Bnp Paribas vs United Breweries (Holding) Limited on 20 December, 2013

Equivalent citations: 2014 (2) AKR 129, AIR 2014 (NOC) (SUPP) 640 (KAR)

Bench: N.Kumar, Rathnakala

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IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 20th day of December, 2013

PRESENT

THE HON'BLE MR. JUSTICE N. KUMAR

AND

THE HON'BLE MRS. JUSTICE RATHNAKALA

OSA No.25 of 2013
c/w
OSA Nos. 26, 27, 29, 30 & 43 of 2013

In OSA No.25 of 2013
BETWEEN:

BNP Paribas
A Company incorporated under
The laws of the Republic of France
Having its registered office at
16 Boulevard des Italiens, 75009
Paris, France
Represented herein by its Constituted Attorneys
Mr. Sabesan Ananthanarayanan and
Mrs. Hyacinth Munshi ...Appellant

(By Ms. Fereshte Sethna, Advocate for
Sri G. Prashanth, Advocate for M/s.DMD Advocates)

AND:

1. United Breweries (Holdings) Limited
A Public Limited Company

Incorporated under the Companies Act, 1956
Having its Registered Office at
12th Floor UB Tower, UB City
No.24, Vittal Mallya Road
Bangalore - 560 001

2. Dr. Vijay Mallya
Having his residence at No.3
Vittal Mallya Road
Bangalore
Karnataka - 560 001

3. Kingfisher Finvest India Limited
A Company incorporated under the
Companies Act, 1956
Having its Registered Office at
UB Tower, 12th Floor, UB City
No.24, Vittal Mallya Road
Bangalore - 560 001

4. Diageo plc, a Foreign Company
Incorporated as a Public Limited Company
Under the laws of England & Wales
Having its Registered Office
At Lakeside Drive, Park Royal
Landon
NW 107HQ, United Kingdom

5. Relay B.V., a foreign company
Incorporated as a Private Limited Company
Under the laws of The Netherlands
Having its Registered Office
At Molenwerf 10-12, 1014 BG,
Amsterdam The Netherlands ...Respondents

(By Sri Udaya Holla Senior Counsel for
Sri Vivek Holla for M/s. Holla and Holla,
Advocates for R1, R2 and R3;
Sri Aditya Sondhi, Advocate for R4;

Sri Harish B.N. for Samrad Partners, Advocates for R5;
Sri M.T. Nanaiah, Senior Counsel for
Sri Prabhu Goud B. Tumbagi, in IA No.7/13)

This OSA is filed under Section 483 of the Companies Act, 1956 r/w Section 4 of the Karnataka High Court Act 1961, praying to call for the records in Company Application No.440 of 2013 filed in Company Petition No.248/2012 and set aside the order of the learned Company Judge dated 24th

May 2013 in Company Application No.440 of 2013 filed in Company Petition No.248 of 2012 to the extent impugned, and etc.,

OSA No. 26 of 2013
BETWEEN:

RRPF Engine Leasing Limited
Having its registered office at
65 Buckingham Gate
Landon SW1E 6AT, England
Represented herein by its
Authorised Signatory
Mr. Jitendra Panda ...Appellant

(By Sri S.S. Naganand, Senior Counsel for
Sri Harish N.N. for M/s. Aaren Associates, Advocates)

AND:

United Breweries (Holdings) Limited
Having its Registered Office at
UB Tower, Level 12, UB City
No.24, Vittal Mallya Road
Bangalore - 560 001
Karnataka
Represented by its Managing Director ...Respondent

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(By Sri Udaya Holla Senior Counsel for
Sri Vivek Holla for M/s. Holla and Holla, Advocates;
Sri M.T. Nanaiah, Senior Counsel for
Sri Prabhu Goud B. Tumbagi, in IA No.5/13)

This OSA is filed under Section 483 of the Companies Act, 1956 r/w Section 4 of the Karnataka High Court Act 1961, praying to set aside the impugned order dated May 24, 2013 passed by the learned Company Judge in Company Application No.441 of 2013 in Company Petition No.121 of 2012 and all action, if any, taken pursuant thereto, and grant such other reliefs as this Hon'ble Court deems fit to grant in the facts and circumstances of the case.

OSA No. 27 of 2013
BETWEEN:

Rolls-Royce & Partners Finance Limited

Having its registered Office at
65 Buckingham Gate
Landon Sw1E 6AT, England
Represented herein by its
Authorised Signatory
Mr. Jitendra Panda ...Appellant

(By Sri S.S. Naganand. Senior Counsel for
Sri Harish N.N. for M/s. Aaren Associates, Advocates)

AND:

United Breweries (Holdings) Limited
Having its Registered Office at
UB Tower, Level 12, UB City
No.24, Vittal Mallya Road
Bangalore - 560 001
Karnataka
Represented by its Managing Director ...Respondent

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(By Sri Udaya Holla Senior Counsel for
Sri Vivek Holla for M/s. Holla and Holla, Advocates;
Sri M.T. Nanaiah, Senior Counsel for
Sri Prabhu Goud B. Tumbagi, in IA No.5/13)

This OSA is filed under Section 483 of the Companies Act, 1956 r/w Section 4 of the Karnataka High Court Act 1961, praying to set aside the Impugned Order dated May 24, 2013 passed by the Learned Company Judge in Company Application No.437 of 2013 in Company Petition No.122 of 2012 and all action, if any, taken pursuant thereto, and grant such other reliefs as this Hon'ble Court deems fit to grant in the facts and circumstances of the case.

OSA No. 29 of 2013
BETWEEN:

AVIONS DE TRANSPORT REGIONAL GIE
1 Allee Pierre Nadot
31172 Blagnac, France
Represented herein by its Attorney
Mr. Sudarshan Pradhan ...Appellant

(By M/s. Murali & Co., Advocates)

AND:

United Breweries (Holdings) Limited

UB City, Level 12, UB Tower
24, Vittal Mallya Road
Bangalore - 560 001 ...Respondent

(By Sri Udaya Holla Senior Counsel for
Sri Vivek Holla for M/s. Holla and Holla, Advocates
Sri M.T. Nanaiah, Senior Counsel for
Sri Prabhu Goud B. Tumbagi, in IA No.4/13)

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This OSA is filed under Section 483 of the Companies Act, 1956 r/w Section 4 of the Karnataka High Court Act 1961, praying to partly set aside the impugned Order of May 24, 2013 passed in CA No.439 of 2013 to the extent that the respondent be directed to deposit in the Hon'ble Court the entire sale proceeds realized from the sale of shares (13,612,591 equity shares) of USL made pursuant to the impugned order or as may be determined after July 22, 2013 by the Hon'ble Court exclusively for the benefit of the Appellant pending disposal of the Company petition and pass such other and further order as this Hon'ble Court may deem fit and proper in the facts of the case.

OSA No. 30 of 2013
BETWEEN:

IAE International Aero Engines AG
Former Address:
628 Hebron Avenue
Suite 400, Glastonbury
Connecticut 06033
USA

New Address:
400 Main Street M/s. 121-10
East Hartford
Connecticut 06108
USA
Represented by its authorized signatory
Thomas K. Wedeles ...Appellant

(By Sri Shreyas Jayasimha, Advocate for
M/s. AZB Partners, Advocates)

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AND:

United Breweries (Holdings) Limited
Having its Registered Office at
UB City, Level 12, UB Tower
24, Vittal Mallya Road
Bangalore - 560 001
Represented by its Managing Director ...Respondent

(By Sri Udaya Holla Senior Counsel for
Sri Vivek Holla for M/s. Holla and Holla, Advocates;
Sri M.T. Nanaiah, Senior Counsel for
Sri Prabhu Goud B. Tumbagi, in IA No.6/13)

This OSA is filed under Section 483 of the Companies Act, 1956 r/w Section 4 of the Karnataka High Court Act 1961, praying to set aside the Impugned Order dated May 24, 2013 passed by the Hon'ble Company Court in Company Application No.438 of 2013 in Company Petition No.57 of 2012 and grant such other reliefs as this Hon'ble Court deems fit to grant in the facts and circumstances of the case.

OSA No. 43 of 2013
BETWEEN:

1. State Bank of India
A Banking Corporation constituted
under the State Bank of India Act
1955 (23 of 1955)
Having its Corporate Centre at
State Bank Bhavan
Madame Cama Road
Nariman Point
Mumbai - 400 021

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And having its Industrial
Finance Branch at
61, Residency Plaza
Residency Road
Bengaluru 580 025

2. Bank of Baroda
A Body corporate under the
Banking Companies (Acquisition and
Transfer for Undertaking Act 1970
(5 of 1970)
Having its head office at

Baroda House
P.B. No.506, Mandavi
Vadodara - 396 006

Acting through its Branch
Office at P.O. Box 11745
Samata Building
General Bhosale Marg
Nariman Point
Mumbai - 400 021

3. Bank of India
A body corporate constituted under
The Banking Companies
(Acquisition & Transfer of
Undertakings) Act, 1970 and
Having its Head Office at
Star House, C-5, G Block
Bandra Kurla Complex
Bandra (E), Mumbai - 400 051
And having its large Corporate Branch
A Ground Floor, Oriental Building
364, D.N. Road, Fort
Mubai - 400 001

4. Central Bank of India
A body corporate constituted

under the Banking Companies
(Acquisition and Transfer
Undertakings) Act, 1980 and
Having its Corporate Office at
Chandramukhi, Nariman Point
Mumbai - 560 021

And having its Corporate Finance
Branch (earlier known as
Industrial Finance Branch) at
Chandramukhi, Nariman Point
Mumbai - 400 021

5. Corporation Bank
A body corporate under
Banking Companies (Acquisition and
Transfer of Undertaking) Act, 1980
(40 of 1980 having its
Corporate office at
Mangaladevi Temple Road
Pandeshwar

Mangalore - 575 001

And having its Industrial Finance
Branch at Rallaram Memorial Bldg.,
1st Floor, CSI Compound
Mission Road
Bengaluru- 560 027

6. The Federal Bank Limited
A Company within the
Meaning of the Companies Act, 1956
Having its registered office at
Federal Towers
Aluva - 683 101, Kerala

And having its Branch Office
At St. Marks Road
9, Halcyon Complex

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St. Marks Road
Bangalore - 560 001

7. IDBI Bank Limited
A Company incorporated
under the Companies Act, 1956 and
a Banking Company within the
meaning of the Banking Regulation
Act, 1949
Having its Head Office at
IDBI Towner, WTC Complex
Cuffe Parade
Mumbai - 400 005
Maharashtra, India
And acting through its Branch Office
At Corporate Banking Group-FAMG
9th Floor, IDBI Towner
WTC Complex
Cuffe Parade, Colaba
Mumbai-400 005

8. Indian Overseas Bank
A body corporate under the
Banking Companies
(Acquisition and Transfer of
Undertaking) Act, 1970
Having its Central Office at
763, Anna Salai
Chennai - 600 002
And its Branch Office at

'Harikripa', 26-A, S.V. Road
Santacruz (W), Mumbai - 400 054

9. Jammu & Kashmir Bank Limited
A Banking Company incorporated
Under the provisions of the
Jammu & Kashmir Companies
Act No.XI of 1977 (Samvat)

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Having its Registered Office at
Corporate Headquarters
Maulana Azad Road
Srinagar, Kashmir - 190001
And its Branch Office at
Syed House, 124
S.V. Savarkar Marg
Mahim (West), Mumbai 400 016

10. Punjab & Sind Bank
A body corporate under
Banking Companies
(Acquisition and Transfer of
Undertaking) Act 1980
Having its Head Office at
21, Rajendra Place
New Delhi 110 008
And having amongst others
A Branch Office at
J.K. Somani Building
British Hotel Lane
Fort, Mumbai - 400 023

11. Punjab National Bank
A body corporate under the
Banking Companies
(Acquisition and Transfer of
Undertaking) Act, 1970 (5 of 1970)
Having its Central Office at
7, Bhikaji Cama Palace
New Delhi - 110 607
Acting through its Large
Corporate Branch
At Centenary Building, 28
M.G. Road
Bengaluru - 560 001

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12. State Bank of Mysore
A body corporate constituted
Under the State Bank of India
(Subsidiary Banks) Act, 1959
Having its Head Office at
Kempe Gowda Road
Bengaluru - 560 009
And its Corporate Accounts Branch
At No.18, Ramanashree Arcade
M.G. Road
Bangalore - 560 001

13. UCO Bank
A body corporate constituted
under the Banking Companies
(Acquisition & Transfer of
Undertakings) Act, 1970
Having its Head Office at
10, BTM Sarani
Kolkata - 700 001
West Bengal, India
And its Branch Office at
1st Floor, 13/22
K.G. Road, Bengaluru - 560 009
Appellant Nos. 1 to 13
Represented by
Mr. S. Ranga Vittal
Age 49 years
S/o Mr. C.N. Srinivasan
Assistant General Manager
& Relationship Manager
AMT IV (SMG-V)
State Bank of India
Having its Branch at
61, Residency Plaza
Residency Road
Bengaluru 580 025 ...Appellants

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(By Sri George Joseph & Sri Rayappa Y. Hadagali for
M/s. Dua Associates, Advocates)

AND:

1. United Breweries (Holdings) Limited Regd.
Regd. Office at UB City
Level 12, UB tower 24
Vital Mallya Road
Bangalore - 560 001

2. Rolls Royce & Partners Finance Limited
Regd. Office at 65
Buckingham Gate
Landon SW 1E 6AT
England

3. RRPF Engine Leasing Limited
Regd. Office at 65
Buckingham Gate
Landon SW 1E 6AT
England

4. BNP Paribas Regd.
Office at 16
Boulevard Des Italiens 75009
Paris, France

5. Avions De Transport Regional G.I.E.
1, Alle Pierre Nadot
31172 Blagnac
France

6. IAE International Aero Engines AG
628 Hebron Avenue
Suite 400, Glastonbury
Connecticut 06033
USA

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7. Relay B.V.
A Private Limited Company
Incorporated under the laws of
Netherlands
Registered Office: Molenwerf 10-12
1014 BG, Amsterdam, the
Netherlands

8. Diageo Plc
Lakeside Drive
Park Royal
Landon
NW107HQ
United Kingdom

9. Diageo Finance Plc
Lakeside Drive
Park Royal
Landon
NW107HQ

United Kingdom

10. Diageo Capital Plc
Edinburgh Park
5 Lochside Way
Edinburgh
EH12 9DT
United Kingdom

11. Tanqueray Gordon and
Company Limited
Lakeside Drive
Park Royal
Landon
NW107HQ
United Kingdom

12. ILFs Financial Services Ltd.,
3rd Floor, D Quadrant

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IL&FS Financial Centre
Plot No.C-22, G Block
Bandra Kurla Complex
Bandra (East)
Mumbai 400 051

13. Religare Finvest Ltd.,
D3, P3B
District Centre
Saket
New Delhi 110 017

14. Capital First Limited
India Bulls Finance Centre
Tower II, 15th Floor
Senapati Bapat Marg
Elphinstone Road (W)
Mumbai - 400 013

15. IFCI Ltd.,
IFCI Tower
61 Nehru Place
New Delhi 110 019

16. Yes Bank Limited
YES BANK Limited
Nehru Centre
9th Floor
Discovery of India

Dr. A.B. Road
Worli
Mumbai - 400 018

17. Housing Development Finance
Corporation Limited
Ramon House, 169, Backbay
Reclamation, H T Parekh Marg
Churchgate
Mumbai 400 020

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18. Motilal Oswal Financial Services Limited
Palm Spring Centre, 2nd Floor
Palm Court Complex
New Link Road, Malad (West)
Mumbai - 400 064

19. LKP Finance Limited
203, Embassy Centre
Nariman Point
Mumbai - 400 021

20. SICOM Limited
Solitaire Corporate Park
Building No.4, 6th Floor
Guru Hargovindji Road
(Andheri Ghatkopar Link Road)
Chakala
Andheri (East)
Mumbai - 400 093

21. SREI Infrastructure Finance Limited
Vishwakarma
86C, Topsia Road (South)
Kolkata - 700 046

22. Narayan Sriram Investments Pvt. Ltd.,
Continental Chambers
3rd Floor, 142, Mahatma Gandhi
Chennai - 600 034
Tamil Nadu

23. ICICI Bank Limited
Landmark
Race Course Circle
Vadodara
Gujarat - 590 007

24. ECL Finance Limited

Edelweiss House

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Off. C.S.T. Road
Kalina
Mumbai - 400 098
Maharashtra ...Respondents

