

(2009) 01 GUJ CK 0042

In the Gujarat High Court

Case No : Company Application No's. 117 of 2007 and 172 and 582 of 2008 and Company Petition No's. 296 of 1999 and 147 of 2000

O.L. of Piramal Financial Services Ltd.

APPELLANT

Vs

Decimal Systems Pvt. Ltd.

RESPONDENT

Date of Decision : 12-01-2009

Acts Referred:

Companies Act, 1956 — Section 441(2), 531, 531A, 536, 536(2)

Citation : (2009) 150 CompCas 546 : (2009) 91 SCL 31

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

Bench : Single Bench

Judgement

K.A. Puj, J.—The Official Liquidator of Piramal Financial Services Ltd., (PFSL) has filed Company Application No. 172 of 2008 praying for the direction to the respondent, namely, Decimal Systems Pvt. Ltd. and Ms. Shefali Doshi to pay to the Liquidator by way of mesne profit and/or compensation calculated at the rate of Rs. 30/- per sq.ft. for office premises and at the rate of Rs. 10/- per sq.ft. for parking space per month from 1.9.1999 till 29.5.2007 when vacant and peaceful possession was handedover to the Liquidator.

2. The Company Application No. 582 of 2008 is filed by Ms. Shefali Doshi through her power of attorney holder - Mr. D.D. Mehta, for declaration that the transaction between the applicant and the Company - Piramal Financial Services Ltd., reflected in the Memorandum of Understanding dated 1.9.1999 is not void against the Liquidator and also to declare that the same is valid within the meaning of Sections 531/531-A of the Companies Act, 1956.

3. Since both these Applications are interconnected and would affect the outcome of one another, the same are heard together and disposed of by this common judgment and order.

4. In Company Application No. 172 of 2008 it is the case of the Official Liquidator that the the Company, namely, PFSL was incorporated and registered under the

Companies Act, 1956. Due to mismanagement and unhealthy features in the working of the Company as well as non-fulfilment of its financial because of serious liquidity crisis, the Reserve Bank of India presented winding up petition under the provisions of Reserve Bank of India Act. This Court vide its order dated 21.10.2000 admitted the petition and appointed Official Liquidator as Provisional Liquidator of the Company. Several other winding up petitions being Company Petition No. 296 of 1999, Company Petition No. 297 of 1999 and Company Petition No. 298 of 1999 were filed on 18.10.1999. The complete records of the company were not available and whatever record was available with the Liquidator, he perused the same and on ascertainment of the said record he has initiated the proceedings for taking possession of the assets of the Company. In many cases taking over possession was objected to by the occupiers. The Official Liquidator, in this process, found that the office premises Nos. 102 to 107 located on First Floor, Devpath Complex, C.G. Road, Ahmedabad, were of the ownership of the Company in liquidation. The Official Liquidator further found that the respondent No. 1 - Decimal Systems Pvt. Ltd. was claiming tenancy rights in respect of office premises Nos. 102 to 107 pursuant to the rent note dated 15.9.1999 executed between PFSL and Desimal Systems Pvt. Ltd. The said rent note reveals that office premises Nos. 102 to 107 aggregating 1300 sq.ft. Was given at the rent of Rs. 1300/- and parking space was given free of cost. On behalf of the Company in liquidation one Mr. M.V. Subramaniam has executed the rentnote.

5. It is the case of the Official Liquidator that under the provisions of Section 531/531-A of the Companies Act, 1956 transaction entered into within six months or one year as the case may be from the date of presentation of winding up petition are void against liquidator. The winding up petition was presented on 18.10.1999 and rent note was executed on 15.9.1999. Hence the period of one year would be calculated from 18.10.1999. In view of the same, this transaction was hit by the provision of Section 531 and 531-A of the Companies Act, 1956.

6. In view of the aforesaid provisions and factual background, the Official Liquidator preferred application being Company Application No. 117 of 2007 praying this Court to declare that rent note dated 15.9.1999 is illegal and not binding on the Liquidator and Liquidator be permitted to take possession of the office premises Nos. 102 to 107 located at Devpath Complex, C.G. Road, Ahmedabad and to direct the respondent No. 1 pending the hearing and final disposal of the application to pay to the Liquidator by way of mesne profit and/or compensation calculated at the rate of Rs. 30/- per sq.ft. for office premises and at the rate of Rs. 10/- per sq.ft. for parking space per month.

7. Decimal System Pvt. Ltd., filed purshis by way of affidavit affirmed by Mr. Narendra Rasiklal Pandya, the authorised signatory of Decimal Systems Pvt. Ltd. that the Company will surrender and handover possession of office premises in question being office No. 107 situated at First Floor, Devpath Complex, C.G. Road, Ahmedabad - 380 006. unconditionally on or before 30.6.2007. This Court

has, therefore, passed an order on 13.4.2007 directing Decimal Systems Pvt. Ltd. to handover possession on or before 19.4.2007. Pursuant to the said order, Decimal Systems Pvt. Ltd. handed over the possession of the premises No. 107 on 19.4.2007. The Official Liquidator sealed the office premises and affixed his board in the parking space.

