

(2004) 07 DEL CK 0031

In the Delhi High Court

Case No : Co. Application 1022 and 1393/03 in Co. Petition 357/99

Motorola India Ltd.

APPELLANT

Vs

DSS Mobile Communications Ltd.

RESPONDENT

Date of Decision : 30-07-2004

Acts Referred:

Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 433, 434, 439, 441(2), 447
Industrial Disputes Act, 1947 — Section 25FF

Citation : (2005) 127 CompCas 318 : (2005) 3 CompLJ 95 : (2004) 113 DLT 176 : (2004) 76 DRJ 214 : (2004) 56 SCL 601

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Rajiv Nayar and Meenakshi Arora, for the Appellant; Amit S. Chadha and Dinesh Rustogi, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—Before I take up these application it would be necessary to recapitulate the progress made in Company Petition No.357/99, and in the process, referring to and/or highlighting certain relevant court orders passed in this petition from time to time.

2. Company Petition No.357/99 is filed by the petitioner under Sections 433(e), 434 and 439 of the Companies Act, 1956 (hereinafter referred to as the "Act") read with Rule 9 of the Companies (Court) Rules, 1959 (hereinafter referred to as the "Rules") for winding up of the respondent company, namely, M/s. DSS Mobile Communications Ltd. This petition is founded on the averments that the respondent company owed a sum of Rs.9,83,78,310/- (Rs.8,2245,429/- towards principal and Rs.1,61,32,881/- towards interest till 30th April, 1999) as on the date of filing of the petition. Notice dated 25th May, 1999 was served upon the respondent u/s 433(e) read with Section 434 of the Act calling upon the respondent to pay the said amount with future interest within 21 days from the

receipt of the notice followed by another notice dated 4th September, 1999 as certain typographical mistakes crept in the earlier notice. As in spite of these notices payment was not made, present petition was filed.

3. After notice was served upon the respondent and the respondent appeared, parties negotiated the matter which resulted into settlement. Application recording the settlement along with consent terms of settlement was filed vide CA 815/2000. Pursuant to this settlement some payments were made by the respondent which fact was recorded in the order dated 25th May, 2000. The Court accordingly disposed of the petition in view of the settlement directing that the parties shall be bound by the consent terms. However, the respondent could not adhere to the terms of the settlement and pay the amount as agreed. Clause 12 of the consent terms entered into between the parties stipulated that in the event of default of payment of any of the installments, the petitioner would be entitled to approach this Court for restoration of the petition. The petitioner accordingly filed CA No.358/2002 for restoration of the petition which was allowed vide order dated 16th July, 2002. The petitioner also filed CA No.357/99 for appointment of provisional liquidator. Order dated 16th July, 2002 was passed in this application as well appointing the Official Liquidator attached to this Court the Provisional Liquidator with the direction to take over the assets and properties of the respondent company. Petition was admitted and citation was directed to be published in the "Indian Express" (English) and "Nav Bharat Times" (Hindi) and Delhi Gazette. Thereafter respondent filed CA No.881/2002 for recall of the order dated 16th July, 2002. During the pendency of this application the respondent company showed its willingness to make further payments in terms of settlement between the parties and the matter was adjourned from time to time.

4. It may be mentioned at this stage that the respondent had also preferred appeal against the order dated 16th July, 2002, which was disposed by the Division Bench vide order dated 23rd August, 2002 remanding the case back to this Court by passing the following order:-

""This appeal has been preferred by the appellant being aggrieved by the order of the learned Company Judge.

Apparently we find nothing wrong with the order passed by the learned Single Judge. However, Mr.V.P. Singh, learned senior counsel for the appellant has brought a bank draft in the sum of Rs.25 lakhs in the name of the Registrar of this Court and handed over the same to the learned counsel appearing for the respondents. Mr. Singh says that the draft shall be prepared in the name of the respondent. He further says that he is in a position to pay the amount in installments. Let proper application be made before the learned single Judge. After hearing learned counsel for the parties the learned single Judge will pass an appropriate order. Accordingly, the appeal stands disposed of in terms of the above order.""