(Respondents No.7 to 24 are arrayed as necessary parties as they are beneficiaries of the impugned order though they were not parties to the proceedings before the Learned Single Judge)

(By Sri Udaya Holla Senior Counsel for Sri Vivek Holla for M/s. Holla and Holla, Advocates for R1;
Sri S.S. Naganand, Senior Counsel for Sri Harish N.N. for M/s. Aaren Associates, Advocates for R2 and R3;
Ms. Fereshte Sethna, Advocate for Sri G. Prashanth, Advocate for M/s. DMD Advocates for R4;
Sri C. Muralidhar, Advocate for R5;
Sri Shreyas Jayasimha, Advocate for M/s. AZB Partners, Advocates for R6;
Sri Harish B.N. for Samrad Partners, Advocates for R7;
Sri Aditya Sondhi, Advocate for R8 to 11;
Sri Aditya Narayan, Advocate for R12;
Sri A. Murali, for J. Sagar Associaes Advocate for R13 & 24 ;
Sri Vikranth Hegde & Ms. Hina Lawence for M/s. Poovayya & Co., Advocates for R16;
Sri Kumar & Bhat, Advocate for R17;
Sri Sundar Raman, Advocate for R21;
M/s. Gerohalli Law Associates for R22;
Sri M.T. Nanaiah, Senior Counsel for Sri Prabhu Goud B. Tumbagi, in IA No.5/13)

This OSA is filed under Section 483 of the Companies Act, 1956 r/w Section 4 of the Karnataka High Court Act 1961, praying to set aside the order dated 24-05-2013 passed by the learned single Judge in Company Application No.437, 441, 440, 439 and 458 and 2013 in Company

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Petition No.122, 121, 248, 185 and 57 of 2012 and set aside all actions taken by the respondent No.1 pursuant to the order dated 24-05-2013 passed by the learned Single Judge

in Company Application Nos.437, 441, 440, 439 and 438 of 2013 in Company Petition Nos.122, 121, 248, 185 and 57 of 2012, and etc.,

These OSAs coming on for further hearing this day, N. KUMAR J., delivered the following:

JUDGMENT

All these appeals are preferred against the common order passed by the learned Company Judge in Company Application Nos.437, 441, 440, 439 and 438/2012 in Company Petition Nos.122, 121, 248, 185 and 57/2012 decided on 24th May 2013, where on an application filed under Section 536(2) read with Section 537(1) of the Companies Act, 1956 (for short hereinafter referred to as 'the Act'), granted permission to the Company to sell 13,612,591 equity shares of United Spirits Limited (USL) held by it, to Relay B.V. and Diageo Plc and others acting in concert, at a sale price of Rs.1,440/- per equity share and other consequential directions. Therefore, all these appeals are taken up for consideration together.

2. For the purpose of convenience, the parties are referred to as they are referred to in the Company Petitions. O.S.A.NO.25/2013 / COMPANY PETITION NO.248/2012:

3. The petitioner - BNP Paribas is a Company organized and existing under the laws of Republic of France, which has a registered office at 16, Boulevard Des, Italiens- 75009, Paris, France, which is a Bank. The petitioner financed the acquisition of three Aircrafts by Kingfisher Aero. However, they secured guarantees from the respondent - United Breweries (Holdings) Limited. On account of default committed by the Kingfisher, the petitioner became entitled to invoke the guarantees issued by the respondent. The total amount due to the petitioner as on 2nd November 2012 is in a sum of US$ 26,634,728 which roughly amounts to Rs.180 crores. Therefore, the petitioner invoked the guarantee and called upon the respondent to make the aforesaid payment. When the said amounts were not paid, petitioner through its Advocate issued a statutory notice of winding up dated 5th July 2012 under Sections 433 and 434 of the Act, calling upon the respondent to make payment of the said sum of US$ 26,634,728 to the petitioner within 21 days from the date of receipt of the statutory notice. The statutory notice was duly served upon the respondent by registered post acknowledgement due and hand delivery at its registered office and the office stated in the guarantee deed and was received by the respondent on 6th July 2012. On receipt of the said legal notice, the respondent has failed to repay the sums demanded or respond in any manner whatsoever to the aforesaid statutory notice for winding up. Therefore, on 5th November 2012, the petitioner presented this petition for an order of winding up the respondent under the provisions of the Companies Act and for other consequential reliefs. O.S.A.NO.26/2013 / COMPANY PETITION NO.121/2012

4. The petitioner - RRPF Engine Leasing Limited is a Company incorporated under the laws of England, having its registered office at 65 Buckingham Gate, London SW1E 6AT, England and is engaged in the business of renting air transport equipments, including aircraft engines.

5. The petitioner and its holding company, Rolls- Royce & Partners Finance Limited entered into a Master Engine Lease Agreement dated September 30, 2005, with Kingfisher Airlines Limited. The said master agreement was executed in order to provide for a standing facility permitting the lessee to lease aircraft engines and associated equipment from the petitioner & RRPF from time to time under a lease agreement incorporating the terms of the Master Agreement and any appropriate amendments specified in the lease agreement. Pursuant to the master agreement, petitioner & RRPF and the lessee - Kingfisher i.e., respondent, entered into agreements for leasing several aircraft engines. In terms of the aforesaid master agreement, they entered into lease agreement No.1 dated 30th September 2005; lease agreement No.2 dated 30th September 2005 and lease agreement No.4 dated 28th March 2007.

6. Their case is that, the respondent has executed a corporate guarantee dated 27th September 2007 in favour of the petitioner & RRPF for the amounts due under the aforesaid agreements. In fact, three separate deeds of corporate guarantee in respect of each lease were executed. The lessee - Kingfisher defaulted in making payments of amounts due and payable under the lease agreements. The petitioner and RRPF made several demands for payment to the lessee and the respondent. However, the respondent neglected to pay the amounts due to the petitioner - RRPF. Thereafter by letter dated 8th February 2012, the petitioner and RRPF called upon the lessee to make payment of the outstanding amount aggregating to an amount of US$ 527,413.97 equivalent to Rs.2,92,76,749.47 towards outstanding lease rental and US$ 5,855 equivalent to Rs.3,25,011.05 towards default interest, aggregating to US$ 533,268.97 equivalent to Rs.2,96,01,760.52. The said letter of demand was duly served on the respondent. One more letter was sent on 20th March 2012 claiming the said amounts, which was also not complied with. Therefore, the petitioner and RRPF were constrained to issue a demand notice dated March 28, 2012 under Section 434 of the Act delivered to the respondent on March 29, 2012 at its registered office for payment of the aforesaid amounts. Respondent was put on notice that in case the amount demanded remained unpaid for a period of three weeks after receipt of the demand, they would be constrained to initiate appropriate legal proceedings against the respondent including winding up proceedings pursuant to Section 433, read with Sections 434 and 439 of the Act. It was duly acknowledged by the respondent. The respondent has never disputed or denied the debts owed to the petitioner. The petitioner terminated the Engine Agreement Nos.1 and 4 by notice dated 29th March, 2012, Thereafter, presented this petition for winding up of the respondent - Company on the ground of their inability to pay debts.

O.S.A.NO.27/2013 / COMPANY PETITION NO.122/2012:

7. The petitioner - Rolls-Royce & Partners Finance Limited is a Company incorporated under the laws of English, having its registered office at 65, Buckingham Gate, London SW1E 6AT, England and is engaged in the business of providing short, medium and long-term spare aircraft engine leasing solutions.

8. The petitioner and its subsidiary Company, RRPF Engine Leasing Limited entered into a Master Engine Lease Agreement dated September 30, 2005 in order to provide for a standing facility permitting the lessee - Kingfisher, to take on lease aircraft engines and associated equipment from the lessor from time to time, under a lease agreement incorporating the terms of the Master

Agreement and any appropriate amendments specified in the lease agreement. In pursuance of the Master Agreement, the petitioner and the lessee entered into agreements for leasing of several aircraft engines. Accordingly, agreement No.1 and agreement No.2 dated 30th September 2005 and agreement No.4 dated March 28, 2007 are entered into.

9. The respondent has executed a Corporate Guarantee dated September 27, 2007 in favour of the petitioner. Separate agreements in respect of each of these lease agreements were executed. The Kingfisher - lessee committed default in making payments of amounts due and payable under the lease agreements. They made several demands on the lessee as well as the respondent. Respondent neglected to pay the amounts due to the petitioner. A letter dated 8th February 2012 was issued calling upon the respondent to pay US$ 10,437,866/- amounting to Rs.57,94,05,941.70. The said demand notice was duly served on the respondent and it was also informed that in case of default, proceedings will be initiated for winding up of the Company under Section 433 read with Sections 434 and 439 of the Act. The said notice was duly served. The respondent did not dispute the amount claimed nor made any payment. Therefore, they were constrained to file this petition for an order of winding up of the Company on the ground that the respondent is unable to pay the debts.

OSA NO. 30/2013/ COMPANY PETITION NO. 57/2013

10. The petitioner is a company organized and existing under the laws of Switzerland, having its registered office at Homburger AG, Prime Tower, Hardstrasse 201, CH 8005 Zurich, Switzerland and principal place of business at 628, Hebron Avenue, suite 400, Glastonbury, Connecticut 06033, USA. They are in the business of manufacturing, owning, managing, maintaining, selling and leasing aircraft engines and related equipment and is also engaged in all general business activities related and incidental thereto. The petitioner along with other third parties, has leased number of aircraft engines to Kingfisher, a subsidiary of the respondent Company. In this regard an agreement came to be executed on 27.10.2010, which was amended on 25.01.2011 and again on 14.07.2011. They also signed an agreement for repayment of outstanding amounts due and payable on 27.10.2010. In order to secure the outstanding amount, the respondent issued separate guarantees to cover the outstanding for the V2500 Rework and the repayment agreement referred to above. These guarantees are unconditional and irrevocable and made the respondent liable as principal debtor. Under the guarantee agreement No.1, the amount guaranteed was US$ 27,804,678 and under guarantee agreement No.2, the maximum guaranteed amount was US$ 18,500,000. The respondent company through numerous correspondence and mails acknowledged his indebtedness and promised to pay the outstanding amount due to the petitioner. When the amounts were not paid, the petitioner on 15.02.2012, invoked the said two guarantees and called upon the respondent to pay the said amount. The respondent failed and neglected to pay nor responded to the letters. Therefore, the petitioner served two legal notices both dated 29.02.2012 under Sections 434 and 439 of the Companies Act calling upon the respondent to pay the aforesaid amounts along with the interest within 21 days from the date of receipt of the notice failing which, they will initiate proceedings for violating the Guarantee Agreement. The notice was duly served on the respondent Company. The respondent sent no reply nor complied with the demand made therein. Therefore, this petition is filed seeking winding up of the respondent Company on the ground that they are unable to pay the debts.

O.S.A.NO.29 OF 2013/COMPANY PETITION NO.185/2012

11. The petitioner - Avions de Transport Regional GIE is a company organized and existing under the laws of France having its registered office and principal place of business at No.1, Allee Pierre Nadot, 31172 Blagnac, France.

12. The petitioner manufactures, owns, manages, maintains, sells and leases aircraft and related equipment and engages in any and all general business activities related and incidental thereto. The petitioner, along with various other third parties, leased a number of aircraft to Kingfisher, the then subsidiary of the respondent company. Under an agreement dated July 21, 2006 called "the Global Maintenance Agreement" the petitioner incurred certain expenses and costs in maintaining various aircraft and supply of spare parts to Kingfisher. Kingfisher and the petitioner signed an agreement for payment of outstanding amounts due and payable i.e., the Payment Agreement on 22.9.2011. The outstanding amount due from Kingfisher to the petitioner was US$ 20,988,224.42. Under clause 12 of the Payment Agreement, Kingfisher was required to provide the petitioner a corporate first demand guarantee of the respondent. Accordingly, respondent issued a corporate First Demand Guarantee dated October 14, 2011 guaranteeing thereby as a principal debtor the payment obligations of Kingfisher under the Payment Agreement. The guarantee is unconditional and irrevocable and made the respondent liable to payment of a maximum amount of US$ 25,000,000. Kingfisher committed default in payment. The Payment Agreement was terminated on March 22, 2012. Thereafter, the petitioner invoked on March 23, 2012 the guarantee demanding the respondent to pay a sum of US$ 19,021,455.78 due at that time. When the respondent did not pay the said amount, a legal notice dated August 3, 2012 under Sections 434 and 439 of the Companies Act calling upon the respondent to pay the outstanding amount of US$ 16,899,970.60 along with interest was issued. It was notified to them that in default of the said payment they would be constrained to file a petition for winding up of the company. The said legal notice was served on the respondents. The respondents have neither sent any reply nor paid the said amount. Therefore, the petitioner was constrained to file this petition for winding up of the respondent company on the ground of inability to pay debts.

13. In all these Company petitions, the common respondent is United Breweries (Holdings) Limited, a public limited company, incorporated under the Companies Act, 1956, having its registered office at 12th Floor, UB Tower, UB City, No.24, Vittal Mallya Road, Bangalore - 560 001, India. The respondent is carrying on business as a trading, real estate development and investment holding company, and reportedly holds inter alia a 24.46% promoter group stake in Kingfisher Airlines Limited, which at the material time was its subsidiary. The share capital of the respondent is Rs. 100 crores divided into 10 crores equity shares of Rs.10/- each. As clearly set out in the petitions, the petitioners as a pre-condition to financing the acquisition of three aircraft by Kingfisher, secured guarantees from the respondent, for due repayment of the amounts advanced. Upon defaults committed by Kingfisher, the petitioners have invoked the guarantees issued by the respondent. When the respondent failed to honor the demands of the petitioner made under such guarantees the aforesaid petitions for winding up of the respondent is filed under Section 439 (1)(b) read with Sections 433 (e), (f), 434 and 450 of the Companies Act, 1956.

14. In all these company petitions, notice was ordered. The respondent Company entered appearance through its Counsel. They have filed detailed statement of objections traversing all the allegations made in the company petitions and denying their liability as claimed by the petitioner. The arguments were addressed by the petitioners regarding admission. The argument of the respondent was also heard. However, before their arguments could be concluded, the respondent filed an application under Section 536(2) r/w. Section 537(1)(b) of the Companies Act, 1956 r/w. Rules 6 and 9 of the Companies (Court) Rules, 1959 for permission to sell to Diageo PLC/Relay BV upto 13,612,591 equity shares of United Spirits Limited (USL) held by the respondent. In the said application, they have stated that on 15.01.2013, the respondent Counsel made the following oral statement before the company Court:-

> "The Respondent (UBHL) agrees not to alienate its investments other than those:-
>
> (a) already secured by facilities availed of from various Institutions and Banks pledging/mortgaging/securitizing the company's investments in shares in other body corporates and
>
> (b) specifically those United Spirits Limited (USL) shares that are already contracted to be sold in terms of the Concluded deal with Diageo."

15. On the basis of the aforesaid statement, which was accepted by the counsel for the petitioner, the Court was pleased not to pass any interim orders.

16. On 15.03.2013, the respondent filed an affidavit placing on record that the shares of USL which was held by the respondent and which have been mortgaged/ pledged/hypothecated in favour of various financial institutions and banks, have been agreed to be sold to Diageo Group at a price of Rs.1440/- per share, as per a contract which was concluded long back. The requisite approvals of the Competition Commission of India (CCI) had been granted and securities and Exchange Board of India (SEBI) has also cleared the open offer by the Relay BV in respect of the said transactions. The copies of the said approvals and clearance were also enclosed. Subsequently, on 21.03.2013, the RBI has given the requisite permission for the Diageo transaction and a copy of the permission was also enclosed. On 02.04.2013, in company petition No.122/2012 and connected petitions, the Company Court was pleased to direct the respondents to make proposal to the Court. Learned Counsel for the respondent on 08.04.2013, submitted that subject to the Company Court permitting the respondent to sell, dispose of and/or to procure the sale or disposal of up to 13,612,591 equity shares in USL held by the respondent to Diageo PLC as well as certain immovable properties of United Breweries City, Bangalore, the respondent was ready and willing to deposit or cause to be deposited in this Court an aggregate amount of Rs.200 crores following the completion of the Diageo transaction (Rs.119 crores) and upon completion of the sale of certain immovable properties or a part thereof of the respondent (Rs.81 crores) in order to demonstrate the bona fides of the respondent but without admitting any liability pending the hearing and final disposal of the various company petitions filed against the respondent in the Company Court. However, as some technical objections were raised by the learned Counsel for the petitioner, the respondent was constrained to file the said application.

