

**(2012) 02 BOM CK 0069**

**In the Bombay High Court**

**Case No :** Appeal (Lodging) No. 752 of 2011 in Company Application No. 1107 of 2009 in company Petition No. 645 of 1988

Rathnam P.V.

APPELLANT

Vs

The Premier Automobiles Limited and Others

RESPONDENT

**Date of Decision :** 22-02-2012

**Acts Referred:**

Companies Act, 1913 — Section 227(2)  
Companies Act, 1956 — Section 227(2), 446, 449, 536(2), 82  
Negotiable Instruments Act, 1881 (NI) — Section 138

**Citation :** (2012) 3 ALLMR 281 : (2012) 114 BOMLR 882 : (2012) 171 CompCas 389

**Hon'ble Judges :** Mohit S. Shah, C.J.;Smt., J.;Roshan Dalvi, J

**Bench :** Full Bench

**Advocate :** Zal Andhyarujina instructed by Mr. M.L. Chaturvedi, for the Appellant; L.T.Satelkar for respondent Nos. 1 and 2. Mr. Shyam Mehta with Mr. Vaibhav Warerkar instructed by y M/s. Govind Desai Associates for respondent No. 3. Ms. Kirti Munshi instructed by y M/s. Govind Desai Associates., for the Respondent

**Final Decision :** Dismissed

## Judgement

Chief Justice Smt. Roshan Dalvi, J.—This appeal is directed against the order dated 13 October 2011 of the learned Company Judge of this Court dismissing the appellant's application u/s 536(2) of the Companies Act, 1956 (hereinafter referred to as the Rs. Act"). The application was for confirmation/recognition of transfer of 3498 equity shares of Rs. 100/-each fully paid up in Elmot Engineering Company Private Limited (ECPL) (in liquidation) (hereinafter referred to as the company in liquidation).

The prayer in the company application was for the following relief:

(a)Confirmation/recognition of transfer to the applicant 3498 Equity Shares of Rs. 100/-each fully paid up bearing distinctive Nos.2723 to 2875, 3526 to 5145, 5346 to 6955 and 6981 to 6995 in Elmot Engineering Company Private Limited

(in liquidation), the Respondent Company, made before order of winding up i.e. 22.03.1990, but after filing of petition for winding up of the Respondent Company, u/s 536(2) of the Companies Act, 1956.

2. The said company in liquidation was ordered to be wound up by order dated 22 March 1990 of the Company Court. The present application was made on 25 September 2009 by the appellant for seeking confirmation/recognition of 3498 equity shares of Rs. 100/-each fully paid up in the company in liquidation, made before order of winding up (i.e. 22 March 1990) but after filing of the winding up petition.

3. The appellant filed this company application with the following case:

3.1. The appellant was appointed as Director of the company under liquidation at its extraordinary general meeting held on 3 March 1990 in which meeting 3498 shares of the company were transferred in favour of the appellant and thus, became majority shareholders holding 3498 out of 6995 equity shares in the company in liquidation. It is also the case of the appellant that the company in liquidation was one of the Elmot Group of Companies and that Mr. C.V.K Rao and MRs. R.K. Rao were the only directors on the Board of companies in the Elmot group. The company became sick by 1981. Mr.C.V.K. Rao resigned in 1983 as Managing Director and all other directors resigned by the end of 1985. By that time, the losses incurred by the company were 8.5 times that of the paid up share capital of 6.995 lacs. Hence, Mr.C.V.K. Rao was desperate to sell and transferred all the shares in the company at Rs. 10/-per share to MRs. V. Sharada Proprietress of VM Finance & Leasing Company (VMFL) on 13 February 1988 which was payable in three equal installments and gave physical possession of all properties including statutory registers/records/documents and accepted pledge of the same shares as security for the deferred payment.

3.2. Having not received the first installment, Mr.C.V.K.Rao filed Suit No. 357 of 1988 for recovery of the consideration. The company under liquidation was closed down on 22 April 1988. The winding up petition came to be filed by Premier Automobiles Ltd. for recovery of dues from the company on 20 June 1988. The consent terms were filed in the winding up petition on 29 March 1989 to pay in all Rs. 1,63,000/-in monthly installments of Rs. 15,000/-but since not even one installment was paid till February 1990, this Court passed order dated 22 March 1990 for winding up of the company under liquidation. Thus, all efforts made by Mr.C.V.K. Rao and his group to revive the company under liquidation failed. The appellant's further case is that the appellant was not aware about the winding up proceedings but because of the grave financial problems, Mr.C.V.K. Rao decided to introduce the appellant to accept the responsibility of revival of the Elmot Group of Companies. It is stated that Mr.C.V.K. Rao is a son of the only sister of the paternal grandfather of the appellant. Upon the appellant's election as a director of the board of the company under liquidation after removal of three directors of M/s. VM Finance & Leasing Company, Mr.C.V.K. Rao was to file the necessary forms regarding appellant's election as director of the company in

question. The appellant's further case is that by letter dated 1 October 1990, the appellant informed the Official Liquidator about his election as director on the board of the company under liquidation. It is also the case of the appellant that Mr.C.V.K. Rao and MRs. R.K. Rao in their statements recorded by the Official Liquidator confirmed that the appellant was director-in-charge of the affairs of the company under liquidation. The appellant's case about transfer of shares as set out in the affidavit in support of the company application is already quoted in para 6 of the judgment under appeal.

