Ms. Triveni Kulkarni has preferred Appeal No.618 of 2018, being aggrieved by and dissatisfied with the dis-allowance of the claim as regards the notice pay, leave wages, retrenchment compensation and the interest on the due amount etc.

12. We have heard Mrs. Meena H Doshi, the learned counsel for the appellant in Appeal No. 163 of 2016 and Shri S.C. Naidu, the learned counsel for the respondent No.1- KMA Workers Staff Union-the rival trade union, L.T. Satelkar, the learned counsel for Official Liquidator and Shri Jayesh Desai, the learned counsel for respondent No.4. The learned counsels have also tendered written submissions in elaboration of the submissions advanced at the bar.

As regards the companion Appeal No. 618 of 2016, it is necessary to note that, though in pursuance of the order passed by the Supreme Court, dated 9th October 2018, the Appeals were directed to be listed for final disposal on 15th April 2019, none appeared for the appellant till the conclusion of elaborate submissions on behalf of the parties in Appeal No. 163 of 2016. After the matter was closed for orders, Smt. Anjali Helekar, the learned counsel for the appellant had submitted written notes of arguments on behalf of the appellant in Appeal No. 618 of 2016.

13. At the outset, it is necessary to note that Shri Naidu, the learned counsel for the respondent No.2-KMA Workers' Union, (hereinafter referred to as the "rival union") submitted that the members of the respondent No.2 do not desire to exercise the option to claim under the consent terms, as provided by clause (iii) of the impugned order. Shri Naidu further submitted that the members of the rival union also do not press the challenge to the determination of the entitlement of the workmen under the various items, namely, notice pay, leave wages, bonus, gratuity and interest covered by the issue as at (c), in the impugned order.

14. In this view of the matter, the controversy revolves around the following points :-

- (1) Whether the consent terms are binding upon the dissenting workmen?
- (2) Whether the dissenting workmen are entitled to wages up to the date of the winding up order, i.e., 24th October 2008?
- (3) Whether the determination of the entitlement of the dissenting workmen under various items, i.e., notice pay, leave wages, bonus, gratuity and interest by the learned Company Judge is justifiable? (In view of the challenge thereto in Appeal No.618 of 2016 preferred by Mrs. Triveni Kulkarni).

Point No.1 :

BINDING EFFICACY OF THE CONSENT TERMS UPON THE DISSENTING

WORKMEN :

15. Indisputably, the consent terms between the registered trade union and the consortium of creditors, led by Bank of Baroda, were tendered in Writ Petition No. 195 of 2006, Writ Petition No. 285 of 2006 and Writ Petition No. 559 of 2007, which were filed by the parties aggrieved by the adjudication of the claims of the creditors by the Debt Recovery Tribunal and of the workmen by the Industrial Court. Those consent terms were tendered before this Court on 8th July 2008. This Court took the consent terms marked 'X', on record of the Court. However, since the company petition was already admitted by the Company Judge, by order dated 29th September 2005, wherein the Official Liquidator had been appointed as Provisional liquidator of the company, the Court directed that it would not be appropriate to act upon the consent terms without concurrence of the learned Company Judge. Those petitions were thus disposed of in accordance with the consent terms subject to the concurrence of the learned Company Judge. It was further clarified that those consent terms do not in any manner extinct right of any creditor to lodge his claim with the Official Liquidator in the proceedings pending with the learned Company Judge in the Company Petition No.778 of 2005.