17. In the application, it is further stated that the respondent in order to unlock value and for the purpose of paying off all the banks/financial institutions had agreed to sell 13,612,591 equity shares of USL in favour of Diageo PlC and/or its nominee/subsidiary Relay BV together with Diageo at a price of Rs.1440/- per share, as per the contract entered into, inter alia between the respondent and Diageo PLC, on 09.11.2012. The said contract was entered into in the ordinary course of business of the respondent. The average price of the shares of USL prevailing in the Bombay Stock Exchange for 12 months period just preceding the date of contract was Rs.762/- per share. On the date of the contract, the share price was Rs.1,360/- following the execution of the contract with Diageo PLC, the share price of USL has increased and is currently Rs.1,900/- per share. In fact, the share price of USL has increased tremendously on the basis of the proposed transaction with Diageo PLC. If the transaction with Diageo goes through, there would be a further increase in the net worth of the respondent, which would be in a better position to pay of its creditors. In the event of the sale not going through, the share prices of USL would go down to far less than the price prevailing as on the date of the contract, between the respondent and Diageo Plc/Relay BV, which will severely affect the net worth of the respondent and would also adversely affect the shareholders and creditors of the respondent Company as well. The delay in the completion of the transaction so far as is primarily on account of the time required for obtaining the required statutory approvals for the said selling of shares.

18. The CCI, SEBI and RBI have granted respective approvals for selling USL shares by the respondent to Diageo Plc/Relay BV. The Diageo transaction is in public knowledge. The bona fides of the Diageo transaction and it being in public interest is demonstrated by the approvals of the CCI, RBI and open offer clearance by SEBI.

19. Then they have set out in para No.6 of the application that equity shares of USL which are held by the respondent and which are proposed to be sold to Diageo Plc/Relay BV, have been pledged in favour of various financial institutions and Bank and the pledge would be released by these institutions against settlement of the following amounts due to them:

HDFC	75.00
Motilal	40.73
LKP	71.53
SICOM	193.66
Future	161.59
ILFS	155.47
IFCI	160.00
Religare	110.00
Edelweiss	200.00
HDFC Bank	23.00
Yes Bank	219.65
SREI	35.00
Narayan Shriram	5.00
ICICI	145.00
TOTAL	1,595.63

20. The secured creditors of the respondent and lenders whose consent is required (specified above) have a prior claim over the sale proceeds of the shares to be sold by the respondent to Diageo. However, considering the price at Rs.1,440/- per equity share, the sale price receivable for the said shares under the Diageo transaction is Rs.1,714.79 crores (net of tax, brokerage and legal fees) and the same will exceed the dues and payments of the above mentioned secured creditors and other lenders (amounting to total of Rs.1,595.63 crores) whose consent is required to proceed with the transaction for selling shares to Diageo. In exercise of its right of redemption the respondent company is entitled to require these secured creditors to sell the shares over which they claim security to sell to Diageo Group at the agreed price of Rs.1,440/- per equity share and which sale proceeds will exceed to the amount claimed by the secured creditors which is due from respondent prorate, which will leave a balance sale proceed which will come into the hands of the respondent Company, being an amount of Rs.119.16 crores.

21. As a result of sale of shares and consequent value unlocked through the Diageo transaction, the net worth of the respondent has increased exponentially, to Rs.7,656 crores, as certified by Grant Thornton India LLP of the Grant Thornton Group, one of the leading international accounting groups. It is therefore submitted that sale of USL shares contemplated by the contract with Diageo is for the purpose of preserving the business of the respondent as a going concern.

22. The respondent also owns certain immovable properties in Bangalore which are mortgaged in favour of lenders. The respondent proposed, to sell the said properties and to that end proposed they would file a separate application. Without prejudice to the rights of the respondent in the winding up petitions and company applications, in order to show the bonafides of the respondent Company, they undertook to deposit before the Company Court after said shares transaction to Diageo, the entire amount of Rs.119.16 crores from sale of shares which is surplus after paying of the above mentioned creditors, to be dealt with, subject to further orders of the Company Court which may be made at the time of hearing of the winding up company petitions.

23. They contend that the application is bona fide and in the interest of the respondent and its shareholders and creditors. The balance of convenience is in favour of the respondent. The share price of USL has increased tremendously on the basis of the proposed transaction with Diageo Plc. If the said transaction goes through there would be a significant increase in the net worth of the respondent, which would be in a better position to pay of the creditors. If the application is not allowed, grave and irreparable injury will be caused to the respondent. Further, it is stated that the share price of USL would go down to far less than the price prevailing as on the date of the contract between the respondent and Diageo Plc/Relay BV, which will severely affect the net worth of the respondent and would also adversely affect the shareholders and creditors of the respondent Company as well. Therefore, they sought for permission in the application.

24. All the petitioners filed detailed objections opposing the said application. We have set down the objections filed in company petition No.248/2012 as it is quite exhaustive. It was contended that adjudication of the application cannot occur without first adjudicating upon the rights of the petitioner to seek admission of the winding up petition and/or for appointment of a provisional liquidator. The petitioner challenged the authenticity of the alleged pledges created and submits that

such purported pledges are liable to be set aside, since these would tantamount to an endeavour on the part of the respondent Company to secure a fraudulent preference of creditors all of them are parties with whom the respondent has significant level of dealings, as is evident from memorandum dated 18.04.2013 filed by the respondent before this Court. All the alleged pledges are created after the filing of the winding up petition which would tantamount to dispossession of the property, would be rendered in capable of and liable to be set aside and/or declared void unless the respondent were in a position to establish an element of bonafides.

25. They have further contended that the records of the respondent filed with the Bombay Stock Exchange, when compared with the disclosures made in the form of public announcement in relation to the intended sale of stock in USL to Diageo reflects that on 09.11.2012, the respondent Company was having 23,577,293 equity shares of USL amounting to 18% shareholding. On 09.11.2012, the respondent Company has contracted to sell to Diageo 9,070,595 equity shares of USL. However, in December, 2012 the respondent Company has reflected in the BSE that the respondent was holding 23,230,123 equity shares of USL amounting to 17.75% shareholding. In March, 2013, in the BSE reflected that the respondent's holding as 20,573,968 equity shares of USL amounting to 15.73% shareholding.

26. Therefore, plainly, the respondent has been effecting sale of equity shares held in USL, after the filing of the winding up petition by the petitioner. Out of the 13,003,327 equity shares sold in the year 2012-13 which appears that 12,646,157 shares have been sold during the three months period from 01.01.2013 to 31.03.2013 alone. Based on a minimum price of Rs.1440/- per share, on basis the Diageo offer price, the respondent will have raised atleast Rs.432 crores, for which there is absolutely no explanation forthcoming as to the justification for such a sale or deployment of its proceeds. The said conduct of the respondent is sufficient to reject the application. They have specifically questioned the pledging of shares in favour of LKP Finance Limited. According to them, an entry at page No.2 of the memo dated 18.04.2013 reflects that LKP Finance Limited as an unsecured creditor as on 30.09.2012 to whom a sum of Rs.25 crores is purportedly owed by the respondent. No pledge form is produced in relation to LKP finance Limited. However, in para No.6 of the application under reply, the very same LKP Finance Limited is reflected as a pledgee to whom a sum of Rs.71.53 crores is intended to be disbursed from proceeds of the respondent stock in USL. On the petitioner pointing out that there is significant discrepancy visibly evident in relation to purported transactions with LKP finance Limited, vide memo dated 02.05.2013, a letter at page No.81 alleged to be dated 21.12.2012, purported to be issued by Motilal Oswal Financial Services Limited (who is already claimed to be owing Rs.40.73 crores, and is an entity who has purportedly availed of ostensible pledges of USL shareholding subsequent to 15.01.2013), agreeing to act as security trustee, to hold 1,22,000 shares have been pledged in favour of LKP Finance Limited is produced. The said discrepancy is sufficient to warrant a full investigation into the respondent's dealings. Similarly, they have also disputed the claim of Edelweiss Capital on the ground that they also require full verification. They have also disputed the authenticity of the pledge forms produced before the Court and they have set out clearly in their objections the discrepancies found therein. In para No.18 of the statement of objections they have set out the pledges made in favour of Yes Bank, Capital First, ECL, Religare, IFCI, IL&FS and HDFC and they pointed out that the amount due to them is exaggerated and according to them if those pledges are held to be valid, what is the actual

amount due? There is no bona fides in creation of those pledges and they are void-ab-initio. They further contend that the pledges in favour of Motilal Oswal, LKP Finance, SICOM, SREI and Narayan Shriram are not entitled to, for any such ostensible pledges nor they are entitled to receive any monies whatever received from any purported sale of equity shares belonging to the said respondent in priority over unsecured creditors of the respondent. They want such ostensible pledges to be declared as void and unenforceable. Out of 13 alleged pledges only 8 may have some right and the extent of validly created pledges would, in any event, be liable to be duly adjudicated upon by the Company Court. They also accuse the respondent for failure to furnish the full information to the Court which show that the respondent has more to hide than to disclose to the Court. They have set out the documents and the requisitions which are not produced by the respondent before the Court. They have accused the respondent for material suppression of details with regard to the secured and unsecured creditors. They also contend that the request for production of share purchase agreement and ancillary documentation was not complied by the respondent. They have disputed the valuation of the shares. According to them the method of valuation adopted appears to have generated an erroneous valuation, since for instance a DCF method only considers quantitative factors, and qualitative factors like the value of "control" and "controlling stack" etc. are completely ignored. They pointed out that no valuation report has been filed before the Company Court for ascertainment or verification of the basis, if any, on which the price has been fixed.

27. They contend that SEBI is simply concerned with the market price of shares during 60 days preceding the public announcement that is, the offer price, should not be less than 60 days average, which was reckoned as at 09.11.2012, nearly 6 months ago and is therefore, of little to no relevance to the petitioner. Any sale at such an undervalued price clearly amounts to fraud upon the creditors and should not be permitted. A fresh valuation of shares is mandatory prior to selling the shares. The assets of a company on the verge of winding up are liable to the sold in manner so as to fetch maximum value/funds and such assets of the company are not capable of being sold at a throw away price. Instead of permitting the sale of shares by private treaty, a global tender requires to be invited and on that basis, the shares should be sold to the higher bidder. The respondent is commercially insolvent and has huge liabilities and in the interest of all this creditors if those shares could fetch more funds.

28. The maximum price realization for the shares in issue is assured, at levels according with the market price prevailing on the date of sale, which would, at the very least, be the date on which the application is being heard, that is, well in excess of Rs.2,300/- per share. Any sale may be permitted strictly through the provisional liquidator that is required to be appointed by the Company Court and all such funds ought to be brought into Court, in order to ensure that such funds are not dissipated, siphoned or diverted and are paid over only to such secured creditors as are entitled to such funds, rather than alleged pledges who may have no valid right capable of assertion.

29. A plan was presented by the UB Group to the aviation authorities for reviving Kingfisher owing to the anticipated infusion of several hundred crores from the sale of Diageo shareholding, which has been rejected by the concerned authorities. Such purported plan clearly establishes the intention of the respondent to misuse the funds from such anticipated sale, in a manner noncomplisant with

priority and ranking of creditors, seeking to give priority to airport authorities and fuel companies over other creditors, in order to revive the company is not permissible. At the present market value of such shareholding, as is intended to be sold by the respondent to meet the claims of its creditors, a sum in excess of Rs.3,130/- crores is capable of being realized, as against Rs.1,960.21 crores claimed to be the sale proceeds that would be liable to be disbursed in terms of the summary statement filed in the Company Court on 08.04.2013. Such a substantial sum is not liable to be left with the respondent to attribute and /or appropriate in a selective manner, preferring certain creditors over others, as it deems fit. They have also pointed out, a sum of Rs.20 crores apportioned towards legal fees, which is utterly incredulous and entirely unacceptable. Similarly, a tax liability of Rs.215.62 crores is also not supported. Further a sum of Rs.9.80 crores is claimed by way of brokerages, which is again unsupported by any form of demonstration and is contrary to the interests of the creditors.

30. In para No.43 of the statement of objections, they have furnished information regarding the share given in the absence of the agreement dated 09.11.2012, which is being made available to them showing the mode of acquisition of the shares, percent of shares and number of remaining shares. In para No.44, they have also set out the names of other persons belonging to the promoter Dr.Vijay Mallya Group, holding shares in USL. They have referred to public announcement and taken objection to split between the respondent and Kingfisher Investment, which according to them is disadvantageous to the creditors. In para No.49 of the statement of objections, they have shown how relevant the consent of the purported pledgees to sell the shares in term of the agreement. They have referred to the valuation of the immovable properties. Thereafter they have traversed the allegations made in the application para wise.

31. In para No.53, they specifically contend that the application is premature and untenable. Until the entitlement of the petitioner to seek appointment of a provisional liquidator and/or admission of the present petition is adjudicated upon, the present application is not capable of being taken up at all. It is further stated that when the contract of Diageo is arrived on 09.11.2012, the respondent was not only in receipt of a winding up notice from the petitioner, to which it has failed to issue any response, but more importantly, the present petition was already filed, as were several prior petitions for winding up pending against the respondent and therefore, Diageo too had deemed knowledge of potential objections of the unsecured creditors to any such sale. The assertion of the respondent that such a contract with Diageo was arrived at in the ordinary course of business is to that extent flawed, since the respondent had knowledge of the petitioner's claim and was not entitled to ignore such claims. The assertion that the agreement to sell shares to Diageo led the increase of the sale price of the shares of USL is not a matter that is capable of being conclusively established, but moreover, a price increase is merely recognition of the market value of a share, and the very fact that the public offer has failed on 26.04.2013 only establishes that the earlier quoted price of USL was below its fair market value. They dispute the listing of pledges or amounts asserted by the respondent, whether or not, such listing of pledges has been furnished by the respondent and where they have priority over the unsecured creditors is the matter which requires verification. Further more, no accurate information is forthcoming from the respondent as to the level of corporate guarantees that have been invoked, in the absence of which the rights of various secured and unsecured creditors, would have to be determined and it is insufficient for the respondent to

come forth and contend that a purported meeting of its pledgees must constitute sufficient basis to permit for a sale of pledged shares to occur. The contents of the Grant Thornton Report are entirely meaningless and unreliable, since it concedes that it has not independently investigated the representations of the respondent. The proposal of respondent depositing lacks bona fides. There is no scope for allowing any fund flow directly to the respondent, from and out of any sale to Diageo, irrespective of the point in time and price which the Company Court adjudicates such sale of shares should occur, if at all, for the benefit of all of the creditors of the respondent. The lack of material particulars forthcoming in relation to information relevant to adjudicate its commercial solvency, evince mala fides on the part of the respondent. They have denied the bonafides of the application and apprehend that if the permission sought for is granted it would seriously affect the interest of the creditors. Particularly, the selling price below the market price is incapable of sanction by this Court. Therefore, they sought for dismissal of the application.

32. Learned counsel for the parties addressed arguments on this interlocutory application also. The learned Company Judge, after hearing the parties formulated the following points for consideration:-

> (1) Jurisdiction under Section 536(2) of the Act during the pendency of Company Petition for winding up.
>
> (2) Allegations of violation of laws in the matter of pledge of shares.
>
> (3) Claim of respondent that USL is a subsidiary of applicant (4) Principles governing exercise of jurisdiction of Courts under Section 536(2) of the Act.
>
> (5) Pledge of shares for raising loans not forthcoming from the applicant's annual report 2011-12.
>
> (6) Adjudication over pledges of shares in favour of S.B.I & J & K Bank Limited.
>
> (7) Public announcement (8) Price per equity share (9) Immovable property valuation report.
>
> (10) Allegation that applicant is commercially insolvent (11) Allegation that SPA, PPA & SHA are detrimental to the interest of creditors (12) Utilization summary.

33. After hearing the parties, the learned Company Judge allowed the applications in part and permitted the respondent to sell 13,612,591 equity shares of USL held by it, to Relay B.V., and Diageo Plc and others acting in concert, at a sale price of Rs.1,440/- per equity share. Then, from out of the sale proceeds to make payment of dues to the secured creditors disclosed in its annual report 2011-12 as extracted at paragraph 31; to expend reasonable sums of money towards legal expenses, to pay taxes incidental to the sale transaction and then to submit to Court the audited statement of accounts over repayments, expenses and taxes, incurred as directed supra, by the 22nd July 2013. The respondent was also directed to pay Rs.250/- crores in the Court immediately on the conclusion

of the transaction and receipt of sale consideration and directed the registry to keep the said amount in a term deposit in a Nationalised Bank for an initial period of one year and to retain the balance of the sale consideration without deploying the same for its business activity, subject to further orders. He also directed the respondent to refrain from creating pledge/ hypothecation/charge/ encumbrance over its movable and immovable properties pending disposal of the company petitions.

