

(1986) 10 MAD CK 0007

In the Madras High Court

Case No : Appeal No's. 73, 120 and 121 of 1985 and C.M.P. No. 13000 of 1985

N.A.P. Alagiri Raja and Company

APPELLANT

Vs

N. Guruswamy and Others

RESPONDENT

Date of Decision : 15-10-1986

Acts Referred:

Companies (Court) Rules, 1959 — Rule 37, 67, 68
Companies Act, 1956 — Section 391(1)

Citation : (1989) 65 CompCas 758 : (1987) 100 LW 515 : (1987) 1 MLJ 333

Hon'ble Judges : V. Ratnam, J; V. Ramaswami, J

Bench : Division Bench

Advocate : S. Govindaswaminathan, for the Appellant; T. Raghavan, for the Respondent

Judgement

V. Ramaswami, J.—O.S.A. No. 73 of 1985 has been filed against the order in Company Application No. 56 of 1985 dated March 29,

1985, in which the learned single judge directed the convening of three meetings (1) of the shareholders, (2) of unsecured creditors and (3) of

preferential creditors on an application filed by one of the contributories u/s 391 of the Companies Act. The other two appeals, O.S.A. Nos. 120

and 121 of 1985, have been filed against the order in Company Applications Nos. 261 and 305 of 1985. These two applications were filed by the

lessee of the company, one praying for sale of the mill and the other for a direction to the official liquidator to continue the lease in his favour until

further orders in the application filed for sale of the mill as a running unit. Both these applications were dismissed on the ground that Application

No. 56 of 1985 filed by the contributory for a direction to call for a meeting has been ordered.

2. Palani Shri Murugan Textiles Ltd., a company incorporated under the Companies Act, was ordered to be wound up by an order dated

November 14, 1969, on a petition filed by a creditor on the ground that the company was unable to pay its creditors. The authorised capital of the

company is Rs. 25,00,000. The issued, subscribed and paid up capital of the company Rs. 6,19,100 inclusive of arrears of call money amounting

to Rs. 24,000 consisting of 12,862 equity shares of Rs. 50 each. The first respondent is a contributory holding 100 shares of Rs. 50 each. He was

one of the directors of the company before the order of winding up was made. Pending the winding up and in the winding up proceedings, the

appellant took the company on lease on "as is where is" condition. The first lease was extended for a further period of 5 years in Company

Application No. 427 of 1976 and later for a further period these application could not be disposal of the lease was further extended during the

pendency of these proceedings.

3. In the affidavit filed in support of the application for a direction to call for the meeting of the shareholders, secured creditors and unsecured

creditors, it was stated that the preferential creditors had been paid in full and a divided of 25% has been declared and paid to all the other

ordinary creditors and that the dues to the Director of Handlooms, who is in the nature of a secured creditor, amounting to Rs. 4 lakhs as also the

other creditors can be paid from the amount with the official liquidator and the lease money and that, therefore, the company should be permitted

to revive and the order of liquidation should be permanently kept under suspension. In that view, he proposed a scheme for the revival of the

company and for that purpose he wanted to call for a meeting of the shareholders and creditors. The scheme or settlement proposed by the first

respondent read as follows :

(1) All creditors of the company who have proved their claim before the official liquidator and whose names are included in the list of creditors

settled by the official liquidator as on the date of the scheme will be paid off in the manner set out hereunder;

(a) 50% of the amount outstanding to the creditors as per the list of creditors settled by the official liquidator will be paid to them within three

months from the date of approval of the scheme by the High Court, Madras.

(b) The balance 50% of such amount will be paid within 12 months from the date of payment of the first instalment together with interest at the rate

of 12% per annum from the date of payment of the first instalment.

(2) All the permanent works of the lessee actually working in the leased mills belonging to the company in liquidation will be offered employment

by the company in liquidation on the terms and conditions not in so (sic) favourable to those obtaining on the date of the approval of the Scheme;

(3) The company will not declare any dividend to its shareholders till all the creditors are paid off as set out above;

(4) On the scheme being confirmed by the High Court, Madras, the order of winding up made in Company Petition No. 12 of 1969 shall be

stayed permanently by the High Court, Madras, u/s 466 of the Companies Act, 1956;

(5) On confirmation of the scheme by the High Court, Madras, the following three persons shall be the directors of the company in liquidation from

the official liquidator, Madras.

(6) On confirmation of the scheme by the High Court, the official liquidator shall hand over all the assets, books and records of the company in

liquidation in the possession of the official liquidator to the three directors mentioned above.