3.3. The appellant's case is that the appellant has not received any salary or any other form of compensation from the company under liquidation but on the contrary, the appellant paid a total amount of Rs. 2,87,039/- to 16 employees of the company under liquidation only because 3498 shares were transferred to the appellant and the appellant was elected as director of the company under liquidation. It is also the appellant's case that after coming to know of the order of winding up, the appellant decided to revive the other companies in the group in preference to the company under liquidation and on revival of Elmot Alternators Private Ltd. (EAPL), the Rao Group wanted to marginalize the shareholding of the appellant in EAPL which led to serious disputes and that the Rao group is now attempting to do the same in the company under liquidation through the sham revival proposal before this Court, for the purpose of acquiring the property of the company under liquidation comprising 10 acres of land with nearly 1,33,700 sq.ft. of built up area.

4. The company application came to be resisted by the affidavit in reply filed by Mr. A.V.K.Rao, a shareholder of the company under liquidation and the managing director of M/s. Elmot Alternators Pvt.Ltd. (EAPL). It is contended therein that all the shares of the company under liquidation are held by the family members of Mr.A.V.K.Rao directly or indirectly. Mr.A.V.K. Rao is the son of Mr.C.V.K. Rao and MRs. R.K. Rao. It is the case of Rao group that Mr.C.V.K. Rao and MRs. R.K. Rao settled 17 trusts which hold 4505 equity shares of the company under liquidation including 3498 equity shares, which are subject matter of the present litigation. Mr.A.V.K. Rao claims to be the sole beneficiary of the shares held by the above trusts' shares. The parents of A.V.K. Rao are trustees of seven of these trusts and the other relatives are trustees of other ten trusts. The date of vesting of the trusts' shares was 10 November 1995. It is further defence of Mr.A.V.K. Rao that when he alongwith M/s. Elmot Alternators Private Limited filed Company Application No. 212 of 2008 for recalling the winding up order dated 22 March 1990, during pendency of the said application, the appellant herein intervened, contending that he is the owner of 3498 equity shares of the company under liquidation. That claim was disputed by Mr.A.V.K. Rao. Mr.C.V.K. Rao also filed affidavit dated 6 December 2008 in the said company application explaining the facts. In view of the said claim made by the appellant in the said company application in the year 2008, the suit has been filed by Mr.A.V.K. Rao against the appellant and others in Ranga Reddy District Court at L.B.. Nagar, Hyderabad being Suit No. 224 of 2009 for a declaration that Mr.A.V.K.Rao is the sole and

absolute owner of 3498 equity shares of the company under liquidation and that the appellant is wrongfully in possession of the share certificates pertaining to those shares, but the purported transfer of 3498 shares is without consideration, without execution of valid transfer documents/deeds and without approval of transfer by Board of Directors and, therefore, invalid. It is also contended that the appellant herein executed affidavit dated 29 July 1996 deposing that Mr.A.V.K.Rao is the sole beneficiary of the very same trusts which held 3498 shares in the company under liquidation. It is also contended that the appellant has not produced any evidence of his having filed before the Registrar of Companies form No. 32 relating to his appointment as director of the company under liquidation.

5. The appellant thereafter filed affidavit-in-rejoinder to which affidavit in sur-rejoinder came to be filed by Mr.A.V.K. Rao.

6. The aforesaid company application No. 212 of 2008 filed by Mr.A.V.K. Rao (respondent No. 3 herein) for revival of the company under liquidation, came to be disposed of with liberty to file a fresh company application. The order refers to the suit which Mr.A.V.K.Rao proposed to file and such a suit ultimately came to be filed in Ranga Reddy District Court at Hyderabad and numbered as Suit No. 244 of 2009. The said order reads thus

1. The applicant seeks an order recalling/revoking and or setting aside the order dated 22.3.1990 ordering the winding up of the company. Mr.Munshi, the learned Advocate appearing for the applicant, states that in view of the leave granted by this Court u/s 446 in Company Application No. 222 of 2009, this application ought to be adjourned by six weeks. This is on the basis that any orders that may be passed in the proposed suit in respect of the balance 50% shares in liquidation would be relevant to this application. I see no reason to adjourn this application on that basis. If any orders are passed in the proposed suit, which would entitle the applicant to any reliefs or even otherwise, the applicant is at liberty to file a fresh company application on that basis as well as on the basis set out in the above company application itself. In other words, the dismissal of the company application will not affect or prejudice the applicant's rights in any manner. The company application accordingly stands dismissed.