34. Aggrieved by the said order, these petitioners have preferred these appeals. After the passing of the impugned order, the sale of shares was effected and out of the consideration so received payments are made to the creditors in whose favour those shares alleged to have been pledged. Therefore, in the appeal the purchaser as well as those creditors were impleaded as parties.

35. OSA 43/2013 is filed by 14 banks seeking to set aside the impugned order passed by the learned Company Judge in Company Application No.437/2013 and other connected applications filed in Company Petition No.122/2012 and other connected matters. The appellants are not parties either to the company applications or the company petitions, complaining that the impugned order has seriously affected the interest, they have preferred this appeal challenging the impugned order.

36. To show their interest in the subject matter in this proceedings, they have produced Master Debt Recast Agreement dated 21.12.2010 entered into between them and Kingfisher Airlines Limited. The total amount sanctioned is Rs.5598.37/- crores and the total amount due as on 28.02.2013 was Rs.6493.29/- crores. Thereafter, United Breweries Limited which was holding Company of the said Kingfisher Airlines Limited entered into a corporate agreement dated 21.12.2010, on behalf of all the 14 banks guaranteeing the repayment of the aforesaid amounts. Clause 5 of the said agreement set out the representations, warranties, confirmations, covenants etc. in this regard. Clause 5(ii)(f) reads as under:-

> "Clause 5(ii) : Till the Final Settlement Date, the Corporate Guarantor shall, unless otherwise agreed to in writing by the Lender's Agent:
>
> Clause 5(ii)(f): not:
>
> 1. wind up, liquidate or dissolve its affairs;
>
> 2. implement any scheme of amalgamation or reorganization or demerger; or
>
> 3. convey, sell, lease, let or otherwise dispose of or create any sort of encumbrance on (or agree to do any of the foregoing at any future time) all or any part of its property or assets without the prior written approval of the Lender's Agent and the Lenders."

37. In spite of the express term in the contract, the Corporate Guarantor has entered into an agreement on 09.11.2012 to sell 13,612,591 equity shares in favour of M/s. DIAGEO and Associates. Further, they contend that on 02.04.2013, when a demand was made on behalf of all the 14 banks, calling upon the applicant to pay a sum of Rs.6493.29/- crores, in reply thereto, they were assured

by the Managing Director by email dated 14.2.2013, that United Breweries Group will make a significant payment to the Kingfisher Airlines Limited Bank Consortium out of the proceeds received from DIAGEO on the United Spirits (USL) deal. Exact mechanism and quantum can only be decided only after meeting with DIAGEO and their advisors which are scheduled on February, 19/20th when the DIAGEO's CEO will also be in India as part of the Prime Ministerial Delegation from the United Kingdom to India. This is because DIAGEO will be obligaged to comply with SEBI regulations and conditions, if any, imposed by the Competition Commission of India and sale of United Spirits Limited shares to them is the only source of funds for United Breweries Group resulting from the binding DIAGEO transaction. He requested the Consortium of Banks not to precipitate any action to sell the pledged USL share in the market which will seriously derail the transaction with DIAGEO. In the balance sheet of the application, the amount due to all these banks are set out. However, the learned Company Judge without issuing notice to them, without hearing them as all of them are secured creditors has passed the impugned order and permitted payment to the so called secured creditors excluding these Banks. On coming to know the said order, immediately, they filed applications for impleadment and also filed two applications on 06.07.2013 requesting the learned Company Judge to direct the applicant forthwith to deposit before the Hon'ble High Court the entire sale proceeds realized from the sale of shares of USL 13,612,591 equity shares and consequently, for a direction that the said amount be released to the appellants. In the other application, an order of ad-interim order restraining the appellants from paying any part of the amount realized from sale of USL 13,612,591 equity shares to the alleged pledgers/charge holders (alleged secured creditors) was sought. However, in spite of the said applications pending before the Court, it transpires that the payment has been made to those creditors. They were necessary parties to the proceedings. They are disputing the pledges in favour of the secured creditors. The order passed by the learned Company Judge is not in the interest of the creditors, in particular, the secured creditors and public financial institutions. Therefore, they have filed an application to permit this Court to prosecute the appeal. As there is a delay of 25 days caused in filing the application, they have filed interlocutory application to condone the delay of 25 days. The said application was allowed and the said appeal was also heard along with other appeals. RIVAL CONTENTIONS

38. Ms. Fereshte Sethna, the learned counsel appearing for the appellant in OSA 25/2013 contended that, an application under Section 536(2) of the Act was not maintainable, at any rate no order could have been passed on such application even before admission of the appeal. Therefore, the impugned order passed on such an application even before the petition was being admitted, is void. Secondly, though the Company Court may pass an order either granting permission to sell or validating the sale which has taken place earlier such an order could be passed only in order to protect the interest of the body of creditors and the Company as well, if the Court is satisfied that it is a bona fide transaction and the disposition in the course of its business. In the instant case, the agreement was entered into after the filing of the petition. Though this agreement was produced before RBI, SEBI and the Competition Commission, a copy of the said document was not made available to the petitioner to have their say in the matter. On the contrary the agreement was produced before the Court in a sealed cover for inspection by the Court and the Court also did not permit the petitioner to look into the said agreement. In those circumstances, principles of natural justice is violated, it was not a confidential document as contended by them as in the public advertisement it was made

clear all public share holders could have a look at the said document. But unfortunately the learned Company Judge did not take note of these facts and has held they were justified in claiming confidentiality and such non-furnishing of the said copy in no way affects the interest of the petitioner, which is illegal and it requires to be set aside. She further contended it is not a mere permission to sell. The Court by the impugned order permitted the respondent to pay the creditors who are not before the Court out of the sale consideration directly on the ground that those shares had been pledged in their favour, by mere relying on the entries in the balance sheet and without following the procedure prescribed under the Companies Act before such payment could be made. Lastly she contended that admittedly, the value of the shares which were permitted to be sold were listed in the National Stock Exchange and the market price of the share was Rs.2,340/-, whereas, it was permitted to be sold at the rate of Rs.1,440/-, the rate actually agreed upon on 09.11.2012. Further it was contended that it is not a mere case of selling of shares. It is a case where the purchaser of shares wanted to have controlling interest in the Company and therefore in those circumstances, it is not mere value quoted in the Stock Exchange, which should be the criteria in deciding the value of the shares. Seen from that angle, the shares worth Rs.2,340/- has been sold at Rs.1,440/- and the number of shares sold is roughly about Rs.One crore and thereby the interest of the creditors is seriously jeopardized and the Company Court ought not to have granted permission. For the aforesaid reasons, she submits that the impugned order requires to be set aside.

39. Sri Naganand, learned Senior Counsel appearing for the appellants in OSAs 26/2013, 27/13 and 43/2013, contended that the transaction in question is not an isolated transaction. The purchasers have purchased substantial number of shares from other four group of Companies, thereby they acquired controlling interest in the Company. It is in that context the Company Court ought to have taken note of the aforesaid transactions and should have seen that virtually permission of the Court is sought for divesting the respondent's interest in USL, which has substantially helped the Diageo in acquiring controlling interest and therefore it is not done in the course of ordinary business and it is not a bonafide transaction. He also contended that in a case of this nature, in order to decide whether the price at which the shares were sold represent fair market value, the value quoted in the Stock Exchange cannot be the sole criteria. Seen from that angle, it is not a bonafide transaction. The effect of permission granted by the Court is, a preference has been given to some of the unsecured creditors, whose credit was not established before the Court. The petitioners have disputed the pledge. In fact, even after the filing of the Company Petition, the shares are pledged and without verifying the validity of these pledges, the impugned order permits payment of amounts to these creditors directly out of the sale proceeds, which is illegal. Therefore, he submits that seen from any angle, the impugned order is liable to be set aside.

40. Sri Shreyas Jayasimha, learned Counsel appearing for the appellant in OSA 30/13, adopted the aforesaid arguments and submits that the permission granted to the respondents to sell the pledged shares and permission to pay the other secured creditors, is contrary to the scheme of the Companies Act and cannot be sustained.

41. The learned Counsel appearing for the other petitioners/appellants adopted the said argument.

42. Sri Udaya Holla, learned Senior Counsel, appearing for the respondent, contended that the opening words of Sub-section (2) of Section 536 of the Companies Act, 1956 gives an impression that permission to transfer shares of a company would be granted only after winding up order is passed which was the view expressed by the Courts earlier. Subsequently, it has been held that such a narrow construction would affect the working of a company which is facing a winding up petition. Courts have been given the power to grant such permission of transfer, even before the winding up order is passed which stands to reason. Further he submitted that when it is held that even before the order of winding up is passed by the Court, such a power could be exercised when a petition is presented before the Court and it is not necessary that before such power could be exercised, the petition should be admitted or advertised. In support of his contention he relies on Section 441 of the Companies Act, which says "Commencement of the winding up by Court", where it has been held that the winding up of a company by the Court shall be deemed to have commenced at the time of the presentation of the petition for the winding up. He further contended that Rule 9 of the Company Rules 1959 confers on the Company Court the inherent power to give such directions or pass such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. Therefore, when Section 441 of the Companies Act makes it clear that the commencement of the winding up proceedings commences at the time of presentation of the petition for winding up from the date of presentation till the date of passing of the order of winding up, the Company Court has jurisdiction to pass order under Section 536(2) of the Act. It is in exercise of that power, in the interest of the Company and in the interest of the creditors of the Company, the impugned order came to be passed. The material on record clearly establishes the year prior to the date of transaction, the value of the shares of the Company was hardly about Rs.772/-. It is only when negotiations started with Diageo for sale of the shares, gradually the price of the shares went up. On the day they concluded the contract, i.e., on 09.11.2012, the share price was Rs.1,360/- per share. However, the agreed price was Rs.1,440/-, which is far above the prevailing market value of the shares on the date of the agreement. This price has been found to be reasonable by the Competition Commission, SEBI, and RBI and they have granted the necessary permission for sale of shares. It is because of concluding that contract, subsequently, the share prices went up and it was Rs.2,340/- on the date of the order of the Company Court. However, that cannot be taken into consideration in order to decide whether the shares are sold for a reasonably good market price. He further contended that if this share transaction has not been entered into, the share price would have fallen down and the body of creditors would have been the sufferers in the bargain. In fact, the Company still held more than Rs.One Crore of shares and that shares are fetching virtually double the price which again would be in the interest of creditors. The business of the Company is investment in companies. Therefore, he submits that seen from any angle, the transaction in question is a bona fide transaction entered into in the course of regular business and it is for the benefit of the body of the creditors, and the Company Court rightly granted the permission and it cannot be found fault with.

43. Sri Aditya Sondhi, learned Counsel appearing for the purchaser of shares, M/s Diageo, contended that the prices at which these shares were sold is a fair market value. In fact, along with the statement of objections, he has produced the correspondence and statistics to show how the share value was calculated. He also pointed out that all the three authorities also applied their mind regarding the valuation of shares and only being satisfied that it is above the minimum prescribed,

they have granted permission and it is only after obtaining the permission, the shares have been purchased and therefore the said transaction cannot be found fault with. How the respondent dealt with the sale consideration would not in any way vitiate the transaction. They have paid the market price, purchased the shares and wants the Court to hold that it is a bonafide transaction. When permission was granted, their interest is fully protected and this Court should not pass any order which would affect their interest.

44. The learned Counsel appearing for the creditors who have been paid out of the sale consideration contended that they are all secured creditors, shares were pledged in their favour, before sale, their consent was obtained, they gave a conditional consent to the effect that if their amounts were going to be paid, they have no objection for the sale of those shares. Accordingly, after sale of shares, out of the sale consideration, the amount due to them have been paid, which is legitimately due to them and therefore the question of they depositing the money in Court at the instance of these appellants-petitioner would not arise.

45. In the light of the facts and rival contentions, the points that arise for our consideration in these appeals are as under:

> (1) Whether the application under Section 536(2) of the Act, was maintainable and an order could be passed thereon by the Company Court, even before the petition is admitted ?
>
> (2) Whether the transaction in question could be construed as a transaction in the course of business of the Company and is it a bonafide transaction and in the interest of the creditors of the Company so as to validate the transaction by exercising power under Section 536(2) of the Act ?

POINT NO.1:

> MAINTAINABILITY OF THE APPLICATION UNDER SECTION 536(2) OF THE ACT

46. Company Petition No. 57/2012 was filed on 26.3.2012, Company Petition No. 121/2012 was filed on 12.6.2012. Similarly, Company Petition No. 122/2012 was also filed on 12.6.2012. Company Petition No. 185/2012 was filed on 3.9.2012. Company Petition No. 248/2012 was filed on 5.11.2012.

47. The order sheet maintained in these cases disclose that, none of these petitions were admitted. But, these matters were clubbed and Company Petition No. 248/2012 was taken up for arguments regarding admission. The order sheet in the Company Petition No. 248/2012 shows that, on 26.11.2012 emergent notice was ordered. On 4.1.2013 the learned counsel for the respondent undertook to file power and sought for two weeks time which was granted. On 22.1.2013 objections were not filed. Time was sought for. It was granted. On 22.2.2013 the learned counsel for the respondent submitted that the statement of objections would be filed during the course of the day in the registry after serving a copy on the learned counsel for the petitioner. On 21.3.2013 at the

request of the learned counsel for the respondent, the matter was listed on 22.3.2013 on payment of cost of Rs.5,000/- each in all the petitions. The order sheet dated 25.3.2013 discloses that the learned senior counsel for the petitioner addressed her arguments on the first of the defences raised by the respondent company. The case was ordered to be listed on 26.3.2013. The proceedings on 26.3.2013 discloses as under:-

> Heard Miss Fereshte Sethna, learned counsel for the petitioner who concluded her arguments. For submission of learned counsel for respondent, list on 27.3.2013."
>
> 48. On 27.3.2013 arguments were addressed on behalf of the respondent on the matter of admission of the winding-up petition. Since, the arguments were incomplete, the matter stood for completion of hearing on 28.3.2013. On 28.3.2013 though the matter was listed, it did not reach, hearing was adjourned to 1st April 2013. However, on 1.4.2013 the order sheet reads as under:-
>
> "Sri.Udaya Holla, learned senior counsel submits that having regard to the report of Grant Thornton, Ex.R5 enclosed to the affidavit dated 15.3.2013 in CA 1130/12 respondent would make available to the Court a proposal of a scheme for repayment of the dues if granted sometime, while reserving liberty to conclude the arguments on the merits of the matter.
>
> In the event of any proposal being filed into court, it is needless to state that the respondent to serve a copy of the said proposal on the learned Counsel for the petitioners in all the connected petitions, well in advance.
>
> List on 8.4.2013 in the orders list at 2.30 p.m."

49. Therefore, this order makes it very clear the learned counsel for the respondent did argue opposing the admission but had not concluded it. It is at that stage he made a submission giving a proposal for a scheme for repayment of the dues if granted some time. He wanted liberty to be reserved to conclude the arguments on the merits of the matter.

50. On 8.4.2013 in the course of the hearing, a memo was filed. At page one of the said memo it is stated that if the sale of United Spirits Limited (USL) shares to Diageo were permitted by this Hon'ble Court, then a sum of Rs.119.16 crores would remain after meeting liabilities to parties to whom USL shares were ostensibly pledged, taxes, legal fees and brokerages. The said one page writing is at page 971 of Volume II of the paper book which is not in dispute. It is the case of the petitioner that as the said writing is unsubstantiated and there is no possibility for the respondent to assert commercial solvency, the petitioner requested that the hearing of the matter of 'admission' of the winding-up petition and application as to appointment of provisional liquidator be completed, since the respondent was unable to establish commercial solvency. The hearing was adjourned to 16th April 2013 to enable the respondent company to put matters on affidavit, including full details as to all unsecured creditors.

51. It is at that stage, on 15.4.2013 Company Application No. 440/2013 under Section 536 and 537 of the Act seeking permission for sale of up to 1,36,12,591 equity shares held in USL, by the respondent company to Diageo was filed. It is the grievance of the petitioner that on 16.4.2013 a request was made to complete the hearing of the matter of the winding up petition. They pointed out the discrepancies in the annexures to the application of 15.4.2013. The Hon'ble Court directed the respondent company to furnish information in relation to matters of pledged shares, as also as to its creditors, both secured and unsecured, and adjourned the matter to 17.4.2013. The order sheet dated 17.4.2013 reads as under:-

> Sri Udaya Holla, learned senior counsel files a memo enclosing the list of the pledgers of shares and total number of shares pledged in their favour, the Balance Sheet of the United Spirits Limited, copies of Form-W filed with the depository.
>
> The memo is placed on record.
>
> The petitioners are permitted to file their objections to the application filed by the respondents.
>
> List these matters on 26.4.2013."