(7) After adjusting the Government commission which the official liquidator has utilised under the Companies (Court) Rules, the official liquidator

may be directed to handover to the company the balance of the amount standing to the credit of the company in liquidation.

(8) All the licences, privileges and quotations to which the company was entitled prior to the date of winding up and on the date of the approval of

the scheme will be restored in the name of the company.

(9) On approval of the scheme, the three directors are jointly and severally entitled to apply for the renewal of the licences under various provisions

of the Companies Act in the name of the company.

(10) On approval of the scheme by the High Court, Madras, the official liquidator shall be directed to hand over the plant, machinery and other

records to the company including movable and immovable properties of the company.

In the affidavit filed in support of the application, the applicant had state :

I am filing this affidavit as a shareholder on their behalf""'. (That is, on behalf of R. Ramanathan. R. V. Parthasarathy and U. S. Sridhar of Udumalpet, Coimbatore District).

4. To this application, the official liquidator and the creditor who filed the winding up petition were alone made parties. The appellant-lessee was not made a party. The official liquidator filed his report pointing out that the only assets remaining with the company are the lands and buildings and the machinery and equipment. In this report he had further stated that he has funds to the tune of Rs. 7,06,289.52 and that the amount due to the unsecured creditors as on that date was Rs. 8,15,793.44. However, he has mentioned that the amount due to the secured creditors was Rs. 3,91,473.26 and 75% of the ordinary creditors and the interest for preferential creditors are still due and payable. He had further pointed out that on investigation into the affairs of the company in liquidation, he found that acts of misfeasance were committed by the former officials of the company. Accordingly, he took out misfeasance application in C.A. No. 73 of 1975 and obtained a decree for a sum of Rs. 53,272.86 and the amount was payable with interest at 6% from November 12, 1974, till date of payment. The applicant (first respondent) was one of the judgment-debtors in that application. He is also jointly and severally liable to pay the said sum of Rs. 53,272.86 with interest at 6% from November 12, 1974. The amount is still outstanding and one of the judgment-debtors has paid only a sum of Rs. 6,750 so far. The official liquidator has also pointed out that the three persons on whose behalf the first respondent filed the application are neither share-holders nor contributories, that though they claimed to have purchased certain equity shares for valuable consideration from various share-holders of the company in liquidation, their application for approval of the transfer of the said shares had been dismissed, that they had not become the shareholders of the company in liquidation, that, therefore, the respondent cannot file the application on their behalf and that since he purports to file an application only on their behalf and he was not filing the affidavit in his own right as a shareholder, the application was not maintainable and was liable to be dismissed. The official liquidator has also stated that he does not admit those three persons as having any substantial stake in the company in liquidation and that

according to the records they are neither creditors nor shareholders. It was also not made clear in the application in which capacity those three

people have given any affidavit to undertake to advance the required funds and that they have not disclosed how they are going to advance the

money and what was their financial position as on date. The report also pointed out that the scheme is silent about the payment of interest to the

preferential creditors as also to the ordinary creditors from the date of winding up order.

5. The learned judge observed that though the application on behalf of others cannot be sustained, still, as long as the applicant was a share-holder,

the application was maintainable by him. The learned judge was also of the view that there was a reasonable change of paying the ordinary

creditors also in full, that after such payment there would be a surplus which can be distributed to the preferential creditors as provided under rule

179 of the Rules. In that view, he directed the convening of three meetings (1) of the shareholders, (2) of unsecured creditors and (3) of

preferential creditors. In view of the filing of the appeal and the stay order obtained, the meetings were not held as per the direction.

6. The first question to be considered in this appeal relates to the maintainability of the application by the first respondent. As already stated, he is

only a contributory holding 100 fully paid shares of Rs. 50 each. The persons on whose behalf he state he had filed the application u/s 391 is

maintainable by a shareholder.

Sub-sections (1) and (2) of section 391 of the Companies Act, which are the relevant sub-sections for the purpose of this appeal, read as follows :

Section 391. Power to compromise or make arrangements with creditors and members -

(1) Where a compromise or arrangement is proposed -

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

or

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

the court may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being

wound-up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to

be called, held and conducted in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case

may be, present and voting wither in person or, where proxies are allowed under the rules made u/s 643, by proxy, at the meeting, agree to any

compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the

class, all the members, or all the members of the class, as the latest financial position of the company, the latest auditor's report on the accounts of

the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251 and the like"".