16. Two more orders passed in Company Petition No. 778 of 2005 are of material significance. In the order dated 25th September 2008, the learned Company Judge specifically recorded that the learned counsels for the dissenting workmen submitted that their employment continues and those workmen were not covered by the adjudication (which was claimed to have been arrived at). The order dated 13th March 2009, whereby the learned Judge accepted the consent terms, recorded a submission that about eighty employees have not accepted the settlement under the consent terms. According to them, they were not bound by the consent terms despite the fact that they had been arrived at on behalf of the workmen by the Applicant union (appellant). The learned Company Judge observed, inter-alia, as under :-

"5. It is not necessary for me to decide this question in the present application. Even assuming that there is any substance in the claim of these dissenting workers, admittedly, the amounts which would be left with the Official Liquidator even after disbursing the amounts to the workers and the employees under the consent terms, would be sufficient to satisfy the same. The dissenting employees have filed claims before the Official Liquidator. Needless to say, that these claims will be decided by the Official Liquidator after giving notice to the union, and the banks/financial institutions. All the contentions of the parties regarding the effect of the consent terms on all the dissenting employees are kept open."

(emphasis supplied)

17. While disposing of the company application, addressing the submissions and grievances raised on behalf of the dissenting workmen, the learned Company Judge directed as under :-

(i) The consent terms are taken on record and an order in terms thereof is passed without prejudice to the rights of the dissenting employees, if any.

ii) An amount of Rs. 11.38 crores shall be retained by the Official Liquidator to meet the claims of the dissenting employees, if any."

18. In the backdrop of the aforesaid orders, the learned Company Judge, in the instant proceedings, was not prepared to accept the submissions on behalf of the appellant-registered trade union that the consent terms accepted by the Court on 18th July 2008 were binding upon the dissenting workmen. It was noted that the issue of the entitlement of dissenting workmen was kept open in terms of the aforesaid orders.

19. Mrs. Doshi, the learned counsel for the appellant made an earnest endeavour to persuade us to hold that the aforesaid finding of the learned Company Judge is contrary to the aforesaid orders and the material on record. This submission was premised on the grounds that the consent terms were executed in substitution of the adjudication of the claims of the workmen, by the Industrial Court, by order dated 2nd July 2005; the consent terms were accepted by the majority of the workmen, i.e., about 1100 workmen and only 60 odd employees were represented by the rival union; the consent terms are otherwise more beneficial and many of the dissenting workmen have filed affidavits accepting the amounts under the consent terms. An endeavour was also made to demonstrate that the dissenting workmen allowed the orders to be passed on the basis of the consent terms and, thus, the dissenting workmen can be said to have waived their rights to claim dues in accordance with the provisions contained in section 529 and 529A of the Companies Act, 1956.

20. In opposition to this, Shri Naidu mounted a multi-pronged attack to the validity of the consent terms. First and foremost, the consent terms were not executed between the employer and the workmen. It was a private arrangement between the creditors and a group of workmen. Secondly, there is no material on record to indicate that the appellant union professed to represent the dissenting workmen. Thirdly, the consent terms are in flagrant violation of the statutory provisions contained in the Companies Act, 1956 as well as the legislations which govern the jural relationship between the employer and the workmen.

21. In the light of the material on record, we are not persuaded to agree with the submissions of Mrs. Doshi. The reasons are not far to seek. The orders, to which we have referred to above, unmistakably indicate that the dissenting workmen had raised strong objections to the acceptance of the consent terms. The dissenting workmen claimed that their employments have not come to an end and they were entitled to claim the dues in accordance with the governing statutory provisions. The learned Company Judge, in the order dated 13th March 2009, whereby the consent terms were accepted and acted upon, made it abundantly clear that the consent terms were accepted without prejudice to the rights of the dissenting workmen. An amount of Rs. 11.36 crores was directed to

be kept aside to meet the claims of the dissenting workmen. In the face of these orders, the dissenting workmen cannot be bound to the consent terms unless there is clinching material on record to show that, on the one hand, the appellant union had the competence and authority to execute the consent terms on behalf of the dissenting workmen and/or, on the other hand, the dissenting workmen took an informed and conscious decision to be governed by the consent terms.