52. The order sheet discloses that the learned counsel for the parties were heard on the Company Application No. 440/2013 till 8.30 PM on 15.5.2013 during summer vacation and the case was reserved for orders.

53. Thus, it is clear even though the learned Company Judge heard the counsel for the petitioner completely and the counsel for the respondent partly regarding admission of the Company Petition, without passing an order for admission he entertained the application filed under Section 536(2) of the Act and has passed the impugned order. Therefore, the question for consideration is, whether such an application was maintainable even before the Company Petition was admitted.

54. Section 536(2) reads as under:-

> "536 Avoidance of transfers, etc., after commencement of winding up - (1) In the case of a voluntary winding up, any transfer of shares in the Company, not being a transfer made to or with the sanction of the liquidator and any alteration in the status of the members of the company made after the commencement of the winding up, shall be void.
>
> (2) in the case of a winding up by the Tribunal, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall unless the Tribunal otherwise orders, be void.

55. Sub-Section (1) of Section 536 deals with voluntary winding up whereas Sub-Section (2) deals with compulsory winding up by the Court. It provides that in the case of winding up by the Court, any disposition of property or transfer of shares or statues of members made after the commencement of the winding up shall be void. Thus the doctrine of lis pendens incorporated in section 52 of the Transfer of Property Act, in principle is, made applicable under the Companies Act. However, a power is conferred on the company Court to save such alienation. The question is at what stage of the winding up proceedings this power is to be exercised. Having regard to the opening words of Section 526, i.e., "in the case of winding up", it gives an impression that the said power can be exercised only after a winding up order is made by the Court. In other words the Court has no power to exercise the power of validating an alienation before the passing of a winding up order. However, this controversy is now resolved by several judicial pronouncement.

56. The question has been examined in England where Section 227 of the Companies Act,1948. is quite similar to Section 536(2) of our Act. There Section 227 has replaced Section 173 of the Companies Act, 1929, which was similar in material particulars. Those provisions of the English Acts have been examined at length by Buckley J. in re A.I. Levy(Holdings) Ltd.(1964) 1 Ch.19. He has considered all the reported and unreported cases on the point, including the view of Vaisay J. in Re Miles Aircraft Ltd.(1948) 1 A.E.R. 225 that the Court had no jurisdiction to make an order under Section 173 of the Companies Act, 1929, in the absence of a winding up order. Buckley J. has effectively dealt with the argument which prevailed with Vaisey J. and expressed his view as follows:

> "It does not appear to me, with the utmost respect to Vaisey J., that the language of the section necessarily requires an order to be made in respect of a company which is in fact being wound up by the Court at the date when the order under Section 227 is made, that is to say, after the date of the winding up order. If that were the true effect of the section, the present case would demonstrate that the section is ill designed to meet a kind of risk to the creditors of a company against which one would have expected it to be intended to protect them.
>
> He has therefore held that the Court has jurisdiction to make an order "not with standing that no winding up order has yet been made".

57. The law on the point has been stated as follows in Palmer's Company Law, twenty-first edition, page 770:

> "The Court has jurisdiction under Section 227 to authorise a disposition of the company's property for the benefit of creditors, notwithstanding that a winding up order has not yet been made."

58. A Full Bench of the Rajasthan High Court in the case of B. GOPAL DAS AND OTHERS .VS. KOTA STRAW BOARD(P) LIMITED [1972 WLN 35] interpreting Sub- section(2) of Section 536 of the Companies Act, 1956 has held as under:-

"Section 441(2) provides that the winding up of a company by the Court shall be "deemed" to commence at the time of the presentation of the petition for the winding up. The effect of sub- Section(2) of Section 536, in a case like the present where a petition has been made for the winding up of the company by the Court is, inter alia, to nullify the effect of any disposition of a property of the company during the period intervening between the date of the presentation of the winding-up petition and the date of the winding up order. As there is always some interval between these two dates, the provision is beneficial to the creditors of the company for it protects and preserves the property of the company from dissipation or unscrupulous appropriation or transfer by providing that any disposition of the property shall be void. But while the sub-section casts such a cloak of protection round the property of the company in the interest of its creditors, it takes note of a situation where disposition of the property may become necessary or unavoidable, for it empowers the Court to uphold transactions which are honest and arise in the ordinary course of its business. While the sub-section safeguards the interests of the share-holders as well as the creditors, it is so framed that before a transaction is allowed to stand it is necessary that the Court should scrutinize it.

3. In this state of the law, it is only natural that the company should find it difficult to attract persons who would accept a disposition of its property, during the pendency of the winding up petition, even when it acts honestly. Thus, in a given case, the company may not find it possible to save a valuable property from distress sale, on account of the reluctance of any other party to agree to a transaction which may not be upheld by the Court in case of a winding up. In such a case, that party would like to fortify itself by an assurance that the disposition would be upheld by the Court and shall not be void abintio on the making of the winding up order. It appears to us that in such a case these is no reason why it should not be permissible for the Court to authorize the disposition before the making of the winding up order.

4. As has been stated, Section 536 finds a place in that portion of the Act which deals with the effect of winding up on antecedent and other transactions, and there is nothing in sub- Section(2) of the schemes of the Act to show that the Court cannot authorize a disposition in a case where winding up petition is pending but a winding up order has not been made. On the other hand, it may well be argued that, in the absence of any prohibition in the law, there is no reason why the Court should be precluded from examining the propriety of a proposed disposition during the pendency of a winding up petition if the company has a genuine case requiring early consideration. It has to be appreciated that while this view is advantageous to the company in as much as it saves it from that difficulty or predicament which leads it to the proposed disposition, it does not harm the interest of the creditors from any unfortunate result which many ensue from an eventual winding up order in as much as the same Court, which has the authority to validate the disposition after the winding up order, examines the merits of the disposition at the very out-set. The extent of the eventual protection to the creditors is not therefore mitigated and is

available in either case. We are accordingly of the opinion that the Court has jurisdiction to authorize a disposition of the company's property during the pendency of the winding up petition.

59. This Court in the case of MANDYA NATIONAL PAPER MILLS LTD., VS. RAI BAHADUR SHREERAM DURGAPRASAD PRIVATE LTD reported in 1967 Company Cases Vol.XXXVII 201 has held as under:

"The second sub-section under which this application is made refers to the powers of the court in the case of a winding up. The dispositions or alienations which are affected by the provision are those made subsequent to the presentation of the winding-up, petition which would be the date of commencement of the winding up, if an order to wind up the company comes to be made. The order of the Court, which could save such an alienation, from becoming void, appears ordinarily to be, in the light of the section, an order made after winding up, because, until an order for winding up is made, the normal powers of the directors continue, and, unless an order for winding up is made, any disposition or alienation made by the directors does not become void. It becomes void only in the case of a winding up. If no winding up order supervenes, the validity of the disposition or alienation made by the directors depends upon the provisions of general law governing the same and not any special consequences relatable to the pendency of a winding-up petition or an order made thereon.

I am therefore of the opinion that the very foundation or the occasion for the court making an order referred to in sub-section (2) of section 536 is that there is a disposition of property made by the directors which has become void. Such an effect on the disposition follows upon an order of winding-up and not earlier. Considerations bearing upon the exercise of discretion by the court under the said sub-section are directly related to the interests of creditors and the equitable distribution of available assets among all creditors in accordance with law, avoiding all preferences not expressly permitted by the law.

It may be that the suggestion that the court has no jurisdiction which-ever to deal with situations arising between the date of presentation of the winding-up petition and the order of winding-up is not sound, because on the passing of a winding-up order, the date of commencement of winding-up is related back to the date of presentation of the petition, and secondly, even before an order for winding up is passed, the court may find it necessary to make appropriate interim orders either for the protection of the company or for the protection of any of the creditors of the company.

60. This Court in the case of SMT. USHA R. SHETTY AND OTHERS vs M/S RADEESH RUBBER PRIVATE LIMITED, BANGALORE AND ANOTHER [1992 (3) Kar. L.J.604] has held as under :-

> "11. Learned counsel referring to Section 536(2) of the Companies Act has submitted that no transfer of the assets during the pendency of the winding up of petition should be effected. As per Section 536(2) in the case of winding up by or subject to the supervision of the Court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members made after the commencement of the winding up, shall, unless the Court otherwise orders, be void. Thus, it clearly indicates that the Court has power to order transfer or to sell the assets of the company when the winding up petition is pending. There is no inherent indication in the section so as to warrant the conclusion that this power can be exercised only after the winding up order is made. It is difficult to spell out the limits on the jurisdiction of the Court from the opening words in the section viz., "in the case of winding up" so as to mean that only if the company is ordered to be wound up. It would be reading more than what the legislature intended in the said wordings. I am of the view that the Court can exercise jurisdiction under Section 536(2) of the Act even before the winding up order is made. The fact that the order become otiose, if the application for winding up is ultimately rejected, does not take away the jurisdiction. Therefore, even before winding up order is made, the jurisdiction of the Court can be invoked under Section 536(2) of the Act for permission for disposal of the assets of the company. The contention of Mr. Jayaram, learned counsel appearing for the second respondent, in view of the decision of the Supreme Court as well as the decision of the High Court referred to above is unsustainable."

61. The Gujarat High Court in RE NAVJIVAN MILLS LIMITED [(1985) 2 COMP LJ 28 (GUJ) has held as under:-

> ".....we are of the opinion that Court can exercise the jurisdiction of giving directions validating the transactions before the winding-up order is made for the obvious reason that unless these transactions are saved from the consequences which may ensue, if at all, on the order of winding-up is made, the company may find it difficult to keep itself going and may land itself in an (un)enviable position of its business being paralysed. If, therefore, the Legislature has invested that power in the Court with that purpose and object in view, the said power must be capable of being exercised at a time when there is a possibility of ultimately such consequences ensuing; otherwise the power is virtually stultified. In that view of the matter, therefore, we are of the opinion that the view expressed by the learned Single Judge, with utmost respect to him, is not warranted by the section, and if the earlier decision of the Bombay High Court in Tulasidas Jasraj Parekh's case (supra) which is binding on this Court, had been shown to him, he would not have taken the aforesaid view."

62. The High Court of Madras in the case of M/s K. & CO., vs M/S ARUNA SUGARS AND ENTERPRISES LIMITED [AIR 1999 MADRAS 45] has held as under:-

> "17. The above decisions rendered by various Courts would go to show that the hands of the Court are not fettered under Section 433(1) of the Companies Act from exercising its inherent powers. If the transaction is bona fide and it has been done in the ordinary course of business without causing any harm to the general body of the creditors, such disposition of properties of the company after commencement of the winding up can be sanctioned if it is necessary in the interest of the company also."

63. The raison-d'etre of these provisions is to prevent disposition of the property of the company made after presentation of the petition for compulsory winding up, without permission of the Court, with a view to avoid fraudulent preferences and to prevent other abuses attendant on transfer of assets of the company in contemplation of its liquidation. The main purpose of the Court's jurisdiction under this sub-section is to ensure that a company is not hampered from carrying out transactions which benefit those interested in the value of assets. The mere presentation of a winding up petition by a share holder or a creditor should not be allowed to interfere with the director's management of a company affairs under this sub- section. The presentation of a petition for winding-up does not by itself disable a company from carrying on its business. Companies in the ordinary course of business have to carry out transactions involving disposition of properties as an incident of their business activities. These transactions are not to be foreclosed, or to hold otherwise would bring the business to a grinding halt. The law would not permit such a consequence by disabling a company from attending to its business in the ordinary course merely because a petition for winding-up is instituted.

64. The object of Section 536 (2) is to prevent, during the period which must elapse before the petition can be heard, improper alienations and dispositions of the company's property in extremis. The Court has an absolute discretion as to validating transactions after the presentation of the winding up petition. The discretion is exercised on the same principles as would guide the exercise of judicial discretion generally, with particular attention to the interests of the company. Honest dispositions made in the ordinary course of business are usually allowed. While passing orders, the Court considers whether the transaction in question is in furtherance of the company's business and/or in the interest of the company in liquidation and/or its creditors. Before a winding up petition is presented, it is in the ordinary course of business for a company to pay all its debts and incidentally to give security to its bankers for any overdraft or loan it may arrange. But after a petition is presented the situation is different. Prima facie all debts will have to be paid pari passu. Therefore, it is no longer in the ordinary course of business to pay one creditor in full to the detriment of his fellow creditors. However, it is difficult to lay down that all dispositions of property made by a company during the interregnum i.e., between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralyzed, for, the company may have to deal with very many day-to-day transactions, make payments of salary to the staff and other employees and meet urgent contingencies. Another example is, it is in the interests of the creditors generally that the company's business should be carried on. This could only be achieved by paying for goods already supplied to the company when the petition is presented but not yet paid for, the court might think fit in the exercise of its discretion to validate payment for those goods. A fraudulent company can deceive any bona fide person transacting business with the company by stage managing a petition to be

presented for winding up in order to defeat such bona fide customers. However, it will not allow the assets to be disposed of at the mere pleasure of the company and thus cause the fundamental principle of equality amongst creditors to be violated. To do so in effect would be to add to the preferential debts enumerated in Section 230, a further category of all debts which the company might choose to pay wholly or in part. Thus, the principle that can be deduced is that if the transactions have been undertaken under compulsion of circumstances, in order to save or protect the property of the company, such transaction could be saved provided evidence is produced about such compulsion. It is for enabling the company to continue as a going concern and to protect the interest of shareholders and creditors that such a power is conferred and must be exercised.

65. Therefore, even before an order for winding up is passed, the Court may find it necessary to make appropriate interim orders either for the protection of the company or for the protection of any of the creditors of the company. In such circumstances, the Court can exercise jurisdiction under Section 536(2) of the Act even before the winding up order is made. It can exercise the jurisdiction by giving directions validating the transactions before the winding-up order is made for the obvious reason that unless these transactions are saved from the consequences which may ensue, if at all, on the order of winding-up is made, the company may find it difficult to keep itself going and may land itself in an (un)enviable position of its business being paralysed. Such disposition of properties of the company after commencement of the winding up can be sanctioned if it is necessary in the interest of the company also.

66. However, whether this power of the Company Court to validate sales effected by the Company prior to the winding up order could be exercised even before a Company Petition is formally admitted is the question. In order to answer this question it is necessary to understand the scope of a winding up proceedings under the scheme of the act.

67. A petition for winding up under Section 433(e) of the Act certainly is a petition by and on behalf of the class of creditors having regard to the nature of the proceedings and the effect of the ultimate order that may be made by the Court. A Company Petition is more in the nature of a class interest litigation and not in the nature of a litigation between an individual and the company. The order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex debito justitiae is not his individual right, but his representative right. It is a recognition of the right, but it is the right not of the individual, but of the class. It is for the majority to seek or to decline the order as best serves the interest of their class. When a winding up petition is entertained and considered, the order made by the Court ultimately would enure to the benefit of all the creditors and contributories.

68. The procedure for hearing a winding up petition is provided under the Company (Court) Rules, 1959 (for short hereinafter referred to as "the Rules"). Rule 95 provides that, a petition for winding up a company shall be in Form No.45, 46 or 47, as the case may be, with such variations as the circumstances may require, and shall be presented in duplicate. Upon the filing of the petition, Rule 96 provides that, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks

fit, direct notice to be given to the company before giving directions as to the advertisement of the petition. Rule 98 provides that, every contributory or creditor of the company shall be entitled to be furnished by the petitioner or by his advocate with a copy of the petition within 24 hours of his requiring the same on payment of the prescribed charges. Subject to any directions of the Court, Rule 99 provides that, the petition shall be advertised within the time and in the manner provided by Rule 24 of these rules. The advertisement shall be in Form No. 48. Once a petition is admitted and advertised, the petition for winding up shall not be withdrawn without the leave of the Court. If an application is filed for leave to withdraw a petition for winding up which has been advertised in accordance with the provisions of Rule 99 it shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition. The reason being once an advertisement is made giving notice to all the creditors calling upon them to appear before a Court on the date fixed in person, without hearing them the application for leave to withdraw cannot be granted by the Court.

69. The Apex Court in the case the NATIONAL CONDUITS (P) LIMITED -VS- S.S.ARORA [AIR 1968 SC 279 (V 55 C 69)] dealing with the procedure to be adopted by a Company Court when a petition is presented to it under Sections 433 and 443 of the Companies Act has observed as under:

> "4. Rule 96 of "The Companies (Court) Rules, 1959" framed by this Court provides:
>
> "Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petitioner and fixing a date for the hearing thereof and for directions as to the advertisement to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to the given to the company before giving directions as to the advertisement of the petition".