7. The question for consideration is whether in the case of a company which is being wound-up, only the official liquidator can file the application

u/s 391 of even in such a case, a creditor or any class of creditors or any member of the company can file an application u/s 391(1). Learned

counsel for the first respondent referred to rule 68 of the Companies (Court) Rules, 1959, framed by the Supreme Court in exercise of the powers

u/s 643 of the Companies Act and contended that the fact that the rule contemplates a notice to be served on the liquidator where the company is

not the applicant clearly. shows that even in the case of a company in liquidation, a creditor or a member of the company can file an application.

Rules 67 and 68 read as follows :

67. Summons for directions to convene a meeting. - An application u/s 391(1) for an order convening a meeting of creditors and/or members or

any class of them shall be by a judge's summons supported by an affidavit. A copy of the proposed compromise or arrangement shall be annexed

to the affidavit as an exhibit thereto. Save as provided in rule 68 hereunder, the summons shall be moved ex parte. The summons shall be in Form

No. 33, and the affidavit in support thereof in Form No. 34.

68. Service on company. - Where the company is not the applicant, a copy of the summons and of the affidavit shall be served on the company,

or, where the company is being wound up, on its liquidator, not less than company is being would up, on its liquidator, not less than 14 days before

the date fixed for the hearing of the summons.

8. On a prima facie reading of these rules, it does appear that the rules

contemplate an application by a creditor or a member of the company even when the company is being wound up. However, learned counsel for the appellant pointed out that u/s 457(2), the entire administration of the company is vested in the liquidator, that the creditors or members of the company have no right to invoke the provisions of section 391 when the company is in liquidation and they can only request the liquidator to file an application u/s 460. He also drew our attention to section 546 which enables the liquidator to make any compromise or arrangement with creditors or person claiming to be creditors, or compromise any call, or liability to call, debt, and liability capable of resulting in a debt, and any claim, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or alleged to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or liabilities or the winding up of the company on such terms as may be agreed to. In the light of this provision, learned counsel contended that the application is not maintainable.

9. The point was considered first in the decision in Travancore National and Quilon Bank, In [1939] 9 Comp Cas 14; AIR 1939 Mad 318, under the corresponding provision in section 153 of the Indian Companies Act, 1913. The objection that was raised as to the maintainability of the petition u/s 153 was that the application, after a winding-up order, could only be made by the liquidator and not by a creditor of a company and this argument is based on the language of section 153, namely, "'in the case of a company which is being wound-up, of the liquidator'". Repelling this contention, the learned judge observed (at page 23) :

There does not seem to be much substance in this argument. The section was intended to confer rights both on the company and on the creditors and members of the company. When it is a going concern, the object will be to avert a winding up. Even after an order for winding up is made, an application can be made to cancel a winding up by the sanction of a scheme and allow the company to resume its normal business. The creditors and members are the best judges of their interests. It could not have been, therefore, the intention of the Legislature to deprive the creditors of the right once an order for winding up is made and place them at the mercy of the

liquidator who may or may not choose to move in the matter. All

that is intended by the section is that the liquidator should also have the right to make the application. At any rate, this is the view taken by Palmer

on the corresponding section of the English Act. In this book on Winding up, he observes thus at page 899 :

"A proposal for an arrangement or compromise is not confined to the company or its liquidator, if any. It is open to any creditor or member to take

the initiative. The Act expressly provides that the court may on the application in a summary way of the company, or of any creditor or member of

the company, or in the case of a company being wound up, of the liquidator, order a meeting.

I think the same view must be adopted in the interpretation of the Indian Act and I have therefore no hesitation in holding that even after an order

for winding up is made, a creditor or member can move the court u/s 153 of the Act.

10. Though the application in that case was filed before a winding up order was made, the point was considered and an opinion expressed by the

learned judge in the portion extracted above. Relying on this decision, a Division Bench of the Travancore High Court in the decision reported in

Muhammed Abdulla v. Gopala Pillai, AIR 1952 TC 243; [1953] 23 Comp Cas 161 observed at page 162 :

The introduction of the words "in the case of a company being wound up, of the liquidator" is intended to provide an additional and not an

exclusive person who could make the application. If a company, or a member, or a creditor may make the application u/s 153(1) proposing a

compromise or arrangement in the case of a company which is not under liquidation, there is no reason why any of them should not be competent

to make the application in the case of a company which is being wound up.