8. Decimal Systems Pvt. Ltd. filed an affidavit dated 27.4.2007 stating that the office premises Nos. 102 to 106 are not in actual possession of the respondent No. 1 but the same are in occupation and possession of Alphanso Enterprises. The possession of the premises was handed over to by Mr. Apurva Doshi and Ms. Shefali Doshi by Memorandum of Understanding dated 1.9.1999 entered into between the Company in liquidation of the first part, Mr. Apurva Doshi jointly with Ms. Shefali Doshi of the second part and Dev Enterprises by and thorough sole proprietor Mr. Sanjay Amin of the third part. It was recorded that office premises Nos. 102 to 106 admeasuring 1454 sq.ft on the First Floor, Devpath Complex was transferred to Shri Apurva Doshi and Ms. Shefali Doshi at or for the price of Rs. 8,72,000/-. The amount of consideration was not paid but it was paid by adjustment of premature encashment of Fixed Deposit. It is the case of the Official Liquidator that this transaction is fraudulent preference in favour of the creditor and that too by a Memorandum of Understanding and not by a registered deed of conveyance. In view of the same, the transaction is illegal and not binding on the Liquidator as per provision of Section 531 and 531-A of the Companies Act, 1956.

9. It is also the case of the Official Liquidator that since 1.9.1999, property of the Company in Liquidation was being used without any valuable and adequate consideration being paid. The whole transaction is void against the Liquidator. The respondents or any one of them has no right to remain in the occupation of the premises. This Court vide its order dated 4.5.2007 observed that prima facie all the alleged transactions are bogus and the respondent had not come out with clean hands and had not only suppressed material facts but had tried to mislead this Court.

10. Mr. R.M. Desai, learned advocate appearing for the Official Liquidator has submitted that as per the order dated 8.5.2007 Mr. Jayantibhai Somabhai Patel, sole proprietor of Alphanso Enterprise handed over possession of office premises Nos. 102 to 106 admeasuring 1454 sq.ft together with proportionate parking space to the Official Liquidator. The respondent No. 1 had paid the compensation upto date of handing over the possession of office premises No. 107 to Liquidator. As far as office premises No. 107 is concerned, this Court has directed the respondent No. 1 to pay mesne profit at the rate of Rs. 5 per sq.ft. from 15.9.1999 till actual handing over possession. As regards mesne profit for office premises Nos. 102 to 106 and parking space are concerned, the Liquidator was directed to prefer separate report. In view of this direction the present Company Application is filed by the Official Liquidator.

11. In response to the notice issued by this Court, Mr. T.S. Nanavati, learned

advocate appears on behalf of the respondent No. 1. An affidavit-in-reply is filed by one Mr. Narendra R. Pandya, an authorised signatory and the Director of the respondent No. 1. On this affidavit, it is submitted by Mr. Nanavati that on 15.9.1999, the day on which the respondent No. 1 hired the premises Nos. 102 to 107 from the Company in liquidation and for the same rent note was executed. At the relevant point of time the respondent No. 1 had preferred H.R.P. Suit No. 1063 of 2000 as the respondent No. 1 apprehended forcible dispossession of the suit premises, for which the learned Small Causes Court, Ahmedabad had granted ex parte ad interim relief on 29.8.2000, in respect of the office premises Nos. 102 to 107 on behalf of PFSL., Mr. M.V. Subramaniam - stating to be the authorized signatory filed a written statement and affidavit-in-reply dated 5.9.2000 emphatically denying any threat or cause to disturb the possession of the respondent No. 1. On 22.11.2000, the respondent No. 1 preferred an application to withdraw the said suit. At no point of time, the respondent No. 1 had claimed the title over the property. It was the case of tenancy right from the inception, which also has stood relinquished along with possession as on 19.4.2007.

12. Mr. Nanavati further submitted that on the basis of documents such as Memorandum of Understanding dated 1.9.1999, undertaking of even date and the press notice for the title clearance certificate dated 19.1.2000 followed by the title clearance certificate 19.2.2000 issued by Jani and Company as well as the certificate of Viral Cooperative Society Ltd., dated 9.3.2006 clearly establishes that the respondent No. 2 was claiming the ownership right over the office premises Nos. 102 to 106. The respondent No. 1 Company is, therefore, not liable to pay the mesne profit in respect of the office premises Nos. 102 to 106.

13. On behalf of the respondent No. 2 Mr. Apurva Vakil has appeared and affidavit-in-reply is filed by Mr. D.D. Mehta practicing Chartered Accountant and constituted power of attorney of the respondent No. 2 Ms. Shefali Doshi.