5. Thereafter the respondent company again gave proposal to discharge its outstanding liability of the petitioner in a phased manner. The proposal initially given by the respondent was not acceptable. However, another proposal was given which was contained in CA No.881/2002 itself. During the pendency of the said CA and after the remand of the case the respondent gave another proposal by filing CA No.1082/2002. However, this was also not acceptable to the petitioner. The orders passed on subsequent hearing reveal that the respondent had improved upon its offer and submitted fourth revised proposal. Since the matter could not be settled CA No.881/2002 in which prayer for recall of the order dated 16th July, 2002 was made whereby provisional liquidator had been appointed, was heard and by detailed order dated 28th May, 2003 the Court rejected the prayer of the respondent to recall the order dated 16th July, 2002 finding the same to be fully justified and valid. In the said order this Court also considered the request of the respondent as to whether the respondent could be given further opportunity and after considering the matter from all angles concluded that the respondent was not in a position to make the payment. However, still one more opportunity was given to the respondent by fixing repayment schedule. In order to understand the circumstances in which the Court arrived at the aforesaid conclusion and fix the repayment schedule of the balance amount, it would be apt to reproduce here in under paras 14 and 15 of the said order :-

""14. There cannot be any dispute to the fact that the respondent company is unable to meet its current liabilities immediately. It is thriving to exist but its balance sheet indicates that as on March 31, 2002 its accumulated losses are Rs.1,431,083,606. Even the auditors of the respondent company have stated that the accumulated losses being the aforesaid amount, the ability of the respondent company to continue as a going concern is dependent upon availability of adequate continued finance and future profitability. The respondent company has diversified its business and has opened a call center with the help of a Korean company. But the records disclose that the respondent has otherwise become commercially insolvent and it is doubtful whether the respondent would be able to meet its current liabilities. The respondent company is even unable to pay an amount of Rs.15 lakhs as upfront money as a first installment to show its bona fide, nor it is prepared to give an undertaking of its promoter-director who alone are responsible for generating the funds and make the same available to meet the liability. It is brought out on record that before the Division Bench the respondent had stated that the respondent may be allowed to reschedule its outstanding dues by a period of one year, i.e., instead of July 2003, the installment could be rescheduled and the payment could be advanced by one year, i.e., to July 2004. The petitioner is even prepared to get it rescheduled up to December 2004, but the respondent company insists that the installments be so rescheduled that payment could be made only by the end of December 2005.

15. It is established from the records that the respondent has been unable to adhere to the repayment schedule as earlier propounded and agreed to by them

and also as stated before the Division Bench. It is making an all out effort to postpone payment of its liability towards the petitioner. I am unable to accept the aforesaid proposal which is rejected outright by the petitioner. There is no agreement between the parties on the issue of repayment schedule of the admitted outstanding dues. The offer of the respondent is found to be not reasonable. Accordingly, the order passed by this court on July 16, 2002, which is upheld by the Division Bench, is reiterated. The company petition, Therefore, stands admitted to hearing and citation is directed to be published in "The Indian Express" (English Edition) and "Nav Bharat Times" (Hindi Edition) and the Delhi Gazette. An order is also required to be passed for appointment of the Provisional Liquidator. However, in order to give one more opportunity to the respondent I am of the opinion that repayment schedule of the balance outstanding could be modified to the following schedule:-

- a) An installment of Rs.15 lakhs as upfront amount would be payable before June 7, 2003;.
- b) Monthly installment for the subsequent months of the year 2003 at Rs.10 lakhs payable before first seven days of every month;
- c) Monthly installment of Rs.15 lakhs from January 1, 2004 for a period of six months, and thereafter a monthly installment of Rs.18 lakhs till the payment of entire liability;
- d) An affidavit to be filed by a promoter director of the respondent company agreeing and undertaking in this Court to pay according to the aforesaid mode within fifteen days.""

6. It was followed by consequential direction contained in para 16, which reads as under:-

""16.In case payment is made according to the aforesaid schedule and an undertaking of agreement is filed as stated herein, the order of publication of citation and the order of appointment of Provisional Liquidator shall be kept in abeyance until further orders. However, in case of default in making payment of any of the installments as scheduled herein or to given an undertaking by a promoter director who could be responsible to generate the funds to meet the liability as ordered herein, the order passed today for publication of citation could be given effect to immediately without any further reference to this Court. However, the order of appointing the Provisional Liquidator shall be given effect only upon an application filed by the petitioner after a default is committed by the respondent. The application of the respondent stands disposed of with the aforesaid directions.""