These two decisions were again followed by the Calcutta High Court in Rajendra Prosad Agarwalla v. Official Liquidator [1978] 48 Comp Cas

476. In this decision also, it was held (at page 478) :

A plain reading of the section clearly indicates that the Legislature intended that if any compromise or arrangement is proposed, the company or

any creditor or any member of the company will be entitled to make the necessary application and in a case where the company is being wound

up, as the board has ceased to function and is no longer there and the company is represented by the liquidator, the liquidator, the liquidator will

also be entitled to make the necessary application. The right which is conferred on the contributories or the creditors is not intended to be taken

away when the company has gone into liquidation and in such a case an additional right is also conferred on the liquidator. The provisions

contained in sub-section (2) which require the approval of the majority of the creditors or class of creditors or members or class of members in

case of any compromise or arrangement for the same being sanctioned, even when the company is in liquidation, clearly go to indicate that the

Legislature never intended that the wishes of the creditors or contributories should be ignored. In our opinion, in the case of a company in

liquidation, apart from the rights which are conferred on the creditors or contributories of a company, an additional right is also conferred on the

liquidator." These decisions were also followed by a single judge of the Bombay High Court in Vasant Investment Corporation Ltd., In re [1982]

52 Comp Cas 139 and by the Delhi High Court in Rajdhani Grains and Jaggery Exchange Ltd., In re [1983] 54 Comp Cas 166. Though it is

pointed out that these cases had not dealt with the general powers of a liquidator and in particular his exclusive right to enter into a compromise or

arrangement with the creditors or debtors u/s 546 and the obligation of the liquidator to file an application u/s 391 when a request was made by the

creditors or shareholders by a resolution to file an application u/s 391(1), we are of the view that it is not necessary to go into the correctness of

these decisions in this case because, we are of the view that even on the merits, the application is liable to be dismissed.

11. We are also unable to agree with learned counsel for the first respondent that at the stage of filing an application u/s 391(1), the court is not

called upon to consider the feasibility or otherwise of the proposed scheme or settlement and that that will have to be decided first in the meeting of

the creditors or shareholders as the case may be and then only when it comes before the court for confirmation or sanction of the arrangement under

(2) of section 391 the court will have to be satisfied about the reasonableness of the compromise and the public interest or the creditors' interest.

Rule 67 of the Companies (Court) Rules, 1959, provides that an application u/s 391(1) for an order convening a meeting of the creditors and/or

members shall be by a judge's summons supported by an affidavit and that a copy of the proposed compromise or arrangement shall be annexed

to the affidavit as an exhibit thereto. Though the rule provides for summons to be moved ex parte, the affidavit to be in Form No. 34. The form

requires that the affidavit should set out in separate paragraphs the circumstances that have necessitated the proposed compromised or

arrangement, the objects sought to be achieved by it, the terms of the compromise or arrangement and the effect, if any, of the compromise or

arrangement on the material interest of the directors, managing director or of the debenture-holders, its effect on the material interest of the trustees

of the debenture-trust deed and that a copy of the proposed compromise or arrangement should be marked as as exhibit and annexed to the

affidavit. Rule 68 further provided that where the company is not the applicant, a copy of the summons and of the affidavit shall be served on the

company, or, where the company is being wound up, on its liquidator, not less than 14 days before the date fixed for the hearing of the summons.

These provisions clearly show that if the company or the liquidator is the applicant for an order u/s 391(1), the summons can be moved ex parte.

However, the facts required to be set out in Form No. 34 will have to be clearly stated. But if the application is by a person other than a liquidator

or a company, then notice will have to be served on the liquidator or the company and no question of the summons being moved ex parte could

arise. Even in such cases, the facts will have to be disclosed in the affidavit as stated above. These detailed facts are required to be stated and

notice has to be served on the company or liquidator as stated above only the purpose of enabling the court to decided whether there are any bona

fide in the application, whether there are only bona fides in the application, whether the compromise is prima facie feasible and whether it is

necessary to convene a meeting of the creditors or shareholders or members of the company. The court is not intended to act as a post office with

no discretion or power to refuse to call for a meeting. In our opinion, even when considering an application u/s 391(1), the court will have to be

satisfied as to the prima facie case that the compromise or arrangement is genuine, bona fide and would be in the interest of the creditors and the

company. This application u/s 391(1) cannot also be considered as inconsequential or just a formality without any effect on the liquidator or on any