14. Based on this affidavit he has submitted that PFSL was carrying on business of non-banking financial company. The respondent No. 2 along with Mr. Apurva Doshi had made investment in 1250 optional fully convertible debentures (OFCDs) of the face value of Rs. 1.25 lacs and 4500 cumulative deposits of the face value of Rs. 4.50 lacs, aggregating to Rs. 5.75 lacs. The due dates of the said investment were during the period from 3.6.1999 to 1.8.2000. The total maturity amount was approximately Rs. 8,17,000/-. The Company was owner and in possession of office premises Nos. 102 to 106 ad measuring 1454 sq.ft. on the First Floor of Devpath Complex, behind Lal Bungalow, Ellisbridge, Ahmedabad from one Dev Enterprise, a sole proprietary concern of one Sanjay Amin - HUF. The PFSL being in financial difficulty was unable to pay the maturity amounts of the aforesaid investments. As a result, a Memorandum of Understanding dated 1.9.1999 came to be executed between the company - PFSL, the said Apurva Doshi and the respondent No. 2 and Dev Enterprises by which it was agreed by the respondent No. 2 to acquire office premises Nos. 102 to 106 at a price of Rs.

8,72,000/- free from all encumbrances by adjusting the maturity and pre-matured encashment proceeds of the aforesaid investment. Mr. Vakil has further submitted that the respondent No. 2 in fact never acquired actual physical possession of the said office premises Nos. 102 to 106. From the record it transpires that the Company PFSL within less than 15 days of executing the aforesaid Memorandum of Understanding dated 1.9.1999 and even before the respondent No. 2 acquired physical possession of office premises Nos. 102 to 106, executed a rent note dated 15.9.1999 in favour of the respondent No. 1, in respect of office premises Nos. 102 to 107 of the said Devpath Complex on the date of execution of the said rent note dated 15.9.1999 the Company - PFSL was in actual physical possession of the office premises Nos. 102 to 107 and the same was also recorded in the rent note dated 15.9.1999. The rent note dated 15.9.1999 also contemplated the use of common facilities/amenities by the respondent No. 1. The respondent No. 1 came in actual possession of office premises Nos. 102 to 107 on execution of the said rent note dated 15.9.1999. Thereafter, on 19.1.2000, before notice came to be issued by Jani and Company, Solicitor on behalf of the respondent No. 2 for the purpose of ascertaining the title/inviting objections in respect of office premises Nos. 102 to 106. Thereafter, the said Jani & Company issued a title certificate dated 19.2.2000 in respect of office premises Nos. 102 to 106. Around 29.8.2000, the respondent No. 1 filed in the Court of the Small Causes Court at Ahmedabad H.R.P. Suit No. 1063 of 2000 against PFSL to pray for declaration that the respondent No. 1 is a tenant of the suit premises bearing office Nos. 102 to 107 and the Company - PFSL be restrained by decree of permanent injunction from interfering with the possession of the suit premises. Ad-interim relief was granted by Small Causes Court on 29.8.2000 and it was confirmed on 7.9.2000. In the written statement, the Company - PFSL has admitted the execution of the rent note dated 15.9.1999 and pursuant to the said rent note, the possession was handed over to the respondent No. 1. The said H.R.P. Suit No. 1063 of 2000 was withdrawn on 21.11.2000 unconditionally.

15. Mr. Vakil has further submitted that the agreement dated 9.3.2006 was executed between Mr. Jayantibhai Somabhai Patel, sole proprietor of Alphanso Enterprise and the respondent No. 2 in respect of office premises Nos. 102 to 106. An undertaking was also executed on the same date on behalf of the respondent No. 2. Pursuant to this agreement as well as undertaking, the office premises Nos. 102 to 106 stood transferred to the said Mr. Jayantibhai Somabhai Patel for consideration of Rs. 5 lacs and the respondent No. 2 stood discharged completely from all liabilities, present or future with regard to the said office premises Nos. 102 to 106.

16. In the aforesaid factual background, Mr. Vakil has submitted that the respondent No. 2 was never in actual and physical possession of the office premises Nos. 102 to 106 despite the execution of Memorandum of Understanding dated 1.9.1999. The said Memorandum of Understanding does not record that the possession of the office premises Nos. 102 to 106 has been

handed over to the respondent No. 2. The possession was to be given only after completing necessary formalities as per Clause (4) of the Memorandum of Understanding dated 1.9.1999. Without completing the formalities and without handing over possession of the office premises Nos.102 to 106, the Company - PFSL executed the rent note dated 15.9.1999 in favour of the respondent No. 1 in respect of the office premises Nos. 102 to 107. In view of the averments made in H.R.P. Suit No. 1063 of 2000 the respondent No. 1 was handed over possession of the office premises Nos. 102 to 107 immediately on execution of the said rent note dated 15.9.1999. The said rent note in addition to the aspect of the possession, was further acted upon by the respondent No. 1 having paid rent of office premises to the Company - PFSL. The actual physical possession of the respondent No. 1 was further established and confirmed in view of the averments and admission made by the respondent No. 1 in the plaint of its own suit being H.R.P. Suit No. 1063 of 2000.