Rule 24 which relates to advertisement of petitions provides:

"(1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these Rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge.

(2) Except in the case of a petition to wind up a company, the Judge may, if he thinks, fit, dispense with any advertisement required by these Rules".

When a petition is filed before the High Court for winding up of a company under the order of the Court, the High Court (i) may issue notice to the Company to show cause whey the petition should not be admitted; (ii) may admit the petition and fix a date for hearing, and issue a notice to the Company before giving direction about advertisement of the petition; or (iii) may admit the petition, fix the date of hearing of the petition, and order that the petition be advertised and direct that the petition be served upon persons specified in the order. A petition for winding up cannot be placed for hearing before the Court, unless the petition is advertised; that is clear from the terms of R.24(2). But that is not to say that as soon as the petition is admitted, it must be advertised. In

answer to a notice to show cause why a petition for winding up be not admitted, the Company may show cause and contend that the filing of the petition amounts to an abuse of the process of the Court. If the petition is admitted, it is still open to the Company to move the Court that in the interest of justice or to prevent abuse of the process of Court, the petition be not advertised. Such an application may be made where the Court has issued notice under the last clause of R.96, and even when there is an unconditional admission of the petition for winding up.

70. Therefore it is clear that, when a petition is filed before the High Court for winding up of a company under the order of the Court, the High Court (i) may issue notice to the Company to show cause why the petition should not be admitted; (ii) may admit the petition and fix a date for hearing, and issue a notice to the Company before giving direction about advertisement of the petition; or (iii) may admit the petition, fix the date of hearing of the petition, and order that the petition be advertised and direct that the petition be served upon persons specified in the order. A petition for winding up cannot be placed for hearing before the Court, unless the petition is advertised. But it is not mandatory that as soon as the petition is admitted, it must be advertised. The Court has the discretion to postpone the advertisement after admitting the petition. However, admission of the petition is a condition precedent for hearing of the petition. Here the distinction between hearing the petition for admission and hearing the petition after admission has to be kept in mind. Hearing the petition for admission is to find out whether a case for admission is made out as provided under the relevant provision the petition is presented. If a prima facie case of the existence of the grounds urged in the petition is made out, a case for admission is made out. If no such ground is made out the petition can be rejected. In other words the petition is not admitted. However, even before admission of the petition, after hearing the petitioner, the Court can pass any interim order protecting the interests of the petitioner, the Company and its creditors. It may also pass an interim order to maintain status quo. Such an interim order is passed in aid of the main relief claimed in the petition. Normally such interim order will be in force till the disposal of the Company Petition and comes to an end with the passing of a final order, unless in the final order, specific directions are issued continuing the interim order.

71. Section 443 of the Act speaks about the hearing of a Company Petition, and the powers that can be exercised by the Court on hearing the petition. It reads as under:

> "443. Powers of Tribunal on hearing petition.- (1) On hearing a winding up petition, the Tribunal may -
>
> (a) dismiss it, with or without costs ; or
>
> (b) adjourn the hearing conditionally or unconditionally ; or
>
> (c) make any interim order that it thinks fit ; or

(d) make an order for winding up the company with or without costs, or any other order that it thinks fit :

Provided that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(3) Where the petition is presented on the ground of default in delivering the statutory report to the Registrar, or in holding the statutory meeting, the Tribunal may -

(a) instead of making a winding up order, direct that the statutory report shall be delivered or that a meeting shall be held ; and

(b) order the costs to be paid by any persons who in the opinion of the Tribunal, are responsible for the default."

72. A reading of the aforesaid Section makes it clear that, in a petition for winding up, after hearing the winding up petition, the Court can dismiss the petition or make an order for winding up the Company, adjourn the hearing or make an interim order that it thinks fit and any other order that it thinks fit. Therefore, the orders which could be passed under Section 443 of the Act are the orders which could be passed after the petition is admitted and it is duly advertised. Before admission of the petition, the question of entertaining the application filed by the respondent and passing an interim order in favour of the Company would not arise. Only if the Company Petition is admitted, then an occasion for entertaining any such application may arise for consideration. Therefore, even before admission he cannot take advantage of pendency of a petition and seek order from the Court under Section 536(2) to validate a sale which he intends effecting after the presentation of the petition. If the respondent is confident that the petition presented is frivolous, it has no merit, he has to contest the petition and get it dismissed, even before it is admitted, if notice is given to him before the admission of the petition.

INHERENT POWER

73. Rule 6 of the Company Rules makes it clear, save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these Rules. Rule 9 provides that, nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It is settled law that the inherent power of a Court cannot be invoked if statute provides a specific provision to meet a particular contingency. Only in the absence of a specific provision or an existing provision inapplicable to a given set of facts, in order to do justice in the case, the inherent powers are conferred on the Courts. Therefore, the said power is very sacrosanct and it has to be exercised in the ends of justice. When the power to grant such permission is specifically provided, the said power has to be exercised in accordance with the said provision of law. At the same time, such a power cannot be exercised contrary to a statutory provision contained in an enactment. The Court has to keep in mind the provisions under the Act before exercising its jurisdiction to pass an order under Section 536(2) of the Act. Section 528 of the Companies Act deals with proof of debts. It provides that, in every winding up, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency; or may sound only in damages, or for some other reason may not bear a certain value. Section 529 deals with application of insolvency rules in winding up of insolvent companies. Section 530 deals with preferential payments. Section 529A which was inserted by Act No. 35/1985 which came into effect from 24.5.1985 provides that, the workmen's dues and debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 pari passu that such dues shall be paid in priority to all other debts. The aforesaid debts payable shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions. These provisions are held to be mandatory. Therefore, the Court while exercising its inherent power cannot issue any directions contrary to these mandatory provisions. Similarly, the Court while passing an order under Section 536(2) not only should bear in mind the aforesaid provisions, but also the nature of winding up proceedings and the power of the Company Court to pass orders as contemplated under Section 443 of the Act. Section 443 specifically states "on hearing a winding up petition". The hearing of a winding up petition would be after the same is being admitted and the petition is advertised as contemplated under Rule 99. That is why when a Company Petition is presented, it is heard, if there is any merit, it is admitted and thereafter it is the mandatory requirement of law that the Company Petition is to be advertised by publishing in a newspaper so that all the creditors of the Company can appear before the Court either to support or oppose the winding up petition. Therefore, even before a winding up order, if the Company Court has to pass an order approving and validating an alienation, it is obligatory on the part of the Court that all these creditors have to be heard. Hearing of one creditor who has presented the petition would not be sufficient, as in law any alienation made after the presentation of winding up petition is void. The legislative intent behind such declaration is to protect the interest of all the creditors who may be before the Court and also who are not before the Court. Notwithstanding the aforesaid legal position, a power is vested in the Court to grant permission to alienate. Therefore, it necessarily follows that the Court can exercise such a power only after hearing the parties before the Court who may appear after the order of admission and advertisement. If such an application is entertained even before admission, at that stage the lis is

only between the petitioner and the Company but the order to be passed by the Court would affect the interest of all those creditors who may appear before the Court after the petition is admitted and advertisement is issued. Though per se sub-section (2) of Section 536 of the Act gives an impression that the said provision is applicable only after a winding up order is passed, by a judicial interpretation, now it has been held that even before such winding up order an application is maintainable. But, at the same time keeping in mind the interest of the Company, the creditors, the Company Court can pass an order under the aforesaid provision only after the petition is formally admitted and advertisement has been issued, calling upon all the creditors to appear before the Court on a date fixed for hearing of the petition. It is only thereafter the Company Court gets the jurisdiction to hear an application filed by the Company for such permission. Otherwise it would run counter to the object with which this power is conferred on the Court. The fundamental principle that must be borne in mind is that the assets of the company should be made available for distribution pari passu amongst the creditors of the company and that no creditor should obtain an advantage over his fellow creditors. In considering whether to make a validating order the court must always do its best to ensure that the interests of the unsecured creditors will not be prejudiced. The Court's discretion under this section should be exercised in the context of the provisions of this Act relating to winding up and the court should not, in the exercise of the discretion, validate a transaction which results in a pre- liquidation creditor being paid in full at the expense of other creditors, unless to do so would benefit the unsecured creditors as a whole. Otherwise the said provision may be abused by getting a Company Petition filed collusively and in such a petition Company filing an application for permission to alienate its assets and if there is no serious contest by the petitioner and not disclosing all the material facts it is possible that an order of the Court may be obtained. The assets of the Company may be alienated detrimental to the interest of the creditors who will be completely in dark about the presentation of the such petition, passing of such an order by the Court and thereby their valuable security is destroyed. Therefore, though such an application is maintainable even before the passing of a winding up order, an application filed prior to the admission of the appeal is not maintainable. The Court has no jurisdiction to pass any such order unless the petition is admitted, advertised and notice is given to the creditors of the filing of such petition. Any other interpretation would lead to catastrophic situation which should be avoided. If such a view is adopted, a fraudulent Company can deceive its creditors by managing the petition to be presented for winding up in order to defeat such bona fide customers. Therefore, the Court has to be circumspect while exercising its jurisdiction under the aforesaid provision.

74. Though the learned Company Judge framed a point for consideration on this question and referred to few decisions, he failed to record a finding on this jurisdictional point. The way he has answered this point could be found in paragraph 25 of the impugned order where he has observed as under:

> "There is force in the submission of the learned Senior Counsel for the Applicant that an order under Section 536(2) of the Act is permissible even before the winding-up of the Company".

75. Therefore, he did not go into the question whether an order under Section 536(2) of the Act can be passed before formal admission of the Company Petition. No reasons are assigned and no

discussion on this point. A finding without reasons is void. Hence, it cannot be sustained. Accordingly, it is liable to be set aside. POINT NO.2:

> IS IT A BONAFIDE TRANSACTION IN THE INTEREST OF THE COMPANY OR CREDITORS

76. We have held that the application under Section 536(2) was not maintainable, much less the Court had jurisdiction to pass an order allowing the application, even before the Company Petition is admitted. However, even on merits let us consider whether the transaction in question is a bona fide one and in the interest of the Company as well as creditors of the Company.

77. The purpose behind sub-section (2) of Section 536 is to prevent improper disposition or dissipation of property so as to affect the assets otherwise available for distribution among the creditors of a company in winding up. Dispositions of the company's property, including actionable claims, made after the commencement of the winding-up are void unless the Court otherwise orders. Any bona fide transaction carried out and completed in the ordinary course of current business will be sanctioned by the Court under Section 536(2). The provisions of sub-section (2) while declaring generally that transactions after the commencement of the winding up are void, leave jurisdiction to the Court to make appropriate orders in bonafide cases which demand protection on equitable considerations.

78. Parliament has used the words "unless the Court otherwise orders" to dilute the rigour of the word "void" by conferring a power on the Court to protect a bona fide transaction. The expression 'unless the Court otherwise orders' casts a duty on the Judge requiring that each case must be dealt with on its own facts and particular circumstances, special regard being had to the question of good faith and honest intention of the persons concerned and that the Court is free to act according to the Judge's opinion of what would be just and fair in each case. This principle is incorporated to protect bona fide transactions carried out and completed in the ordinary course of the current business of a company.

79. Reliance is placed on several judgments in support of their contentions.

80. In RE GRAY'S INN CONSTRUCTION CO. LTD.

reported in (1980) 1 W.L.R. 711 it is held as under:

> "In considering whether to make a validating order the court must always, in my opinion, do its best to ensure that the interests of the unsecure creditors will not be prejudiced. Where the application relates to a specific transaction this may be susceptible of positive proof. In a case of completion of a contract or project the proof may perhaps be less positive but nevertheless be cogent enough to satisfy the court that in the interests of the creditors the company should be enabled to proceed, or at any rate that proceeding in the manner proposed would not prejudice them in any respect. The desirability of the company being enabled to carry on its business

generally is likely to be more speculative and will be likely to depend on whether a sale of the business as a going concern will probably be more beneficial than a break-up realization of the company's assets. In *718 each case, I think, the court must necessarily carry out a balancing exercise of the kind envisaged by Templeman J. in his judgment. Each case must depend upon its own particular facts.

Since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors' claims, it is, in my opinion, clear that the court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interests of the unsecured creditors as a body. If, for example, it were in the interests of the creditors generally that the company's business should be carried on, and this could only be achieved by paying for goods already supplied to the company when the petition is presented but not yet paid for, the court might think fit in the exercise of its discretion to validate payment for those goods."

81. The nature of the proceedings is brought out by the Chancery Division in Re CRIGGLESTONE COAL COMPANY LIMITED at page 331 as under:

"A creditor who obtains judgment, and issues execution at law, has a legal right to the means of satisfying his judgment. Subject to qualifications, one of which rests in the fact that the language of the Act is "may" and not "shall", and to the reservation which Lord Cranworth made, and subject to what I shall presently say as to the representative position of the petitioner, it seems to me that the petitioning creditor has, as between himself and his debtor, a similar right ex debito justitiae to seize his debtor' assets by the hand of a liquidator and administer them for the benefit of his class. There are cases in which such an order has been refused on the ground that there were no assets to seize. In my judgment this is no exception to or qualification of the right. It is only affirming that if there are no assets the rule does not apply. If the right is to seize the debtor's assets by the hand of a liquidator, it is no exception to say that there is no such right when there are no assets. There cannot be right to seize nothing. This so-called exception, therefore, is not an exception to the rule, but a statement that under these circumstances there is nothing upon which the rule can operate. Subject to the foregoing, I think that, as between the creditor and the company as his debtor, the creditor who proves insolvency is, without exception, entitled ex debito justitiae to a winding-up order.

But then comes another consideration, viz., that the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex debito justitiae is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment of abstaining from seizing the assets, then, upon general grounds and upon Section 91 of the Companies Act, 1862,

> the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class; that it is for the majority to seek or to decline the order as best serves the interest of their class. It is a matter upon which the majority of the unsecured creditors are entitled to prevail, but on which the debtor has no voice".

Therefore, a Company Petition is more in the nature of a class interest litigation and not in the nature of a litigation between an individual and the company.

82. In the case of THE ANDHRA BANK LTD. VS.

PROVISIONAL LIQUIDATOR, THE GODAVARI SUGARS & REFINERIES LTD reported in 1954 Company Cases Vol.XXIV 149 it is observed as under:

> "the fundamental principle is that in a winding up, all unsecured creditors are to be paid pari passu, the object being to prevent the injustice and scrambles and intrigues which would arise if the company were to be at liberty to prefer one creditor to another. The Court has to steer a middle course between two extremes. On the one hand, the words of the section are wide enough to include any sale or payment that a company may make after the date of the winding up petition. On that basis, any business would practically have to be stopped if a petition was presented, because it would be unsafe to dispose of any of the company's assets. Any bona fide transaction carried out and completed in the ordinary course of current business will be sanctioned by the court under Section 227(2). It will not allow the assets to be disposed of at the mere pleasure of the company and thus cause the fundamental principle of equality amongst creditors to be violated. To do so would in effect be to add to the preferential debts enumerated in Section 230 a further category of all debts which the company might choose to pay wholly or in part.

83. In the case of KANCHAN KUMAR DHAR, OFFICIAL LIQUIDATOR VS. DR.L.M.VISARAI AND OTHERS reported in 1986 Company Cases Vol.60 746, it has been held as under:

> "the question is not whether respondent NO.1 acted bona fide or he was a victim of a deception or a fraud practiced on him by the company. The question is whether the transaction in question is in the interest of the business of the company or in the interest of the company (now in liquidation) or its creditors. If the answer to this is in the negative, then the question of sustaining the transaction cannot arise.

84. The Bombay High Court in the case of TULSIDAS VS. INDUSTRIAL BANK REPORTED IN AIR 1931 BOMBAY 2, has held as under:

> "There is, I think, a dividing line between what is the ordinary course of business before a winding-up petition is presented and what is the ordinary course afterwards.

> Before a petition is presented it is in the ordinary course of business for a company to pay all its debts and incidentally to give security to its bankers for any overdraft or loan it may arrange. But after a petition is presented the situation is different. Prima facie all debts will have to be paid pari passu. Therefore it is no longer in the ordinary course of business to pay one creditor in full to the detriment of his fellow creditors.
>
> The object of S.227 (2) is to prevent, during the period which must elapse before the petition can be heard, improper alienations and dispositions of the company's property in extremis. Dispositions of the company's property, including actionable claims, made after the commencement of the winding-up are void unless the Court otherwise orders.