7. The respondent felt aggrieved by the aforesaid repayment schedule fixed by this court and appealed to the Division Bench. This appeal has been dismissed by the Division Bench vide order dated 5th December, 2003, inter alias, observing as under:-

""A new schedule was exchanged between the parties and a small disagreement was sorted out between them by Court Order dated 26.9.2003, whereby it was provided that the appellant would liquidate its liability by August 2005 instead of July 2005 in accordance with the installments fixed in the modified schedule.""

8. The Division Bench also noted, with concern, the conduct of the respondent (appellant in the appeal) by observing that several opportunities were granted to it to satisfy the requirements of the order passed by even the Division Bench from time to time taking care of the convenience/grievances of the respondent company but every time the respondent resorted to diversionary tactics on one pretext or the other. Following portion of the order also needs emphasis:-

""This Court, in the present appeal, had intervened only to narrow down the differences on the schedule between the parties. Otherwise, there was no basis for proceeding with the appeal which is directed against the Company Court's order fixing a payment schedule by the appellant and on appellant's request. Now, that the appellant had backed out from its commitment and had uselessly engaged the Court in several hearings since July 2003, we find no good reason to proceed with this appeal, which is dismissed.""

9. It is in this backdrop the petitioner filed CA No.1022/2003 for appointment of the Provisional Liquidator. As far as CA No.1393/2003 is concerned, it is filed by the respondent wherein prayer is made to direct the petitioner to deposit in this Court a sum of Rs.5.24 crores, which was given by the respondent company to the petitioner during the pendency of this petition.

10. Mr.Rajiv Nayar, Senior Advocate, made submissions on behalf of the petitioner and Mr.Amit Chadha argued the matter for the respondent. Now I shall take up the two applications for consideration. CA No.1022/2003

11. In view of the aforesaid factual matrix disposal of this application does not pose any problem. As is clear from the narration of facts, vide order dated 28th May, 2003, while admitting the petition for hearing and directing citation to be published the Court pointed out that an order is required to be passed for appointment of Liquidator and in these circumstances order of publication of citation and appointment of provisional liquidator was kept in abeyance until further orders. However, in order to give another opportunity to the respondent repayment schedule of the balance outstanding was fixed and it was unambiguously ordered that in case of default in making payment of any installment as scheduled therein, the order of publication of citation could be given effect to immediately without any further reference to the Court and order of appointing provisional liquidator shall be given effect to only upon an application filed by the petitioner after a default is committed by the respondent. The respondent company had filed appeal against that order but without any success. It has defaulted in making the payment as per the schedule fixed in the order dated 28th May, 2003 and even after further opportunities given by the Appellate Court. In these circumstances the petitioner becomes entitled to the

prayers made in this application.

12. The Official Liquidator attached to this is appointed as Provisional Liquidator, who shall take possession of the assets of the company. Further, as per the order dated 28th May, 2003 citation would be published in the "Indian Express" (English) and "Nav Bharat Times" (Hindi) and the Delhi Gazette.

13. The application stands disposed of. CA No.1393/2003

14. The issue raised in this application is an interesting one. As noted above, the petitioner filed present winding up petition alleging that a sum of Rs.9,83,78,310/- was payable by the respondent company which it was unable to pay. Further, as noted above, in order to resolve the matter the respondent company paid certain amounts from time to time totaling Rs.5.24 crores leaving a balance of Rs.2.91 crores. Since there is an order of provisional winding up and it is the Provisional Liquidator who as to take charge of all the assets and affairs of the company, the respondent prays in this application that amount of Rs.5.24 crores should be deposited by the petitioner in this Court as any amount paid during the pendency of the petition to reach settlement would not belong to the petitioner, if ultimately settlement has not come through and the company is to be wound up. In support of this plea Mr.Chadha, learned counsel for the respondent has referred to the provisions of Sections 447 and 441(2) of the Act. With the aid of these provisions it is contended that once the winding up order is passed the winding up of the company is deemed to have commenced at the time of presentation of the petition for winding up. Therefore, winding up order would relate back, in the instant case, to 12th October, 1999 when the winding up petition was filed. Further, the order of winding up would endure to the benefit of all the creditors and the contributors of the company as if it had been made on a joint petition of creditors and contributors. Thus, any payments made, submitted the learned counsel, after 12th October, 1999 to any creditor shall belong to all the creditors and, Therefore, amount of Rs.5.24.crores paid to the petitioner should form part of common kitty. Learned counsel in support of this proposition also relied upon the judgment of Bombay High Court in the case of Castwell Engineering Corporation vs. Bombay Castwell Engineering Pvt. Ltd. reported in [1984] 55 Com Cas 75.