17. Mr. Vakil has further submitted that there was possibility of collusion between the respondent No. 1 and the Company - PFSL more particularly, considering the nature of the pleadings in the suits as well as written statement and the manner in which the said H.R.P. Suit No. 1063 of 2000 came to be withdrawn unconditionally. He has further submitted that though ordinarily question of actual physical possession would be purely a question of fact requiring leading of evidence, the fact and the record establishes beyond reasonable doubt that the actual physical possession of office premises Nos. 102 to 106 has been that of the respondent No. 1. He has, therefore, submitted that the Company Application No. 172 of 2008 deserves to be dismissed in so far as respondent No. 2 is concerned and the direction to pay mesne profit is required to be issued only to the respondent No. 1.

18. Without prejudice to the above submissions, Mr. Vakil submitted that the Company - PFSL has duped/cheated the respondent No. 2 in as much as the Company - PFSL has at no point of time disputed the execution of the Memorandum of Understanding dated 1.9.1999 and at the same time also not disputed the execution of the rent note dated 15.9.1999. However, the collusion is apparent between the Company - PFSL and the respondent No. 1 for the obvious reason that even while filing its written statement and affidavit-in-reply dated 5.9.2000 in H.R.P. Suit No. 1063 of 2000, the Company - PFSL never disclosed to the Small Causes Court, Ahmedabad that it had already executed a Memorandum of Understanding dated 1.9.1999. He has, therefore, submitted that it would be just and proper to issue direction to the respondent No. 1 to pay mesne profit for the period prayed for in the present Company Application No. 172 of 2008.

19. So far as Company Application No. 582 of 2008 is concerned, Mr. Vakil has submitted that on the basis of documents on record of Company Application No. 582 of 2008 and Company Application No. 172 of 2008, there is no conclusive evidence to suggest that the office premises Nos.102 to 106 are of the ownership

of the Company - PFSL. On the contrary, from the documents on record, the ownership of office premises Nos. 102 to 106 apparently seems to be of Dev Enterprises/Devland Developers Pvt. Ltd. To substantiate this proposition he submitted that Memorandum of Understanding dated 1.9.1999 is executed between the Company - PFSL as a party of the first part, Ms. Shefali Doshi and late Apurva Doshi as party of the second part and Dev Enterprise as party of the third part. The Company - PFSL has stated in the said Memorandum of Understanding dated 1.9.1999 that it has right of disposal of office premises Nos. 102 to 106. It has been further stated in the said Memorandum of Understanding that Dev Enterprises/Devland Developers Pvt. Ltd., has given the office premises Nos. 102 to 106 to the Company - PFSL against the finance availed by Dev enterprises/Devland Developers Pvt. Ltd. and, therefore, has joined in the agreement as confirming party. Thus, as on 1.9.1999 the Company - PFSL was stated to have right of disposal of office premises Nos. 102 to 106.

20. Thereafter, as per affidavit-in-reply of the Official Liquidator, it has been stated that two Memorandum of Understandings dated 7.9.1999 and 8.9.1999 came to be executed between Valor Finstock Pvt. Ltd. (through M.V. Subramanyam) and the Company - PFSL (through Ashish Patel). The rent note dated 15.9.1999 was executed by the Company - PFSL in favour of Decimalin respect of office premises Nos. 102 to 107. However, in the said rent note the Company ? PFSL is described as the lessor. It is also stated that the Company - PFSL/lessor is absolutely seized and possessed of or otherwise well and sufficiently entitled as owner of office premises Nos. 102 to 107. Thus, it is not on record as to what transpired after 1.9.1999 and before 15.9.1999. That in the rent note dated 15.9.1999 the Company - PFSL came to be described as lessor and also as owner of the office premises Nos. 102 to 106.

21. Mr. Vakil has further submitted that the Official Liquidator in his reply has also made a reference to Suit No. 2137 of 1998 wherein Dev Enterprises, Shri Sanjay Chandrakant Amin & Shri Ashish Patel were the defendants. The consent decree dated 18.8.1999 has been passed in the said suit. He has submitted that the documentary evidence are not on record reflecting the transactions between Dev Enterprises/Dev land Developers Pvt. Ltd., and the Company ? PFSL pertaining to office premises Nos. 102 to 106, the record of Suit No. 2137 of 1998, the consent decree dated 18.8.1999, the Memorandum of Understandings dated 7.9.1999 and 8.9.1999 etc. This Court should, therefore, draw an adverse inference in the matter of title/ownership of the Company - PFSL over the office premises Nos. 102 to 106.

