
(1995) 08 CAL CK 0014
In the Calcutta High Court
Case No : Company Petition No. 120 of 1986

Nilkanta Kolay

APPELLANT

Vs

The Official Liquidator

RESPONDENT

Date of Decision : 30-08-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 12, Order 9 Rule 13
Companies Act, 1956 — Section 173, 454, 466

Citation : AIR 1996 Cal 171

Hon'ble Judges : Baboo Lall Jain, J

Bench : Single Bench

Judgement

1. This application had been filed by one Nilkanta Kolay on 20th January, 1992 u/s 466 of the Companies Act, 1956 before the Hon"ble Appeal Court and was remanded to this Court, inter alia, with the following directions:

"In the event, the Company Court allows the application for stay of the winding up proceeding and/or setting aside the order of the winding up order, the sale will automatically stand set aside, if however, the Company Court dismissed the application for setting aside the winding up order, the sale shall stand confirmed. There will be no sale and disbursement without the leave of the Company Court."

2. Some of the facts relating to the instant application are as follows: On 20th March, 1986 one Lalit Kumar Sinha filed a winding up petition being Company Petition No. 120 of 1986 against the company claiming a sum of Rs. 68,000/- from the Company.

3. It appears from the submissions made and it is a matter of record that another winding up petition was filed against the company by another creditor Krishna Kumar Sinha being C.P. No. 121 of 1986 for non payment of Rs. 68 thousand. On 20-3-1986. Notice in respect of C.P. No. 120 of 1986 was admittedly served on the company. On 23-4-1987 the applications being C.P. No. 120 of 1986 and C.P. 121 of 1986 were admitted by the Court and directions were given for advertisements. On 5-7-1988 winding up order was passed in C.P.

No. 120 of 1986 against the company and official liquidator was appointed in respect of the assets of the company. On 25-4-1990 the Official Liquidator took possession of the assets of the company upon notice and in presence of the representatives of the directors of the company. In September, 1980 the Official Liquidator filed a petition of complaint, inter alia, against the ex-directors of the said company in liquidation including Nil Kanta Koley for taking cognizance and for punishment of the offence committed by them by not filing the statement of affairs as envisaged u/s 454 of the Companies Act, 1956. On 10-9-1990 the summons were directed to be issued u/s 454 of the Companies Act, 1956 against the accused persons including Nil Kanta Kolay. On 14-11-1990 summons were served on Nil Kanta Kolay through officer in charge, Memary P.S. On 16-11-1990 Nil Kanta Kolay engaged Mr. Subhas Medda learned Advocate to represent him in the said complaint case marked as C. A. No. 220 of 1990 connected with C.P. No. 120 of 1986. On 22-11-1990 order was passed by Justice Prabir Kumar Majumdar (as His Lordship then was) in C.A. No. 220 of 1990 when Mr. Subhas Medda appeared for Nil Kanta Kolay and took direction for affidavit.

4. The petitioner has stated in paragraph 3 of the petition that there are 3 contributories i.e. Nil Kanta Kolay to the extent 50%, Karuna Nand Kolay to the extent of 25% and Subhrananda Banerjee to the extent of 25%.

5. Two applications were made for winding up of the company on 28-3-1986 i.e. C.P. No. 120 of 1986 and C.P.No. 121 of 1986. The company did not take any steps to defend the said proceedings and ultimately on 5-7-1988 after advertisement the company was directed to be wound up in C.P. No. 120 of 1986. The Official Liquidator took possession on 25-4-1990 and summons were served in proceedings u/s 454 of the Companies Act, 1956 and the petitioner Nil Kanta Kolay appeared pursuant to such summons on 16-11-1990.

6. In spite of all these proceedings no application was made for setting aside the order of winding up under Order 9, Rule 12 though several allegations have been made in the petition that the petitioner could not appear or defend the said proceedings due to certain alleged defaults as against his own advocate. The petitioner was admittedly served with the notice of the winding up application in C.P. No. 120 of 1986. If at all the petitioner had any defence to the same and was prevented by any sufficient cause from defending the same, then the petitioner or the company could probably make an application under Order 9, Rule 13 of the CPC for setting aside the ex parte order and or orders within 30 days from the date of the Order or within 30 days from the date of knowledge. As no such application has been made the allegations against his own advocate are irrelevant for the purposes of this application which purports to be an application u/s 466 of the Companies Act. During all this period since 5-7-88, when the winding up order was made the petitioner did not make any application u/s 466 of the Companies Act until the instant application was made on 20-1-92. It is to be noted that neither the petitioner nor any other person has as filed the statement of affairs which is required to be filed by the petitioner and other

