

(2019) 11 MP CK 0272

In the Madhya Pradesh High Court

Case No : Company Petition No. 8 Of 1981

Virendra Singh Bhandari

APPELLANT

Vs

Nandlal Bhandari And Sons P.Ltd

RESPONDENT

Date of Decision : 14-11-2019

Acts Referred:

Companies Act, 1956 — 293, 372, 441(2), 531A, 536(2), 537(1)
English Bankruptcy Act, 1883 — Section 47
Provincial Insolvency Act, 1920 — Section 53, 54
Code Of Civil Procedure 1908 — Section 64
Income Tax Act, 1961 — Section 55A
Transfer Of Property Act 1882 — Section 58
Recovery Of Debts Due To Banks And Financial Institution Act, 1993 — Section 22(2)
(g)
Limitation Act 1963 — Article 58, 137

Citation : (2019) 11 MP CK 0272

Hon'ble Judges : Prakash Shrivastava, J

Bench : Single Bench

Advocate : A.K. Sethi, Vivek Patva, Vinay Saraf, H.Y. Mehta, Swati Mehta, Vijay Asudan, Pushpa Bhandari, B.M. Maheshwari, Gajendra Singh Bhandar, R.S. Chhabra, Shrenik Bhandari, Rajni Bhandari, Vishal Baheti, Rajendra Singh Bhandari, Pankaj Bagadiya, Randheer Bhandari, Ajit Singh Bhandari, Beenadevi, V.K. Jain, Yashwardhan Singh, Veerchand Manavat, Shantilal Manavat, D.S. Panwar

Final Decision : Disposed Of

Judgement

1. IA No.1714/1984 & OLR No.23/2018 have been filed by the Company Petitioner and OL for declaring sale/transfer of the property of the company in liquidation by the Ex.Directors/Ex.Management and the consequential sale deeds made within a period of one year before the date of filing of the company petition as null and void u/Ss.531-A of the Companies Act, 1956.

[2] The brief facts are that this company petition was filed on 16/8/1972 seeking to wind up the company M/s. Nandlal Bhandari & Sons Pvt. Ltd u/S.433(e) and

(f) of the Companies Act. On 27/4/1981 this Court had passed the winding up order to the following effect:-

"In the light of the discussion above, I hold that:-

[1] the company is unable to pay its debts;

and

[2] it is just and equitable that the company should be wound up.

I, therefore, order that the respondent-company be wound up. A copy of the winding-up order shall be drawn by the Additional Registrar as per company rules and shall be forwarded to the official liquidator and also to the Registrar of Companies as required under s.444 of the Act. The official liquidator shall forthwith take into his custody all the property and effects, books and papers of the said company. The official liquidator shall also cause a sealed copy of this order to be served on the company as also to the directors thereof by registered post. The petitioners shall get advertised within fourteen days a notice in the prescribed form of the making of this order in one issue each of, (1) Daily Naiduniya, Indore, (2) Daily Indore Samachar, and (3) Daily Hitwad, an English daily of Bhopal. The official Liquidator shall take all other necessary steps in the Winding-up Proceedings of the said company, in accordance with the provisions of the Companies Act, 1956. Costs of this petition shall be borne by the company. Advocate's fee Rs.500/-".

[3] After passing of the above winding up order, IA No.1714/1984 dated 27/4/1984 was filed by the company petitioner u/S.467(1), 531-A and 543 of the Companies Act with a prayer to set aside the transactions which have been impugned in the said I.A. Following are the transactions which are impugned in this I.A:-

[1] Sale of Nandanvan, 1, M.G.Road, Indore, Rampurawala, 27, M.G.Road, Indore and other properties scheduled in the petition.

[2] Transfer of the business of Central Hotel.

[3] Sale of shares of Nandlal Bhandari Mills Ltd.

[4] Equitable mortgage of Yeshwant Niwas Palace.

[5] Disposal of properties of preferential payment of various creditors during the pendency of the petition.

[4] The OLR No.23/2018 has also been filed by the OL on 18/9/2018 for the same purpose praying for the following reliefs:-

"[1] Report of the Official Liquidator may kindly be perused and taken on record.

[2] In view of above submissions, the sale/transfer of property of the company (In-Liqn.), by the ex-directors/ex-management and consequently sale deeds

executed in favour of purchaser may kindly be declared void/annulled under the provisions of section 531-A, 536(2) and 537(1) read with section 441(2) of the Companies Act, 1956, with a direction to purchaser/transferees to handover the possession of the said properties to the Official Liquidator.

[3] In view of submissions in Para no.23 above, notice of present OLR No.23/2018, may kindly be issued to purchasers/transferees of the subject properties of the company (In-Liqn.), to file their say in the matter.

And

Such other order(s) as this Hon'ble Court deem fit and proper may kindly be passed in the circumstances of the case."

[5] The purchaser/transferee of the impugned assets have been served with the notice of above I.A and OLR.

[6] Learned counsel for applicant and the OL have submitted that since the impugned transactions have been done within one year prior to passing of the winding up order and they are hit by the provisions of Sec.531-A, therefore, the transaction are void and required to be set aside. They have submitted that the conditions of Sec.531-A are duly satisfied. Shri Vinay Saraf, learned Sr. counsel placing reliance upon the judgment of Gujarat High Court in the matter of Official Liquidator of Piramal Financial Services Ltd. Vs. Reserve Bank of India (2004)118 Co.Cases 27, Kerala High Court in the matter of Official Liquidator, Kerala High Court Vs. Victory Hire Purchasing Co.(P) Ltd & another (1982) 52 Co.Cases 88 and Rajasthan High Court in the matter of Official Liquidator Vs. Ashok Kumar Dalmia & Ors. (1999) 98 Co.Cases 269, Gujarat High Court in the matter of Official Liquidator of Piramal Financial Services Ltd. Vs. Diljit Builders & Associates P. Ltd. & another (2015)193 Co.Cases 482 has submitted that since the transactions are in the nature of fraudulent reference, therefore, they are liable to be set aside.

[7] As against this, learned counsel for respondents and the purchasers of the aforesaid property have submitted that the I.A at the instance of the petitioner u/ S.531-A is not maintainable and only OL has right to file such an application.

[8] Shri B.M.Maheshwari, learned counsel has also submitted that there is delay in filing the I.A and the OLR.

[9] Shri R.S.Chhabra, learned counsel has submitted that conditions of Sec.531-A are not satisfied and that OL is required to file an I.A u/S.531-A, therefore, OLR by the OL in this regard cannot be maintained. He has also raised an issue that the OLR is barred by time and in this regard he has referred to Article 58 and 137 of the Limitation Act by submitting that three year limitation has been prescribed and the limitation will start from the date of admission of the company petition and he has referred to the judgment of Kerala High Court in the matter of K.N. Narayan Iyer Vs. Commissioner of Income Tax (1993) 78 Comp Case 156 and judgment in the matter of Official Liquidator of The Mysore

Kirloskar Limited Vs. Kirloskar Institute of Advanced Management Studies 2015(5) KarLJ 396.

[10] Having heard the learned counsel for the parties on above aspect, I am of the opinion that before proceeding to examine the legality and validity of the impugned transactions, the scope of Sec.531-A is required to be considered and issue of maintainability of application is to be decided.

[11] Sec.531-A of the Companies Act, 1956 (for short "the Act") provides as under:-

"531A.- Avoidance of voluntary transfer.-- Any transfer of property movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by [the Tribunal] or the passing of a resolution for voluntary winding up of the company, shall be void against the liquidator."

[12] In terms of the aforesaid provision, if the following conditions are satisfied, a transaction is void against the OL:-

[1] Transfer of property by a company not made in the ordinary course of its business.

[2] Transfer not made in good faith and for valuable consideration.

[3] Transfer made within one year before the presentation of the winding up petition.

[13] A bare perusal of above provision reveals that at first the Company Court is required to see if transfer was made within one year before the presentation of petition. If answer is yes, then the Court has to examine if the transfer was made in the ordinary course of business of the Company. If the answer is no, the transfer is void. If the answer is yes, then the Court has to examine if transfer was made in good faith and valuable consideration. If the answer is no, the transfer is void against the liquidator.

[14] Since transfer made in violation of conditions mentioned in Section 531A are void against the liquidator, hence they are not in nullity in absolute but voidable at the option of the OL. Kerala High Court in the matter of K.N. Narayana Iyer Vs. Commissioner of Income Tax reported in (1993) 78 Company Cases 156 (DB) taking note of its earlier Full Bench judgment in this regard has held:-

"13. The section forms part of a series of sections relating to the effect of the winding up on certain antecedent transactions of which we will refer to only three. Section 531 deals with fraudulent preferences, namely, transfers of property, movable or immovable, and the like made on the eve of the winding up of a company with a view to favour some creditors over others. Such transfers were deemed to be fraudulent preference of the creditors and are invalid

accordingly. We have already extracted Section 531A under which transfers within a period of one year before the presentation of the petition for winding up or the passing of a resolution for voluntary winding up of the company are deemed void against the liquidator. Section 532 deals with another category of transfers, namely, the transfer by a company of all its property to trustees for the benefit of its creditors ; it is provided that such transfers shall be void. Thus, while Section 531 treats certain transactions as invalid and Section 532 treats another category of transfers as void, Section 531A stands in between treating the transfers covered thereby as void against the liquidator. These transfers covered by Section 531A are not rendered totally void or non-est or non-existent as assumed by the Appellate Tribunal. They are declared void only as against the liquidator. In other words, they are valid inter partes and against the rest of the world, except the liquidator. It is open to the liquidator to treat them as void and of no effect, and, accordingly, seek to recover the property covered thereby ignoring the transfers. He need not seek to have the transfers set aside or cancelled. The transfers are voidable at his option so that it will be equally open to the liquidator to honour the transfers and deal with them as such. All that the section implies is that the transfers will not bind the liquidator, and it will be open to him either to treat them as non est or void, or to affirm them. Since the option is with the liquidator, if he does not choose to disown them, they will continue to be valid and operative.

14. A Full Bench of this court had an occasion to deal with the purport and meaning of the expressions "void", "voidable" and "void as against..." in the decision, *Chacko Mathew v. Ayyappan Kutty*, AIR 1962 Ker 164; [1962] 1 KLR 413, while dealing with assignments in violation of the provisions of Section 21 of the Travancore Ezhava Act. *Madhavan Nair J.*, with whom *Velu Pillai J.*, concurred dealt with this point in paragraphs 5 to 13 of his judgment. Inter alia, he referred to *In re Vansittart*, Ex parte *Brown* [1893] 2 QB 377. *In re Brail*, Ex parte *Norton* [1893] 2 QB 381, both of which dealt with the expression "void against the trustee in bankruptcy", in Section 47 of the English Bankruptcy Act, 1883, as also *Mariappa Pillai v. Raman Chettiar* [1919] ILR 42 Mad 322; AIR 1919 Mad 161 and *Rukh-manbai v. Govindram*, AIR 1946 Nag 163, besides analogous provisions in Section 54 of the Provincial Insolvency Act, 1920, and Section 64 of the Code of Civil Procedure, 1908, and observed (at page 168) :

"The expression is often used : 'void as against' a person or persons. In strict terminology, a thing cannot be void and valid at the same time. As 'Void' denotes a nullity, a thing which is void must be a nullity for all. It is totally non-existent. Therefore, 'void as against A' can mean only that A can treat it as void ; or, in other words, A can avoid it. It is, strictly speaking, voidable at the option of A

It is thus clear that the use of the expression 'void as against the tarwad' means only that the involved transaction is 'voidable by the tarwad', and not void as regards the tarwad. If a transaction by the karnavan is not a nullity and is not challengeable by any one other than the members of the tarwad, in strict legal

terminology we must say 'it is voidable at the instance of the tarwad', and not 'void as against the tarwad' ; but we find many learned judges have used the latter expression ; and it is that loose usage that gave rise to this reference."