22. With regard to the applicability of Sections 531, 531A and 536 of the Companies Act, 1956, Mr. Vakil has submitted that the Official Liquidator has stated in para-8 of the affidavit-in-reply that only because the transaction i.e. Memorandum of Understanding dated 1.9.1999 was executed within six months or one year immediately preceding the date of commencement of winding up, the transaction is hit by the provisions of Sections 531, 531(A) and/or 536 of the

Companies Act, 1956. He has further submitted that the Memorandum of Understanding was executed on 1.9.1999 and the winding up petition was filed on 21.10.1999. That u/s 536(2) of the Companies Act, 1956 any disposition of the property of a Company made after the commencement of winding up, shall, unless Court otherwise orders, be void. As the Memorandum of Understanding dated 1.9.1999 is executed prior to the commencement of winding up Section 536(2) of the Companies Act will not be applicable to the facts of the present case. He has further submitted that Section 531(A) will not apply to a transfer of a property of the Company made to a creditor within a period of one year immediately preceding the date of presentation of petition for winding up. The transfers contemplated u/s 531(A) are only transfers to non-creditors. In this view of the matter, reliance placed on the Official Liquidator to treat the transaction forming subject matter of the Memorandum of Understanding dated 1.9.1999 is void against the Liquidator by placing reliance upon Section 531(A)) or 536 of the Companies Act, 1956 is wholly misconceived and inapplicable. Section 531(A) or 536 will have no application to the facts of the present case.

23. Mr. Vakil further submitted that even though the transaction forming subject matter of the Memorandum of Understanding dated 1.9.1999 by which there is a transfer of office premises Nos. 102 to 106 to Ms. Shefali Doshi and late Apurva Doshi, who were undoubtedly creditors of the Company - PFSL within a period of six months immediately preceding the date of presentation of the winding up petition, the same cannot be treated/deemed a fraudulent preference of a creditor and may not be treated invalid accordingly.

24. To make good this point he further submitted that the title of the Company - PFSL to office premises Nos. 102 to 106 itself is in doubt. The Official Liquidator has not produced any document on record to even remotely suggest that the Company - PFSL was undisputedly the owner of office premises Nos. 102 to 106 having a clear and a marketable title free of all encumbrances. The Company - PFSL was claiming to have right of disposal over office premises Nos. 102 to 106 as on 1.9.1999 when the Memorandum of Understanding dated 1.9.1999 was executed in favour of Ms. Shefali Doshi and late Apurva Doshi. It was, therefore, clear that Dev Enterprises/Devland Developers Pvt. Ltd., was required to sign the Memorandum of Understanding dated 1.9.1999 as a confirming party. On 15.9.1999, the Company - PFSL claimed to have ownership right over the office premises Nos. 102 to 106 as ascertained in the rent note dated 15.9.1999 and, therefore, the said Dev Enterprises/Devland Developers Pvt. Ltd. was not required to and had in fact not signed the rent note dated 15.9.1999. What transpired between 1.9.1999 and 15.9.1999 so as to change the status of the Company - PFSL vis-a-vis office premises Nos. 102 to 106 has not been disclosed by the Official Liquidator. In that view of the matter, title of the company - PFSL being itself is in doubt, Section 531 cannot be applied to the facts of the present case.

25. Mr. Vakil has further submitted that on a plain reading of the affidavit-in-

reply of the Official Liquidator, it is now undisputed that the applicant had alongwith late Apurva Doshi made investment in 1250 Optional Fully Convertible Debentures (OFCDs) of the face value of Rs. 1.25lacs and 4500 Cumulative Deposits of the face value of Rs. 4.50 lacs aggregating to Rs. 5.75 lacs. The due date of said investments were during the period 3.6.1999 to 1.8.2000 and the total maturity amount was approximately Rs. 8,17,000/-. He has, therefore, submitted that Ms. Shefali Doshi and late Mr. Apurva Doshi are creditors of the Company - PFSL on 1.9.1999. They have become creditors of the Company by virtue of having subscribed to the OFCDs and the Cumulative Deposits. He has further submitted that Section 531 of the Companies Act, places the onus/burden on the Official Liquidator to establish that the transfer of property made by the Company - PFSL to Ms. Shefali Doshi and late Mr. Apurva Doshi, within the period of six months immediately preceding the date of presentation of the winding up petition, is deemed a fraudulent preference of its creditor. The Official Liquidator has failed to discharge the said burden. There is no evidence, much less any direct evidence, to suggest that the Company - PFSL transferred office premises Nos. 102 to 106 with a view to give a preference, much less a fraudulent preference to them. He has further submitted that the onus is on the Liquidator to prove that the dominant intent of the Company -PFSL was to prefer these persons and where there is no evidence much less any direct evidence or any such intent, the intent to prefer cannot be inferred. The transfer of office premises Nos. 102 to 106 might have been due to reasons unconnected with any intention to prefer. Reliance is placed on the decision of House of House of Lords in the case of MIG Trust Ltd. 1934 (4) SCC 325 . He has further submitted that there must be a clear intention to shield the assets against the claims of other creditors of the Company - PFSL and the same was entered into with a view to defraud the creditors and that there was a common intention between the transferor Company - PFSL and transferee. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of N. Subramania Iyer Vs. The Official Receiver, Quilon, . He has further submitted that the claim of Ms. Shefali Doshi and late Mr. Apurva Doshi over the amount of Rs. 8,17,000/- is undoubtedly genuine and if that be so, the transaction forming subject matter of the Memorandum of Understanding dated 1.9.1999 cannot be impeached. It is now well recognized and the proposition is not contested that if a debtor prefers one creditor to another on account of pressure that may be put upon the debtor, the payment cannot be regarded as fraudulent preference. It is the dominant motive that impels a debtor to make a transfer of some of its property in favour of one of the creditors, that decides the issue whether the transfer amounts to fraudulent preference or not. The onus is upon the person who impugns the transaction as being a fraudulent preference to make it out and not for the alienee to disprove that it is a fraudulent preference. He has further submitted that the Official Liquidator has not disputed the fact that the sum of Rs. 8,17,000/- is due to Ms. Shefali Doshi and Mr. Apurva Doshi from the Company - PFSL. The Official Liquidator has only challenged the transaction forming subject matter of the Memorandum of Understanding dated 1.9.1999 on the ground that