7. Company application No. 222 of 2009 was filed by Mr.A.V.K. Rao for permission u/s 446 of the Companies Act for commencing suit against the Liquidator and other parties before the Principal District Judge, Ranga Reddy District Court at L.B. Nagar, Hyderabad. The learned Company Judge allowed the application granting permission u/s 446 of the Act and passed the following order:

1. By consent, the Company Application is placed on board and heard finally.

2. The applicant seeks reliefs to commence the suit against the Liquidator and other parties before the Principal District Judge, Ranga Reddy District at L.B.Nagar. Essentially, the reliefs are claimed not against the official liquidator, but against the persons shown on the record of the company as the holders of

the shares in respect of the suit which is proposed to be filed. The civil application is made absolute in terms of prayer clause (a).

3. Mr. Munshi, the learned Advocate for the applicant, states that no reliefs will be claimed against the Official Liquidator per se, except consequential directions in the event of the applicant succeeding in respect of his claim to the said shares. The Official Liquidator therefore, will be a formal party to the suit and will submit to the orders of the Court. However, all the papers and proceedings shall always be served upon the Official Liquidator. Liberty to the Official Liquidator to apply. In view of the same, it will not be necessary for the Official Liquidator to appear in the proceedings unless otherwise directed by this Court.

4. It is further clarified that this order and the pendency of any suit that may be filed pursuant thereto, shall not be a ground by itself for the Official Liquidator not proceeding with the liquidation proceedings.

8. After hearing company application giving rise to this appeal, the learned Company Judge referred to the rival contentions and then rejected the application seeking confirmation/recognition of the transfer of shares in favour of the appellant purportedly made on 3 March 1990 in the following terms:

40. Having considered the rival versions in their entirety, I am of the opinion that it is not as if the interveners have raised the issue of holding of meeting on 03.03.1990, passing the resolution there at with regard to transfer of 3498 shares, drawing up the minutes on loose papers, but it is the Applicant who has pleaded all this in his affidavit in support. Once it is doubtful whether there was any transfer of shares and once I am of the opinion that the Applicant is raising the issue with regard to his rights as transferee of shares, shareholder of the Company under liquidation after a lapse of more than 18 years from the date of the alleged meeting, then, all the more this Company Application cannot be entertained. I have only highlighted the controversy between the parties and it is not as if this Court is disinclined to consider the request because of pendency of a civil suit. The reasons that have been assigned for approaching this Court after such a long duration having not found to be satisfactory, that I am of the view that the Applicant is disentitled to any reliefs as prayed in this Company Application.

41. After this material is perused by me, I am of the opinion that there is no explanation for the lapse on the part of the Applicant in not pressing the claim earlier. If the claim was indeed admitted and beyond doubt, then, there was no reason for the Applicant to maintain silence for all these years. In any event, the claim is not admitted, but disputed one. That there is dispute is clear from the contents of the affidavit in support and particularly the affidavits that have been filed in reply and rejoinder. There is a civil suit pending with regard to the transfer of shares. It is in these circumstances that I am of the opinion that the Applicant cannot be granted any relief in this Company Application.

42. Once the above view is taken, there is no necessity of referring to all

decisions that have been brought to my notice. I am proceeding on the basis that the transfer of shares is a matter which can be dealt with and is covered by section 536(2) of the Companies Act, 1956 and same principles which apply with regard to the dispositions of property would apply and govern the transfer of shares or alteration in the status of the members. However, finding that the claim is belated, there being unexplained and erroneous delay in raising it, so also, it being highly disputed, that it will not be possible to grant any relief on this application. If the claim was not belated as referred to above, possibly all other aspects could have been gone into and then a view in favour of the Applicant on other aspects could have been taken. However, finding that the parties are involved in litigation in relation to the very transaction and that it is not a case of admitted transfer of shares on the own showing and going by own version of the Applicant, that the Company Application fails. It is dismissed. In the circumstances, there will be no order as to costs.

9. It is the aforesaid order of the learned Company Judge made on 13 October 2011 which is under challenge in this appeal.

10. Mr. Zal Andhyarujina, learned counsel for the appellant has raised the following contentions for challenging the order under appeal:

(i) The learned Company Judge erred in dismissing the application on the ground of delay and in holding that the appellant did not give satisfactory explanation for filing this company application u/s 536(2) of the Act at this stage. It is vehemently contented that no period of limitation is prescribed for filing an application u/s 536(2) of the Act. Strong reliance has been placed on several decisions in support of the contention that application u/s 536(2) may be filed at any time even after passing of the winding up order and so long as the company has not been dissolved. Vide *Bir Chand Vs. John Bros*, , *H.L. Seth Vs. Wearwell Cycle Company (India) Ltd. and Others*, , *Pankaj Mehra and Another Vs. State of Maharashtra and Others*, .