15. Learned counsel for the petitioner, on the other hand, disputed the aforesaid position in law and submitted that judgment in the case of Castwell Engineering Corporation (Supra) has no application to the facts and circumstances of the present case.

His submission was that whatever is paid to the petitioner belongs to it and it is only for balance amount due to the petitioner that it shall lodge its claim before the Liquidator and stand at par with other creditors of its category. He also submitted that having regard to the law laid down by Bombay High Court in the case of Monark Enterprises vs. Kishan Tulpule and Ors. [1992] 74 Comp Cas 89 and the provisions of Section 531(2) of the Act, such a payment made to the

petitioner was a result of lawful pressure of a bona fide creditor to recover his dues and, Therefore, could not be treated as ""fraudulent preference"" and thus there was no question of giving back this money.

16. Let me say at the outset that the statutory provision unambiguously provides that when the winding up order is passed its effect is from the date when the petition for winding up is presented to the Court and not the date when the order is passed.

It is also clear, in view of the provisions of Section 441(2) of the Act, that such order of winding up operates in favor of all the creditors and the contributors of the company as if it had been made on a joint petition filed by all of them. However whether the consequence would be to also conclude that any payments made to the creditors after the filing of the winding up petition should be recalled back when the winding up order is passed? If the effect of the aforesaid provisions is to be taken o these extremes it would create a chaos and insurmountable difficulties in every winding up petition. It is the common sight that in some cases, particularly where non-banking financial institutions or other companies who invite deposits from public at large are many times not able to pay back and hundreds of winding up petitions are filed by different creditors. It is seen that in such cases companies pay up some such depositors partly and others fully. Since winding up orders are passed against man of such companies when the efforts fail, is it to suggest that all those creditors/petitioners who could get some payment from the company in the pending petitions should be asked to pay back the said amount? It is a matter of common knowledge that between the filing of winding up petition and the passing of the winding up order, there is bound to be time gap. It would be generally more in case of petition u/s 433(e) of the Act. During this period the functioning of the company would no come to a halt. Naturally, the company would keep on doing its business as usual which would include, depending upon the nature of business, receiving money from the debtors and making payment to the creditors in the ordinary course of business. Thus, from the date of filing of the petition till the passing of winding up order, if it is passed ultimately in a petition, numerous such transactions would be entered into by the company. If the effect of the relation back of the winding up order, i.e., rating it back to the date of filing of the petition is to direct all such creditors, who received payment in the meantime, to pay back the amount, effect would be to unsettle all such transactions which were entered into in the interregnum, even when they were bonafide. Such a position, if accepted, would have serious consequences and would lead to multiple, nay, insurmountable and unmanageable litigation. Not only this, other effect may be more serious. The moment winding up petition is filed against a company people would stop dealing with such a company providing that in case ultimately winding up orders are passed in such a petition they would be drawn to the court for paying back the amount received. This may sound death knell to the company the moment winding up petition is filed.

17. It was never contemplated by the legislature that on the winding up of the company any money paid to the creditors after the commencement of the winding up proceedings should be remitted back. The legislature in its wisdom made provision for annulling fraudulent transactions. To avoid any dishonest payments to the creditors the Legislature has provided Section 531 of the Act, which frowns upon ""fraudulent preference"", i.e. making payment to some creditors or other fraudulently. This section read as under:-

""S. 531. Fraudulent Preference.--(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly:

Provided that, in relation to things made, taken or done before the commencement of this Act, this sub-section shall have effect with the substitution, for the reference to six months, of a reference to three months.

(2) For the purposes of sub-section (1), the presentation of a petition for winding up in the case of a winding up by [the Tribunal], and the passing of a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond to the act of insolvency in the case of an individual.""

18. Thus, while not disturbing the genuine and bona fide transactions which took place during this period, the Legislature at the same time took care of the transactions which could amount to ""fraudulent preference"" within the meaning of Section 531 of the Act by empowering the O.L. and the Court to redeem those situations by treating such antecedent transactions as invalid. Therefore, only those payments which amount to ""fraudulent preference"" could be directed to be given back to the O.L. by making an order for depositing the amount received during the pendency of the petition or one year before filing of the petition as envisaged in Section 531.