15. Reference may also be made to the observation of Subba Rao J., in *Ramaswami Chettiar v. Official Receiver*, AIR 1960 SC 70, where, after referring to Section 54 of the Provincial Insolvency Act, 1920, which uses the expression "void as against the receiver", the learned judge observed that the transfer in question was not absolutely void and that in the context the expression "void" only meant "voidable".

16. The fact that a transfer falling within Section 531A is void as against the liquidator implies that it is not a nullity in the absolute sense. Since it is void only as against the liquidator, it means the court will invalidate or ignore the transfer only if the relief is sought by the right person, namely, the liquidator and in appropriate circumstances. For instance, it may be avoided only if it is necessary to satisfy the creditors of the company, or to the extent necessary for that purpose as held by the Madras High Court in *Official Receiver v. Palaniswami Chetti alias Ponnuswami Chettiar*, AIR 1925 Mad 1051, a case under the Provincial Insolvency Act, 1920. A void transfer is no transfer at all and is completely destitute of any legal effect. A voidable transaction is otherwise a valid transaction and continues to be good until it is avoided by the party aggrieved (*Johrilal Soni v. Bhan-wari Bai*, (1977) 4 SCC 59 : AIR 1977 SC 2202) . The transfers hit by Section 531A are voidable in the above sense, the avoidance being only at the instance of the liquidator."

[15] In view of the above judgment, if the OL does not choose to disown such transactions, they will continue to be valid and operative. Even otherwise they are void as against OL but they are valid inter parties and against the rest of the world.

[16] While deciding the objection, this Court is required to see if transfer was in good faith. Bombay High Court in the matter of *Monark Enterprises Vs. Kishan Tulpule and others* reported in (1992) 74 Sompany Cases 89 (Bom) while considering the meaning and scope of "good faith", has held:-

"43..... Before I analyse this submission, I consider it necessary to refer to the leading judgment of the Supreme Court indicating the approach which the court is enjoined to follow in cases of this kind. In the case of *N. Subramania Iyer v. Official Receiver*, the apex court dealt with an identical question under insolvency legislation. It was held by the apex court that the burden of proof was entirely on the official liquidator who impugned the transaction of transfer. In paragraph 10 of his judgment, Sinha J; speaking for the Bench of the Hon'ble Supreme Court, observed that it was not necessary for upholding the transaction that the transferor who had been subsequently adjudged as an insolvent should have been honest and straightforward in the matter of the transaction impeached. It was observed in paragraph 11 of the said

judgment the both the transferor and the transferee must have shared a common intention to defraud the creditors. It was held that unless the conduct of the transferee was blameworthy, the transaction could not be annulled. In that case, the High Court had accepted the submission of the official liquidator who represented the estate of the insolvent that the burden of proof was on the transferee to prove that the transaction was bona fide. Relying on several judgments of the Privy Council, the apex court negated this proposition of law propounded in the judgment of the High Court under appeal. The definition of "good faith" in the General Clauses Act (X of 1987) is in these terms :

"A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not."

44. The same definition of "good faith" is not adopted under the Indian Limitation Act, 1963. The definition of "good faith" as set out in the Limitation Act, 1963, states that a thing shall not be deemed to be done in good faith if not done without due care or caution. The definition of good faith as enacted in the Limitation Act was erroneously adopted in the High Court's judgment in support of its finding that the impugned transaction of transfer or usufructuary mortgage was not a transaction in good faith. The High Court held that the mortgagee had not acted with due care and caution and, therefore, the transaction could not be considered to have been effected in good faith. Overruling this approach of the High Court and its ultimate decision, our Supreme Court held that the definition of "good faith" given in the General Clauses Act (X of 1987) shall have to be read in all Central statutes unless some other definition was provided in the specific statute. It was, therefore, held that the act of the transferee shall have to be held to have been done in good faith if it was done honestly, whether it was done negligently or without due care and caution. No definition of "good faith" is to be found in the Companies Act I of 1956....."

Hence, if an act is done bona-fidely with honest intention, it is done in good faith.

[17] Patna High Court in the matter of Shivshakti Builders and Financial Co. Ltd; In re [2010]158 Company Cases 237 after taking note of Sec.531-A has held as under:-

"It is evident from a perusal of the aforesaid provision that two types of transactions by the application of the said provision would be void against the official liquidator. The first requirement for either of those transactions is that it should be made within one year before the presentation of a petition for winding up. Once that condition is satisfied, the said transaction must be a transfer or delivery which has not been made in the ordinary course of its business. Alternatively, even if the said transfer or delivery has been made in the ordinary course of business, the same has not been made in favour of a purchaser or encumbrancer in good faith and for valuable consideration. Thus, the two parts of the said section are clearly distinct. The second part as to the person being a purchaser in good faith and for valuable consideration only comes into picture if

the transfer itself has been made in the ordinary course of business. If the allegation is that the transfer or delivery has not been made in the ordinary course of business, ie; it is not a transaction or transfer which the company could have entered into in the ordinary course of business, then there is no requirement for further proving that the purchaser was a bona fide purchaser and for valuable consideration."

[18] In terms of the aforesaid judgment once it is established that the transaction was made within one year before the presentation of the petition and it was not made in the ordinary course of business then it is not required to be proved that the purchaser was a bona-fide purchaser and for valuable consideration, however, if the transaction is found to be in the ordinary course of business, then it is required to be examined if the transaction was in good faith and for valuable consideration.

[19] Under Section 531A the offending transactions are void. Considering the meaning of void, Hon'ble Supreme Court in the matter of Pankaj Mehra and Another Vs. State of Maharashtra and others reported in (2000) 2 SCC 756 has held as under:-

"14. In the above backdrop alone we can consider the impact of the legislative direction in Section 536(2) that any disposition of the property of the company made after the commencement of the winding up (i.e. after the presentation of a petition for winding up) shall be void. There are two important aspects here. First is 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. Black's Law Dictionary gives the meaning of the word "void" as having different nuances in different connotations. One of them is of course "null, or having no legal force or binding effect". And the other is "unable in law, to support the purpose for which it was intended". After referring to the nuances between void and voidable the Lexicographer pointed out the following :

"The word 'void' in its strictest sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force, but frequently the word is used and construed as having the more liberal meaning of 'voidable'.

The word 'void' is used in statutes in the sense of utterly void so as to be incapable of ratification, and also in the sense of voidable and resort must be had to the rules of construction in many cases to determine in which sense the Legislature intended to use it. 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."

[20] In light of provision contained u/S.531A, a transaction can be held to be void if it is found to be in violation of conditions mentioned therein.

[21] So far as burden of proof is concerned, it lies on the person who alleges the transaction to be void. Punjab and Haryana High Court in the matter of Sunder Lal Jain Vs. Sandeep Paper Mills P. Ltd. and others reported in (1986) 60 Comp Cas 77 has held Section 531A of the Act is equivalent to Section 53 of Provincial Insolvency Act and has held that burden of proof is on the person seeking annulment by observing as under:-

"8. It is equivalent to Section 53 of the Provincial Insolvency Act. The reason for introducing the section in the Companies Act, as given in the Notes on Clauses, was that there was no provision in the Act in respect of voluntary transfer dealt with in Section 53 of the Provincial Insolvency Act and, therefore, it was introduced by the Act No. 65 of 1960. It is well-settled that the burden of proving that a transfer, which is sought to be annulled under Section 53, has not been made in good faith and for valuable consideration is on the party seeking annulment of the transfer: (see *Lajje v. Lala Basheshar Nath*, Official Receiver, Delhi [1936] PLR 212 and *N. Subramania Iyer v. Official Receiver, Quilon*, AIR 1958 SC 1). The same principle will apply in the case of an application made under Section 531A of the Act. Now, the question arises as to how the burden of proof is to be discharged by that party. The following observations of the Supreme Court in *N. Subramania Iyer's* case, AIR 1958 SC 1, as extracted in the headnote, may be read with advantage:

"An application by the Official Receiver under Section 53 for annulment of transfer can be allowed on proof either that there was no consideration for the transaction or that the consideration was so inadequate as to raise the presumption of want of good faith. Alternatively, the Receiver may also succeed on showing that though there was valuable consideration for the transaction impeached, there was want of good faith in the sense that the transferee knowing all the circumstances of the transferor who had since been adjudged an insolvent entered into the transaction with a view to screening the assets of the insolvent from the Receiver in whom the insolvent's property vests for the benefit of the creditors. Such will be mostly cases of benami transactions in favour of some relative of the insolvent or a person in whom he has full confidence that he will hold it ultimately for the benefit of the insolvent or persons in whom he may be interested. Or it may be that a person finding himself over head and ears in debts wishes to convert his assets into liquid assets with the collusion or connivance of the transferee. In both cases, the intention clearly is to shield the assets against the claims of creditors and in such cases, though the transfer may have been for consideration, either adequate or otherwise, but having been entered into with a view to defraud or delay the creditors, the transferor and the transferee sharing the common intention, the transaction must be annulled and the assets must be brought into the common hotchpot for the benefit of the insolvent's creditors."

9. It is further observed by their Lordships that it is not necessary in annulment proceedings to prove that the transferor who has been subsequently adjudged an

insolvent should have been honest and straightforward in the matter of the transaction impeached. If he was really so, there would not be much difficulty in coming to the conclusion that the transaction as a whole was bona fide. Even if the transferors were wanting in bona fides, the crucial question still remains to be answered. It is further held that unless it is found that the transferee was wanting in bona fides in respect of the transaction in question, he cannot be affected by the dishonest course of conduct of the transferor. In the said case, Section 53 of the Provincial Insolvency Act was interpreted and the observations will apply to the instant case as well. "

[22] Counsel for OL has relied upon judgment of Rajasthan High Court in the matter of Ashok Kumar Dalmia (supra), wherein Court has taken the view that Section 531 gives protection if transaction is carried out in the ordinary course of business or if it is in good faith for valuable consideration. The provisions of Section 531 and 531A are meant to protect the interest of other creditors so that if company-in-liquidation makes the sale, the proceeds may be proportionately distributed. In the matter of Victory Hire Purchasing Co.(P) Ltd (supra), Kerala High Court while considering the issue of fraudulent preference has held that it must be shown to have been done to give favoured treatment. The dominant motive attending the transaction has to be ascertained and if it is tainted with element of dishonesty, question of fraud arises and if the circumstances proved are equally consistent with the guilt or innocence, the benefit of doubt goes to accused. Counsel for the OL has placed reliance upon the judgment of Gujarat High Court in the matter of Daljit Builder (supra), but in that judgment court has considered the issue of fraudulent preference under Section 531 and has found such preference to be void ab initio, but language of Section 531A is different.

[23] Learned counsel for the respondents have questioned the maintainability of IA No.1714/1984 and opposed the OLR No.23/2018 as barred by time on the basis of judgment of Kerala High Court in the matter of Official Liquidator of The Mysore Kirloskar Limited Vs. Kirloskar Institute of Advanced Management Studies reported in 2015(5)KarLJ 396 .