22. In the impugned order, the learned Company Judge has recorded that the appellant-registered trade union could not show any material in support of its contention that the dissenting workmen had accepted the consent terms by filing affidavit. It was further noted that the affidavits and documents placed on record suggested otherwise. This factual position, recorded by the learned Company Judge, could not be shown to be incorrect. Concededly, the dissenting workmen were not party to the consent terms. Nor there is any material of unwavering tendency to establish that the appellant-union had requisite competence and authority to represent the dissenting workmen. The submission that the dissenting workmen were well aware of the then impending consent terms or they allowed the consent terms to be taken on record, or, for that matter, the consent terms were accepted in the presence of the learned counsels representing the dissenting workmen are of no avail. In the face of the provisions contained in section 529 and 529-A of the Companies Act, 1956, the dissenting workmen cannot be deprived of their statutory and legitimate right to participate in the product of their labour and effort, which becomes disburseable, in the wake of winding up, on the basis of such submissions of tacit consent or waiver. The finding recorded by the learned Company Judge that the consent terms do not bind dissenting workmen, in the circumstances, appears to be impeccable. Thus, we are not impelled to take a different view of the matter.

Point No. 2

THE DATE UP TO WHICH THE DISSENTING WORKMEN ARE ENTITLED WAGES?

23. The learned Company Judge, having regard to the provisions contained in section 445(3) of the Companies Act, 1956, recorded a finding that the jural relationship between the dissenting workmen and the employer came to an end only upon passing of the winding up order, i.e., 24th October 2008. It was further observed that no discharge of workmen at any anterior point of time could be shown. The learned Judge did not accede to the submission of Mrs. Doshi that since the winding up order relates back to the date of presentation of the company petition, a similar relation-back obtained in a case of notice of discharge under section 445(3) of the Companies Act, 1956.

24. Mrs. Doshi urged that the aforesaid approach of the learned Company Judge is not in consonance with the legal position and, in any event, is not justifiable in the peculiar facts and circumstances of the case at hand. Taking us through the various developments commencing from the suo motu reference by BIFR in the year 1991, it was submitted that the date of winding up prescribed under section

445(3) of the Companies Act, 1956 as the deemed date of discharge of employment cannot be said to be the sole determinative factor in ascertaining the entitlement of the dissenting workmen. The learned counsel for the appellant urged that the entitlement of dissenting workmen to wages is required to be restricted upto three events, which were pressed into service, as alternatives. The first is the 20th December 2002, when the minutes of orders were tendered in Writ Petition No. 1512 of 2002 filed by the Company against the order of AAIFR approving the recommendation of BIFR to wound up the company. The second is 15th December 2004, the date on which the sale of the factory premises was confirmed by this Court in Notice of Motion No. 476 of 2004. With the confirmation of the sale, the substratum of the company was lost, submitted Mrs.Doshi. The third is 29th September 2005, the day on which the company petition for winding up was admitted by this Court. It was submitted that in accordance with the provisions contained in section 441(2) of the Companies Act, 1956, the winding up of a company shall be deemed to commence at the time of the presentation of the petition for the winding up. Thus, the winding up order dated 24th October 2008 relates back to the date of presentation of the petition and, thus, at any rate, the entitlement of the dissenting workmen for wages needs to be capped up to 30th September 2005.

25. The last submission as regards the relation back of the date of winding up to that of the date on which the Company Judge admitted winding up petition, was canvassed with a degree of vehemence. In order to lend support to this submission, a strong reliance was placed on the judgments of the Supreme Court in the case of NGEF Ltd. VS. Chandra Developers (P) Limited & Anr. (2005) 8 SCC 219, of the Delhi High Court in the case of Greaves Fresco Ltd. Vs. Ratlam Ispat Ltd. (In Liquidation) (1997) 88 Company Cases 155, and of the Gujarat High Court in the case of Indoco Remedies Limited Vs. Official Liquidator of Kay Packaging Pvt. Ltd. & Anr. (2009) 4 Comp. LJ 156 (Guj.).