85. The High Court of Calcutta in the matter of J.SEN GUPTA PRIVATE LIMITED [AIR 1962 CAL 405] has held as under:-

> "12. It seems to me, therefore, upon considering various authorities on this subject that the following principles are doubtless applicable to sub-section (2) of Section 536 of the Companies Act, 1956:
>
> 1. The Court has an absolute discretion to validate a transaction.
>
> 2. This discretion is controlled only by the general principles which apply to every kind of judicial discretion.
>
> 3. The court must have regard to all the surrounding circumstances and if from all the surrounding circumstances it comes to the conclusion that the transaction should not be void, it is within the power of the Court, under Section 536(2) to say that the transaction is not void.
>
> 4. If it be found that the transaction was for the benefit of and in the interests of the company or for keeping the company going or keeping things going generally, it ought to be confirmed."

86. The Apex Court in the case of CHITTOOR DISTRICT CO-OPERATIVE MARKETING SOCIETY LIMITED VS. M/S. VEGETOLS LIMITED AND ANOTHER reported in 1987 (Supp) SCC 167, has held as under:

> "3. Counsel for the appellant next contended that in any view of the matter the High Court should have in exercise of its powers under Section 536(2) of the Indian Companies Act validated the repayments. Insofar as the payments which have been made after the winding up order was passed, the appeal against the winding up order having been dismissed, it is futile to contend that any payments made during the interregnum should be validated. There is also no evidence to show that these payments were made in a bona fide manner under a commercial compulsion in the

course of transactions necessitated for the running of the business. There is nothing to show that if the payments to the appellant-society were not made the business could not have been run. In fact, the running of the business would result in loss of liquidity and its operations would have been hampered by making these payments. It is not shown that there was any compulsion and the payments were made either in order to save the property from being sold or that there was any commercial compulsion. Under the circumstances, the view taken by the High Court must be confirmed.

87. A Division Bench of this Court in the case of A.V.KRISHNA -VS- KARNATAKA LEASING AND COMMERCIAL CORPORATION LIMITED reported in ILR 1993 KAR 338 has held as under:

"10. The concept of cause of action shall have to be understood by reference to the nature of the proceedings that could be initiated consequent upon such a cause of action. When a company is sought to be wound up because the company is unable to pay its debts, the cause of action arises as and when the company's commercial insolvency is disclosed or it is realized that the company is commercially insolvent or it is unable to pay its debts. This cause of action can be taken advantage of by any one of the creditors or the entire body of creditors. Section 439(1) (b) of the Act clearly discloses this principle which says that an application for the winding up of a Company shall be by petition presented by any creditor or creditors, including any contingent or prospective creditor or creditors (other provisions are not necessary here). Thus the Act itself recognizes the right of any creditor or creditors to invoke the jurisdiction of the Court seeking the winding up of a company by a single petition.

11. The effect of winding up order is brought out by Section which says:-

"An order for winding up of a company shall operate in favour of the creditors and of all the contributories of the company as if it had been made on the joint petition of a creditor and of a contributory".

Therefore, when a winding up petition is entertained and considered, the order made by the Court ultimately would enure to the benefit of all the creditors and contributories. In fact, the procedure contemplated before making such an order includes a mandatory procedure of an advertisement of the Company Petition, so that other creditors or contributories may participate in the proceedings. A petition for winding up under Section 433(e) of the Act certainly is a petition by an on behalf of the class of creditors having regarding to the nature of the proceedings and the effect of the ultimate order that may be made by the Court.

88. The Apex Court in the case of PANKAJ MEHRA AND ANOTHER VS. STATE OF MAHARASHTRA AND OTHERS REPORTED IN AIR 2000 SC 1953, has held as under:

"20. It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for winding up and the

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

89. The High Court of Madras in the case of ICICI VENTURE FUNDS MANAGEMENT LIMITED vs NEPTUNE INFLATABLES LIMITED [(2005) 6 COMP LJ 420 (MAD)] has held as under:-

".....On the facts of this case, the provisions of Sub-Section (2) of Section 536 cannot be made applicable and, consequently, the contention of the official liquidator that those judgments are applicable only to day-to-day transactions-is not acceptable, as the judgments of the Supreme Court apply to all bona fide transactions of the company and could not be limited only to the day-to-day transactions."

90. In the case of LAXMAN YESWANT PRABHUDESAI VS. NRC LIMITED REPORTED IN (2010) 99 SCL 250 (BOM) VOL.99 PAGE 250, it is held as under:

> "20. Thus, the principles that can be deduced are that the transactions which have been undertaken under compulsion of circumstances in order to save or protect the property of the company could be saved provided evidence is produced about such compulsion. The assets of the company cannot be disposed of at the mere pleasure of the company. If the business is going to be paralyzed, then, the court in appropriate cases can, for the benefit and interest of the company, save the transaction. It is for enabling the company to continue as a going concern and to protect the interest of shareholders and creditors that such a power is conferred and must be exercised".

91. In the case of SUNITA VASUDEO WARKE VS.

OFFICIAL LIQUIDATOR AND OTHERS REPORTED IN 2013(2) MH.L.J PAGE 777, it is held as under:

> 10. The effect of section 536(2) is that where a winding-up proceeding is by or subject to the supervision of the Court, any disposition of the property of the company which is made after the commencement of the winding-up is void, unless the Court otherwise orders. Under section 441(2), a winding-up of a company by the Court is deemed to have commenced at the time of the presentation of a petition for winding-up. Sub-

section (2) of section 536 confers an enabling power on the Court to direct that a disposition of the property of a company shall not be void, though it was effected after the commencement of winding-up proceedings. Since an enabling power is conferred upon the Court, to order otherwise, a disposition after the commencement of a winding-up proceeding is not, in law, regarded as void ab-initio or a nullity in all situations. Parliament has used the words "unless the Court otherwise orders" to dilute the rigour of the word "void" by conferring a power on the Court to protect a bona fide transaction. This principle is incorporated to protect bona fide transactions carried out and completed in the ordinary course of the current business of a company. The presentation of a petition for winding-up does not by itself disable a company from carrying on its business. Companies in the ordinary course of business have to carry out transactions involving a disposition of properties as an incident of their business activities. These transactions are not foreclosed, for to hold otherwise would bring the business to a grinding halt. The law would not permit such a consequence by disabling a company from attending to business in the ordinary course merely because a petition for winding-up is instituted. The law recognizes this position and the practical necessity for a company against which a petition for winding-up has been presented to continue its business.

92. The Madras High Court in the case of K.PERIASAMY GOUNDER V. KOTHARI INDUSTRIAL CORPORATION LTD. AND KOTAK MAHINDRA BANK LIMITED reported in 2010(1) CTC 62 has held as under:

> "Therefore, a Survey of the English as well as Indian decisions on the issue shows:-
>
> (i) that the disposition made or sought to be made, must be honest and bona fide;
> (ii) that the transaction is in furtherance of the Company's business/interest and in the interest of the creditors; and
> (iii) that no creditor should obtain an advantage over his fellow creditors."
>
> ".....This Court also observed that the fundamental principle to be borne in mind is that the assets of the Company should be made available for distribution pari passu amongst the creditors of the Company and that no creditor should obtain an advantage over his fellow creditors....."

93. The Delhi High Court in the case of RBI CRYSTAL VS. CREDIT CORPORATION LIMITED reported in (2006) 132 Company Cases 363 (Delhi), (in para 5) held as under:

> "Obviously, the purpose behind sub-section (2) of Section 536 is to prevent improper disposition or dissipation of property so as to affect the assets otherwise available for distribution among the creditors of a company in winding up. But the court is, however given the discretion to uphold all proper transactions which otherwise appear to be proper transactions.

What is to be borne in mind, while examining such a transaction, is that the assets of the company should be made available for distribution pari passu amongst the creditors of the company and that no creditor should obtain an advantage over his fellow creditors.

In Andhra Bank Ltd. Vs. Provisional Liquidator, Godavari Sugars & Refineries Ltd., reported as (1954) 24 Comp. Cas 149 after scanning through the case law on the point culled out the following principles which are to be kept in mind in such cases:

> (i) Transactions bona fide entered into and completed in the ordinary course of trade must be protected.
>
> (ii) If the disposition is made for the purpose of preserving the business as a going concern, then also the discretion of the court must be exercised.
>
> (iii) A disposition must not be validated merely because the party bona fide entered into the transaction.
>
> (iv) Knowledge of the presentation of the winding up is immaterial.

94. From the aforesaid judgments it is clear that, the Court can exercise its power under Section 536(2) before the passing of the winding up order, if it is found the transaction was for the benefit of and in the interest of the Company or for keeping the Company going or keeping things going generally. The transaction should be a bona fide one entered into and completed in the ordinary course of trade. It should be for the purpose of preserving the business as a going concern. It should ensure that the interest of creditors, in particular, unsecured creditors will not be prejudiced. The right ex debito justitiae is not his individual right, but his representative right. The powers so exercised should not be contrary to the fundamental principle that all unsecured creditors are to be paid pari passu. The transaction in question has to be in the interest of the business of the Company or in the interest of the Company in liquidation or its creditors. The Legislature by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the Court must be deemed to have left it entirely at large and controlled only by the general principles which apply to every kind of judicial discretion.

95. It is in this background, we have to see whether the transaction in question is a bona fide transaction, keeping in mind the interest of the Company and its creditors. The answer to the question has to be in the negative for the following reasons:

96. Firstly, dealing with the question, adjudication over pledges of shares in favour of SBI and J&K Bank Limited, the learned Company Judge declined to go into the question on the ground that the disposal of the shares by the pledgees if ought to be declared as void, the said pledges/financial institutions are to be heard, but they are not parties to the proceedings. He left the said question to be decided while making an order of winding-up of the Company, after an investigation by the Official Liquidator. Therefore, it shows it was brought to the notice of the Court that SBI and J&K Bank have claim against the Company and the Company has pledged 26,46,155 shares in favour of

SBI and 3,57,170 shares in favour of J&K Bank, the secured creditors. However, the learned Company Judge proceeded to pass the impugned order without notifying the said secured creditors who held substantial shares as pledgees and without hearing them. In this context the Company deliberately suppressed the true facts from the Company Judge. In the appeal filed by the SBI and other consortium of banks, they have produced Master Debt Recast Agreement dated 21.12.2010 entered into between them and Kingfisher Airlines Limited. The total amount sanctioned is Rs.5598.37/- crores and the total amount due as on 28.02.2013 was Rs.6493.29/- crores. Thereafter, United Breweries Limited which was holding Company and the said Kingfisher Airlines Limited entered into a corporate agreement dated 21.12.2010, with all the 14 banks guaranteeing the repayment of the aforesaid amounts. Clause 5 of the said agreement set out the representations, warranties, confirmations, covenants etc. in this regard. Clause 5(ii)(f) reads as under:-

> Clause 5(ii) : Till the Final Settlement Date, the Corporate Guarantor shall, unless otherwise agreed to in writing by the Lender's Agent:
>
> Clause 5(ii)(f): not:
>
> 1. wind up, liquidate or dissolve its affairs;
>
> 2. implement any scheme of amalgamation or reorganization or demerger; or
>
> 3. convey, sell, lease, let or otherwise dispose of or create any sort of encumbrance on (or agree to do any of the foregoing at any future time) all or any part of its property or assets without the prior written approval of the Lender's Agent and the Lenders."
>
> 97. In spite of the express term in the contract, the Corporate Guarantor has entered into an agreement on 09.11.2012 to sell 13,612,591 equity shares in favour of M/s.DIAGEO and Associates. Further, on 02.04.2013, when a demand was made on behalf of all the 14 banks, calling upon the Company to pay a sum of Rs.6493.29/- crores, in reply thereto, they were assured by the Managing Director by email dated 14.2.2013, that United Breweries Group will make a significant payment to the Kingfisher Airlines Limited Bank Consortium out of the proceeds received from DIAGEO on the United Spirits (USL) deal. Exact mechanism and quantum can only be decided only after meeting with DIAGEO and their advisors which are scheduled on February, 19/20th when the DIAGEO's CEO will also be in India as part of the Prime Ministerial Delegation from the United Kingdom to India. This is because DIAGEO will be obligated to comply with SEBI regulations and conditions, if any, imposed by the Competition Commission of India and sale of United Spirits Limited shares to them is the only source of funds for United Breweries Group resulting from the binding DIAGEO transaction. He requested the Consortium of Banks not to precipitate any action to sell the pledged USL share in the market which will seriously derail the transaction with DIAGEO. The Company during the pendency of the Company Petition entered into correspondence with the SBI and some creditors seeking their consent for such sale of shares. It is alleged that such a consent was

obtained including SBI. The correspondence which is now produced by Diageo and Associates clearly demonstrate that there was correspondence between the Company and the State Bank of India with reference to the sale of the shares. The Company made a request to these banks not to precipitate the matter which would seriously delay the transaction with Diageo and the banks in turn were insisting that the sale consideration should be paid to them. Therefore, it is clear that the Company was due to the extent of Rs.6493.29 crores to the nationalized bank, in substance, monies due to the public. The said fact was not brought to the notice of the Company Court. The petitioners are completely kept in dark about these correspondences. So also the Court. In the balance sheet of the application, the amount due to all these banks are set out. However, the learned Company Judge without issuing notice to them, without hearing them, who are the secured creditors, has passed the impugned order and permitted payment to the so called unsecured creditors excluding these Banks. The aforesaid facts make it clear the Company owed a sum of Rs.6493.29 Crores to 14 nationalized banks. Even otherwise, the sale consideration could not have been permitted to be paid to the creditors in preference to these 14 nationalized banks. Therefore, the transaction in question is not a bona fide transaction and as material facts are suppressed and the learned Company Judge was misled, the order passed by him is vitiated and is liable to be set aside on that ground alone.

98. Secondly, the learned Company Judge dealing with public announcement of public offer to the public share holders for acquisition of 37,785,214 equity shares of the Company constituting 26% of the share capital at a price of Rs.1,440/- per equity share, had noticed that the public offer has failed since none of the public share holders offered to sell their shares in the Company at Rs.1,440/- per equity share. Then, the learned Company Judge refers to the Share Purchase Agreement between Relay B.V and Diageo with the Company, amongst others for acquisition of 25,226,839 equity shares constituting 17.4% shares in USL, where under the Company together with its subsidiary King Fisher Finvest India Limited have agreed to sell 19,536,648 equity shares in USL held by the Company and 12,676,342 being 9% of equity shares held by KFL. When the petitioners sought for a copy of the said Share Purchase Agreement to have their say in the matter, it was denied on the ground of confidentiality. However, a copy of the said agreement was handed over to the Court in a sealed cover. The learned Company Judge opened the sealed cover, looked into it and held that, having scrutinized the terms and conditions of the SPA, a copy of which is placed before the Court, material particulars as set out therein are reflected in the PA and regard being had to the term of confidentiality, the imprimatur of the Competition Commission of India on 26.2.2013, Annexure-A, the Securities and Exchange Board of India on 31.1.2013, Annexure-B, and the Reserve Bank of India on 21.3.2013, Annexure-C, cannot but be said that no prejudice is caused to the respondent by not being furnished with a copy of the SPA. The contention to the contrary is without merit. What merits consideration is the fact that permission for sale of shares numbering 13,612,591 of USL are encumbered/pledged in favour of reputed financial institutions, for securing loans to carry on the

applicant's business, as indicated in the annual report for the financial year 2011-12 and, therefore, he granted the permission.

99. The petitioners have brought to the notice of this Court, a letter of offer sent to public shareholders of United Spirits Limited, informing them that, Relay B.V. along with Diageo plc, Diageo Finance plc, Diageo Capital plc and Tanqueray Gordon and Company Limited, made a cash offer of Rs.1,440/- for fully paid up equity share of face value of Rs.10/- each, to acquire up to 37,785,214 equity shares representing 26.0% of the emerging voting capital under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, as amended from the public shareholders of United Spirits Limited.

100. At page-73 Clause-IX, the documents for inspection read as under:

"Copies of the following documents will be available for inspection by Public Shareholders at the office of the Manager to the Offer at 407, 4th Floor, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi - 110 001 on any working day (except Saturdays and Sundays) during the period from the date of commencement of the Tendering Period until the date of expiry of the Tendering Period."

101. In all, 15 documents have been listed therein. The documents 6, 7 and 8 read as under:

"6. Preferential Allotment Agreement dated November 9, 2012 entered into between the Acquirer, Diageo and USL.