[24] Supreme Court in the matter of Percept Advertising Ltd. Vs. M.Ravindran and Ors.(2003) 10 SCC 84 while considering similar submissions has observed as under:-

"6. In this special leave petition, Mr. C.A. Sundram, learned senior counsel appearing for the petitioner contended that there was no application form the official liquidator as contemplated under Section 531-A of the Companies Act, and without there being such order as is required under the said Section, the Company Court could not have treated the conveyance of the property in question in favour of the petitioner as being void. He also contended that without declaring such conveyance as being void, the Company Judge as well as the appellate court could not have dispossessed the petitioner from the property.

7. From the order of the learned Company Judge, we notice that after discussing

the material on record he has held that the transactions in favour of the petitioner herein in regard to the property in question do not have any legal sanctity and that the same were entered into one year after institution of the Company Petition, hence, that is liable to be struck down under Section 531-A of the said Act. This finding of the Company Judge may or may not be on an application made by the concerned party under Section 531-A of the Act, but in our opinion, since the lease in question is being granted with a view to preserve the property in question and the learned Company Judge has protected the interests of the parties by directing the Administrator to separately keep the amounts realised from the lease in a separate account, we feel the interest of the petitioner is well-safeguarded. We also notice that the Appellate Court in the impugned order has specifically left open the right of the petitioner to establish its title in separate proceedings. In such circumstances, bearing in mind the fact that the order in question was passed by consent, we do not think this SLP merits any further consideration, hence, the same is dismissed."

[25] In view of above, the Company Judge has to protect the interest of the Company and its properties. Since offending transactions are void as against OL, therefore, OL has right to file an application under Section 531-A, but for an order u/S.531-A application by the OL may not be necessary and Company Court can take suo motu action under this provision to protect the properties of the Company.

[26] Hence even if the IA No.1714/1984 is not maintainable, this Court is required to examine the bonafides of the transfer because subsequently OLR No.23/2018 has been filed by the OL and even otherwise in terms of judgment of Supreme Court in the Case of Percept Advertising Ltd (supra) this Court can exercise the suo motu power to protect the properties of the company in liquidation. Hence, objections raised by the respondents about the maintainability of the I.A and OLR need not be gone into.

[27] The issue involved in the present case is required to be decided keeping in view the scope of provisions contained in Sec.531-A of the Act. In the present case, the winding up petition has been presented on 16/8/1972, therefore, the transactions within one year before the date i.e. on or after 16/8/1971 and up to 16/8/1972 will fall within the scope of scrutiny under S.531-A. Hence, each of the transaction which has been impugned in the I.A and OLR is being examined by this court in the light of the above legal position.

[1] Immovable properties Nandanvan, 1, M.G.Road, Indore AND Rampurawala, 27, M.G.Road, Indore

[28] Shri Vinay Saraf, learned Sr.counsel for the OL submits that the sale deeds for Nandanvan and Rampurawala properties were made without payment of consideration and sale was to the family members of the Directors and it was within one year from presentation of petition and was at a price much less than the market value of the property and the property was sold with a view to siphon

off the fund of the company in liquidation. He has also submitted that the properties have been sold without there being proper resolution of the Board. He has also submitted that while selling the properties only the adjustment of account of the purchasers were made in the books of account without receiving any consideration.

[29] Shri A.K.Sethi, learned Sr.counsel appearing for the applicant in IA No.1714/1984 submits that the properties have been sold at a value much less than the value in the report of the valuer Shri P.G.Joglekar dated 24/8/1971 and that the Directors have sold the properties of the company to their own family members and the sale was not for the benefit of the company and it was also not in good faith or for valuable consideration.

[30] Shri Vijay Asudani, learned counsel for Mrs. Pushpa Bhandari w/o. Rajendra Bhandari supporting the OLR and IA has submitted that sale was done to liquidate the properties and to adjust the account.

In support of his submission he has placed reliance upon the judgment of Nattukottai Bank Ltd; In re. (1957)27 Co.Cases 404 (Madras) and Sundarlal Jain Vs. Sandeep Paper Mills P. Ltd. (1986) 60 Co.Cases 77 (P&H).

[31] Shri B.M.Maheshwari, learned counsel for L.R of Gajendra Singh Bhandari in respect of purchaser of Nandanvan property submits that there is no proof that the company was in default when the transfer was made or any litigation was pending, therefore, question of giving preference to particular creditor does not arise. He has further submitted that in the Board meeting dated 28/5/1956 policy decision was taken to sell the assets of the company. He has also submitted that the object of the company was to enter into sale and purchase of the property and the Board of Directors of the company had sold the properties of the company from time to time between 1956 to 1972 and that the Board had passed the Resolution dated 26/7/1971 to sell the property and it was approved by the share holders meeting dated 20th August, 1971. He has also submitted that the company was closely held concern of the family members and the sale was made to return back the deposit made by the family members, therefore, only the adjustment of account was done, therefore, the sale was for valuable consideration. He has also submitted that the observations made by the learned Single Judge at the time of admission and advertisement of the company petition have been set aside by the division bench. Referring to the written arguments he has submitted that the land in the vicinity during the relevant time was sold almost at the same rate or at much lower rate.

[32] Shri R.S.Chhabra, learned counsel for Shrenik Bhandari and Rajni Bhandari in respect of Nandanvan property has submitted that the sale was for valuable consideration and that it was on the basis of the valuation report and it was in the ordinary course of business. He has also submitted that no investigation has been done by the OL to find out if the sale was at a price less than the market priced.

[33] Shri Vishal Baheti, learned counsel for L.Rs of Rajendra Bhandari in respect of Nandanvan property has adopted the submissions made by counsel for other parties.

[34] Shri Pankaj Bagadiya, learned counsel for Randhir Singh Bhandari, Ajit Singh Bhandari and Beenadevi w/o.Tejsingh in respect of Rampurawala building has submitted that as per the valuation report of Shri P.G. Joglekar the property was a tenanted premises and the calculation has been done by both the methods and by averaging the valuation of two methods the value of the property has been ascertained and the sale has been made on that value. He has further submitted that independent valuation report cannot be relied upon and that since the purchasers were having deposits in the company, therefore, the adjustment in the account was made which was in the nature of sale consideration and there is no material to show that the credit entries in the account of the company were fictitious and that there is no proof that sale was at a rate less than the market rate.

[35] Shri D.S.Panwar, learned counsel for sole secured Creditor SBI submits that the liability of the company with interest presently is about 70 crores and that the property which is mortgaged with the bank, is sufficient to recover the debt of the bank. He has clarified that the properties impugned in this IA and OLR have not been mortgaged. He has also submitted that even if the impugned properties are sold, then also the amount will be given back to the earlier purchasers of these properties.

[36] Having heard the learned counsel for parties in respect of the aforesaid properties, it is noticed that following sale deeds were executed by the Ex.Directors/Management of the company in liquidation in respect of the Nandanvan Kothi and Rampuravala Building:-

NANDANVAN KOTHI

1.

Sale deed dated 29/08/1971

In favour of

Gajendra Singh Bhandar

2.

Sale deed dated 29/08/1971

In favour of

Rajendra Singh Bhandari

3.

Sale deed dated 29/08/1971

In favour of

Surendra Singh Bhandari

4.

Sale deed dated 29/08/1971

In favour of

Mahendra Singh Bhandar

RAMPURAWALA BUILDING:

1.

Sale deed dated 29/08/1971

In favour of

Randhir Singh Bhandari

2.

Sale deed dated 29/08/1971

In favour of

Tej Singh Bhandari....

3.

Sale deed dated 29/08/1971

In favour of

Ajit Singh Bhandari....

[37] There is no dispute that purchasers are sons and grandsons of the Ex-Directors of the company in liquidation. The above sales are within one year prior to filing of winding up petition, therefore, they are required to be scrutinised under Section 531A.

[38] This Court at the time of admitting the company petition vide order dated 27/4/1981 (Virendra Singh Bhandari & Ors. Vs. Nandlal Bhandari & Sons. P. Ltd [1982]52 Company Cases 36) had examined the issue and made certain observations in respect of the sale of Nandanvan and Rampurawala building but against the order of the learned Single Judge, LPA No.11/1981 was filed and the division bench vide order dated 4/8/1981 had set aside those observations by holding as under:-

"21-The learned counsel for the appellant also assailed the finding of the learned Judge that the petitioner had justifiable lack of confidence in the working of the majority members. The finding of the learned Judge that the transfer of its two buildings by the company was not in good faith was assailed by the learned

counsel for the appellant on the ground that though the appellant wanted to adduce evidence to show that those transfers were bona fide, no opportunity was given to adduce evidence in that behalf. It is true that without giving opportunity to a party to adduce evidence, to meet the allegations made against it, a finding adverse to that party cannot be given. That such an opportunity was sought and was not given was not denied on behalf of the petitioners. In these circumstances, the findings given by the learned Single Judge that the transfers of Nandanvan and Rampurawala buildings were not made by the company in good faith and that the transaction of sale of shares of Nandlal Bhandari Mills Ltd. by the company was not in the interest of the company are set aside. Learned counsel for the petitioners did not want to remand for enquiry into these questions and hence all that we can say at this stage is that the question of bona fides of various transactions entered into by the company and assailed by the petitioners in this petition shall be examined in accordance with law as and when such questions are raised. We, therefore, refrain from expressing any opinion in that behalf.

22- The learned Judge further held that the company was in fact a family concern and principles of partnership can be applied in such a case. Reliance was placed on the decision reported in *In re Yenidje Tobacco Co. Ltd* (1916) 2 CH. 426). The House of Lords in *In re Westbourne Galleries* (1973 A.C.360) approved the decision in *In re Yenidje Tobacco Co. Ltd*. (1916) 2 CH.426). Both these cases came up for consideration before the Supreme Court in *Hind Overseas Pvt. Ltd Vs. R.P. Jhunjhunwalla* (AIR 1976 SC 565), where the Supreme Court held as follows:-

"When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when shareholding is more or less equal and there is a case of complete dead lock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding up on the just and equitable ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership."

In the instant case, the shareholding between the petitioners and the other group cannot be said to be more or less equal. It has not been shown that the apparent structure of the company is not the real structure and on piercing the veil it is found to be in reality a partnership. Moreover, there are allegations and counter allegations of misconduct levelled against each other by both the parties, and no finding as to the truth of these allegations and counter allegations could be given without an enquiry into the matter after giving the parties full

opportunity to adduce evidence. The allegation of the appellant company was that petitioner No.1 had mismanaged the affairs entrusted to him and that such mismanagement had landed the company into the present state. The learned Judge has not given any finding in this behalf. In this connection, we may usefully refer to the following observations of Lord Cross in *In re Westbourne Galleries* (1973 AC 360):-

"A petitioner who relies on the 'just and equitable' clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct, he cannot insist on the company being wound up if they wish it to continue."

In the instant case, as already observed by us, the appellant-company had made allegations of misconduct, against petitioner no.1 and unless an enquiry was made, no finding could be given in that behalf one way or the other. The petitioners did not want, in view of the delay which has already taken place, a remand for the purpose of enquiry into the allegations of misconduct made by the parties. In the absence of any enquiry, no finding in that behalf could be reached. In these circumstances, in our opinion, the petitioners cannot be allowed to rely on the 'just and equitable' clause in section 433 of the Act for an order of winding up. However, as we have upheld the finding of the learned Single Judge that the petitioners have made out a case for winding up on the ground specified in clause (e) of section 433 of the Act, we see no reason to interfere with the order of winding up."

[39] Against the aforesaid order of the division bench SLP(C) No.5987/1981 was filed before Hon. Supreme Court which was dismissed in limine vide order dated 1/10/1981.