26. Per contra, Shri Naidu, the learned counsel for the respondent No.2-rival union, stoutly submitted that section 441(2) of the Companies Act, 1956, on the strength of which the edifice of the submission is sought to be built, only provides the date on which commencement of winding up proceedings is required to be reckoned. It was submitted that for appreciating the true import of section 441(2), it is necessary to notice other provisions of the Companies Act, 1956, especially the provisions of section 446, which incorporates an interdict against institution and continuation of the legal proceedings against a company, upon passing of a winding up order or the appointment of the Official Liquidator as Provisional liquidator, except by leave of the Court, and section 537, which renders any attachment, distress, execution against the estate or effects of the company or sale of any of the properties or effects of the company, without the leave of the Court, void. It was urged that section 537 thus covers the intervening period between the commencement of the proceedings under section 441 and the passing of the winding up order.

27. To bolster up, aforesaid submissions, Shri Naidu placed reliance upon the judgments of the Punjab High Court in case of Lahore Enamelling and Stamping Company Ltd. vs. A.K. Bhalla & Ors. AIR 1958 Punjab 341 , of the Delhi High Court in the case of Income Tax Officer Vs. Official Liquidator, National Conduits (P) Ltd. (1981) 51 Company Cases 174 and a Division Bench of this Court in the case of Orkay Industries Ltd. Vs. State of Maharashtra & Ors. 1998 (2) Mh.L.J., 910.

28. We have perused the aforesaid judgments. We do not find it necessary to note the background facts, in the context of which, the pronouncements in the aforesaid cases were made. It would suffice to note that the time of commencement of the proceedings for winding up, specifically provided in sub-section (2) of section 441, is with the purpose of addressing the events, which transpire during the interval of commencement of the proceedings and the passing of the winding up order, and subject the transactions, which have occurred, without the express leave of the Court, to the winding up order. The utility of the deeming provision as to the commencement of winding up proceedings finds its practical application in the provisions contained in sections 536 and 537 of the Companies Act, 1956.

29. In fact, from the date of the presentation of the petition, the Court's protective arm is thrown on all transactions so that private individuals would not deal with the assets of the company so as to prevent a situation that on the date of winding up, nothing is left with the Company Court for distribution. This, however, does not necessarily justify an inference that the winding up order relates back to the date of the presentation of the petition for all intent and purpose.

30. The pivotal issue raised in the instant appeal as regards the date up to which the workmen are entitled to wages, is specifically dealt with by a Division Bench of this Court in the case of Grand View Estates Private Limited Vs. Vishwanath Namdeo Patil & Ors., Appeal No.447/2014 with Appeal No.668/2014 dt. 22.12.2015 a judgment of the Appeal Bench, before which the judgment of the learned Single Judge in the case of Vishwanath Namdeo Patil Vs. Official Liquidator of Swadeshi Mills & Ors. (2013) 181 Company Cases 133 (Bombay), (on which, in the instant case, the learned Company Judge had placed reliance to arrive at the conclusion that the dissenting workmen were entitled to wages upto the date of winding up order), was taken in appeal.

31. In this context, Shri Naidu submitted that even the Appeal Bench in the case of Grand View Estates Private Limited (Supra) had reckoned the date of winding up as the date up to which the workmen, in the said case, were entitled to claim wages, and, thus, the said judgment cannot be said to lay down a proposition of law, contrary to that of the judgment in the case of Vishwanath Namdeo Patil (Supra) and the principle emerging from section 445(3) of the Companies Act, 1956.

32. In the case of Vishwanath Namdeo Patil (Supra), the learned Single Judge had considered the question, "Whether the Companies Act, 1956 provides the date of passing the order of winding up as the only contingency or whether the Act provides any other event prior to the date of the order of winding up for calculation of dues of the workmen", in the backdrop of following facts.