(ii) It is submitted that in view of the provisions of sections 82 and 84 of the Companies Act, the share certificates in favour of the appellant constitute evidence of the title of the appellant to such shares.

(iii) It is submitted that since the Rao group had admitted the ownership of 3498 equity shares right from the beginning and there was no dispute earlier, the appellant was not required to file any application u/s 536(2). It is also submitted that the appellant had taken up revival of Elmot group only because of transfer of 3498 shares on 3 March 1990 at the same price on which they were sold and transferred in 1988 but after coming to know about the order of winding up, the appellant decided to revive other companies in the group in preference to the company under liquidation. It was on revival of Elmot Alternators Private Ltd. (EAPL) that the Rao group wanted to marginalize the shareholding of the appellant in EAPL which led to serious disputes and therefore, the Rao group is now attempting to do the same in the company under liquidation through the

sham revival proposal before this Court,

(iv) The sole intent of the Rao group is to hold on to the unlawful possession of the properties of the company under liquidation having 10 acres of land with nearly 1,33,700 sq.ft. of built up area. The Rao group came up with the application on the pretext of revival after 18 years of winding up order and that too only after the Official Liquidator initiated action to take possession of the property of the company under liquidation. The Rao group deliberately did not file the statement of affairs and statutory records of the company under liquidation.

(v) The appellant is a senior citizen and a very senior member of The Institute of Chartered Accountants of India and transfer of 3498 shares (more than 50% share holding) in the company was the main consideration for the appellant to give up his career on 3 March 1990 and take directorship of the company under liquidation. The appellant without prejudice is willing to contribute 50% of additional equity as and when required through his family members/nominees, which shall be held in an Escrow Account till Interveners also make matching 50% contribution that may be envisaged for revival of the company in liquidation as per the scheme of revival appraised by any investment banker/financial institution/bank approved by this Hon'ble Court for the purpose, within 30 days of completion of the said appraisal. If the intervener Mr. A.V.K. Rao, succeeds in Suit No. 244 of 2009 before the Ranga Reddy District Court at Hyderabad, the appellant and/or his family members/nominees shall transfer their share holding held in Escrow to interveners at 15% p.a compounded return on investment.

11. On the other hand, the application has been vehemently opposed by Mr. Shyam Mehta, learned senior counsel appearing for respondent No. 3 Mr.A.V.K. Rao and by Mr. Kirti Munshi, learned counsel appearing for respondent No. 4 Mr. C.V.K. Rao and respondent No. 5 MRs. R.K. Rao. Mr. L.T. Sathelkar, learned counsel appeared for the Official Liquidator and for the original petitioning creditor.

12. Mr. Sham Mehta, learned senior counsel for respondent No. 3 has made the following submissions:

(a) the company application was filed on 25 September 2009 after the admission of the winding up petition in the year 1989 (by virtue of operation of the consent terms dated 29 March 1989 under which the company petition was to stand admitted upon failure to pay two installments )and in any case, long after the order of winding up was passed on 22 March 1990. The application though deserves to be dismissed on the ground of delay, laches and negligence.

(b) There is no substance in the argument of the appellant based on sections 82 and 84 of the Companies Act which merely provide that the certificates of shares shall be, prima facie, evidence of the title of members to such shares. However, in view of the serious disputes between the parties, which are referred to by the appellant in his own company application, regarding the meeting held on 3 March

1990 and the minutes thereof having been written on loose sheet of papers and upon going by the appellant's own case, no presumption can be raised in favour of the appellant, particularly when the appellant has not produced any copy of form No. 32 filed with the Registrar of Companies. In fact, it is contended that the appellant's version itself raised a serious doubt whether there was any meeting held on 3 March 1980 and if at all, there was any meeting, whether minutes were drawn, prepared and maintained and whether these minutes were adopted or ratified at the subsequent meetings of the Board of Directors. It is also submitted that if there is only one meeting on 3 March 1990 prior to the order of liquidation dated 22 March 1990 then all the more the appellant's version raises serious arguable issues on facts and law.

(c) The suit with the same controversy as the subject matter is pending before the District Court at Hyderabad.

13. Mr. Munshi, learned counsel for respondent Nos.4 and 5 (Mr.C.V.K. Rao and MRs. R.K. Rao) adopted the submissions of the learned counsel for respondent No. 3 Mr.A.V.K.Rao and has submitted that the conduct of the appellant makes it clear that in the facts of this case, the prayer should not be granted. Our attention was also invited to the affidavit dated 9 December 2009 of Mr.C.V.K.Rao in the present company application explaining the circumstances under which the appellant had obtained the share certificates from Mr.C.V.K.Rao.