[40] The learned Company Judge at the stage of publication of company petition vide order dated 23/4/1976 (*Virendra Singh Bhandari & Ors. Vs. Nandlal Bhandari & Sons. P. Ltd* (1980) 50 Co.Cases 54) had also made certain observations in respect of Rampurawala building and Nandanvan transfers, but for the reasons which are assigned by the division bench, at this stage no benefit can be derived by the petitioner's from those observations.

[41] Having examined the present case in the light of above parameters, it is noticed that the record reflects that undisputedly one of the object of the company in liquidation was to deal with the properties of the company. The petitioner himself in the company petition has mentioned some of the object with which the company was established as under:-

"15- To exchange, sell, convey, assign or let on lease or leases the whole or any part of the company's immovable properties and to accept as consideration or in lieu thereof, other land or cash or Government securities or securities guaranteed by Government, or shares in joint Stock companies, or partly the one, and partly the other property or securities as may be determined by the company to take back or reacquire and property so disposed of by repurchasing or leasing the

Board of Directors dated 25th April, 1966, 10th November, 1970, 26th July, 1971 reveal that the properties of the company in liquidation were sold to different parties from time to time. It is worth noting that in the meeting of the Board of Directors dated 26th July, 1971, the petitioner Virendra Singh Bhandari was present. In the minutes of the meeting the policy of the company to dispose of the companies house property was noted as under:-

"The Chairman stated that as decided in the meeting of the Board of Directors of the company held on 27th May, 1970, it has been the policy of the company to dispose off company's House property, and under the same policy the company has already sold its building situated at Kanthal. Ujjain land at Manglia, Distt. Indore Land known as Cendabagh at Bhanwarkuan, Indore and building No.17 and 40 Pipli Bazar, Indore and building of Anandpura Road, Dewas.

Under the said policy and scheme it is proposed to sell the buildings of the company known as Nandanwan Kothi situated at 1, Mahatma Gandhi Road, Indore and Rampurawala Building situated at 27, Mahatma Gandhi Road, Indore. The Directors considered the matter and

IT WAS RESOLVED THAT

That the value for the said building be verified and arrived at by some authorised valuer appointed by the Government and the Chairman Shri Sughanmalji Nandlalji Bhandari be and is hereby authorized to get the buildings valued.

He is further authorised to make negotiations for sale of the said buildings and finalise the offer as he may deem proper in the interest of the company and on finalisation of the offers, the sale deed may be executed on behalf of the company by Shri S.N. Bhandari and Shri B.M. Bhandari the two directors of the company and common seal be affixed thereon in their presence duly countersigned by Shri B.B.Surana, Secretary of the company."

[44] The aforesaid Resolution also reveals that the sale was effected on the basis of the report of the authorized valuer. The record further reflects that in pursuance to the Resolution dated 26th July, 1971, the valuation from the government valuer P.G.Joglekar was obtained. The valuation report Annexure 7 to the reply of Shrenik Bhandari reveals that the value was assessed as on 15/8/1971. As per this valuation report the value of Rampurawala building was assessed as Rs.6,86,000/-. While arriving at the said value, valuer has duly taken into account the age of the building and the fact that it is a tenanted building. The valuer had assessed the value of Nandanvan house as Rs.11 lakh. The detailed calculations are contained in this valuation report showing the manner in which the value was arrived at. Thereafter the issue relating to sale of these two properties ie. Rampurawala building and Nandanwan was taken up in the extra ordinary general meeting of share holders of the company on 20th August, 1971 and after deliberations it was resolved to sell the Nandanvan house to Gajendrasingh Bhandari, Rajendrasingh Bhandari, Surendrasingh Bhandari and Mahendrasingh Bhandari and Rampurwala building to Randhirsingh Bhandari,

Tejsingh Bhandari and Ajitsingh. Bhandari. The relevant extract of the meeting dated 20th August, 1971 Annexure A/6 to the reply of Shrenik Bhandari is as under:-

"NANDLAL BHANDARI & SONS PRIVATE LIMITED: INDORE

20th August, 1971.

EXTRA ORDINARY GENERAL MEETING

In pursuance to the notice dated 26th July, 1971 an Extra Ordinary General Meeting of the share-holders of the company was held on Friday the 20th August, 1971 at 4 P.M at Nandanwan Kothi (Tukoganj) 1, Mahatma Gandhi Road, Indore.

The Share-holders who signed the attendance Register were present.

Shri Suganmalji Nandlalji Bhandari took the Chair.

Shri B.B.Surana, Secretary of the company read the notice convening the meeting and the explanatory statement therewith.

The Secretary thereafter read the minutes of the last meeting dated 29th June, 1971 which being found in order were approved by the Members present and Chairman signed the same.

The Chairman clarified that the meeting of the share-holders was called to pass the following Resolution as Special Resolution with or without modification as mentioned in the notice and explanatory statement given there under.

The Chairman further elucidated the explanatory note in extense discussing the present position and impending legislation regarding ceiling or urban immovable property and property of dividing properties to members of the company keeping in view the equitable distribution as well as justification for the same in support of the Resolution. As empowered by the Board of Directors in the meeting dated 26th July, 1971 a valuation of Nandanwan Kothi, 1, Mahatma Gandhi Road, Indore and Rampurawala Building 27, Mahatma Gandhi Road, Indore has been duly obtained from a Government Valuer which has been made available to all the share- holders for inspection and after due deliberation and after exchanging the views of all the members in attendance it has been considered expedient proper and in the interest of the company to allot the aforesaid buildings or their portions. Such an allotment would also liquidate considerably the deposits of such members, which are with the company such an allotment would also endeavour to main a good will amongst the share-holders who are members of same family.

After due deliberation and consultation following allotment is approved by all the members in attendance:-

1] Nandanwan Kothi,1, Mahatma Gandhi Road, Indore.

[I] Shri Gajendrasinghji Sukanmalji Bhandari.

[ii] Shri Rajendrasinghji Sukanmalji Bhandari.

[iii] Shri Surendrasinghji Motilalji Bhandari.

[iv] Shri Mahendrasinghji Motilalji Bhandari.

2] Rampurawala Building, 27, Mahatma Gandhi Road, Indore.

[I] Shri Randhirsinghji Bhanwarsinghji Bhandari

[ii] Shri Tejsinghji Bhanwarsinghji Bhandari

[iii] Shri Ajitsinghji Bhanwarsinghji Bhandari

The Chairman also emphasised the fact that all the directors of the company are interested in the aforesaid allotment and Shri Virendrasinghji Bhandari and Smt. Shantabai V. Bhandari who are absent in this meeting despite due notice of the meeting and agenda. Even at the time of meeting contact was made by telephone with Shri Virendrasinghji Bhandari and Smt. Shantabai V. Bhandari appraising them of the commencement of the meeting and their desirability to participate the deliberations of the meeting. Despite attempt to secure their presence valuable suggestions of Shri Virendrasinghji Bhandari and Smt. Shantabai V. Bhandari were not available. Considering the context of the subject and purpose of meeting, in the course of deliberation, Shri Bhanwarsinghji Bhandari expressed that he had previously discussed the matter of allotment of Nandanwan Kothi and Rampurawala building informally with Shri Virendrasinghji Bhandari and he expressed that he is not interested in any of the aforesaid Building under deliberation and he is interested in Yeshwant Niwas Palace which is partly in his occupation and whenever deliberation pertaining Yeshwant Niwas Palace would be taken and allotment is considered, then in that event, he would be interested in a portion of the said Yeshwant Niwas particularly because he is holding a big plot of land nearby. In view of the said expression of Shri Virendrasinghji Bhandari the question of allotment of Yeshwant Niwas has been deliberately omitted and if and when occasion arises for allotment and/or division of Yeshwant Niwas Palace, the views of Shri Virendrasinghji Bhandari and Smt. Shantabai V. Bhandari would be duly considered. In the context of the premises above, deliberations adverted to above regarded allotment are proceeded with. It is further clarified that if amongst the aforesaid allottees if any of them want to exchange the portion they would be permitted to exchange themselves, and keeping the above scope of allotment, the Board of Directors be given General Power to transfer Nandanwan Kothi and Rampurawala Building for transfer of portion or portions of Building on such terms and conditions and at such price as they thing fit."

[45] In the above resolution, word "allotment" is apparently referable to "sale".

[46] The prospective purchasers of above properties were having deposits in the company in liquidation. These properties have been sold to the purchasers by

different sale deeds executed on 29/8/1971, the details of which are as under:-

Sr. No.

Date of Sale deed

Sale Consideration

Name of purchaser

Page No. of the Register

NANDANVAN KOTHI

1.

29/08/1971

Rs.3,13,100/-

Gajendra Singh Bhandari

1 to 20

2.

29/08/1971

Rs.2,48,600/-

Rajendra Singh Bhandari

21 to 37

3.

29/08/1971

Rs.2,59,000/-

Surendra Singh Bhandari

38 to 54

4.

29/08/1971

Rs.2,79,300/-

Mahendra Singh Bhandari

55 to 74

Total

Rs.11,00,000/-

RAMPURAWALA BUILDING:

1.

29/08/1971

Rs.1,86,000/-

Randhir Singh Bhandari

75 to 88

2.

29/08/1971

Rs.3,00,000/-

Tej Singh Bhandari....

89 to 105

3

29/08/1971

Rs.2,00,000/-

Ajit Singh Bhandari....

106 to 119

Total

Rs.6,86,000/-

[47] The above sale deeds have been placed on record. It has been submitted by Shri Maheshwari that the purchase price on the basis of the above sale deed comes to Rs.6.23 per sq.ft. The purchaser Surendra Singh Bhandari has disclosed the purchase price of the same locality on the basis of the sale deed executed by others approximately at the same time as under:-

S.N o.

Date of Sale

Parties

Property

Area

Sale considera tion

Rate (per sq.ft)

1

02/08/71

Devi Singh(Seller) Manoharlal (purchaser
Plot No.16, Gali No.1, South Tukoganj, Indore
3200 sq.ft

9,000/-

2.81

2

03/05/71

Surendra Kale (Seller) Prabhakar (Purchaser)

Building No.2, Gali No.1, South Tukoganj, Indore

5040 Sq.ft

26,500/-

5.25

3

26/08/71

Avinash(Seller) Shobha(Purchaser

Plot No.5, Near Nath Mandir, Sought Tukoganj, Indore

2400 sq.ft

12,500/-

5.2

4

29/08/71

M/s.Nandlal Bhandari & Sons (Seller) Late Shri Surendra Singh Bhandari
(Purchaser)

Part-3 of Nandanvan, MG Road, Indore

47700 sqft

2,59,000/-

5.43

5

29/08/71

M/s.Nandlal Bhandari & Sons (Seller) Late Shri Mahendra Singh Bhandari

(Purchaser)

Part-4 of Nandanvan, MG Road, Indore

48555 sq.ft

2,79,300/-

5.75

6

28/03/69

Her Highness Maharani Usha Devi (Seller) Virendra Singh Bhandari (Purchaser)

Yeshwant Niwas Palace, Yeshwant Niwas Road (Malwa Mill Road

51800 sq.ft

1,00,000/-

1.93

[48] The sale deeds in support of the aforesaid sale have also been filed. Nothing has been pointed out by the counsel for applicant or OL to show that during the relevant time any property in the near vicinity was sold at a price higher than the price at which the subject properties have been sold. No comparative sale deed in this regard have been pointed out by the applicant or the OL. Hence, it is clear that the sale deeds were not executed at a rate which was materially below the prevailing market price.