Officers of the company under the provisions of the Companies Act, 1956. It is difficult to believe that the petitioner or other officers of the company did not come to know about the order for winding up even when the Official Liquidator took possession of the factory and assets of the company on 25-4-90. Ordinarily it was for the petitioner and the other co-Directors of the company to keep a watch in respect of the winding up proceedings and the orders made therein, when the notice was admittedly served on the company as admitted in paragraph 9 of the petition, in March, 1986.

7. Advertisements were issued in newspapers by the Official Liquidator long after he took possession, in April, 1990, inviting offers regarding sale of the assets of the company in liquidation on or about 7-3-91 and 8-3-91. On 12-4-91 order was made by Justice Padma Khastgir (as His Lordship then was) concluding sale in favour of one Ram Avtar Singhania for Rs. 7.60 lacs being the highest bidder. The said Ram Avtar Singhania failed to pay the 10% purchaser price and on 29-4-91 another order was made regarding failure of Ram Avtar Singhania to deposit the money and recording an offer from one M/ s. Amicus Steel (India) Pvt. Ltd. at Rs. 7.60 lacs. On 31-7-91 the Court refused an application of Amicus Steel for extension of time to pay the balance 90% of the purchase price and the Official Liquidator was given liberty to forfeit the 10% earnest money deposited by Amicus Steel (India) Pvt. Ltd. Thereafter further orders were made and ultimately by an order dated 16-9-91 Justice Ruma Pal set aside the sale in favour of Amicus Steel and confirmed the sale in favour of Shiva Shakti Iron and Steel upon payment of entire purchase price of Rs. 8.25 lacs, to Official Liquidator, in Court. The Official Liquidator was directed to handover possession to M/s. Shiva Shakti Iron and Steel. The Official Liquidator was also directed to return the amount paid by Amicus Stell. On 17-9-91 Amicus Steel preferred an appeal and also filed an application for stay of the order dated 16-9-91. On 20-9-91 the stay application filed by Amicus Steel against the order dated 16-9-91 was dismissed by the Hon"ble Division Bench. On 23-9r91 Shiva Shakti mentioned the matter before the Trial Court and prayed for possession in terms of the order dated 16-9-91. On. 25-9-91 order made by Justice Ruma Pal. At this stage two parties namely Baba Udyog and Manoj Steel offered to purchase the assets at Rs. 8.50 lacs and Rs. 9 lacs respectively which was objected to by Shiva Shakti. The Court directed that it would consider as to whether the Court had power to consider the higher offer made by the said two parties. The matter was adjourned till 30-9-91. On 27-9-91 Shiva Shakti preferred an appeal against the order dated 25-9-91 which was withdrawn on 30-9-91. On 3-10-91 the matter again appeared in the list before the Trial Court when a new party namely Amit Steel Corporation appeared and offered Rs. 9.25 lacs. Shiva Shakti objected to the same contending that once the sale had been confirmed in favour of Shiva Shakti at Rs. 8.25 lacs and the said entire purchase money had already been paid the Court cannot go on enntertaining the new offers. The matter was directed to appear on 4-10-91. Amit Steel Corporation deposited Rs. 3.35 lacs with the Official Liquidator in Court on that day. On 4-10-91 order was passed by