33. Upon recommendations of BIFR, a company petition for winding up of M/s. Swadeshi Mills Company Ltd., was admitted on 13th February 2002. On the very day, the Official Liquidator was appointed as Provisional liquidator. In the meanwhile, the sale of the assets of the company was confirmed on 17th September 2003. The winding up order was passed on 5th September 2005. In the aforesaid backdrop, the learned Single Judge observed, inter-alia, as under :-

"42 Section 445(3) clarifies that unless the business of the Company is continued, the order of winding up shall be deemed to be a notice of discharge. It states that no separate notice for discharge is necessary and order of winding up is good enough and will be deemed to be a notice. The fiction that section 445(3) creates is that 'order' of winding up will be treated as 'notice' of discharge. What the Section says is that the order of winding up is cessation of service unless the business is continued. Thus the workers are put to notice that unless business is continued their services will be treated as coming to an end from the date of winding up and no separate notice is necessary. It is in this context the deeming fiction is to be read.

.....

65To conclude, the relevant date for computing workman's dues will be the date of winding up as per Section 445(3) and not the appointment of Provisional Liquidator. The Official Liquidator will have to recalculate the dues of the workmen accordingly."

(emphasis supplied)

34. On appeal, the Appellate Court, in the case of Grand View Estates Pvt. Ltd. (Supra) formulated the following question for consideration :-

"Whether, in an adjudication proceedings before the Official Liquidator, dues of the workers are to be calculated from the date of actual winding up of the Company by the Company Court or whether they should be calculated from the date of appointment of the Provisional Liquidator with full powers to sell the assets or from the date on which there is cessation of work on account of various valid legal reasons?"

And answered the aforesaid question as under :-

"Depends on the facts and circumstances of each case."

35. The observations of the Appellate Court in paragraph No. 32 and 33 are material for the determination of controversy at hand. They read as under :-

"32. There cannot be any dispute regarding the said proposition. The deeming fiction clause which is introduced in any provision may not necessarily mean that, that date alone would be date on which the provision would come in operation and factually if it can be shown that it would be set in motion on some other date then that date also would operate as a cut off date.

33. In our view, therefore, if the other dates are not applicable in the facts and circumstances of the case then, in that case, the date of winding up would be the date on which the relationship of employer-employee would come to an end and from that date workmen would be entitled to get their legal dues. Therefore, there cannot be any strait-jacket formula which can be arrived at by holding that the date under section 445(3) would be the only cut off date from which workers dues are to be calculated and in a given case, it is possible to hold that earlier date could be the cut off date for calculating the workers' dues. To that extent, we disagree with the view taken by the learned Single Judge that date under section 445(3) would be the only date from which workers dues can be calculated."

(emphasis supplied)

36. It is evident that the Division Bench of this Court has, in terms, observed that there cannot be any strait-jacket formula to the effect that the date under section 445(3) would be the only cut-off date up to which the workers' dues are to be calculated. In a given case, it is possible to hold that even a date at an anterior point of time, could be considered the cut-off date for calculating the workmen's dues. To the said extent, the Appeal Bench did not approve the view of the learned Single Judge that the date of winding up would be the only date for the purpose of calculation of the workmens' dues.

37. It is true that in the case of Grand View Estates Private Ltd. (Supra), in the backdrop of its peculiar facts and circumstances, the Court held that the workmens' dues shall be computed up to the date of the winding up order. The prime factor which weighed with the Court was that, in the said case, the assets of the company included 48 Acres of prime land in the heart of Mumbai City and it was noticed that upon sale of those assets there would be surplus even after the payment was made from the proceeds thereof to the workmen and creditors. Thus, adopting beneficial interpretation, which would favour the workmen, the date of winding up order was taken as the cut-off date. However, the legal principle was enunciated in clear and unequivocal terms that the date of winding up under section 445(3) cannot be the only date for the purpose of calculating the workmens' dues.

38. Having regard to the clear exposition of the legal position, in the case of Grand View Estates Private Ltd. (Supra), the enquiry which is thus warranted is whether the facts and circumstances of the instant case would justify reckoning of an earlier date, than the date of winding up order, for calculating the dissenting workmen's dues?