19. We may draw some support from Section 227 of the English Companies Act, 1948, although that Section is not identically worded and is couched as under:-

""In a winding up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void""

20. Any disposition of property etc. after the commencement of the winding up, is rendered void by the aforesaid provision and it can be saved only if the Court otherwise orders. Although while examining a particular transaction, no yardstick

is provided which the Court is to apply if it has to order otherwise, Courts in England have held that ""each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case"" (See *In re. Steane's (Bournemouth) Ltd.* [1950] 1 All ER 21). On the other hand, in Section 531 of the At, the Legislature has specifically provided the principle for invalidating such transactions, namely, ""fraudulent preference"". Be as it may, the reason I have referred to Section 227 of the English Companies Act, 1948 is to state the purpose, as judicially defined, for enacting such a provision. It can be found in the classic judgment of Lord Cairns L.J. in *Re. Wiltshire Iron Company*, [1868] 3 C. A. 443. Referring to Section 227, as it originally appeared in the Act of 1862, he said, at page 446 a under:-

""The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding-up (that is the presentation of the petition) and the order for winding-up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must lapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of everyone to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would ipso facto, paralyze the trade of the company, and great injury, without any counterbalance of advantage, would be done to those interested in the assets of the company.""

21. Applying these principles, Courts in England have validated many transactions. (See *In re. Clifton Place Garage Ltd.* 1970 40 Comp. Cas. 979 and *Re. T.W. Construction Ltd.* 1954 (1) All ER 744).

22. At this stage, let me consider as to what the two judgments of the Bombay High Court, cited by the parties, decide.

23. In *Castwell Engineering Corporation (Supra)* winding up petition was filed by M/s. Castwell Engineering Corporation against M/s. Bombay Castwell Engineering Pvt. Ltd. in respect of a debt of Rs.92,560.12/- together with interest as well as for the royalty amount of Rs.9,800/-. At the stage of admission of petition, the parties filed consent terms whereby debt to the extent of Rs.74,053/- was acknowledged and it was agreed that interest thereon @ 12% shall be paid from a specific date as well as quantified cost of the petition. Certain other terms were also accepted. The consent terms provided that in the event of company failing to pay any installments on its respective due dates or the last installment, the petition was to stand admitted and was to be advertised as mentioned therein.

Certain installments amounting to Rs.31,010.64/- were paid. Even thereafter further sum of Rs.37,500/- was paid, thus, making a total of Rs.68,150.64/-. But thereafter Bombay Castwell Engineering Pvt. Ltd. committed a default. In view of this default, the citation was published. Bombay Castwell Engineering Pvt. Ltd. was granted some more adjournments to enable it to pay the balance. Ultimately four post-dated cheques were given. The petitioner, however, refused to accept these cheques or to agree to any adjournment for Realizing the cheques and insisted that they were entitled to order of winding up against the company which had undisputedly admitted its liability and was unable to pay the debt. It was in these circumstances hearing of the petition had to proceed. However, the Court passed an order that the petitioner should pay back the amount realised from the respondents during the pendency of the proceedings. The argument of the petitioner was that amount received by it under the consent term cannot be directed to be deposited. It is only after the winding up order is made the Official Liquidator can call upon the petitioner to bring back the money if the Official Liquidator concedes that payment of the said money amounts to ""fraudulent preference"" and not otherwise as laid down in Section 531 of the Act. The Single Judge did not accept this contention as the position in law, according to the learned Judge, was to the contrary :-

""Now, whatever be the mutual arrangement between the parties under the consent terms, the petition is still pending for hearing and final disposal. The parties have not been able to work out the arrangement. The company court has not gone out of the picture as a result of the consent terms, as is normally in case the parties are left to work out the arrangement without the intervention of the court except in cases like here a receiver remains on the scene. In a winding-up petition, the company court continues to exercise jurisdiction notwithstanding the mutual agreement between the parties. What happens under the consent terms is that the petition is not argued for admission and by virtue of a ""self operating order incorporated in the consent terms with the approval of the court, the petition simply gets admitted in case of default without recourse to the court. In other words, the winding-up petition is revived and is back on the track of the provisions of the Companies Act, 1956, and the Companies Court) Rules, 1959. Presently, the petition is at the stage of hearing and final disposal. I think the court can take account of all that has passed under the bridges since the filing of the petition in order to pass an appropriate order. In most of the petitions for winding-up, a creditor uses this cheap and expeditious remedy for recovery of his dues and the court normally allows the parties to work out the settlement without pestering itself whether there was a bona fide attempt to wind up a company or whether the attempt was to put pressure on the company to wrest payment from a reluctant debtor, which it would have contested in an ordinary suit but for fear of a winding-up order going against it. However, when settlements do not work out, then the contest reopens. In my opinion, the petitioners cannot be heard to say that they will retain the amount collected before the admission of the petition, namely, Rs.31,010.64, and the amount