Justice Ruma Pal turning down the offer of Amit Steel Corporation and confirming sale in favour of Shiva Shakti at Rs. 9.25 lacs. The said Amit Steel Corporation failed to bring the amount offered by them but in spite of that sale already confirmed in favour of Shiva Shakti at a sum of Rs. 8.25 lacs by order dated 16-9-91 was set aside and again confirmed at Rs. 9.25 lacs in favour of Shiva Shakti. It was directed that the said additional sum of Rs. 1 lac shall be paid by Shiva Shakti after obtaining possession of the assets. On 9-10-91 possession of the assets was handed over to Shiva Shakti by the Official Liquidator and Rs. 1 lakh was paid by Shiva Shakti to Official Liquidator in accordance with the order dated October 8, 1991. Before that on 8-10-91 Justice Ruma Pal passed an order giving the authority to the Official Liquidator to execute the agreement on behalf of the company with Shiva Shakti and was directed to make over possession of the assets of the said company to Shiva Shakti, who would make over Rs. 1 lakh to the Official Liquidator. On 21-10-91 and 1-11-91 notices were published in Aajkal and Telegraph by Shiva Shakti and also notice was placed on the Notice Board of the factory inviting all ex-workers of Kolay Re-rolling Mills to report at the factory with evidence for their employment by Shiva Shakti. On 5-12-91 CITU (Workers' Union) wrote to Shiva Shakti, inter alia, that a time and date be fixed for negotiations of the terms and conditions of employment of the ex-workers. On 4-1-92 CITU wrote a letter stating that negotiations were going on regarding employment of ex-workers of Kolay Re-rolling Mills with Shiva Shakti.

8. Thereafter, on 20-1-92 the instant application was filed by Nilkanta Kolay and an interim order was passed, inter alia, directing Shiva Shakti not to make further investments and status quo to be maintained but this would not prevent Shiva Shakti from carrying on the business and directions were given for filing of affidavits. On 29-1-92 a letter was given from CITU stating that Basudeb Kundu was never the Secretary of the Kolay Re-rolling Mills Workers' Union. On 25-4-94 the judgment and order was passed by the Hon'ble Appeal Court in three matters including the instant application of Nilkanta Kolay.

9. From the submissions made on behalf of the Official Liquidator it appears that on or about 29-4-81 another earlier petition for winding up of the company was filed by one Jiwan Kumar Jain claiming a sum of Rs. 20,000/- being Company Petition No. 140 of 1981. On the said application an order was passed on 8-6-81, admitting the petition. The company agreed to pay the petitioning creditor's dues of Rs. 23,800/- in instalments. The company paid only a sum of Rs. 3,000/-. As the company defaulted in payment of the balance sum an order for winding up of the company was passed on 20-6-83 in the said Company Petition No. 140 of 1981. On or about 21-7-83 an application was made by company through Nilkanta Kolay for stay and/or recalling of the order dated 20-6-83.

10. It also appears that on or about 15-3-84 the State Bank of India instituted a suit against Kolay Re-rolling Mills Pvt. Ltd. and others including Nilkanta Kolay in Title Suit No. 37 of 1984 for recovery of Bank's claim of Rs. 18,50,402.01 before the 4th Additional District Judge, Burdwan. The said suit was transferred to this

Hon"ble Court and marked as Transferred Suit No. 4 of 1984. On or about 7-7-84, possession of the said company was taken by the Official Liquidator and the order for sale was passed on 20-12-84. On or about 5-2-85, the Official Liquidator published advertisement for sale of the assets of the said company (in Hqn.).

11. On or about 21st February, 1985 Nilkanta Kolay and Arunananda Banerjee on behalf of the Company made another application praying of the dues of the petitioner creditor in C.P. No. 140 of 1981. On the said application an order was passed on 22nd February, 1985 by Mr. T. K. Basu, J. (as His Lordship then was) directing payment of the dues of the petitioning creditor by the Company and the order for winding up dated 20th June, 1983 was stayed. On or about 8th July, 1985 Mr. B. N. Sett, Barrister-at-Law was appointed Receiver over the assets of Kolay Re-rolling Mills Pvt. Ltd. in the said transferred Suit No. 4 of 1984.

12. On 23rd December, 1985 the Appeal Court presided over by Mr. Justice B. C. Basak and Mr. Justice S. K. Ganguly disposed of the appeal then pending before the said Court being Appeal No. of 1985 (Kolay Re-rolling Mills Pvt. Ltd. v. State Bank of India). By the said order the Appeal Court by consent of the parties treated the suit as on the day's list and a decree was passed for Rs. 18,15,402.01 p., both preliminary and final against the defendant No. 1, that is Kolay Re-rolling Mills Pvt. Ltd. By consent the Company was allowed to pay in instalments of Rs. 15,000/- per month for some time and thereafter, increased instalments were provided. Certain interest was also provided in case of default. It was also provided that the Receiver shall be there, but the Receiver shall not interfere with any day to day business and the Receiver shall be entitled to inspect the premises at any point of time or inspect any books of account of the Company or have the same examined and inspected by any Auditor. In case of default in the payment the whole of the amount will become due and payable and the decree shall become executable and the Receiver will take immediate actual physical possession of the property. It was recorded that Nilkanta Kolay was present in Court and at his instruction Mr. Roy submitted to a decree and prayed for such instalments. A copy of the signed copy of the minutes of the said order has been filed before me on behalf of the Bank. The learned Advocate for the Bank who appeared at the time of hearing opposed the instant application for stay of winding up proceedings. The learned Advocate for the Bank submitted that in spite of the said decree dated 23rd December, 1985, the Company committed defaults and the Receiver became entitled to take possession of the assets of the Company.