39. The following factors have a material bearing on the determination of the aforesaid question. The business of the company became unviable as back as 1991. A suo motu reference was initiated by BIFR. A scheme of rehabilitation for the company was approved in the year 1993. The workers' co-operative took over the affairs of the company. The workers' co-operative ran the company till December 1998. The BIFR recommended the winding up of the company on 6th September 2000. AAIFR dismissed the appeals against the said recommendations. During the pendency of the writ petitions, challenging the orders of AAIFR, by consent, it was decided to sell the assets of the company. Eventually, the assets of the company were sold and the same was confirmed by this Court by order dated 15th December, 2004.

40. Firstly, the situation which thus obtains is that the sale of the assets of the company, which included the sale of the plant and machineries at Mumbai and Bangalore, in the year 2004, left a shell of the company without any assets, plant and machinery. The sale was confirmed by the orders of this Court. It was not a case of private sale, without the judicial imprimatur. With the sale of the assets of the company, including the plant and machinery, neither the company could have offered any work to the workmen nor the workmen could have rendered any services.

41. Secondly, with the confirmation of the sale of the asset of the company and realization of the proceeds, the corpus so realized constituted the product of the labour and effort of the workmen as well. From this stand point, the workmen's dues, after the sale of the assets of the company and conversion thereof into the sale proceeds, constituted a charge on the said corpus. By the orders of this Court, the said sale proceeds were invested in interest bearing account. The submission of Mrs.Doshi that the very substratum of the company was lost with the confirmation of the sale and receipt of the sale proceeds, cannot be said to be totally unfounded.

42. Thirdly, in the case at hand, in view of the consent terms, the share of the employees as a whole, in the sale proceeds, has been crystallized at Rs.3759.14 lakhs. Moreover, in terms of the order dated 13th March 2009, the claim of the dissenting workmen was stated to be, in any event, not more than 11.38 crores, which amount was, thus, directed to be kept aside to meet their claims. Evidently, there is no question of the workmen laying any competing claim with the secured creditors pari pasu as the entitlement of the workmen, as a class, has been frozen. The dispute in the instant case is between the workmen inter-se.

43. The entitlement of the workmen to wages, who have lodged their claims in accordance with the consent terms, is frozen till December 2002. It is true that there are contentious issues regarding entitlement as provided under the consent terms, including the eligibility of the workmen to get the wages thereunder. It is also true that all these questions have been kept open. However, the fact remains that the real dispute among the workmen is about the surplus which would remain after satisfying the claims of the workmen, which command priority.

44. Fourthly, the matter can be looked at from another perspective. With the approval of the scheme of rehabilitation, in a sense, the workers' co-operative managed the affairs of the company and, conversely, the directors of the company ceased to manage the affairs thereof as the employers. Still the company found itself in a straitened financial circumstances and ultimately the operations were closed down. In the impugned order, the Company Judge has recorded that as a matter of fact, the Principal Labour Court, Bangalore has, on the application of the rival union, in its award, held that there was no refusal of employment on the part of the employer for those workmen who did not join the workers' co-operative and work for the company under the workers' co-operative. On this premise, the claims of the workers, who did not become the members of the workers' co-operative and worked with the company till December 1998, were disallowed. This development of the workers' co-operative, running the company under the scheme of rehabilitation approved by BIFR, in 1993, cannot, therefore, be said to be insignificant or inconsequential. This circumstance has a material bearing on the jural relationship between the company and the workmen.