14. Mr. C.V.K.Rao (Respondent No. 4 herein) has given the following version in para 8 of the affidavit dated 9 December 2009 about the events relating to the appellant's claim of ownership over the 3498 shares in the company in liquidation:

8. I say that the Applicant (Rathnam PV) was unable to revive EAPL inspite of my whole hearted support and cooperation and that EAPL found itself in dire straits by 1999. I further say that some time in the year 1999, the Applicant informed me that he was able to convince a financier from Chennai, namely M/s. Alcon Engineering, to loan funds to EAPL, which was the only possible way that it could be revived. At this time, there were no funds even to pay regular salaries to the employees, let alone to raise working capital for the execution of pending orders placed with EAPL. The Applicant then informed me that he had already represented to the said financier that he holds 50% equity in three Elmot Group Companies, namely, the Company, EAPL and Mechelm Engineers Private Limited. The Applicant also informed me that the said financier would release the money only on condition that the Applicant holds 55% of the Equity Share Capital in all these three Companies. Since there was unsubscribed capital in EAPL in 1992, the Applicant had already and without my knowledge got issued equity shares from time to time to himself and to his family, so that their equity share holding was approximately 50%. Although the Applicant and his family got issued only 0.5% equity in Mechelm Engineers Private Limited, he claimed to be a deemed 50% share holder in the said Company since it is a 99% subsidiary of EAPL, in which he and his family were 50% share holders. As regards the Company in

liquidation however, no transfer was ever effected in respect of any shares in favour of the Applicant. Therefore, the Applicant, who had already represented to M/s. Alcon Engineering that he held 50% of the equity in the Company, was faced with a problem. Being fully aware that no transaction can be made in respect of the Company in liquidation without leave of this Hon"ble Court, he (the appellant) suggested that for the purposes of obtaining finance from M/s. Alcon Engineering, he would show a back dated transfer of the 3,498 trust shares in his favour, of which my son, Mr. Aakash Vishalraj K. Rao is the sole beneficiary. The Applicant implored me to go along with this scheme, being fully aware of the fact that the purported transfer was not legally valid and binding, and was made only with a view to establish what was represented by the Applicant to M/s. Alcon Engineering in respect of his shareholding in the Company. The Applicant then asked me to give him possession of all the share certificates pertaining to the 4,505 equity shares held in the Company by the 17 trusts, which I refused to do. To get over this deadlock, the Applicant, in his own handwriting, wrote out transfers of all the shares belonging to the said trusts to my son, despite the fact that my son was a minor in the year 1990, and made me sign on the back of each of the 4,505 trust shares. The Applicant's contention was that M/s. Alcon Engineering was not aware that my son was a minor in 1990. Despite this, I insisted that I would only part with share certificates evidencing ownership of 3498 trust shares, and that too because I trusted him implicitly and I wished to support him all the way in the revival of EAPL. The Applicant then further implored me to sign on the back of the share certificates to be given to him (evidencing ownership of 3,498 shares) once again, presumably to record a transfer of these shares in his name. I say that I was still hesitant to go through with this scheme, but the Applicant convinced me to go alongwith it, pointing out that his possession of these share certificates was harmless for the following reasons; (a) None of the trust shares could be transferred to anyone, as my son is the sole beneficiary of these trusts; (b) the trustees of the 14 trusts which owned the 3498 shares whose certificates were to be handed over to the Applicant were not parties to this transaction; (c) no transfer forms were signed and no valuable consideration was ever paid; and (d) the first transfer was executed in the name of my son. I hesitatingly in 1999 handed over these share certificates to the Applicant. Thereafter, the Applicant in his purported capacity as director of EAPL, entered into an agreement with M/s. Alcon Engineering dated 17th August 1999 and I was asked to sign the said Agreement even though I was not a party to the said Agreement. After the said Agreement was executed, the Applicant requested me to execute another agreement dated 19th August 1999, by which I was asked to undertake that I would take necessary steps for issue of additional 5% of the equity shares of the Company to the Applicant, in order to show compliance with the condition laid down by M/s. Alcon Engineering for releasing finance. Subsequently, the understanding with M/s. Alcon Engineering did not go through. Hence there was no occasion to issue 5% additional shares of the Company to the Applicant. Subsequently the Agreement dated 19th August 1999 was cancelled. In April 2000, the Applicant informed me