13. However, as already stated, two Company Petitions being C.P. No. 120 of 1986 and C.P. No. 121 of 1986 were filed against the Company for the compulsory winding up of the Company and the order for winding up was made on 5th July, 1988 after service of notice on the Company and after advertisements of the Company Petition No. 120 of 1986.

14. According to the Official Liquidator, so far as the Company Petition No. 140

of-1981 is concerned the same was stayed and the dues of the said petitioner in Company Petition No. 140 of 1981 were paid by the Company.

15. It has been submitted on behalf of the Official Liquidator that it is not correct to allege that the Company never faced any litigation of whatsoever of nature in this Hon"ble Court as alleged in paragraph 8 of the said petition. It is quite clear that the Company was involved in litigations in this Court including the said C.P. No. 140 of 1981 wherein the Company appeared and CON-tested through Lawyers and made applications before this Court. The said Nilkanta Kolay and/or the Company engaged Mr. Kinjal Kumar Boral, Mr. Subhas Medda and others from time to time.

16. In paragraph 10 of the petition the petitioner has alleged as follows:

"10. The said Company was carrying on business at Burdwan. All the" Directors including your petitioner also residing at Burdwan. Neither your petitioner nor any of the Principal Officer of the said Company were acquainted with any Court matter nor they were aware of any Advocate of this Hon"ble Court who can render any assistance to the Company in respect of the said winding up application. Your petitioner has also the other Directors and/or Principal Officers of the said Company including your petitioner were also not familiar with the city of-Calcutta."

17. The allegations made in the said paragraph are apparently incorrect in view of the proceedings relating to C.P. No. 140 of 1981, suit and the proceedings in the Trans-ferred Suit No. 4 of 1984 and the consent decree passed by the Appeal Court dated 23rd December, 1984 wherein the Company in Nilkanta Kolay were both represented and a consent decree was passed for rupees 18,50,402.01 p. in favour of the State Bank of India.

18. The petitioner has sought to make several allegations against his own Lawyer and/or Lawyer for the Company said to be Shri Pursottom Chakravarty. However, in its application the company has sought to allege that in spite of the notice, the Company could not defend the said winding up proceeding. Whether there were any good ground or not for non-appearance in the winding up proceeding could be relevant in an application under Order 9, Rule 13 for setting aside the winding up order on the ground of having been prevented by sufficient cause, but no such application has been made. In an application u/s 466 of the Companies Act, 1956 the petitioner can only proceed on the basis of accepting the winding up order and the grounds have to be made out in terms of Section 466 of the Companies Act, 1956.

19. In paragraph 13 of the petition the petitioner has alleged that until 9th October, 1991 neither the petitioner nor any other contributory had any knowledge about any development in respect of the said winding up application.

20. It is unbelievable that the petitioner and/or the said contributories and/or other Directors of the Company could not come to know about the winding up

order even when possession was taken by the Official Liquidator on 25th April, 1990.

21. In the proceedings under Sec. 454 of the Companies Act the petitioner appeared through Mr. Subhas Medda, Advocate in this Court and obtained direction for filing of affidavits. A signed copy of the order dated 22nd November, 1990 is annexed to the affidavit-in-opposition. The petitioner, Nilkanta Kolay who was the respondent No. 1 appeared through Advocate. Furthermore, after the service of notice of the winding up application it was for the petitioner to keep watch on the proceeding and it is quite apparent that the petitioner failed to do so. However, the taking of possession by the Official Liquidator on 25th April, 1990 could not be a matter which would not be known to the Managing Director of the Company, namely, Nilkanta Kolay when possession was taken by the Official Liquidator on 25th April, 1990 and the petitioner having obtained directions in Section 454 proceedings on 22nd November, 1990 could still allege lack of knowledge until 9th October, 1991 as has been sought to be alleged by the petitioner.