45. In our considered view, the aforesaid factors render it rather inequitable to allow the dissenting workmen to claim wages up to the date of the winding up, as the very substratum of the company was lost in the year 2004 itself and the sale of the assets of the company was confirmed by this Court. The submission on behalf of the rival union that the cessation of jural relationship can only be in accordance with the provisions contained in Industrial Disputes Act, especially sections 25-N and 25-O and only the date of winding up constitutes a valid notice of discharge of the employment, in accordance with section 445(3) of the Companies Act, 1956, and, thus, the dissenting workmen are entitled to the wages upto the date of winding up order, no matter what were the developments and circumstances in the intervening period, does not merit acceptance.

46. We are of the view that the factors enumerated above, would justify the prescription of an earlier date than the date of winding up as the cut-off date for the entitlement of the dissenting workmen, in view of the law laid down by this Court in the case of *Grand View Estates Private Ltd.* (Supra). In our view, the date of the appointment of the Provisional Liquidator, i.e., 30th September 2005, after admission of the company petition, pursuant to an opinion rendered by BIFR under section 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 would be the appropriate date for calculating the claims of the dissenting workmen. The Provisional Liquidator came to be appointed much after the confirmation of the sale of the assets of the company and realization of the proceeds thereof. We make it clear that we have not prescribed the date of appointment of the Provisional Liquidator as the cut-off date as the mandate flowing from the provisions of the Companies Act, 1956, but having regard to the fact that, by the said date, the company was rendered a shell and its assets were converted into corpus, for the purpose of liquidation.

47. In view of the above, we are inclined to modify the impugned order only to the extent of the date upto which the dissenting workmen are entitled to the wages. Point No.2 is thus answered partly in the affirmative.

Point No.3 :

48. It bears repetition to state that the rival union has not pressed any ground questioning the legality, propriety and correctness of the directions issued by the learned Company Judge as regards the entitlement of the workmen under specific items like notice pay, leave wages etc.

49. In the companion appeal, however, as indicated above, the appellant has tendered notes of arguments, challenging the disposition by the learned Company Judge as regards notice pay and closure compensation. We have indicated that though the matter was heard over a period of time, on a couple of days, no endeavour was made by the appellant Ms. Triveni Kulkarni to advance the submissions and only after the matters were closed for orders, written submissions were tendered.

50. We have perused the written submissions. We find that the learned Judge has ascribed sound reasons for negating the claim for notice pay, rested on the provisions of section 25-O of the Industrial Disputes Act, (Maharashtra Amendment), which was held to have been subsequently substituted by Act No.46 of 1982 (Central Legislation) with effect from 21st August 1984, a complete and self contained code. We do not find that the learned Judge committed any infirmity in disallowing the claim for notice pay. As regards the closure compensation, we find that the issue has not been dealt with by the learned Company Judge, apparently, for the reason that it was not agitated before the learned Judge. We do not find it appropriate to deal with the said issue of entitlement of the appellant, Mrs. Triveni Kulkarni for closure compensation, for the first time, in exercise of appellate jurisdiction, especially when the appellant did not care to canvas the issue across the bar and the rival union has chosen not to question the disposition made by the learned Judge by the impugned order. As the amount is lying un-disbursed on account of non-adjudication of the claims, in view of pendency of the proceedings before this Court, we are of the view that said issue raised by an individual workman should not detain the Official Liquidator from adjudicating the claims and disbursing the due amounts to the workmen any more.

We are thus not persuaded to interfere with the impugned order as regards the entitlement of the workmen under the specific items.

51. The upshot of the aforesaid consideration and the reasons, which we have indicated above, is that the appeal No.163 of 2016, preferred by Kamani Employees Union deserves to be partly allowed and the appeal No. 618 of 2016 deserves to be dismissed. Hence, we pass the following order :-

ORDER

(I) Appeal No. 163 of 2016 stands partly allowed.

(II) The impugned order stands modified to the extent that the dissenting workmen shall be entitled to wages upto 29th September 2005, instead of 24th October 2008.

(III) Rest of the impugned order stands confirmed.

(IV) Appeal No. 618 of 2016 stands dismissed.

(V) Pending Notice of Motion, if any, stands disposed of.

No costs.