other proceedings in relation to the company. As may be seen from sub-section (6) of section 391, the court may be called upon at any time after an application has been made to it under this section to stay the commencement or continuation of any suit or proceedings against the company on such terms as the court thinks fit, until the application is finally disposed of. There is also an appeal provided under sub-section (7). In the light of this and the fact that an application filed by a shareholder is required to be served on the company or the liquidator, there can be no doubt that this application should be considered on merits and the court will have to be satisfied about the justness of a direction to the shareholders or the creditors to meet together and consider the proposal. It may also be noticed that at the stage of sanctioning of the compromise or arrangement after the meeting of the creditors, different considerations arise and different conditions as provided in sub-section (2) will have to be satisfied. The court will not only have to be satisfied that the meeting was attended by a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members as the case may be and that they have agreed to the compromise of the proposal, but will also have to be satisfied that all the material facts relating to the company, such as the latest financial position of the company, the latest audited report of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251 and the like are placed before the court. There can be no doubt, therefore, that an order u/s 391(1) has to be made only after the court considers the feasibility or otherwise of the proposed scheme or settlement and the bona fides of the applicant and the application.

12. On merits, we are unable to agree with the learned judge that the first respondent has made out a case for calling for any meeting of the shareholders, unsecured creditors, ordinary creditors and preferential creditors for the purpose of considering the proposed scheme. It is seen from the report of the official liquidator that as per the list of settled creditors, the amount payable to preferential creditors was Rs. 1,14,524.04 and that for ordinary creditors it was Rs. 10,87,726. Though the principal amount due to the preferential creditors had been paid in full, they are eligible for interest at 4% from the date of liquidation under rule 179 of the Companies (Court) Rules. In respect of the ordinary creditors, 25%

dividend has been paid and the remaining 75% with interest on the entire amount including the 25% dividend paid was also payable from the date of winding up under the said rule. The amount of interest payable at 4% to the preferential creditors from the date of winding up unit April 30, 1981, being the date of declaration of dividend under rule 197 was Rs. 41,234.57. The amount payable to the ordinary creditors as per the settled list of creditors less the 25 per cent. dividend paid already amounted to Rs. 8,15,793.44. Interest on the 25 per cent. dividend up till August 3, 1984, the date on which that dividend was declared, was Rs. 1,60,136.52. Interest payable on the remaining 75 per cent. for the ordinary creditors up to date is Rs. 5,54,787.52. The amount payable to the Government of Tamil Nadu, a secured creditor was Rs. 3,96,690.26 and the interest payable thereon was Rs. 2,26,749.37. The total of the liabilities thus come to Rs. 22,38,393.68. This did not include, according to the official liquidator, the claims received by him after filing of the settled list of creditors and which are in the process of being enquired into and the total of the claims amounts to more than Rs. 15,50,000. It may be seen from the clauses in the scheme proposed that the scheme envisaged the payment to all the creditors in full. However, it is not stated as to how the amount could be paid at all in full to any of the creditors. He had not assured that he and the other interested shareholders were ready to discharge all the liabilities forthwith and even the proposed settlement speaks of payment in a year's time. Even the lease amount mentioned in the affidavit is not correct. The amount payable by the lessee is only Rs. 14,190 per month for the mill and Rs. 2,000 per annum for the agricultural lands. The three persons whom the proposed compromise contemplates to be appointed directors of the company to take charge of the affairs are not shareholders and, as already stated, they have not stated in what capacity they want to undertake the management or advance the required funds for the company. They have also not disclosed as to how they are going to advance the money and what their financial position as on date. The first respondent himself was charged for misfeasance and a decree for a large amount has been passed against him and the amount is still outstanding. The appellant has produced a report submitted by the South India Textile Research Association (hereinafter referred to as "the SITRA"), who was appointed official liquidator to value the machineries and additions and