[49] So far as the discrepancy in the valuation reports is concerned, the draft report of Joglekar dated 18/8/1971 shows that valuation of Rampurawala Building was Rs.6,86,000/- and that of Nandanwan was Rs.11,00,000/-and the final report of Shri P.G. Joglekar shows the same valuation of two properties as on 15/8/1971. The valuation report of S.V.Puranik and Co. (Pvt.) Ltd. has privately been obtained by one Mrs.Shantabai and doubts have been expressed about it.

[50] Learned counsel for the OL has also raised an issue that the Income Tax Department has held these transfers to be for inadequate consideration and has treated them to be gift but Shri Pankaj Bagadia, learned counsel has pointed out that the OL did not prosecute the case before the Income Tax Officer and was proceeded ex parte, therefore, the full and correct facts were not pointed out and now it is not open to the OL to rely upon the said order. It has also been pointed out that Section 55A of the Income Tax Act was incorporated in 1.1.1973, whereas Income Tax assessment enclosed with the OLR is for the financial year 1972 (assessment year 1972-73) and the date of transaction is 29.8.1971, therefore, in view of the judgment of the Supreme Court in the matter of Karimtharuvi Tea Estate Ltd. Vs. State of Kerala 1966(40) Income Tax Reports,

the said amended provision will have no retrospective applicability and the valuation report was wrongly obtained from Income Tax Valuer u/S.55-A and the tax authority has wrongly relied upon this report. Hence, the valuation report of S.V.Puranik and report of valuer u/S.55-A do not furnish sufficient ground to hold that subject properties were sold for inadequate consideration.

[51] There is no material on record to controvert the fact that these purchasers were having deposits with the company in liquidation. It has been pointed out by the learned counsel for purchasers that an adjustment of sale price has been done as against the deposits which they were having with the company in liquidation. Though these purchasers were closely related to the Director and Chairman of the company in liquidation, but it is not in dispute that the company itself was a closely held company in which only the family members were having the shares.

[52] Hence, it is clear that the transactions were not mala-fidely made, but they were made for valuable consideration. This is more so in the back ground of the fact that at the time of transaction, no pending litigation against the company has been pointed out. Hence, it is clear that not only the transactions were in the ordinary course of business of the company, but they were also for valuable consideration. Even otherwise the sale deeds were executed in the year 1971, thereafter almost 48 years have passed. The OL, against whom transaction can be held to be void, has filed the OLR after about 47 years, therefore, unless very strong and cogent material is pointed out, these sales cannot be held void merely on suspicion. Hence, it would not be in the interest of justice to declare these sale transactions as void.

[53] Counsel for the OL has relied upon the Single Bench judgment of the Madras High Court in the matter of P.G.Vivekanandan & Others, Archean Granites Ltd Vs. R.P.S.Benefit Fund Ltd (2003)115 Co.Cases 649 as affirmed by the Division Bench, wherein the appropriate order was passed because it was found that the transactions were not made in good faith and for valuable consideration and that property was not sold for a fair market price but finding of this Court in this regard is otherwise.

[54] So far as the judgment of Madras High Court in the case of Nattukottai Bank Ltd. (supra) is concerned, that was a case of fraudulent preference under Section 531 of the Act and in that case fraudulent preference was proved but that is not so in the present case.

[55] Hence, the arguments for holding the sale of property of Nandanwan and Rampurawala buildings as void is rejected.

[2] 10, Pipli Bazar Property

[56] By the registered sale deed dated 16/9/1971 and 17/9/1971 House No.10, Pipli Bazar, Indore has been sold by the company in liquidation to Shri Shantilal S/o Moolchand Manavat and Shri. Veerchand S/o Basantilal Manavat. Since these

sales have been made within one year prior to filing of the company petition, therefore, they fall within the scanner of scrutiny u/S.531-A of the Act.

[57] Learned counsel for OL submits that the sale deed dated 17/9/1971 refers to the proposal dated 26/7/1971 but there is no Resolution of the Board of this date regarding sale of the aforesaid property.

[58] Shri A.K.Sethi, learned Sr.counsel for applicant also submits that the sale is void because no proper publication before the sale was done and the value of the property was rupees 1.65 lakhs during the relevant time, but it has been sold at a lesser price.

[59] Shri V.K. Jain, learned Sr.Counsel appearing for the purchasers submits that the decision to sell the aforesaid property was taken by the Board and due negotiations were done and in this regard he has referred to the Resolutions dated 28/5/1956, 25/4/1966 and 27/5/1970. He has also submitted that the purchasers are not related to the Directors, Shareholders or Creditors of the company and the purchased property was occupied by the tenants, therefore, the price has been calculated accordingly.

[60] Having heard the learned counsel for parties and on perusal of the record, it is noticed that by the sale deeds dated 16/9/1971 and 17/9/1971 the aforesaid property was sold in two parts and each sale deeds was for a consideration of Rs.49,000/-. The sale deed reflects that the sale consideration was paid by cheque. The record further reflects that vide Resolution dated 28th May, 1956 passed in the meeting of the Board of Directors, a decision was taken to obtain offers for sale of House No.10, Pipli Bazar. The minutes of the said meeting reads as under:-

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23 ?? ???? ?? ????? ????????? ???? ??? ????????? ????? ???? ?? ????? ?? ????? ???? ?

[61] After the above Board meeting the offers were received and thereafter the negotiations were done and sale deed of the aforesaid property has been executed. The purchasers undisputedly are not in any way related to the Directors, Shareholders or the Creditors of the company in liquidation. No special circumstances have been pointed out due to which any favour could have been extended to these purchasers. Counsel for applicant has raised a submission that the market price of the aforesaid property during the relevant time was Rs.1.65 lakhs, but no cogent and reliable material in this regard has been pointed out. The sale deeds reflect that the tenants were residing in the building when the aforesaid property was sold, therefore, price must have been arrived at after duly taken into account this fact. It has been submitted by learned counsel for purchasers that there were 5 tenants including two Advocates in the premises which had also affected its sale price. Hence, in the circumstances of the case, I am of the opinion that there is no material to show that the sale deeds were not made in good faith or without valuable consideration as has already been noted that the company was involved in the sale of the assets and earlier also the company had also sold its own assets, therefore, the sale was in the ordinary course of business. Hence, no case for declaring the sale as void is made out.

[3] 60 (New No.61), Ada Bazar, Indore.

[62] Vide Sale deed dated 3rd November, 1971, the House No.60 (New No.61), Ada Bazar, Indore was sold by the company to Dr.Chandanmal Rajmalji Bhandari, Kundanmal Sardarmalji Bhandari, Rajendra Singh Sardarmalji Bhandari, Sajjan Singh Sardarmalji Bhandari and Vinod Kumar Sardarmalji Bhandari.

[63] Learned counsel appearing for the applicant and OL submit that there was no resolution of the Board to sell this property though valuation report was obtained, no consideration was received and no details of payment are on record and it was a bogus transaction.

[64] In spite of service of notice through publication no one has appeared for the purchasers to contest the matter.

[65] Record reflects that the above property at Ada Bazar were sold by the sale deed dated 3rd November, 1971 for purported sale consideration of Rs.49,000/- The consideration was stated to have been paid in cash. No details of receipt of cash consideration are on record. No resolution of the Board taking a decision to sell the aforesaid house at Ada Bazar has been pointed out to this Court. There is no material on record to show as to how and under what authority the sale deed was executed on behalf of the company. The sale deed refers to the proposal dated 26/7/1971 but the Resolution of that date also does not contain any such proposal to sell the house at Ada Bazar. The sale is within a period of one year prior to the date of filing of the company petition.

[66] The aforesaid facts clearly indicates that the sale was not bona-fide and it was also not in good faith, therefore, the sale deed dated 3/11/1971 in respect of the House No.62 (New No.61), Ada Bazar, Indore is declared void as against the OL and OL is permitted to take possession of this property and proceed in the matter in accordance with law.

[4] Transfer of business of Central Hotel

[67] The business of Central Hotel was being done in the first floor and second floor of Rampurawala Building. On 20th September, 1971, business of Central Hotel was transferred to Smt. Neelam Devi w/o Randhir Singh and Binadevi W/o Tejsingh, the daughter-in-laws of the Ex.Directors. As per the allegation, only the business of the hotel was transferred to these two transferees. Rampurawala Building was separately sold on 20th August, 1971 to Randhirsingh, Tejsingh, Ajit Singh etc. Hence, there was no transfer of immovable property while transferring the business of Central Hotel to daughter-in-laws.

[68] Learned counsel for OL has placed reliance upon the order dated 23rd April, 1976 passed at the time of directing advertisement of the company petition and has submitted that the transfer has already been found to be faulty. He has submitted that this order has attained finality. Referring to the balance sheet he has also submitted that the Central Hotel was running in profit, therefore, there was no need to transfer it without any consideration and no document of transfer exists.

[69] Shri A.K.Sethi, learned Sr.Counsel for the applicant submits that the transfer of business was not bona-fide, no consideration was paid though the fixtures, fitting, furnishing relating to the business was transferred. He has also submitted that the transfer has been made in favour of the daughter-in-laws of one of the Directors and that the business of Central Hotel was done in first and second floor of Rampurawala Building and even after the sale of the building on 29/8/1971 the business had continued and the transfer was made on 20th September, 1971 which itself shows that the transaction was a sham transaction.

[70] Shri Pankaj Bagadiya, learned counsel for transferees have submitted that all the assets of the Central Hotel were already sold and the hotel was already closed by the company. He has also submitted that on 20th September, 1971 new partnership was constituted by Smt. Neelam Devi and Smt. Bina Devi and they have started new business in the name of Central Hotel by making their own investment. He has submitted that the new partnership had purchased the furniture and had paid rent of the premises and that the business of Central Hotel itself was closed by the partnership firm in the year 1999.

[71] Having heard the learned counsel for parties and on perusal of the record, it is noticed that at the time of admission of the petition this court on 23rd April, 1976 had passed the order making following observations about the Central Hotel:-

"Another transaction relates to the transfer of the Central Hotel business to the daughters-in-law of Shri Bhanwarsingh Bhandari, one of the directors of the majority group, for no consideration at all. This hotel was located in the Rampurawala building mentioned above, which building itself was transferred on August 27, 1971, as already stated. The company's books show that the hotel business was carried on by the company till Sep.20,1971, on which date the hotel was closed, even after the building itself had been transferred during the previous month by the company. These facts are not in dispute. It is also not in dispute that no consideration whatsoever was paid by the transferees for this hotel business which undoubtedly had considerable value atleast as price of the furniture and other articles needed for running that large hotel. It is significant that this benefit in its entirety also went to the majority group."

but the division bench vide order dated 26/6/1981 considering the challenge to another order of the learned Single Judge dated 27th April, 1981 had observed as under:-

"The learned counsel for the appellant also assailed the finding of the learned Judge that the petitioner had justifiable lack of confidence in the working of the majority members. The finding of the learned Judge that the transfer of its two buildings by the company was not in good faith was assailed by the learned counsel for the appellant on the ground that though the appellant wanted to adduce evidence to show that those transfers were bona fide, no opportunity was given to adduce evidence in that behalf. It is true that without giving opportunity to a party to adduce evidence, to meet the allegations made against it, a finding adverse to that party cannot be given. That such an opportunity was sought and was not given was not denied on behalf of the petitioners. In these circumstances, the findings given by the learned Single Judge that the transfers of Nandanvan and Rampurawala buildings were not made by the company in good faith and that the transaction of sale of shares of Nandlal Bhandari Mills Ltd. By the company was not in the interest of the company are set aside. Learned counsel for the petitioners did not want a remand for enquiry into these questions and hence all that we can say at this stage is that the question of bona fides of various transactions entered into by the company and assailed by the petitioners in this petition shall be examined in accordance with law as and when such questions are raised. We, therefore, refrain from expressing any opinion in that behalf."