that he had identified another financier and this time there would be no hitches as in the case of M/s. Alcon Engineering. In good faith and relying on the repeated assurance given by the Applicant to me, I signed the Agreement dated 9th April, 2000, whereby I was made to acknowledge that the Applicant holds shares in the abovementioned three companies to the extent of 50% of their subscribed equity capital. This was purely with a view to facilitate procurement of finance. After signing the Agreement with the Applicant on 9th April 2000, no new finance was forthcoming as promised by the Applicant, presumably because the Applicant had failed to convince anybody to finance the revival of the companies. I asked the Applicant to return the share certificates belonging to the 4 trusts evidencing ownership of 3498 shares in the Company back to me. The Applicant has wrongfully withheld these share certificates, although he kept promising me that he would duly return them to me. Since the Applicant was not able to procure any finance for the revival of the three companies for which limited purpose of Agreements dated 19th August, 1999 and 9th April, 2000 were signed by me, these transactions were treated as dead transactions. Consequently, these 3498 shares were never treated as shares belonging to the Applicant, as the limited purpose for which I had so acknowledged the same had also failed. I did not take any action against the Applicant as the Company was in liquidation. From this point onwards, the Applicant made all out attempts to marginalize me and remove me from my own Companies. I was eventually forced to seek the help of my son in the year 2002, after he had decided to return to India. I reiterate that there was no board meeting of the Company held on the 3rd March, 1990, as alleged by the Applicant, nor was there any transfer of 3,498 equity shares of the Company to the Applicant. I say that neither the Applicant nor his wife was ever appointed as a director of the Company at any time. The acknowledgment of the Applicant's shareholding in the Company made by me in the said Agreements was solely for the purposes of the transaction for raising funds on such terms as represented by the Applicant. I repeatedly requested the Applicant to return the share certificates in respect of the 3,498 shares of the Company, which were wrongly held by him. I say that there was no consideration paid in respect of any of the shares of the Company by the Applicant to me or to any of the trustees of the trusts at any time. I say that the story of the Applicant that he has paid me consideration in cash for purchase of 3,498 shares is bogus and false to the knowledge of the Applicant and has been deliberately concocted with malafide intentions and ulterior motives. I submit that all that is stated in the Applicant's Affidavit in Support of the Company Application No. 1107 of 2009 in respect of the transfer of these shares is an afterthought and false to the knowledge of the Applicant. I submit that the claim of the Applicant that he owns 3,498 shares in the Company is baseless as the transfer in any event is not valid in law.

(emphasis supplied)

15. Having heard the learned counsel for the parties and having given our anxious consideration to the rival submissions and having regard to the rival

versions about the circumstances and the manner in which the appellant claims to have become owner of 3498 equity shares in the company under liquidation, we are of the view that the company application raises serious disputed questions of fact which can only be decided after a full-fledged trial and after considering the oral evidence of the parties. Admittedly, Suit No. 244 of 2009 filed by Mr.A.V.K. Rao (respondent No. 3 herein) in the Ranga Reddy District Court at L.B. Nagar, Hyderabad centers around the same controversy about the alleged transfer of 3498 equity shares in the company under liquidation in favour of the appellant.

16. We are still required to consider whether the company application could have been dismissed on the ground of limitation or delay.

17. In *Bir Chand vs. John Brothers*, AIR 1934 Allahabad 161, the Court considered the provisions of section 227(2) of the Companies Act, 1913 which are analogous to the provisions of section 536(2) of the present Companies Law viz. Companies Act, 1956. Section 227(2) of the Companies Act, 1913 read as under:

In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares..... made after the commencement of the winding up shall, unless the Court otherwise orders, be void.

After considering the aforesaid provision, the Allahabad High Court held as under:

Dr. Asthna on behalf of Seth Bir Chand, argues that the proper construction to be put on the section is that every transfer of shares without the previous sanction of the Court is void. I do not think that the section can bear this construction. If the legislature had meant that a transfer of shares without previous sanction should be void, it was perfectly easy for the legislature so to enact. In my opinion, the plain reading of the section means that it is within the jurisdiction of the Court at any time after the transfer of the shares to order that the transaction is a good transaction and shall stand. The words "every transfer of shares..... shall, unless the Court otherwise orders, be void," clearly allude to a transfer of shares which has actually taken place. In my opinion this reading is in accordance not only with law, but with common sense and justice. Complete discretion has been left, and property left, to the Court to do whatever it may think just in a matter of this sort. Such an order however although it would be discretionary would not ordinarily be made without good grounds for making it.

18. In *H.L. Seth Vs. Wearwell Cycle Company (India) Ltd. and Others*, , the Delhi High Court considered the scope and ambit of the powers of the Company Court in winding up proceedings u/s 536(2) and other provisions of the Companies Act. The Court held in terms that the Company Court has the jurisdiction u/s 536(2) to validate the transfer of shares which had taken place after the winding up

order, so long as the company has not been dissolved, that is to say, the name of the company struck off from the register of companies under the Companies Act, 1956.

19. In *S.P. Khanna v. S.N. Ghosh*, 1976 (6) TLR 1740 equivalent to 1976 Mh L.J.150, a Division Bench of this Court considered the provision s of Section 536(2) of the Act, where the transaction in question had taken place after presentation of winding up petition and before the date of winding up order. The order u/s 536(2), however, was made after the date of winding up order, in the course of the winding up proceedings. The question raised before the Division Bench was whether such an order u/s 536(2) of the Act could be made after the date of winding up order. The Division Bench held that sub-section (2) of section 536 clearly permits making of such an order by the Court after the commencement of the winding up proceedings by the Court and while the proceedings of winding up are going on and the dissolution has not reached, the power under the said section can be exercised by the Court. However, the principle and policy underlying the said provision is clearly enabling and the power has to be exercised in the interest of justice. The jurisdiction is equitable and is meant to be exercised as such.