alterations made to the mills by the lessee-appellant, in which the SITRA has reported that as on 16th February, 1985, the value of additions and alterations made by the lessee during 1971-85 was Rs. 13,94,000. On the terms of the lease, the lessees can made additions to the existing building, plant and machinery with the permission of the liquidator. The lessor has the option to purchase from the lessee any of the additional machineries and effects. The lessee was entitled to the value of these additions and alterations. If the lease is to be terminated and the winding up order suspended, he would be entitled either to be paid this amount or permitted to remove those assets put by him. If that is done, funds will have to be produced either for paying the lessee or replacing those machineries and equipment and value of other improvements. In fact, as seen from the report of the official liquidator filed in C.A. No. 261 of 1985, the official liquidator has informed the appellant that the additions made to the leased out properties cannot be purchased by the official liquidator as he had no authority. He had no funds also. That has not been provided for in the scheme. If the lessee is permitted to remove those improvements, whether be the value, the mill cannot be run and there is no guarantee of any income or payment to the creditors. The liquidator has got funds only to the tune of about a little over Rs. 7 lakhs. We may also mention at this stage that the order for winding up was made by consent of the then board of directors. Subsequently, in 1982, the managing director of the company filed C.A. No. 195 of 1982 praying for the identical relief of calling for a meeting of the shareholders and creditors. The official liquidator filed a report to the effect that there was no merit in the proposal. That application was not pursued and it was dismissed as withdrawn. In the foregoing circumstances, we hold that there are no merits in this application and that it was intended to delay the winding up. It may be mentioned that when the lessee filed an application in C.A. No. 1110 of 1981 at the end of the ten year lease for a further renewal of the lease, the official liquidator filed a report bringing all factors into account and pleading that if at all there is a case for sale and there is no possibility of the entire creditors being paid in full and that any delay in the disposal of the mill will be detrimental to the interests of the creditors of the company, on that basis, he opposed the grant of the lease. Though the court was also of the same view, since the valuation of the machinery, land and building and

the processing of sale would take some time, a further lease for a short period of three years was granted. The official liquidator also set the machinery in motion for obtaining a valuation report from the SITRA so as to enable him to apprise the court of the value of the mill for the purpose of sale. In the foregoing circumstances, we are of the view that there are no merits in the application for calling for a meeting of the creditors and shareholders and that the application was liable to be dismissed. We accordingly allow the appeal O.S.A. No. 73 of 1985 and set aside the order of the learned judge in Company Application No. 56 of 1985.

13. As already stated, Company Applications Nos. 261 and 262 of 1985 were filed by the appellant, one praying for sale of the mill as a running unit with its machinery, land and building for a consideration of Rs. 13,08,000 and the other for a direction to the official liquidator to continue the lease in his favour until his request for sale is considered and disposed of on merits. The learned judge dismissed the application for sale without going into the merits of the application on the ground that he had already ordered the application filed u/s 391 of the Companies Act and until a final order is made on the proposed compromise or settlement, the sale could not be ordered. However, the learned judge gave liberty to the appellant to renew the application for sale if the company is not revived pursuant to his order passed in Company Application No. 56 of 1985.

14. Since we have allowed the appeal against the order in Company Application No. 56 of 1985 and dismissed that application, it has become necessary to consider Application No. 261 of 1985 merits. On the other application for lease of the property pending his request for sale, the learned judge has permitted him to continue to run the mill as a lessee till March 31, 1986, and that is now being extended. On the merits of the claim for sale, learned counsel for the appellant contended that on the peculiar facts and circumstances of the case and in the light of the reports available, and since there is no case for the revival of the company, the company should be sold as a running unit to the appellant. He also further contended that he had offered a sum of Rs. 13,08,000. But, however, his client will be willing to purchase at such figure as this court may consider as reasonable and just. The official liquidator placed all the relevant facts before us and suggested that unless this court feels that there is any

peculiar circumstance needing a private sale in favour of the appellant at a price to be fixed by the court, it shall have to be ordered to be sold in

public auction. The question, therefore, for consideration is whether having regard to the facts and circumstances of the case, the sale of the mill

could be made in favour of the appellant without going in for a public auction and if so, what be the reasonable price for which it will have to sold.

15. Though the company was incorporated in June, 1948, the company obtained an industrial licence to start a spinning mill only on October 19,

1953. Even thereafter, there was no offer of its shares to the general public till about 1960 and only on April 1, 1960, such an offer was made to

the public to buy the shares. The company commenced commercial production only in the year 1969 and that too, with incomplete building and

with very old and second-hand machineries. Within about four years of its commencement of production, the mill itself was closed. There were

several creditors, many of whom have obtained decrees against the company. The company remained closed for over four years. The company

petition was filed by a creditor for winding up the company on the ground that the company was unable to pay its creditors. The management filed

a counter affidavit pleading inability to discharge the creditors, and in effect conceding that a winding up order could be made. It was also found

that the condition of the machineries was such that even the Government of India refused to take over the mill as a sick unit. After the winding up

order was made, the official liquidator took possession of the properties, sold all the movables except the mills, machinery and land and building.