[72] Even otherwise Smt. Neelam Bhandari and Smt. Bina Devi are not bound by the said order of single bench because they were not heard at the time of passing of the said order.

[73] In view of the aforesaid, now the issue relating to the transfer of the business of the Central Hotel is to be examined by this court.

[74] Balance sheet of the Central Hotel Indore is on record (on page 221 of Volume 1) which shows that the business of Central Hotel was running in profit

as in the balance sheet of the year ending 31st December, 1971 profit of Rs.98,498.50 was shown. This balance sheet also states that the assets of business were sold to a firm on 20th September, 1971, therefore, income and expenditure of the business from 20th September onwards have not been accounted for in this unit. In OLR No.23/2018 in para 10 page 5 the details of profit are given as under:-

"10- That in respect of transfer of "business of Central Hotel" which was running in the Rampurawala Building, it is most humbly submits that said business was transfer on 20/09/1971 (without one year before the date of presentation of the petition), after the sale of Rampurawala building on 29/08/1971. Further, as observed from the copy of the C.P.No.8/81, at Page no.13, that business of Central Hotel was most profit yielding business and it reached to the profits in the year 1969, 70 and 1971 as under:-

S. No.

Year

Profit figure

1

1969

Rs.58,832/-

2

1970

Rs.37,332/-

3

1971

Rs.96,775/-

However, for wrongful gain the said property was fraudulently transferred by ex-management/ ex- directors on 20/09/1971, to their family members i.e. Smt. Neelamdevi w/o of Sh. Randhir Singh Bhandari and Smt. Binadevi w/o Sh. Tej Singh Bhandari without any consideration, within one year of presentation of petition before this Hon'ble Court".

[75] There is no deed of transfer of the business of Central Hotel on record. Smt. Neelam Bhandari and Smt. Bina Devi have taken the plea that they had started new business in the name of Central Hotel but no supporting documents have been placed on record. This petition was filed on 16/8/1972 and the business of Central Hotel was transferred on 20th September, 1971 i.e. within one year. Hence, it falls within the scrutiny of this court.

[76] The record shows that Rampurawala Building was sold on 29th August, 1971 and the business of Central Hotel was running till 20th September, 1971. The alleged new partnership was formed by Smt. Neelam Bhandari and Smt. Bina Devi and as per their own reply the Firm had commenced business on 20th September, 1971, hence it is clear that the company in liquidation had transferred the business of Central Hotel to Smt. Neelam Bhandari and Smt. Bina Devi without there being any deed of transfer and without receipt of any consideration amount. Hence, the said transfer was void u/S.531-A.

[77] Undisputedly, no immovable property was transferred but it was only the business of Central Hotel which was transferred. Since Smt. Neelam Bhandari and Smt. Bina Devi have subsequently closed down the business and they have also dissolved the Firm and there is no material on record showing the value or the assets of the business of Central Hotel which were transferred to Smt. Neelam Bhandari and Smt. Bina Devi. In view of this, OL is directed to take possession of available movable assets of the Central Hotel belonging to company which were transferred by company to Smt. Neelam Bhandari and Bina Devi.

[5] Transfer of 8299 shares of Shri Nandlal Bhandari Mills Ltd (for short "NB Mills") by the company in liquidation to Shri GajendraSingh Randhir Singh Oil Mills (for short "G.R Oil Mills" Pvt. Ltd.)

[78] The facts on record reveal that the company was holding 85% of the share of the NB Mills and NB Mills was considered a subsidiary of the company in liquidation. The company was earning substantial income from the sales commission from the NB Mills but the majority group in the company sold 8299 shares of NB Mills held by the company to GR Oil Mills. The allegation is that these shares have been sold without any consideration and the entire transaction of sale was a sham transaction. By this sale the majority group had reduced the holdings of the share capital of the company in the NB Mills in such a manner that the subsidiary position of the NB Mills was abolished and this was done to shift the virtual control of NB Mill out of the hands of the company to other majority groups. There is also an allegation that the sale price shown was much less.

[79] Learned counsel for OL submits that the company in liquidation had purchases these shares @ Rs.325/- per share and had sold it to G.R. Mills @ Rs.250/- per share and GR Oil Mills subsequently had sold it to a third party @ Rs.350/- per share. He further submits that the intention of the sale and transfer of these shares by the company was to transfer the business of the company in liquidation of "sole selling agency" to G.R. Oil Mills. He has also submitted that the company was earning profit as sole selling agency of NB Mills, therefore, there was no reason to sell the shares. He also submits that some of the Directors of the company in liquidation and G.R. Oil Mills were common and neither the G.R. Oil Mills had any funds nor the company had any fund, therefore, the entire transaction of receipt of cheque and its deposit was a bogus

transaction. He has also submitted that in terms of Sec.372 of the Companies Act and Rule 11(C) of the Rules of 1956, the G.R. Oil Mills was not competent to purchase the shares worth Rupees 20 lakhs because its share capital was only rupees Two lakhs.

[80] Shri A.K. Sethi, learned counsel for applicant has also given the details of the debit and credit entry of Rs.20.74 lakhs and has submitted that no money transaction took place while selling the shares. He has also submitted that G.R. Oil Mills had no surplus fund, therefore, the Board Resolution dated 28/7/1971 itself was bogus and that when the Resolution was made by the company in liquidation to sell the shares to G.R. Oil Mills till that time there was no Resolution of G.R. Oil Mills to purchase these shares which itself shows that the transaction was fabricated.

[81] No one has appeared for the purchasers of the share inspite of service of notice.

[82] Having heard the learned counsel for parties and on perusal of the record, it is noticed that the uncontroverted facts reflect that the company was holding 85% share of the N.B. Mills which was considered to be company's subsidiary. The company in liquidation had earned Rs.2,67,993/-, Rs.3,08,132/- and Rs.3,35,194/- respectively as sales commission as sole selling agency of N.B. Mills in the years 1969, 1970 and 1971 respectively. The record further reflects that 8299 shares of N.B. Mills were sold by the company in liquidation to G.R. Oil Mills @ Rs.250/- per share for the alleged consideration of Rs.20,74,750/-. The record further reflects that only about an year back the company in liquidation had purchased about 5000 shares of N.B Mills from M/s.Shrikrishna Chandmal @ Rs.325/-per share. There is no justification on record to show that what was the need to sell these shares at the price lower than the price for which additional shares were purchased especially when the company was earning huge commission from the mill. The uncontroverted facts further reveal that the total share capital of G.R. Mill was only Rs.Two lakhs, therefore, in terms of Sec.372 of the Companies Act, G.R. Oil Mills could not have invested Rs.20,74,750/- in the purchase of shares. Sec.372 provides as under:-

"372. Purchase by company of shares, etc; of other companies.--

[(1) A company, whether by itself or together with its subsidiaries (hereafter in this section and section 373 referred to as the investing company), shall not be entitled to acquire, by way of subscription, purchase or otherwise (whether by itself, or by any individual or association of individuals in trust for it or for its benefit or on its account) the shares of any other body corporate except to the extent, and except in accordance with the restrictions and conditions, specified in this section.]

(2) [The Board of directors of the investing company shall be entitled to invest in any shares of any other body corporate up to such percentage of the subscribed equity share capital, or the aggregate of the paid-up equity and preference share

capital, of such other body corporate, whichever is less, as may be prescribed :] Provided that the aggregate of the investments so made by the Board in all other bodies corporate shall not exceed [such percentage of the aggregate of the subscribed capital and free reserves of the investing company, as may be prescribed] :

Provided further that the aggregate of the investments made in all other bodies corporate in the same group shall not exceed [such percentage of the aggregate of the subscribed capital and free reserves of the investing company, as may be prescribed].

(3) In computing at any time the percentages specified in sub-section (2) and the provisos thereto, the aggregate of the investments made by the investing company in other body or bodies corporate [whether before or after the commencement of the Companies (Amendment) Act, 1960] up to that time shall be taken into account.

[(3A) A company, which has defaulted in the repayment of any deposit referred to in section 58A or part thereof or interest due thereupon in accordance with the terms and conditions of such deposit, shall not make any investment under this section till the default is made good.]

(4) The investing company shall not make any investment in the shares of any other body corporate in excess of the percentages specified in sub-section

(2) and the provisos thereto, unless the investment is sanctioned by a resolution of the investing company in general meeting and unless [previously] approved by the Central Government :

Provided that the investing company may at any time invest up to any amount in shares offered to it under clause (a) of sub-section (1) of section 81 (hereafter in this section referred to as rights shares) irrespective of the aforesaid percentages :

Provided further that when at any time the investing company intends to make any investments in shares other than rights shares, then, in computing at that time any of the aforesaid percentages, all existing investments, if any, made in rights shares up to that time shall be included in the aggregate of the investments of the company.

(5) No investment shall be made by the Board of directors of an investing company in pursuance of sub-section (2), unless it is sanctioned by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting, except those not entitled to vote thereon, and unless further notice of the resolution to be moved at the meeting has been given to every director in the manner specified in section 286."

[83] The facts on record reveal that the account of G.R. Oil Mills during the relevant time was only showing a sum of Rs.186.18, therefore, the very

mentioning of the fact that the G.R. Oil Mills was having surplus funds in its board resolution dated 28th July, 1971 was incorrect. Though, the G.R. Oil Mills was not having money in its account but it had issued the cheque of Rs.20,74,750/- of M/s.Bank of Baroda towards the sale consideration of the shares to the company in liquidation. On the same day the following withdrawals were reflected by the company in liquidation, though the company in liquidation was also not having any such amount in the account.

Rs.

Cheque No.

"Shri S.N.Bhandari

3,39,527.99

876866

Smt.Champabai Bhandari

1,34,896.29

876867

Shri P.M.Bhandari

2,60,253.49

875868

Smt.Nirmala Bai Bhandar

1,35,551.21

875869

Miss.Poornima Bhandari

50,981.01

875872

Miss Aruna Bhandari

29,253.15

875873

Shri Jitendra B.Bhandar

2,96,225.16

875874

Smt.Jyotsana Bhandari

217.04

875875

Smt.Bina T.Bhandari

10,128.07

180101

Miss.Smriti S.Bhandar

21,166.23

180102

Mrs.Rajni M.Bhandari

14,100.81

180103

Miss.Vandana R.Bhandari

45,270.36

180104

Miss.Madhubala R.Bhandari

43,639.00

180105

Shri Ashish R.Bhandari

1,11,019.92

180106

Shri R.B.Bhandari

40,149.40

180107

Shri Mahendra M.Bhandari

75,400.00

180108

Shri Ajeetsingh Bhandar

1,50,000.00

180109

Smt.Bhuwan C.Bhandari

80,000.00

180110

Shri Dileep R.Bhandari

2,00,000.00

180111

Rs.20,75,998.62"

[84] Since the N.B. Mills and M/s.G.R. Mills had a common bank, therefore, without possessing the amount in question and merely by show of withdrawal and deposit and by getting the book entries made, the majority group of the company in liquidation had sold the shares of M/s.N.B. Mills to M/s. G.R. Oil Mills. There is also uncontroverted allegation that two of the Directors S.N.Bhandari and B.M.Bhandari had withdrawn a sum of Rs.3,33,527.99 and Rs.2,60,253.49, but realising the mistake the two Directors had shown the withdrawal of this amount subsequently from G.R. Oil Mills and deposit with the N.B. Mills.