the same is a fraudulent preference. Considering the entire affidavit in reply of the Official Liquidator, Mr. Vakil submitted that the Official Liquidator has not succeeded in discharging the onus that lay on him viz. that the Company PFSL did not owe the sum of Rs. 8,17,000/- to Ms. Shefali Doshi and Mr. Apurva Doshi. Reliance is placed on the decision of Andhra, Delhi High Court in the case of O.L. of Victor ChitFund (P) Ltd. v. Kanhiya Lal and Ors. 1972 42 SCC 396.

26. Mr. Vakil has further submitted that the Official Liquidator has not even remotely made any allegation of fraud in his affidavit in reply. The tone and tenor of the affidavit in reply of the Official Liquidator only suggest that simply because the transaction reflected in the Memorandum of Understanding dated 1.9.1999 being within the period six months immediately preceding the date of presentation of the winding up petition, the same is deemed to be a fraudulent preference and liable to be treated as invalid. No allegation of fraud has been made nor any particulars of it are given by the Official Liquidator. The distinction has to be drawn between fraudulent preference and preference simpliciter. In these circumstances, it cannot be said that the Company ? PFSL showed any undue preference to the applicant. Section 531 of the Companies Act comes into play only if a fraudulent preference has been shown in any transaction.

27. Mr. Vakil has further submitted that the essence of fraudulent preference is the giving of an improper benefit to a few creditors leading to inequality between them and the generality of creditors. In order to establish that fraudulent preference was shown to a particular creditor it must also be shown that it was done with a view to giving the said creditor a favoured treatment. The dominant motive attending the transaction has to be ascertained and if it is tainted with an element of dishonesty, the question of fraud would arise. A probe into the debtors mind and a assessment of various motives that animate human conduct is thus involved. Since the inference relates to dishonesty or something approaching dishonestly, there must be solid grounds for drawing it. Only if the circumstances proved are not equally consistent with guilt or innocence, the benefit of doubt goes to the accused. Suspicion, however, strong, will not be sufficient, if there is room for more explanations than one. For the debtors conduct, an intent to prefer cannot be inferred in the absence of direct evidence. There is no fraudulent preference if the payment or the transfer is not voluntary. The payment of debts/transfer of property by a company under a threat of legal proceedings or under a reasonable apprehension of such proceedings does not amount to showing of preference. Reliance is placed on the decision of Kerala High Court in the case of Official Liquidator v. Victory Hire Purchasing Co. (P) Ltd. and Anr. 1982 52 SCC 88.

28. Mr. Vakil has further submitted that it is too well settled that to constitute fraudulent preference the dominant motive in the mind of a Company as represented by its directors should be to prefer a particular creditor. Where the transaction is made in favour of a creditor solely with a view to avoid civil or criminal proceeding, that will not be termed as a fraudulent preference. It must

be shown that the preference was made with a view to give the creditor a favoured treatment. It must be established that both the transferor and the transferee had joined hands to defraud the creditors. Reliance is placed on the decision of Official Liquidator v. Managing Director, Andhra Pradesh State Financial Corporation and Ors. 2000 2 C LJ and Monarch Enterprises v. Kishan Tuipule and Ors. 1992 74 CC(Bom) 89.

29. In view of this settled legal position Mr. Vakil has submitted that the title of the Company ? PFSL to office premises Nos. 102 to 106 itself is in doubt. The Official Liquidator has failed to produce any document on record to establish a clear and a marketable title of the Company - PFSL to office premises Nos. 102 to 106. Further assuming that the Company - PFSL possessed a clear and amaranke table title to office premises Nos. 102 to 106 the transaction at any rate, cannot be impugned/challenged by the Official Liquidator by placing reliance upon Section 531(A) and Section 536 of the Companies Act. In so far as Section 531 of the Companies Act is concerned, Mr. Vakil submitted that on a plain and simple reading of the affidavit in reply of the Official Liquidator he has failed to discharge the burden to establish that the transfer was a fraudulent transfer. He has, therefore, submitted that the application moved by the applicant deserves to be allowed.