The SITRA was asked to value the machinery and estimate the cash required to run the mill, if it is decided to run it as unit. They reported in the

counter filed in May, 1961, that the value of the machinery would be Rs. 7.41 lakhs and it would need another Rs. 9.08 lakhs if they were to be

renovated and put in working condition. Finding that it is not possible to find that much money to renovate and run the mill, the official liquidator

filed Application No. 231 of 1970 praying for delegation of power u/s 457(1) of the Act to enable him to take early steps either to make an

outright sale of the mill as a running unit or to lease out the same to any prospective offerer to run the same. By an order dated July 2, 1970,

powers u/s 457(1) were conferred on the official liquidator. Since it was considered that the possibility of running the mill on lease has first to be

explored, the official liquidator called for applications for lease of the property and ultimately the appellant was given the lease of the mill on "as is where is" condition in order to generate some money for the administration of the liquidation proceedings and for payment of some interest to the creditors. That is how the original lease was given for a period of five years. When the application for renewal was made, the lessee placed all the facts before the court, his difficulties in running the mill, the enormous amount of funds he had to invest and pleaded that there is a case for the sale of the property and that he is willing to purchase the mill as a running unit with its machinery, land and building for any reasonable price fixed by the court. But since at that time the office of the official liquidator remained vacant, this court ordered extension of the lease for a further period of five years from 1977 to 1982. Subsequently, the appellant filed Application No. 1110 of 1981 for further extension of the lease. The official liquidator filed his report submitting that any further extension of the lease would delay the completing of the winding up operations of the company and since the mill is the only asset of the liquidated company, the continuous use of machineries for any longer period would depreciate the value and this would vitally effect the interests of the creditors and that, therefore, it is necessary to sell the same and not to extend the lease. The court accepted this contention. Since the modalities of ascertaining the market price of the land and the building by a recognised valuer and that of the machineries by SITRA would take considerable time, the court thought it fit to give lease for a shorter term, viz., three years. The official liquidator accordingly took steps to value the land, building and machinery. Originally, SITRA gave its report with reference to the value of the material as on February 16, 1985. The value given by it was Rs. 22.79 lakhs. It also valued the additions and alterations made by the lessee from 1971 to 1985 which he was eligible to remove unless the official liquidator exercises his option to purchase the same at Rs. 13,94,000 leaving a net value of Rs. 8,85,000 for the machinery. A Government of India approved valuer for estate duty and wealth-tax valued the building at Rs. 4,56,699 and the lands at Rs. 1,10,160 making a total of Rs. 5,66,859 or Rs. 5,67,000. The official liquidator has not commented on the valuation of the machinery and the building. However, he stated that the valuation of 9 acres and 18 cents of land at Rs. 1,10,160 was (very) low and that the price may be

somewhere about Rs. 1,00,000 per acre. However, the official liquidator has not produced any material in this regard except to make an oral

statement. The total value of the machineries, land and building thus comes to Rs. 14,62,000. Even if we take the value of the land at Rs. 50,000

per cent, for 9.18 acres it will come to Rs. 4,59,000 adding the difference in value of Rs. 3,48,340 given by the Government of India approved

valuer, still the value of the land, building, machinery, etc., would be Rs. 18,10,840. The official liquidator has filed a report which showed that an

amount of Rs. 8,15,793.44 was payable to the ordinary creditors. This does not include the interest payable from the date of the winding up order.

The amount payable to the Government to Tamil Nadu with interest till November 14, 1986, comes to Rs. 6,66,43963. The total outstanding

liabilities thus come Rs. 14,82,233.07. This does not include the interest payable to the preferential creditors and ordinary creditors under rule

179.

16. Learned counsel appearing for the official liquidator stated that the official liquidator has received claims from a number of persons after the

filing of the settled list of creditors and the amount claimed and being processed by the official liquidator comes to Rs. 7,44,719.37. The interest

payable on this amount comes to Rs. 8,06,409.42. The official liquidator has also given a memo dated September 11, 1986, in which he has given

the list of liabilities including interest payable under rule 197 both on the settled list of ordinary creditors and preferential creditors and those claims

which are in the process of being enquired into and that comes to Rs. 34,89,473. Of this Rs. 34,89,473, Rs. 15,51,128.79 relate to claims in the

process and the interest on the same. Learned counsel for the appellant offered a cash down payment of Rs. 15,00,000 and accepting any future

liability that may arise in respect of the claims which are in the process of being enquired into which as already stated with interest amounts to Rs.