[85] After examining the aforesaid, this court while passing the order dated 23/4/1976 at the stage of advertisement of the petition had observed in respect of these shares of sales as under:-

"These shares were transferred to M/s.Gajendrasingh Randhirsingh Oil Mills Pvt. Ltd at the rate of Rs.250 per share when about 1 ½ years earlier they were bought at the rate of Rs. 325 per share and then sold by M/s Gajendrasingh Randhirsingh Oil Mills Pvt. Ltd. on October 12, 1973, against at Rs. 350 per share. The transfer of these shares to M/s Gajendrasingh Randhirsingh Oil Mills Pvt. Ltd in which also the majority group has a controlling interest, was again by mere transfer entries made in the company's books and no cash was obtained for them by the company. In this transaction also the majority group was able to siphon out for its own benefit, considerable amount of money by getting back its deposit from the company. The transfer of these shares had the further effect of passing the controlling interest in the Mills to another concern in which also the majority group has a controlling share, and thereby the advantage of ensuring for itself the sold selling agency of the Mills is a loss to this company."

[86] Further this court in its winding up order dated 27/4/1981 in respect of sale of these shares has held:-

"It was alleged that the company was holding 85% shares of the Mills Ltd. and because of this it was the sold selling age of the products of the Mills Ltd. It was earning substantial amounts as sales commission. However, the majority group sold 8,299 shares of the Mills Ltd. to another company, G.R. Oil Mills Pvt.Ltd. The G.R. Oil Mills Ltd. is controlled by the majority group of the respondent company and details of its constitution have been given in annex."K". The G.R. Mills Ltd. which ostensibly purchased the shares sold by the company in the Mills Ltd. had no money to do so and only hawala entries were passed by the majority group so that the company's assets were depleted without relieving it of its liability to the

main creditors. Details of this hawala entries have been given in the petition, but it is not necessary to refer to them because the factual position was admitted that payments were shown and received, only by adjustment of entries, more or less in a circular manner so that actually no cash passed and no profit came to the coffers of the company."

[87] Though, these observations were made without hearing the affected parties, therefore, the division bench by a subsequent order had held that these observations are not binding but even at this stage the affected parties have not appeared and defended the transaction. Hence, the observations made earlier support the allegations.

[88] In view of the above analysis, I am of the opinion that the sale of 8299 shares of N.B. Mills by the company of G.R. Oil Mills was not in good faith and it was not a bona-fide transaction, hence it is declared to be void as against the OL and OL is permitted to take appropriate steps.

[6] Equitable mortgage of Yeshwant Niwas Palace by the company with the State Bank of India.

[89] Yeshwant Niwas Palace was the property of the company-in-liquidation which was mortgaged with SBI on 22/11/1971. The winding-up petition was filed on 16/8/1972 and the winding up order was passed on 27/4/1981, therefore, objection is that since the mortgage is within one year of date of filing of company petition and it is not bona-fide, therefore, it be set aside.

[90] The submission of learned counsel for applicant is that equitable mortgage of Yeshwant Niwas Palace was done in favour of SBI and in terms of Section 531A of Act it is a transfer. He has submitted that in the resolution of the board dated 30/10/1971 there is no mention of Yeshwant Niwas Palace therefore, there was no authorization of board to create the equitable mortgage of Yeshwant Niwas Palace. Referring to the bank letter dated 17/11/1971 he has submitted that this communication also does not mention the Yeshwant Niwas Palace. He has also submitted that the mortgage was created to avoid payment to the preferential creditors in winding up petition within one year of the winding up order and that the events which took place after the creation of mortgage are not relevant. He has also referred to the conduct of the OL by submitting that OL has not included Yeshwant Niwas Palace in OLR 23/18 and had remained ex parte in the decree passed by DRT in this regard.

[91] Shri D.S. Panwar learned counsel for Bank has referred to reply of bank and has submitted that bank had advanced loan, executed cash credit limit etc. to the company and the amount was due on 1/4/1970 hence the company-in-liquidation had mortgaged Yeshwant Niwas Palace with the bank by creating equitable mortgage. He has further submitted that in terms of Section 58 of Transfer of Property Act, mortgage covers existing or future liability. He has referred to additional documents filed on 1/3/2019 and relied upon the judgment and decree of DRT dated 18/6/2002, the order of this court dated 5/2/1982

granting leave to proceed with the suit and application for setting aside the ex parte decree and its dismissal in default on 29/4/2004 also pointing out that MA No 70/02 for setting aside the ex parte decree was dismissed on merit and the orders were not challenged any further. He has submitted that application for revocation of leave (IA No. 3710/1989) application for direction to transfer the civil suit to the company Court (IA No. 2786/1987) and application with a prayer to decide the civil suit being IA No. 2621/87 were rejected by this court by order dated 7/5/1997 which were not challenged any further and were allowed to attain finality. He has referred to pre-mortgage affidavit of the director; deposit of mortgage deed, letter of confirmation of mortgage by two directors, certificate of registration of charge and relied upon Section 293 of Companies Act to show that in a private limited company board of directors were competent to take a decision. He further submits that OL has not challenged the mortgage and only one of the ex-director has challenged the mortgage by filing this IA. Referring to documents filed alongwith the list of documents on 27/4/2019 he has pointed out the balance sheet of of the company showing equitable mortgage and referring to the additional documents he has submitted that no objection was taken before the DRT. He has referred to clause 95 of Article of Association, clause 96 (d) thereof to show that board of director was competent to execute the mortgage and clause 38 of Memorandum of Association in respect of power to raise a borrower or secured payment by mortgage. He has submitted that mortgage was done by the company therefore, one of the directors who is the applicant in IA No. 1714/1984 is not competent to question it and in this regard he has placed reliance upon judgment of Allahabad High court in the matter of Lakshmi Ratan Cotton Mills Co.Ltd. Vs. J.K. Jute Mills Co.Ltd. Reported in AIR (1957) Company Cases 660(All).

[92] Having heard the learned counsel for parties and on perusal of the record it is noticed that undisputedly the mortgage was created within one year prior to filing of the company petition. Clause 95 of Memorandum of Association of company in liquidation provides that business of company will be managed by the directors and in terms of this clause the directors were competent to do on behalf of the company all such act as may be exercised and done by the company. Clause 96(d) of Memorandum provides as under:

"96(d)-To secure the fulfillment of any contract or agreements entered into by the company by mortgage or charge of all or any of the property of the company and its uncalled capital for the time being or in such other manner as they may think fit."

[93] Para 38 of the Objects of the company as contained and clause 3 empowers them to raise or borrow or secure payment of money in such manner and to such extent and on such terms as may seem expedient and in particular by the issue of bonds, mortgages etc.

[94] Hence in terms of various clauses of Article and Memorandum of Association, directors were competent to mortgage the property of company-in-

liquidation and borrow money.

[95] The record reflects that board of directors in its resolution dated 30th October 1971 had authorized Shri Suganmalji Nandlalji Bhandari and Shri Bhanwarsinghji Motilalji Bhandari, the two directors of the company to sign the memo of equitable mortgage for the sum not exceeding Rs. 60 lakhs as per draft which was placed before the meeting with any modification as may be approved by the bank.

[96] Reply of the bank reveals that company was availing various types of banking facilities in the form of cash credit, (hypothecation/pledge), bill purchase, export-credits, overdrafts etc for its business and for these facilities as per the bank record at the end of year 1968 to 1971 the outstanding balance amount in the account of the company in the bank was as under:

Year

Rupees

1968

49,66,213

1969

47,80,723

1970

51,49,193

1971

61,78,703

[97] It has further been disclosed by the bank that for the month of June/July, 1971 on verification of the securities by the bank huge shortage in the hypothecated pledge stocks etc. was found. Hence the bank had insisted for replacement of the security whereupon the company-in-liquidation had mortgaged Yeshwant Niwas Palace with the bank on 22/4/1971. The pre-mortgage affidavits of Suganmal Bhandari and Bhanwarsingh Bhandari dated 20/11/1971 have been placed on record by the bank offering Yeshwant Niwas Palace in mortgage. The document of deposit of title deed of Yeshwant Niwas Palace by Suganmalji Bhandari and Bhanwarsingh Ji Bhandari on 22/11/1971 has already placed on record as document no. 11 alongwith additional documents filed on 1/3/2019 by the bank. The letter dated 23/11/1971 (document 12) was signed by Suganmal Bhandari and Bhanwarsingh Bhandari to the bank confirming the creation of equitable mortgage by deposit of title deed in terms of the board resolution dated 30/10/1971, certificate of registration of modification of charge, mortgage etc. have been filed as document no. 14 in respect of Yeshwant Niwas Palace.

[98] Not only this when the company-in-liquidation had failed to repay the debt the bank had filed the suit for recovery and had applied for leave to prosecute the suit and this court by order dated 5/2/1982 had granted leave to State bank of Indore with the condition that it will not enforce the judgment against the company which it may obtain without the leave of this court. Thereafter the suit was transferred to DRT and DRT Jabalpur in TA No. 1/2001 had passed judgment and decree dated 18/6/2002 in favour of State Bank of Indore finding it entitled to recover a sum of Rs. 74,44,000/- from the company-in-liquidation. Since it was an ex parte decree, therefore, Virendra Singh Bhandari had filed MA No. 63/2002 under Section 22(2)(g) of Recovery of Debts Due to Bank and Financial Institutions Act, 1993 for setting aside the ex parte decree and the said application was dismissed in default on account of non appearance of applicant vide order dated 29/4/2004 by DRT. Another application of the similar nature being MA No. 70/02 was filed by M/s Nandlal Bhandari and Sons, Smt. Bhuwan Kumar, Jasbir Singh, Jambu Singh and Satish Kumar Singh and this application was dismissed by the DRT on merit by order dated 10/6/2004 (Document No. 26). This order was not challenged any further therefore, it has attained finality.

[99] The record further reflects that IA No. 2786/1987 was filed for transfer of pending civil suit to the High court for deciding the same on merits, IA No. 3710/89 was filed by petitioner for revocation of leave granted under the Act and IA No. 2621/87 was filed by petitioner with a prayer to this court to decide the suit filed by the bank and all these IAS were dismissed vide order dated 8/5/1997.

[100] Though bank has the decree in his favour in respect of recovery of the amount but the decree has not been executed till now and it has been pointed out by counsel for bank that IA No. 3674/18 is pending before this court at the instance of bank seeking permission to sell the said property Yeshwant Niwas Palace and recover the amount.

[101] To establish the factum of mortgage the bank has also placed on record the audited balance sheets of the company-in-liquidation for period ending on 31st December 1972; 31st December 1973, 31st December 1974 and 31st December 1975 wherein in the account of the company-in-liquidation the equitable mortgage of Yeshwant Niwas Palace has been reflected.

[102] Shri Sethi, learned Sr.Counsel for the applicant has further submitted that the applicant has not been heard by the DRT as no notice was issued to the applicant after transfer of the proceedings from the learned Addl. District Judge. These arguments have been opposed by the bank by referring to various documents on record.

[103] Having examined the record, it is noticed that the State Bank of India had filed a suit against the company as secured creditor for enforcing the mortgage properties being CS No.10-A/76 before the Addl. District Judge. After passing of the winding up order, the bank had filed the application seeking leave to

prosecute the suit and this court had granted permission vide order dated 5/2/1982. The IA No.3710/1989 was filed by the petitioners for revocation of leave and while rejecting the said IA vide order dated 8/5/1997 this court had granted liberty to the company petitioners as also to all the defendants in the suit to contest the suit on merit by observing as under:-

"Passed by this Court on 06/12/1986.