20. In *Iftex Oil & Chemicals Pvt.Ltd. v. Official Liquidator of Dhake Dyes & Chemicals Pvt. Ltd. & others*, 1999(Supp.) Bom. C.R.435, the Company Judge held that the very purpose of the Court granting such sanction u/s 536(2) is that the Court can make such order as is required in justice and equity to protect the interest of all creditors beginning with secured creditoRs.

21. Similarly, in *The Sidhpur Mills Company Ltd.*, (1987)1 CLJ 71, learned Single Judge of Gujarat High Court held that the Company Court can validate the transactions u/s 536(2) in those bonafide cases which demand protection of equitable consideration.

22. On an analysis of the above decisions, the following principles emerge:

(i) The jurisdiction of the Court u/s 536(2) is extant till such time the company is dissolved.

(ii) The application, if any, u/s 536(2) may be made at Rs. any time after the transfer of shares", which transfer must have taken place after presentation of the winding up petition, but before passing of the winding up order.

(iii) That such an application is in the form of application against the Official Liquidator but in fact is against the company.

(iv) That the Court will apply the principles of equity and justice in exercising its discretion.

(v) That the Court will bear in mind the object of the section is to prevent a share holder from defeating the winding up by disposing off his liability in respect of his shares.

23. The learned counsel for the appellant also invited our attention to the decision of the Apex Court in *Pankaj Mehra and Another Vs. State of Maharashtra and Others*, . The Supreme Court has held that the word "void" need not automatically indicate that any disposition should be ab initio void. The legal implication of the word "void" need not necessarily be a stage of nullity in all contingencies. It may also be used in the sense of voidable. "An act or contract neither wrong in itself nor against public policy, which has been declared void by statute for the protection or benefit of a certain party, or class of parties, is voidable only.

24. We may note that the decision of the Apex Court in *Pankaj Mehra and another vs. State of Maharashtra and others*, was rendered in the context of the controversy whether a company under liquidation can escape the penal liability for dishonor of cheque u/s 138 of the Negotiable Instruments Act on the ground that payment of the cheque pursuant to the issuance of notice under proviso (b) to section 138 would amount to disposition of property of the company and hence, void u/s 536(2) of the Companies Act. It was in this context that the Apex Court held that the presentation of the winding up petition would not disentitle the creditor-payee of the cheque from legally enforcing the "debt or other liability" of the Negotiable Instrument Act. The Apex Court held that Companies Act does not prohibit enforcement of debt due from the company and that failure to pay the cheque amount for whatever reason would render the drawer of the cheque liable for the penal action u/s 138. The Court also held that any disposition of property of the company during the interregnum between presentation of petition and passing of order for winding up would not be void ab initio. It was in this context that the Apex Court held that the legal implication of the word "void" need not necessarily be a stage of nullity in all contingencies and it is also be used in the sense of "voidable" and the act of contract neither wrong in itself nor against public policy, which had been declared void by statute for the protection or benefit of a certain party, or class of parties is voidable only. The Court held that the words "unless the court otherwise orders" are capable of diluting the rigour of the word "void" and to choose the alternative meaning attached to that word. The Supreme Court approved the principle laid down by the Division Bench of Gujarat High Court in *Navjivan Mills Ltd.* (1986)59 Com Cases 201 for adopting a pragmatic attitude while dealing with the applications u/s 536(2). The Division Bench of Gujarat High Court drew a clear distinction between the period till the passing of the order of winding up and thereafter, so far as dispositions are concerned and then observed as under:-

The court can exercise the jurisdiction u/s 536(2) of the Companies Act, 1956, of giving directions validating proposed transactions pending a petition for winding up but before the winding up order is made for the obvious reason that unless these transactions are saved from the consequence which may ensue, if at all, on an order of winding up being made, the company might find it difficult to keep itself going and its business might be paralysed. The purpose underlying the investment of the power in court is for the benefit and the interest of the

company so as to ensure that a company which is made the subject of a winding up petition may nevertheless obtain the money necessary for carrying out its business and so as to avoid its business being paralysed. If that is the purpose and object of the section, it would hardly be proper and just to stultify the power and restrict its operation since otherwise it is bound to be counterproductive in the sense that the very purpose of keeping the company as a going concern so as to ensure the interest of the shareholders and creditors would be defeated.

25. After approving the aforesaid reasoning of the Gujarat High Court, the Supreme Court made the following observations:

20. It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralysed, for the company may have to deal with very many day-to-day transactions, make payments of salary to the staff and other employees and meet urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is adopted, a fraudulent company can deceive any bona fide person transacting business with the company by stage-managing a petition to be presented for winding up in order to defeat such bona fide customers. This consequence has been correctly voiced by the Division Bench in the impugned judgment.