30. Mr. Roshan Desai, learned advocate appearing for the respondent - Official Liquidator in this application has referred to the various contentions raised in the affidavit-in-reply filed by the Official Liquidator on 1.12.2008. He has submitted that the transaction of disposing of the office premisesNos.102 to 107 in Devpath Complex is a fraudulent preference in favour of creditor. Several depositors had approached Company Law Board for a direction that Company be directed to refund the deposit with interest. Details of the proceedings before the Company Law Board and reply of the Company are referred to in detail in decision rendered in the case of Official Liquidator of Piramal Financial Services Ltd. v. Reserve Bank of India 118 CC 27. The facts in the present case are similar to the facts in the said decision. In the said decision disposition was of the flats by a registered document while in the present case disposition is of office premises by way of Memorandum of Understanding. In the said case this Court has held that disposition of the flats isfraudulent preference and held that the sale as void. In view of the said decision, the present application is required to be rejected.

31. Mr. Desai further submitted that any transaction relating to immovable property of value of more than Rs. 100/- is required to be effected by a document bearing the proper stamp duty and registered with the Sub Registrar of Assurance of the District where the property is situated. Admittedly Memorandum of Understanding is not a deed or document by which property can be transferred. It is a settlement and/or understanding between the parties but does not create any title in favour of person to whom it is to be transferred. The Memorandum of Understanding does not bear proper stamp duty and is not registered with the Sub Registrar of Assurance. In this view of the matter, he has

submitted that there is no transfer of any immovable property nor does it create any title. No immovable property is transferred in favour of Ms. Shefali Doshi and Mr. Apurva Doshi and they cannot claim any right in respect of the said property.

32. Mr. Desai further submitted that an MOU and undertaking dated 1.9.1999 executed by DevEnterprise and by Dev land Developers Pvt. Ltd. in favour of late Apurva Doshi and Ms. Shefali Doshi and Company in liquidation records that Mr. Apurva Doshi and Ms. Shefali Doshi are interested in purchasing office premises Nos. 102 to 106 admeasuring 1454 sq.ft. for a total price of Rs. 8,72,000/- and on their giving an undertaking that the said office premises is free from all encumbrances and that its titles are clear and marketable, the office premises would be transferred in their favour.

33. Mr. Desai further submitted that it is surprising that by consent decree dated 18.8.1999 passed in Suit No. 2138 of 1998 security is created in favour of Company in liquidation and hence the said Dev Enterprise and Dev land Developers Pvt. Ltd., cannot make such statement. Perusal of the said undertaking would lead to believe that it is Dev Enterprise and Dev land Developers Pvt. Ltd., who are selling the property and not the Company in liquidation. It is also surprising that consideration of so called sale is adjustment of amount due from Company in liquidation. It is also surprising that when substantial amount is due and payable by Dev Enterprise and Dev land Developers Pvt. Ltd., to company in liquidation the whole transaction entered into between the company in liquidation and late Apurva Doshi and Shefali Doshi and Dev Enterprise is a fraud and in collusion with each other to deprive the company in liquidation of its assets, security and amount.

34. Mr. Desai has further submitted that the Certificate of title does not create any title in favour of Ms. Shefali Doshi. The person issuing certificate has not perused the documents produced being Memorandum of Understanding and receipt dated 1.9.1999. If the property is of the ownership of Company in liquidation then satisfaction of charge on security is required and security is to be reconveyed to the owner. The said step is not followed by Mr. Shefali Doshi or the person issuing certificate. He has, therefore, submitted that the certificate is of no consequence and does not create any title in favour of Ms. Shefali Doshi. Even if certificate is accepted it cannot carry the case of Ms. Shefali Doshi any further, since there is no document bearing proper stamp duty registered with the Sub Registrar of Assurances. He has, therefore, submitted that the application deserves to be rejected.

35. Having heard learned advocates appearing for the respective parties and having considered the pleadings made by them in both these applications and having gone through the relevant statutory provisions as well as the decided case law on the subject, the Court is of the view that the recovery of mesne profit from the respondents in Company Application No. 172 of 2008 largely depends upon the outcome in Company application No. 582 of 2008. If the court takes the view that the office premises Nos. 102 to 106 are validly transferred

in favour of late Apurva Doshi and Ms. Shefali Doshi under the Memorandum of Understanding dated 1.9.1999 and the said transaction is not hit by the provisions contained in Sections 531, 531A and 536(2) of the Companies Act, there is no question of recovery of any mesne profit either from Ms. Shefali Doshi or from Desimal Systems Pvt. Ltd. The Court is, therefore, much concerned about the prayers made in Company Application No. 582 of 2008. Before the Court proceeds to deal with the rival contention in this application, it is worthwhile to mention that the said application was preferred much after the Official Liquidator has filed Company Application No. 172 of 2008 for recovery of the mesne profit. It, therefore, appears to the Court that it is a counter blast to the application preferred by the Official Liquidator and by moving such application, the applicant of Company Application No. 582 of 2008 appears to avoid any liability that may be fastened upon them as a result of Company Application No. 172 of 2008. Even otherwise, the applicants of Company Application No. 582 of 2008 are not in occupation and possession of the office premises Nos. 102 to 106. The case record reveals that they have transferred the said office premises to Shri Jayantibhai Somabhai Patel, sole proprietor of Alphanso Enterprise for a consideration of Rs. 5 lacs in 2006. The Official Liquidator has already taken the possession of these office premises from the said Shri Jayantibhai Somabhai Patel. It appears that Shri Jayantibhai Somabhai Patel has filed Summary Suit against Ms. Shefali Doshi for recovery of amount of Rs. 5 lacs, and possibly for this reason, she has preferred the present application before this Court. Be that as it may, the facts remain that the Memorandum of Understanding was executed on 1.9.1999 and that date falls within the period of six months prior to the date of commencement of winding up proceeding as the first winding up petition against the company was filed on 18.10.1999 or 21.10.1999. There is no dispute about the fact that the applicants are creditors of the Company - PFSL. The office premises No. 102 to 106 are given to them in lieu of the amount due to them by the Company - PFSL. There are thousands of other creditors, who have to recover amount from the Company - PFSL. Ignoring the claim of all other creditors the office premises were offered to the applicants and they were in fact given to them. Thus, it can certainly be said that they were given preference in discharging of the liability of the Company - PFSL.