I.A. No.3487/89 has been filed by State Bank of Indore on 05/09/89 for vacating the order of stay passed by this Court on 06/12/1986 and Bank are allowed to continue the suit.

I.A. No.3710/89 has been filed by petitioners on 19/09/89 for revocation of leave granted under Sec.446 of Companies Act.

Reply to all these applications have been filed by the concerned parties. It is already mentioned that except for IA No.1714 of 84, all other Interlocutory Applications are being heard and disposed of by this order.

Before I deal with the aforesaid pending applications, it is necessary to give resume of the case.

The case has a long and chequered history. Pet No.4/72 (Virendrasingh Bhandari & others v. Nandlal Bhandari and Sons Pvt. Ltd) was filed by Petitioners, under Sec. 439 of the Indian Companies Act, 1966 (for short the 'Act') for a direction to wind up Respondent-Company, or, in the alternative to make certain directions under Sec. 397 and 398 of the Act to grant other reliefs specified in the petition. After the matter was contested hotly, the said Company petition was allowed and by an order passed by this Court on 27/04/1981, the Respondent-Company was directed to be wound up. The matter went up to the Supreme Court, but the order has been maintained. After the aforesaid order, the properties of Respondent-Company stood vested with Official Liquidator, by virtue of the provisions of the Act.

State Bank of Indore has filed a suit against the Company and others claiming itself to be a secured creditor, for enforcing the mortgaged properties. The said suit was filed on 08/03/1976 in the Court of District Judge, Indore and was registered as C.O.S. No.10-A of 76. The same is now pending disposal in accordance with law, in the Court of VIth Addl. District Judge, Indore. The suit was filed much prior to the date, Respondent-Company was directed to be wound up by this Court.

After the winding up order was passed by this Court, the Intervener-Bank approached this Court under S. 446 of the Act for leave to continue the suit. The said permission was granted to the Intervener- Bank by this Court on 05/02/1982, in view of the judgment of Supreme Court reported in 1955-SC-604(M.K. Rangnathan v. Govt. of Madras).

After the grant of leave by this Court, the Bank continued to get its evidence

recorded. The same was completed on 20/07/1983. The defendants of the said suit i.e. Company and other Guarantors were granted full opportunity and time to lead evidence, but they did not enter the witness box. Since, by the time the Company was already directed to be wound up and the Official Liquidator was in possession of the properties, he was asked to lead evidence for defendants of the suit but on account of the peculiar defence and facts of the case, Official Liquidator, did not enter the witness box to lead any evidence.

It appears that as soon as the petitioners and other applicants, who are parties to the suit, came to know that that Official Liquidator, has refused to lead any evidence as per the written statements filed by respective defendants, they approached this Court for staying further proceedings in the Trial Court of the said suit. On this application being filed, order of stay was passed by this Court on 06/12/1986, whereby the proceedings of the suit have been stayed.

I have gone through the said order dated 06/12/1986.

It appears that after the Official Liquidator, made a statement that he is unable to lead any evidence, the Trial Court was pleased to fix the civil suit for hearing arguments. On account of this fact, the Company Judge was pleased to stay further proceedings of the Civil Suit filed by the Bank.

Applications filed by the State Bank of Indore from time to time, for vacating the stay order, could not be considered for various reasons. Petitioners and applicants also filed various applications for grant of certain reliefs and directions pertaining to the suit, filed by State Bank of Indore.

I have heard the Petitioners on all the aforesaid pending applications, except IA 1714/84 and the Counsel appearing for various parties, at length.

An order was passed by this Court on 05/02/1982, granting leave to the Bank to proceed with the suit. This order was passed, on the application filed by State Bank of Indore, under S.446(1) of the Act, seeking leave of this Court to proceed with Civil Suit No.10-A of 76, pending in the Court of VI Additional District Judge, Indore. By an elaborate and detailed order, the Learned Company Judge allowed the said application and passed the order in favour of State Bank of Indore. The relevant and operative part is reproduced hereinbelow:

"The application is, therefore, allowed, leave to proceed with the Suit is granted to State Bank of Indore, subject to condition that applicant State Bank of Indore will not enforce against the Company any judgment which it may obtain, without leave of this Court."

Sd/-K.N. Shukla,

Judge

5/2/1982

Petitioner No.1 while arguing the matter himself has strenuously submitted that

Bank is not a Secured Creditor as has been alleged by it.

While considering this objection, this Court has already passed an order dated 05/02/1982. It has been held in the said order that question, whether Bank is a Secured Creditor, will also be decided in the pending suit.

Shri Pavecha, learned senior counsel appearing for State Bank of Indore, at the out-set submitted and gave an undertaking to this Court, that Bank shall raise no objections, for allowing the defendants and LRs of the defendants to lead evidence as per the written statement, or, additional written statement, or, amended written statements, filed by them from time to time. He has also submitted that for the said purpose, if they so desire, they may engage the services of Advocates of their choice, who would be permitted to participate in the suit.

In fact, in one voice, all the present defendants of civil suit have submitted that, if in the interest of justice and fair play, opportunity of contesting the matter on merits is granted, they shall have no objection, in participating in the suit.

In the considered opinion of this Court, this substantially serves the purpose of all the parties. Since, the permission has already been granted by this Court to the Bank of Indore, to continue with the suit, under S. 446 of the Act, I find that no case has been made out by the Petitioners, for revocation of the said leave. As mentioned above, they are permitted to lead evidence in support of the written statement, filed by them.

Thus, the apprehension of the contesting defendants of the suit, now appears to be misconceived and untenable, when the Bank itself is giving permission to all of them to lead evidence, without any restriction or reservation, the defendants shall be at liberty to contest the suit on merits. I, therefore, find that the Interim Order of stay, passed by this Court on 06/12/1986 deserves to be vacated. The same is hereby vacated.

In the light of the directions given above, all the aforesaid pending applications filed by Petitioner, Applicants, Interveners and Bank, stand hereby decided. The same are closed.

Matter be now listed for hearing arguments on petitioners' I.A. No.1714 of 1984, as requested by them after summer vacation, on

27th June, 1997.

CC to all.

COMPANY JUDGE"

[104] This indicates that the petitioners/applicant had full opportunity to appear in the suit of the State Bank of India. When the DRT was constituted the suit was transferred to the DRT and DRT had passed the decree dated 18th June, 2002 in TA-1/2001 in favour of the bank after considering the evidence led by the

parties. The entire proceedings were within the knowledge of the applicant, yet they had not appeared before the DRT. After examining the evidence which had come on record, the bank was found to be entitled to recover a sum of Rs.74,44,000/- with cost and interest from the defendants No.1,3 and 4 jointly and severally. Nothing has been pointed out to show that the said decree was challenged any further. Hence, inspite of the knowledge of the decree, the petitioners, other Ex-Directors and OL have allowed it to attain finality.

[105] Learned counsel for OL has taken a limited stand in respect of this mortgage property by submitting that OL had no personal knowledge of the mortgage and the Ex-Directors were given full opportunity by this court to contest the suit vide order dated 8/5/1997, therefore, the OL had not contested the matter. He has raised a technical objection that the notice from the DRT was not served to the OL. He has not contested the issue of mortgage of the property of the company in liquidation with the State Bank of India.

[106] The record reflects that the mortgage is within the knowledge of the applicant since very beginning. They were participating in the suit for recovery before the ADJ, they had contested the issue of grant of leave and they had also applied for revocation of leave before this court and it has also been pointed out by the counsel for bank referring to the proceedings of the DRT dated 26/4/2002 that they were sent notice by the DRT and were proceeded ex-parte after notice was held to be served in accordance with law. It has also been pointed out by the learned counsel for Bank that there is no averment in the winding up petition about the mortgage and in fact in para 11(h) of the winding up petition, the factum of obtaining loan from the State Bank of India has been admitted. Hence, at this stage it is not open to the applicant to raise an issue that the State Bank of India is not one of the secured creditor or the applicants did not have proper opportunity in the recovery proceedings instituted at the instance of the bank. The documents on record clearly establish that the properties in question were mortgaged by the company in liquidation with the bank and the bank has lawfully obtained the decree from the DRT which has now become final. These documents also clearly reveal that the State Bank of India is the secured creditor.

[107] The similar issue had come up before the Allahabad High Court in the matter of Lakshmi Ratan Cotton Mills Co. Ltd. Vs. J.K. Jute Mills Co. Ltd. (1957) 27 Co.Cases 660 (Allahabad) wherein the division bench has held that:-

"13- In view of the above provisions, there can be no doubt that Sri Gulab Chand Jain who was the director of the defendant company, the director of the managing agency and also a delegate of the managing agency could be authorised to enter into this transaction. Under the above circumstances, even supposing that there was no actual resolution authorising him to enter into this transaction on behalf of the defendant company either by the Board of Directors or by the Board of Managing Agents, the claim of the plaintiff who was a creditor cannot be affected. A creditor dealing with a trading company is required by law to be conversant with the terms of its Memorandum and Articles of Association

and no more. If it is found that the transaction of loan into which the creditor is entering is not barred by the charter of the Company or its Articles of Association, and could be entered into on behalf of the Company by the person negotiating it, then he is entitled to presume that all the formalities required in connection therewith have been complied with. If the transaction in question could be authorised by the passing of a resolution, such an act is a mere formality. A bona fide creditor, in the absence of any suspicious circumstances, is entitled to presume its existence. A transaction entered into by the borrowing company under such circumstances cannot be defeated merely on the ground that no such resolution was in fact passed. The passing of such a resolution is a mere matter of indoor or internal management and its absence, under such circumstances, cannot be used to defeat the just claim of a bona fide creditor. A creditor being an outsider or a third party and an innocent stranger is entitled to proceed on the assumption of its existence; and is not expected to know what happens within the doors that are closed to him. Where the act is not ultra vires the statute or the company such a creditor would be entitled to assume the apparent or ostensible authority of the agent to be a real" or genuine one. He could assume that such a person had the power to represent the company, and if he in fact advanced the money on such assumption, he would be protected by the doctrine of internal management."

[108] As per the above judgment, the bank being a bona-fide creditor and being an outsider to the internal proceedings of the company, in the absence of any suspicious circumstances, is required to be protected by the doctrine of internal management. The division bench of Patna High Court in the matter of Kumar Krishna Rohatgi and others Vs. State Bank of India and Ors. (1980) Co.Cases (50) 722 also supports the stand of the bank.

[109] Having regard to the aforesaid analysis, I am of the opinion that creation of mortgage of Yeshwant Niwas Palace by the company-in-liquidation with the State Bank is not hit by provision of Section 531A of the Companies Act.

[110] So far as the allegation made by counsel for the petitioner in respect of conduct of OL is concerned, this court need not go into that aspect of the matter having regard to the detailed analysis as contained above.

[111] Hence, I do not find any merit in the plea of the applicants that the transaction of mortgage of the property of the company in liquidation with the State Bank of India was a collusive transaction which is hit by Sec.531-A of the Companies Act. Hence, the objection in this regard is rejected.

[112] Having regard to the aforesaid, it is held that the sale of property at 60, Ada Bazar, Indore, transfer of business of Central Hotel and transfer of 8299 shares of Shri N.B. Mills to G.R. Oil Mills was not made in good faith and for valuable consideration, therefore, the same are void as against the Liquidator u/ S.531-A of the Act.

[113] IA No.1714/1984 & OLR No.23/2018 are accordingly disposed of.