22. The petitioner has admitted in the petition that since 1984 the said Company started facing financial difficulty and the said Company were also enjoying credit facility with the said Bank. Other impediments were also being faced by the said Company, such as electricity, labour paucity of working capital and various unforeseen expenses. The factory of the Company was lying closed according to the respondent No. 2 since 1982. The petitioner and the other Directors of the Company have not yet filed the Statement of Affairs nor has the Official Liquidator invited any claims from the creditors. They are in default in filing the Statement of Affairs. No latest balance-sheet of the Company has been annexed to the petition nor has any particulars been given with regard to the list of creditors. Even the proceedings of the Company Petition No. 121 of 1986 have been suppressed by the petitioner. The said Company Petition was started by Krishna Kumar Saha for non-payment of Rs. 68,000/-. The claim of the petitioning creditor in C.P. No. 120 of 1986 was Rs. 68,000/- including interest as would appear from the annexure to the petition being the copy of the winding up application. Rs. 40,000/- was the principal amount.

23. Principles governing the application u/s 466 of the Companies Act, 1956 have been discussed in the case reported in 85 Cal WN 557 : (1980 Tax LR NOC 150) (Mahabir Prasad Agarwala v. Askaran S. Singh).

The Court in the said case held, inter alia, as follows:

"Therefore, from the above principles which have been summarised in different authorities and the decision referred to hereinbefore it appears that the discretion for stay u/s 466 can only be exercised by the Court (1) if the Court is satisfied on the materials before it that the application is bona fide; (2) the Court would be guided by the principles and definitely come to the finding that the principles are applicable to the facts of a particular case; (3) mere consent of all

the creditors for stay of winding up is not enough; (4) that offer to pay in full or make satisfactory provisions for the payment of the creditors is not enough; (5) Court will consider the interest of commercial morality and not merely the wishes of the creditors and contributories; (6) Court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation; (7) a firm had accepted proposal for satisfying all the creditors must be before the Court with material particulars; (8) the jurisdiction for stay can be used only to allow in proper circumstances a resumption of the business of the Company; (9) the Court is to consider whether the proposal for revival of the company is for benefit of the creditor but also whether the stay will be conducive or detrimental to commercial morality and to the interest of the public at large; (10) before making any order Court must see whether the Ex-Directors have complied with their statutory duties as to giving information to the Official Liquidator by furnishing the statement of affairs; (11) and any other relevant fact which the Court thinks fit to be considered for granting or not granting the stay having regard to the peculiar facts of a particular case."

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

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

above I have no doubt in my mind that the applicants who were some of the Ex-Directors have adopted various contrivances to hang on other properties and deprive the creditors of their legitimate dues only to carry on business in illegal, dishonest manner and absolutely lacking in commercial morality. It is also the further duty of the Court from the Socio-Economic point of view to eradicate dishonest, and corrupt management of the company affairs and to set up a healthy atmosphere in the industry, particularly the Jute Industry which is foreign exchange earner and passing through a boom having very bright prospects in the near future. Therefore, the assets of the company being that of Prem Chand Jute Mills Ltd. together with any machineries if any has been added by the company in liquidation has to be protected and steps should be taken so that it may be restarted under efficient, honest and bona fide management."

The respondent No. 2 relied on the judgment reported in AIR 1949 Cal 69 (In the matter of: East India Cotton Mills Ltd.). In the said case Justice S. R. Das (as his Lordship then was) held as follows:

"In this application the petitioners also pray for stay of the winding-up proceedings under S. 173, Companies Act. This section comes into play after an order for winding-up has been made. It presupposes a good and valid winding-up order. In an application under this section, there can be no question of attacking the order. Any creditor or contributory may make an application under this section. Therefore, each of the petitioners is fully qualified to maintain this application insofar as it is one under this section. The company, however, independently of the Liquidator, does not appear to me to have any locus standi in such an application. The section requires proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed. What has happened to justify a stay of proceedings? I have already dealt with and rejected the allegations of collusion between Shiva Prosad and Manabendra and the suppression of service of the petition. Has anything happened since the order was made? All that has happened is that the petitioning creditor has been satisfied, not by the company but by Dulichand a creditor of the company. But is the satisfaction of the petitioning creditor's debt by itself sufficient to stay the winding-up when there are other creditors? It is said that Dulichand who in his firm of Murarilal Dulichand claims about Rs. 90,000, Jewraj Ram Kissen who claims about also Rs. 90,000 and is represented by Mr. M. N. Banerjee are supporting this application. On the other hand there is the creditor Manabendra. Manabendra claims to be a creditor in the sum of Rs. 5,24,651/-. It is probable that he agreed to accept Rs. 25,000/-. I do not propose to go into the question whether the settlement with him was on any condition or whether the condition has been broken. Admittedly Rs. 25,000 is due to him. The petitioners through their counsel offer to pay Rs. 25,000 to him in full settlement which Manabendra is not prepared to accept. There is also one Khagendra Lal Saha who appeared before Edgley, J. and filed an affidavit claiming Rs. 6,444-4-6 and objected to any stay but who has not been served with the present summons. Lastly there are the Banks and other creditors shown in the balance-sheet as on 31 st

December, 1944 about whose claim nothing has been said in the petition and the affidavits before me. Further even if all the creditors consent to stay, is the Court bound to grant a stay? The principles on which the Court proceeds on an application of this kind have been summarised in Hals-bury's Laws of England, 2nd Edn., Vol. 2, Art. 1209 at p. 724 in the following terms:

"In the exercise of its jurisdiction to stay, the Court so far as possible, acts upon the principle applicable in exercising jurisdiction to rescind a receiving order annulled an adjudication in bankruptcy against an individual. The Court refuses, therefore, to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large. In particular the Court will have regard to the following facts that the Directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement of the affairs that there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid up shares forming the consideration for the purchase of property by the company on formation; that the promoter has made gifts of fully paid up shares to the Directors, that there are other matters connected with the promotion, formation or failure of the company or the conduct of its business or affairs, which appear to the Court to require investigation. The same principles are apparently applicable whether the company has or has not invited the public to subscribe for its shares except, possibly, in the case of a private company, where all the shareholders have full knowledge of what has been done.

"The summary of the law is based on the observations of Buckley, J. in the case of *In re: Telescriptor Syndicate Ltd.* (1903) 2 Ch 174 pp. 180 : (72 LJ Ch 480) wherein reference was made to the Trenchard observation of French, L.J. in the earlier case of *In re : Hester* (1882) 22 QBD 632 at p. 641 : (60 LT 943). I, therefore, proceed to consider the facts in the light of these principles."

In the instant case an unverified Project Feasibility Statement had been submitted before the Appeal Court but the ready availability of the funds is not to be found. Only vague statements have been made in the said unverified Project Feasibility Statement to some land belonging to Nilkanta Kolay and the members of his family but no particulars are there whether the sale has been or could be made at an early date is also not clear. The factory was lying closed since 1982 until the Official Liquidator took possession and apparently even the instalments to the Bank were not paid. The Court cannot act on an unverified Project Feasibility Statement to which no oath has been pledged. It is to be remembered that even the latest account or audited accounts of the company are not available and the Statement of Affairs have not been filed. It has been submitted on behalf of the petitioner that the application has not been opposed by any of the creditors. The State Bank of India has appeared and opposed this application and they have clearly said that they are entitled to enforce the mortgage and

charges and/or the decree which they have obtained by consent and they are interested in immediate payment of their dues from out of the sale proceeds of the assets of the company to the extent they are entitled. The Official Liquidator has also opposed and the Official Liquidator in winding-up proceeding represents the creditors of the company. No particulars of the creditors have been furnished by furnishing any Statement of Affairs or by furnishing any audited accounts and no notice had been given to the other creditors. Even none of the other contributories have come to support the petitioner, who is only one of the contributories. The learned Advocate appearing on behalf of the petitioner submitted as to whether permanent stay of the winding-up order should be refused particularly when there is no opposition from any creditor or contributory of the company or from the Official Liquidator even though there is delay. The Official Liquidator has opposed the application and has made his submissions in a Written Note. The State Bank of India has also appeared and opposed the application. The other creditors have not been given notice. In any event, it is the petitioner who has to satisfy the conditions as laid down in Mahabir Prasad Agarwalla's case, 85 Cal WN 557 : (1980 Tax LR NOC 150) (supra). I am not satisfied that the application has been made: bona fide. As a matter of fact, the petitioner has relied on various incorrect allegations which are incorrect to his knowledge as has been referred to hereinbefore. No correct or audited account or the financial position of the company has been disclosed and the petitioner has not come with clean hands. The creditors are opposing the stay of the winding up. The petitioner has not cooperated with the Official Liquidator in furnishing the Statement of Affairs and/or the correct position of the company's financial position nor has furnished the same as required under the Companies Act, 1956. There is no firm or accepted proposal for satisfying all the creditors with any material particulars before this Court. Merely obtaining an affidavit from one Basudeb Kundu on behalf of the workers as alleged by him is not sufficient. Even his position as Secretary of the Workers Union is disputed and one of the Unions has been carrying on negotiation with the purchaser. It is also difficult to believe that a factory can be run with Rs. 20,000/-only as has been alleged by Basudeb Kundu. I am satisfied that the Ex-Directors of the company, have not even complied with their statutory duties as to giving information to the Official Liquidator by furnishing the Statement of Affairs.