collected during the pendency of the petition for hearing and final disposal, namely, Rs.37,500, and at the same time press the petition for winding-up. An order for winding-up does not ensure for the benefit of an individual creditor who obtains the order, but for all creditors. It is not an individual right but representative right. The creditor who first comes to the court and used the process of the court cannot feather his nest and enrich him self by collecting payment on the strength of consent terms. He must be relegated to the same position in which he was when he presented the petition for winding-up. Section 531 of the Companies Act, 1956, cannot be used as a shield to retain the money. Section 531 is one of the sections which deal with effect of winding-up on antecedent transactions. The section, so far as it is relevant, makes any payment made by the company six months before the commencement of its winding-up ""deemed"" fraudulent preference of its creditors and further invalidate such transaction of payment. Now, apart from the question of the applicability of s. 531 to the facts of our case, the burden of proving that the transaction is fraudulent preference would be on the official liquidator. He might not be able to establish the motive in making the payment to prefer the petitioners. This is a case of a winding-up and in the event an order of winding-up being made, the order is to take effect from the date of presentation of the petition. The payments made by the company to the petitioners are during the pendency of the petition and Therefore, the payments are not antecedent to the winding-up but made during the course of the winding-up proceedings. The court has, Therefore, jurisdiction to pass order for depositing the amount received during the pendency of the petition.""

24. Since the petitioner in that case had not deposited the amount even after the direction, the company petition was dismissed.

25. Let us now examine as to what the decision in Monark Enterprises (Supra) decides. Facts of that case were as under:-

K was a company engaged in the manufactures of textiles and held 2 plots, Nos. 7A and 10, in a Government industrial estate, on a lease granted by the Collector of Bombay. A firm M supplied yarn to the company from time to time on credit and had a bill discounting facility with its bankers. The company accepted the hundis drawn by M. M's bankers threatened to take legal proceedings against M. and the company, as several hundis had not been honoured. In 1986, M filed a suit against the company for recovery⁶ of amounts due under the hundis. A consent decree was obtained in the suit allowing the company to pay its dues in installments. On February 18, 1987, the company entered into an agreement with M, for assigning to M its leasehold rights in one of the plots (No. 10) for a specified consideration, which was to be paid by M partly by adjustment against the decretal amount, and partly by payment by M of certain statutory tax liabilities of the company. M was placed in possession of the plot on the some day, and an application was made on the same day by both M and the company to the Additional Collector for permission for the said transaction. Permission was

granted on September 14, 1987. In the meanwhile however, the parties acted in terms of the agreement, A deed of mortgage in relation to the said plot was executed by M in favor of its bankers and permission of the Collector the transfer obtained. On August 12, 1987, the workmen of the company filed a winding up petition against the company, which was later allowed and the official liquidator took charge of the assets. He also took possession of the plot in question treating it as the company's and submitted a report that the transfer of the leasehold rights therein was void in terms of section 531A of the Companies Act, 1956, not having been made in the ordinary course of business. M filed an application for a direction to the official liquidator to deliver possession of the plot. The workmen also filed an application for a declaration that the transfer was a fraudulent preference within the meaning of section 531 of the Companies Act. 26. It was in these circumstances the Court was called upon to decide whether leasehold rights realised by firm M in a property belonging to the company pursuant to consent decree obtained in a suit amounted to 'fraudulent preference'. In this context the provisions of Section 531 of the Companies Act relating to fraudulent transfers were discussed and the Court held that it was a 'fraudulent preference' within the meaning of the said provisions. What was held is succinctly brought out in the head notes which provide bird's eye-view of the judgment and the purpose would be served in reproducing the same:-

""(i) that although the consent decree allowed the company to pay in installments, the possibility of immediate execution of the decree by M coupled with the lawful pressure by M's bankers constituted the immediate cause of the settlement culminating in the transaction dated February 18, 1987, and the intention of the company in entering into the said transaction was to salvage the situation as far as possible and not to prefer one creditor over another. Therefore, the transaction dated February 18, 1987, was not vitiated by section 531 of the Companies Act.