36. Once the preference is established the Court has to see as to whether it is fraudulent preference or not. This issue is already decided by this Court in the case of O.L. of Piramal Financial Services Ltd. v. Reserve Bank of India 2004 118 CC 27, wherein it is held that the transaction had taken place on May 7, 1999 i.e. within a period of six months previous to the date of presentation of the first petition, namely, on October 21, 1999. In view of Section 441(2) of the Companies Act, winding up of the Company shall be deemed to commence at the time of the presentation of the petition for the winding up. So the date of commencement of the winding up was October 21, 1999, the date of the earliest winding up petition. Therefore, the transfer date May 7, 1999, of the flats clearly fell within six months from the date of presentation of the winding up petition.

The Company had not shown whether it had published any advertisement in the newspaper about the sale of the property and whether it had received any other offer. The sale of the property was far below the cost of acquisition. The valuation report did not inspire any confidence because the valuation as on May 7, 1999, had been done only on February 16, 2002 and the valuation report also did not show how the value was arrived at. Moreover, the company had paid the entire amount before the maturity period. The company had made cash payments to the purchasers on the date of sale, though in fact the company had no capacity to make payment to the other creditors. The payment was at the volition of the company in this behalf, though admittedly the company was facing financial difficulty and was not able to pay to any other creditors. The Company had clearly preferred the purchasers to other creditors. Before the Company Law Board, the Company expressed its inability to pay and had proposed to pay over five years. The Company had incurred considerable loss in the transaction. The documents like banakhat, sale deed and other documents did not inspire any confidence. The Company and the purchasers had not been able to show how the value of the flats had decreased as against cost of acquisition and that too to the extent of about 25 per cent. within a period of one and half years. The intention on the part of the company was to prefer the preferred creditor to the prejudice of the other unsecured creditors and the transactions amounted to fraudulent preference hit by Sections 531 and 531A of the Companies Act and were liable to be quashed. The application by the transferee for resealing the premises could not be granted.

37. The facts in the present case, are more or less similar. On the contrary, they are worse than the earlier case. As rightly pointed out by the Official Liquidator in his affidavit that no document was executed, only under Memorandum of Understanding, the property was sought to be transferred. The Court is, therefore, of the view that the transaction is clearly hit by the provisions of Section 531 of the Companies Act, 1956, and it amounts to fraudulent transfer. In view of the binding decision of this Court the authorities cited and contentions raised by Mr. Vakil cannot render any assistance to the case of the applicant.

38. Once it is held that the transaction in question is hit by the provisions of Section 531 and it is a fraudulent transfer the question remains as to the payment of mesne profit and that to by whom. The documents produced on record reveal that for a certain period the possession is stated to have been with the respondent No. 1 and the respondent No. 2 has claimed the ownership over the premises. In view of the documentary evidence produced on record and in view of the fact that the Official Liquidator has taken the possession from Shri Jayantibhai S. Patel to whom the office premises were transferred in March, 2006 it cannot be said that late Apurva Doshi and Ms. Shefali Doshi were not given the actual physical possession of office premises Nos. 102 to 106. The moot question for the Court to decide as to from which date who was in possession of the said office premises and at what rate the mesne profit should be calculated. As far as rate is concerned, this Court has already taken the view that it is to be

recovered at the rate of Rs. 5 per sq.ft. p.m. The same rate is made applicable. In this regard the contention of Mr. Desai that it was an adhoc arrangement and the court has not finally decided the said rate has no substance as there is nothing in the order of this Court which indicate that the rate was adhoc rate. The Official Liquidator has to recover mesne profit from 1.9.1999 to March, 2006 in respect of office premisesNos.102 to 106. Admittedly, Ms. Shefali Doshi has recovered sum of Rs. 5 lacs on sell of the office premises and hence to the extent of Rs. 5 lacs the mesne profit should be recovered from Ms. Shefali Doshi. Even otherwise, she is not entitled to retain this amount and it is to be recovered from her and to be appropriated towards mesne profit.

39. In view of the above directions, both these applications are accordingly disposed off.