24. So far as the other relevant factors are concerned, it is to be seen that the factory was sold by this Court to Shiva Shakti pursuant to orders of this Court. The order for winding-up was made in 1988 and the possession was taken in 1990. The said purchaser had paid the entire consideration money and has taken possession of the assets. His case is that he had invested large sums of money after taking possession and in putting the factory in order. Various challenges had been made regarding the sale but without success. This application has been made by the petitioner after more than 3 years of the winding-up order. The process for sale of the assets also continued pursuant to orders passed by this Court from time to time and ultimately the sale was confirmed pursuant to

orders of this Court and possession was taken by the purchaser after paying Rs. 9.25 lacs. Such possession was taken by the purchaser on 4-10-91. The purchaser even started negotiations with the workers and has, according to him, invested large sums of money with intention to run the said factory. In my opinion, it will be a serious injustice at this stage against the purchaser if he is deprived of the fruits of his purchase made pursuant to orders of Court. In my opinion, after the sale is concluded and possession is made over it will be serious injustice to the purchaser if an order is made thereafter with retrospective effect. No party should be allowed to suffer pursuant to act of Court and if the sale is set aside then it will be serious injustice as against the purchaser. The purchaser made investments after purchase in the factory, after he received possession and before the restraint order was made. How can he be compensated for the same. Furthermore there are no grounds whatsoever as to why the order for winding-up should be stayed. There is no proposal as to how the Bank will be paid and where are the funds. No particulars of the other creditors are given, nor is there any proposal as to how they will be paid.

25. It was also contended on behalf of the petitioner that the said Shiva Shakti has no locus standi to oppose the application u/s 466 of the Companies Act, 1956. One of the prayers of the petitioner is that the Official Liquidator be directed not to handover possession (of) Koley Re-rolling Mills Pvt. Ltd. to any other person or persons. He has also prayed that Shiva Shakti Iron & Steel Industries be restrained in taking any step or steps in connection with Koley Re-rolling Mills Pvt. Ltd. or to remove any article or articles. The petitioner has also made the said Shiva Shakti as one of the respondents. In the premises the question of the said Shiva Shakti not having locus standi to oppose the application does not and cannot arise. The application has been opposed by the Bank who is a creditor for more than Rs. 18 lakhs. Official Liquidator has also opposed the application and he represents the other creditors. The application for stay from giving effect to the sale cannot be made except in the presence of Shiva Shakti and, in my opinion, Shiva Shakti has locus standi to oppose the application.

26. I have considered the facts of this case and I am of the view that the petitioner has not made out any ground for stay of the winding-up u/s 466 of the Companies Act as enunciated in the judgments, cited hereinabove. I am also satisfied that the petitioner has not made out any ground for setting aside the sale or stay of the sale in favour of Shiva Shakti Iron & Steel Industries.

27. In the premises, the instant application of Nilkanta Kolay is dismissed. All restrained orders against the respondents or any of them are vacated. In terms of the aforesaid order of the Appeal Court, the sale in favour of Shiva Shakti Iron & Steel stands confirmed. The said Shiva Shakti Iron & Steel will be entitled to give effect to the sale in its favour and to act in accordance with the sale held in its favour.

28. Stay is asked for on behalf of the petitioner and is declined.

29. All parties concerned are to act on a signed copy of the operative part of this judgment and order on the usual undertaking.

28. Petition dismissed.