(ii) That M had acted honestly in obtaining the transfer of the leasehold right in the plot in question. It was not possible to hold that the transfer and the transferee shared the common intention to defraud the other creditors or the workmen. M had supplied goods to the company. The company could have been also by M's bankers by reason of the company having accepted the hundis for valuable consideration. Therefore, the impugned transaction had to be held to have been entered into in good faith and for valuable consideration, and was not fraudulent or collusive. The impugned transaction was not vitiated u/s 531A of the Act.

N. Subramania Iyer Vs. The Official Receiver, Quilon, applied.

(iii) That the company was engaged in the manufacture of textiles. To deal in real estate was not the business of the company. The impugned transaction could not have been entered into the ordinary course of business. However, section 531A of the Act saves transactions entered into in good faith and for valuable consideration though not entered into in the ordinary course of business.

(iv) That the official liquidator and the petitioner-workmen failed to discharge the onus placed on them to prove fraud or collusion or any other grand sufficient in law to vitiate the impugned transfer.

(v) That M's banker had also entered into the mortgage in good faith and for valuable consideration and it was not affected by reason of the passing of the order for winding up the company.

(vi) That the fact that the agreement dated February 18, 1987, contained a clause which stated that the said plot or building thereon was not encumbered by any claim of workmen or decree or order of the court or Tribunal by itself was not sufficient to invalidate the impugned transaction or warrant a finding that the transaction was not entered into a good faith and for valuable consideration.

(vii) That the validity of the impugned transaction was not affected even if no resolution for entering into it was actually passed by the board of the company as the company had entered into and adopted the transaction throughout and implemented it after receiving consideration therefore. The doctrine of indoor management protected the transferee and the transferor. There was nothing to show that the transferee was aware of the alleged infirmity in respect of the resolution.

(viii) That section 25FF of the Industrial Disputes Act had no application to the case, nor was the contention that without the workmen's consent, no transfer could be effected as the workmen are deemed to be co-owners of the undertaking sustainable.

(ix) That section 537(1) of the Companies Act applied only to sales which were held in pursuance of attachment, distress or execution levied by the court or by any other competent authority. The present transaction was a voluntary transaction and not transaction in pursuance of an attachment, distress or execution put in force.

M.K. Ranganathan and Another Vs. Government of Madras and Others, followed.

(x) That section 536(2) of the Companies Act cannot be invoked unless the transferor exercises disposing power after the commencement of winding up. In this case, the disposing power had already been exercised by the transferor prior to the commencement of the winding up and the only thing which remained to be done was to obtain sanctions and permission from various authorities. Thus, the transaction could not be treated as ""disposition of property"" effected after the commencement of the winding up. The impugned transaction was, Therefore, not vitiated either u/s 537 or section 536(2) of the Act.""

27. In view of the aforesaid reading of the provisions of the Companies Act, as understood by me, I am unable to agree with the judgment of the Bombay High Court in the case of Castwell Engineering Corporation (Supra) and respectfully disagree there from.

In fact, it would be seen that the ratio of the said judgment goes contrary to another judgment of the Bombay High Court in the case of Monark Enterprises (Supra), which is a judgment by the Division Bench and in my opinion lays down the law correctly.

28. With this we come to the payments made in the present case. These payments are made during the pendency of the present petition when the respondent company wanted to settle the matter and even made endeavor to give the payments. It is not uncommon that in such winding up petitions when filed, many times attempt is made by the respondent companies to salvage the situation by making payments to the creditors who file such petitions and some payments are made in the process. In many cases the companies are able to settle the entire dues/disputes. In other cases like in the present case, ship may sink in the middle of the river where some payments are made but in spite of best efforts a company is not able to tide over the financial crunch and mounting liabilities in spite of its best efforts and the Court is ultimately forced to form an opinion that such company is unable to pay its debts and cannot survive and has lost its substratum. The payments which are already made to the petitioners in such cases, like the present one or to some other creditor who might not have also approached the Court would not be returned back by them unless such payments come within the sweep of Section 531 of the Act. That aspect will have to be determined at the appropriate stage in appropriate proceedings and before the appropriate authority.

29. In view of the aforesaid discussion, I am of the view that relief prayed for by the applicant in this CA cannot be granted at this stage.

30. This CA is accordingly dismissed.