15,51,128.79, provided he is given an opportunity in the proceedings in respect of these claims to contest if it is not a proper claim or a barred

claim. Thus, the offer of the appellant is Rs, 15,00,000 plus a liability of Rs. 15,51,128.79 on settlement of claims. Having regard to the fact that

the winding-up proceedings have been pending since 1970 with no prospect of the entire debt being wiped out from out of the income from the

mill, the offer of Rs. 15,00,000 cash down payment and undertaking to pay any there claim that may be proved hereafter is, in our opinion, reasonable. However, in view of the fact that the claim which may have to be proved in future alone cannot be paid in full with interest while the other claim is paid without interest, we consider that if the appellant is willing to pay Rs. 30,00,000 as the total consideration without any further liability to pay, contingent on the claim being proved, a sale can be ordered in his favour. Having regard to the fact that the machineries are very old and only 8,250 spindles are working, the sum of Rs. 30,00,000 now fixed, in our opinion, is very reasonable. It may also be mentioned that if the property is to be offered in public auction and some third party bids at the auction, the appellant will have to remove the machinery which he has installed. As already stated, the value of the additional machinery which the appellant would be entitled to remove is Rs. 13,94,000 and it would be problematical if somebody would offer Rs. 30,00,000 if this machinery valued at Rs. 13,94,000 is to be removed. The other way of looking at it is that this consideration of Rs. 30,00,000 is for the machineries less the addition of Rs. 13,94,000 so that the total offer now comes to Rs. 43,94,000. The other aspect is that if a third party purchases and the appellant is permitted to remove the machinery, there will be an interregnum during which time the mill could not be run and the workers also will have no work. That will be the period when the appellant had to remove the machinery and the time that may be taken by the third party purchaser to put the mill in a running condition again. There is also the expenses involved in public auction. Having regard to these features, we are of the view that a sum of Rs. 30 lakhs can be fixed as a reasonable price and that the mill including buildings and lends can be sold to the appellant on private sale by the official liquidator and it will not be in the interest of the creditors, shareholders or the company to sell the same by public auction.

17. An illustrative case on this aspect of the question came up for consideration before the Calcutta High Court in the decision in Elvoc (P.) Ltd. In re, [1982] 52 Comp Cas 308. The question for consideration was whether the court is entitled to order a private sale of a company in liquidation as a running unit to the lessee. The learned judge posed the question as to whether the only object of such sale is to fetch the maximum price or

whether the court at its discretion, having regard to the prevailing socio-economic questions which are involved in a welfare State like India, should apply the law in a pragmatic manner having regard to the realities and interests of the public. There also the company in liquidation was given on lease to a co-operative society which after some time asked for either renewal of the lease or alternatively for sale. The learned judge held that the only duty laid down on the court is to see that a reasonable price is obtained and the rule is not so rigid that in every case it must be sold in public auction. We are in entire agreement with this view of the learned judge. Though the learned judge observed that it cannot be treated as a precedent as the order is to be made on the peculiar circumstances of that particular case which has got certain exceptional features, we are of the view that the principle laid down there is very objective and could be followed even in this case.

18. Since the claims filed subsequent to the settled list of creditors will have to be processed by the official liquidator and since payment of the entire consideration could not be directed to be made in one lump sum and in fact the appellant was expecting to contest the claims of the various people and agreed to pay those claims, if proved, and that would have given him some time, we think it reasonable to direct the appellant to pay a sum of Rs. 15,00,000 on execution of the sale deed and the balance of Rs. 15,00,000 to be paid in five half-yearly instalments of Rs. 3,00,000 each, the first of such payment to be made on or before December 31, 1987, and the remaining instalments before the end of each of the six months thereafter. In pursuance of an interim direction of this court, the appellant has deposited a sum of Rs. 13,00,000 towards any sale that may be ordered. This amount, the official liquidator can withdraw towards the sale consideration. On payment of the balance of Rs. 2,00,000, on or before December 31, 1986, the sale deed will have to be executed by the official liquidator. Till the execution of the sale deed, the lessee has to pay the lease amount. For the payment of the balance of consideration, there will be a first charge on the mill and the appellant shall execute such documents as are needed by the official liquidator creating that charge. The appeals are accordingly allowed on the above terms. The appellant will bear his costs. The official liquidator will be entitled to costs which will come from the estate. Counsel's fee for the official liquidator is fixed at Rs.

5,000.

19. C.M.P. No. 13000 of 1985 :- This petition has been filed by the applicant in Company Application No. 56 of 1985 for impleading himself as

a party-respondent in O.S.A. No. 120 of 1985. Since we have dismissed the application and since the interest of the company is looked after by

the official liquidator and no particular reason could be assigned by the petitioner for impleading himself as a party, we dismiss the this petition, but

without costs.