26. We must, however, say that the defence of the respondents in the present case is to the effect that 3498 shares of the company under liquidation were not transferred till 22 March 1990 when the company was ordered to be wound up but the appellant implored respondent No. 4 Mr.C.V.K. Rao to go along with the appellant in a scheme of showing back dated transfer of 3498 trust shares in favour of the appellant. This was to be done to enable the appellant to represent to M/s. Alcon Engineering for the purposes of obtaining finance. The defence of the respondents also is that when this was done, the shares were held by the trusts of which respondent No. 3 Mr.A.V.K. Rao was the sole beneficiary and at the relevant time in 1990 Mr.A.V.K. Rao was a minor. It is further case of the respondents that when Mr.C.V.K. Rao refused to give the appellant possession of the share certificates pertaining to the equity shares held in the company by the 17 trusts, the appellant in his own handwriting wrote out transfer of all shares belonging to the said trusts (of which respondent No. 3 Mr.A.V.K. Rao is the sole beneficiary in spite of the fact that respondent No. 3 was a minor in the year 1990). According to respondent No. 4, though he was still hesitant to go through with this scheme, the appellant convinced him to go along with it, pointing out that the appellant's possession of these share certificates was harmless for the following reasons :

(a) None of the trust shares could be transferred to anyone, as his son is the sole beneficiary of these trusts;

(b) the trustees of the 14 trusts which owned the 3498 shares whose certificates were to be handed over to the appellant were not parties to this transaction;

(c) no transfer forms were signed and no valuable consideration was ever paid; and

(d) the first transfer was executed in the name of his son.

27. In short, it is the case of respondent No. 4 in the affidavit in reply that there was no board meeting of the company held on 3 March 1990 as alleged by the applicant (appellant) nor was there any transfer of 3498 equity shares of the company in liquidation by the appellant before the Company Court passed the order of winding up on 22 March 1990.

28. Having regard to the aforesaid stand of the respondents as set out in para 8 of the reply affidavit of respondent No. 4, it appears that according to the defence of respondent Nos.3 to 5, the alleged transfer of shares took place after Elmot Engineering Co. Pvt. Ltd. (that is the company in question) was ordered to be wound up on 22 March 1990. If that be so, it is obvious that the power u/s 536(2) would not be available to the Company Court for approving or confirming the transaction which would be void ab initio. Obviously, upon passing of the order of winding up by the Company Court, the Official Liquidator shall, by virtue of his office, become the Liquidator of the Company, as provided in section 449 of the Act and the properties of the company including the shares would vest in the Official Liquidator and there can be no question of approving or validating any purported transfer of shares which might have taken place after passing of the order of winding up. The decision of the Supreme Court in Pankaj Mehra's case (supra) also clearly indicates that the power u/s 536(2) is to be exercised in respect of transaction after presentation of winding up petition and before the date of winding up order.

29. The question whether the alleged transfer of 3498 shares in the company under liquidation had taken place before 22 March 1990 as alleged by the appellant or after 22 March 1990 as averred by the respondents is itself a seriously disputed question of fact and that question is already pending trial before the District Court at Ranga Reddy, Hyderabad. We are, therefore, of the view that the learned Company Judge was fully justified in not granting any relief to the appellant in the background of such seriously disputed questions of fact. If the District Court at Ranga Reddy, Hyderabad allows the suit filed by respondent No. 3 being suit No. OS 244 of 2009, then obviously, the question of validating the transfer of 3498 shares in favour of the appellant can never arise. However, in case the District Court at Ranga Reddy, Hyderabad dismisses the suit and holds that the alleged transfer of shares had, in fact, taken place prior to 22 March 1990 then only the question would still survive for the appellant to move this Court for sanction /validating the transfer during pendency of the winding up petition No. 645 of 1988.

30. Since the Courts have already taken the view in *Bir Chand Vs. John Bros*, ,

H.L. Seth Vs. Wearwell Cycle Company (India) Ltd. and Others, , Pankaj Mehra and Another Vs. State of Maharashtra and Others, and Navjivan Mills Ltd. (1986)59 Com Cases 201, that disposition of property of the company during the interregnum period between the date of presentation of winding up petition and the date of passing of the winding up order can be validated at any time, the company application filed by the present appellant should not have been rejected on the ground of limitation but of course, the applicant would have to give explanation for any reasonable delay in making such an application u/s 536(2) of the Act.

31. The appeal is accordingly dismissed but with liberty to the appellant to make a fresh application u/s 536(2) of the Companies Act, 1956 if and only if Suit No. OS 244 of 2009 is dismissed by the District Court, Ranga Reddy, Hyderabad. If the suit is decreed, there can be no question of the appellant making any fresh application u/s 536(2) of the Act.

Subject to the above clarifications and observations, the appeal is dismissed.