7. Share Purchase Agreement dated November 9, 2012 entered into between the Acquirer, Diageo and the Sellers.

8. Shareholders' Agreement dated November 9, 2012 and amendment agreement to Shareholders' Agreement dated March 4, 2013 entered into between the Acquirer, Diageo, UBHL and KFIL."

102. When the petitioners in the Company Petitions called upon the respondent - Company to produce those documents for the inspection, the said documents were produced in a closed cover and handed over to the Judge for inspection and they refused to furnish copy of the same to the petitioners on the ground of confidentiality term in the said document. Accordingly, though the learned Judge looked into the said documents, he agreed that, as it is a confidential document, copies cannot be made available to the petitioners. If a document was available for public inspection to the public shareholders, the case of confidentiality put forth before the Company Court is without any substance. Denying a copy of the said document, certainly prevented the petitioners from putting forth their case effectively pointing out the irregularities of the transaction entered into. At any rate, the principles of natural justice is violated. The learned Judge looked into the documents and made the contents of the document as the basis for an order, which is against their interest. It is yet another attempt on the part of the Company to keep the creditors in dark and in particular the

petitioners who were before the Court, which demonstrates that the transaction which the Company was entering into is not a bona fide one and there is more than that meets the eye. The learned Company Judge was not justified in denying inspection of the aforesaid agreement. This admitted facts vitiates the order granting permission and renders it liable to be set aside.

103. Thirdly, JM Financial Institutional Securities Private Limited issued the said public announcement under Regulation 15(1) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 for and on behalf of Relay B.V. together with Diageo Plc to acquire 37,785,214 equity shares of the United Spirits Private Limited (USL). The offer price was Rs.1,440/- per share calculated in accordance with Regulation 8(2) of the SEBI (SAST) Regulations. Column No.4 gives the details of selling shareholders. It reads as under:-

> 4. Details of selling shareholders Details of shares/voting rights held by the Part of selling shareholders Name Promoter group (Yes/No) Pre Transaction Post Transaction Number of % Number of % shares shares United Breweries (Holdings) Yes 23,577,293 18.0 Limited 19,536,648[2] 13.4 Kingfisher Finvest India Limited Yes 12,676,342 9.7 SWEW Benefit Person acting in Company concert with the 125,531 0.1 Nil Nil promoter group USL Benefit Trust Person acting in concert with the 3,459,090 2.6 Nil Nil promoter group Palmer Investment Person acting in Group Limited concert with the 4,376,771 3.4 Nil Nil promoter group UB Sports Person acting in Management concert with the 548,460 0.4 Nil Nil Overseas Limited promoter group Notes:
>
> 1) Post Transaction shareholding is computed on Emerging Voting Capital
>
> 2) In terms of the SPA, United Breweries (Holdings) Limited and Kingfisher F invest India Limited have agreed to sell an aggregate of 16,716,987 equity shares of USL to the Acquirer and the split between them shall be determined closer to the completion of the SPA. Currently, United Breweries (Holdings) Limited intends to sell 9,070,595 equity shares and Kingfisher F invest India Limited intends to sell 7,646,392 equity shares.

104. Kingfisher Finvest India Limited is a 100% subsidiary of the United Breweries (Holdings) Limited. Similarly, UB Sports Limited is also a 100% subsidiary of UBL.

105. Business Today - Online Partner - Monday Today dated 4.7.2013 published that the world's largest spirits maker Diageo Plc on Thursday said it has acquired 25.02 per cent stake in Vijay Mallya-led United Spirits Limited (USL) on completion of a share purchase deal announced last year, getting less than half of what it had originally planned. Diageo has completed the acquisition of a further 14.98 per cent stake in USL, the consideration was Rs.1,440/-per share and the total consideration of Rs.3,134.56 crores has been settled today. Separately, Diageo had acquired 58,668 additional USL shares in the tender offer for a total consideration of Rs.8.57 crores. With completion of the share purchase agreement, the shareholders' agreement between Diageo, United Breweries (Holdings) Limited and KF Invest is now effective. It also published that Diageo Chief

Executive Ivan Menezes said "Since we received approval for this transaction we have been getting ready for closing and integration. Having completed the share purchase, we will now begin the work to identify and capture the significant growth opportunities within this attractive market".

106. In the Capital Market dated July 5, 2013 under the heading "United Spirits hits record high after Diageo Hikes Stake", it is published that Diageo acquired shares from United Breweries (Holdings) (UBHL), K.F Invest (a subsidiary of UBHL), Palmer Investment Group and UB Sports Management Overseas (two subsidiaries of USL) and SWEW Benefit Company (a company established for the benefit of certain USL employees). Shares owned by the USL Benefit Trust, which were part of the original transaction announced on 9 November 2012 and which represent 2.38% of the enlarged issued share capital of USL, were not part of the sale and purchase announced on Thursday. If the release of all security interests over these shares is obtained they will be purchased separately at a later stage. Diageo said it is the major shareholder in USL after the completion of transaction. Last year, Diageo had announced that it would pick up 53.4% stake in USL in a multi-structured deal. Instead, it now has 25.02% stake in USL for a total consideration of Rs.5235.85 crores. As per an agreement reached between Diageo and the UB group in November 2012, Diageo agreed to acquire a 27.4% stake in United Spirits - partly by acquiring shares directly from the promoter entities of the United Breweries group and partly by way of subscribing to a preferential share issue of United Spirits. The agreement triggered a mandatory open offer from Diageo to acquire additional 26% shares in United Spirits as per the Securities & Exchange Board of India's takeover norms. On 27 May 2013, Diageo subscribed for a preferential allotment of new shares in USL amounting to 10% of the post-issue enlarged share capital at a total consideration of Rs.2092.71 crores.

107. It is also relevant to point out at this stage, the material on record shows as is clear from paragraphs 15(b) and (c) of the appeal memo that, a key parallel transaction that was apparently entered into by respondent No.1 with the Diageo Group, rather significantly, on 9 November 2012 itself, i.e. on the very date of execution of the Share Purchase Agreement, Preferential Allotment Agreement and Shareholders' Agreement (also all dated 9 November 2012) entered into between respondent Nos.1/3 on the one hand and the respondent Nos.4/5 on the other (each with persons acting in concert), for the sale of USL shares, whereby a sum of US$36 million (Rs.219 crores, as per foreign exchange rates prevalent around the date of institution of the present appeal) became receivable from the Diageo Group into a company based in South Africa, beneficially owned and/or controlled by respondent No.2. The details of this purported Joint venture transaction in South Africa, recorded in a filing on or about 4 July 2013 by respondent No.4 with the London Stock Exchange, are stated thus: "Having received the necessary regulatory and competition authority clearances, Diageo completed its agreement to acquire a 50% interest in the company which owns United National Breweries' traditional sorghum beer business in South Africa on 27 June 2013. The remaining 50% is held by a company affiliated with Dr Mallya. Diageo has acquired its 50% interest for $36 million (approximately £24 million), subject to customary adjustments. Diageo announced its intention to form this Joint venture on 9 November 2012, subsequently announcing its agreement to enter into such Joint venture on 28 January 2013. Following today's completion of USL Transaction, the near-term priority of Diageo and Dr Mallya is the integration of USL into Diageo group. Once that is successfully under way, Diageo and Dr Mallya will explore the

opportunity of extending their relationship into other emerging markets in Africa and Asia (excluding India) through a further Joint venture relationship on terms and with a scope as yet to be determined. It is not certain whether such a Joint venture will be established or, if so, on what basis. If this wider emerging markets joint venture is established, it is expected that the South African Joint venture would be contributed to it." This parallel arrangement is exacerbated by the 2006 Annual Report of Respondent no.1 indicating divestiture of respondent No.1's interests in the South African brewery business.

108. Another key parallel transaction whereby guarantee facilitation to the tune of US$135 million was agreed to be arranged by Diageo Holdings Netherlands BV, an affiliate of the Diageo Group, for the benefit of respondent No.2's Formula One Racing team Interests held/controlled through Watson Limited, which is an overseas shareholder of Respondent no.1. The details of this arrangement have surfaced from the afore referred filing on or about 4 July 2013 by respondent No.4 with the London Stock Exchange, which states thus: "As part of the arrangements being put in place at closing, Diageo Holdings Netherlands B.V. ("DHN") has agreed to issue a conditional back-stop guarantee to Standard Chartered Bank ("Standard Chartered") in respect of the liabilities of Watson Limited ("Watson"), a company affiliated with Dr Mallya and which is a significant shareholder in UBHL, under a $ 135 million facility that Standard Chartered expects, subject to arrangement of full documentation and implementation of a security package, to advance to Watson to refinance certain existing loan facilities. The right of Standard Chartered to call on the guarantee from DHN would be subject to Standard Chartered having first taken certain agreed steps to recover from Watson, including defined steps towards enforcement of its expected security package. In addition, DHN would have, in respect of its potential liability under this guarantee, the benefit of certain counter-indemnity protection as well as the security package put in place for the Standard Chartered facility. "This substantial benefit to be availed by respondent No.2, is liable to be accounted for by respondent No.2 to the general body of creditors of respondent No.1.

109. Further, it was contended before the learned Company Judge that, a sum of Rs.4,000 crores had been diverted to a British Virgin Island subsidiary of USL, which respondent No.1 has vaguely attempted to justify as remitted overseas inter alia towards the purported acquisition of a Scottish Distillery Whyte & Mackay and ostensibly discharging liability to Citibank, without any proper explanation or supporting documentation, with regard to such a valuable asset being parked in a tax haven jurisdiction. Respondent Nos.1's explanation was unacceptable, and in deferring Investigation, contrary to the interests of the general body of creditors of respondent No.1, since such diversion of Rs.4000 crores was bound to have an indirect impact on respondent No.1 and its general body of creditors, by virtue of a 27.72% stake held at the material time by respondent No.1 in USL. Respondent No.1 should not have beeen permitted to receive and/or disburse proceeds of the sale of its USL shares to respondent Nos.4 and/or 5 with minimal fetters, until investigation into the diversion of Rs.4000 crores was complete, particularly in view of the lack of confidence of the general body of creditors of respondent No.1.

110. Therefore, when the Company Court is hearing an application for permission to sell the assets of the Company, even if that is required to carry on day-to-day business of the Company, it is of utmost importance that all the materials showing the conduct of the Company should be before it.

There should be total transparency in the transaction of the Company. Then only the Court will be able to appreciate, whether it is a bona fide transaction. The Court has its own limitations. That is the reason why such a request has to be considered after advertisement and appearance of all the creditors who will be in the know of things and who will be able to place on record the relevant material on the basis of which the Company Court can form its opinion.

111. The learned Company Judge dealing with Scottish Distillery "WHYTE" and "MACKAY", Scotland held that, USL is not a party to the proceeding and that monies invested in the acquisition of Scottish Distillery "WHYTE" and "MACKAY", Scotland, a wholly owned subsidiary of USL is through financial assistance obtained from City Bank, London, in full compliance with the Foreign Exchange Regulations, and therefore, he was of the opinion an investigation into the aforesaid allegations at this stage of the proceeding in Company Petition is neither desirable nor called for. Therefore, he was of the opinion that is a matter to be investigated. If that is so, when such serious allegations are made, without investigation of the facts, he could not have granted the permission sought for. Otherwise, if the aforesaid facts are true, it shows that the Company has not come to the Court with clean hands and the transaction in question is not a bona fide one. In other words, without investigation of serious allegations made attacking the transaction in question, the learned Company Judge has granted the permission which is not proper.

112. Fourthly, the material on record discloses that equity share of USL as quoted on the National Stock Exchange Limited for India for the period from 25.4.2012 to 30.4.2013 discloses that, as on 25.4.2012 one equity share of USL closed at Rs.737.60 and on 9.11.2012 it closed at Rs.1,360.50. Thereafter, on the increasing trend it closed at Rs.2,210.95 on 30.4.2013. On 8.5.2013 it closed at Rs.2,324.10. The share transaction agreement with Diageo was entered into on 9.11.2012 for sale of equity shares of USL at a price of Rs.1,440/- per equity share though the prevailing rate of share as on that day was Rs.1,360.50 per equity share. Therefore, on 15.4.2013, when the application is filed seeking permission, the prevailing rate was Rs.2,210.95. On the day the permission was granted on 24.5.2013 it was around Rs.2,324.10.

113. It was contended on behalf of the petitioners from the shares quoted, the transactions referred to supra, it were negotiated parallely by the Company, a substantial portion of the consideration has been diverted in the aforesaid manner and the price at which the shares were sold do not represent the true market value. Further, it was also contended that, in the light of the facts set out in the above chart, the sale of shares held by the Company in favour of Diageo is not an isolated transaction. It is a scheme under which Diageo was acquiring a substantial portion of shares in USL so as to have a controlling interest in the affairs of the USL. In those circumstances, the price quoted in the National Stock Exchange cannot be the guiding factor. Even otherwise, the rate at which the shares are sold is far less when compared to the rate at which the shares were sold on the day the permission was made and the day the impugned order came to be passed granting such permission.

114. Per contra, it was contended by the learned counsel for the respondent-Company that, the sale of the shares by the applicant in favour of the DIAGEO is in the course of its business as it is an investment company. Prior to their entering into the contract with DIAGEO for a period of nearly one year, the value of the USL shares was hardly around Rs.762/-. On the day they entered into the

agreement it was Rs.1360/-. Therefore, they agreed to sell the shares at Rs.1440/- per equity share. Once it became public that DIAGEO is acquiring the shares from others thereby getting a control of USL, the share prices went up to Rs.2320/-. Therefore, the said enhancement of share value is not only for the benefit of the company but also for the creditors and therefore it cannot be said that the said transaction is not bona fide or the shares were sold at lesser price. In fact it was also contended that the majority of the share holders of USL have approved the scheme and they have given consent for sale of the shares at Rs.1,440/- per share. Therefore, he contended that the said price paid is more than the price quoted on the Stock Exchange on the date of the agreement, as such it cannot be faulted. In support of his contention, he relied on the judgment of the Apex Court in the case of COMMISSIONER OF WEALTH TAX VS. MAHADEO JALAN AND MAHABIR PRASAD JALAN AND OTHERS ETC. REPORTED IN (1973) 3 SCC 157 where dealing with the valuation of the shares in limited company it has been held as under:-

> "Para No.12 (1) : Where the shares in a public limited company are quoted on the stock exchange and there are dealings in them, the price prevailing on the valuation date is the value of the shares."

115. This view has been reiterated by the Apex Court subsequently in the case of DR.MRS. RENUKA DATLA .VS. SOLVAY PHARMACEUTICAL B.V. AND OTHERS [AIR 2004 SC 321].

116. The learned Company Judge accepted the share price on the basis of the price quoted in the National Stock Exchange and came to the conclusion that it is a reasonable price. However, in coming to such a conclusion he has not considered the contentions urged on behalf of the respondent nor has he taken into consideration the other material on record by which the petitioners were contending that some parallel transactions have been entered into, to which substantial portion of the consideration payable in the transfer of these shares has been diverted. What the learned Company Judge did not notice is, it was not a case of simple transfer of shares. It is a case where the purchaser was purchasing the shares of not only the Company but also its associates who were the share holders of USL with the object of getting substantial control over USL. The facts on record do disclose that it is a case where the purchaser of shares wanted to have a controlling interest in the Company. It is not an isolated transaction. The purchaser have purchased substantial number of shares from four group companies of the respondent thereby they acquired controlling interest in the Company. It is a case of divesting the respondent's interest in USL which has substantially helped the Diageo in acquiring controlling interest. Therefore, it is not done in the course of ordinary business. Though the price quoted on the Stock Exchange is a factor which should be taken note of at the time of valuation of shares, it is not decisive and conclusive. In a transaction of this nature when the Company was divesting its substantial portion of the shares which has resulted in acquiring controlling interest by the purchaser, the valuation by an approved valuer should have been insisted upon. As is clear from the material on record, the shares which was quoted at Rs.762/- one year prior to the agreement rose up to Rs.1,360/- in a span of one year without any marked change in the net worth of the USL. If the case of the respondent is to be believed the mere fact that Diageo is negotiating for purchase of shares pushed the value of the share, then on the face of it, it is a case of mere speculation and the said value did not truly represent the value of the shares and the worth of the Company. Further, the learned Company Judge has

recorded a categorical finding that public offer has failed since none of the public share holders offered to sell their shares in the Company at Rs.1,440/- per equity share. Therefore, it was of utmost importance before selling the shares, the shares ought to have been valued. Merely because the three authorities, namely the RBI, SEBI and the Competitive Commission accepted the price agreed to between the parties and granted the requisite permission would not make the said price the actual market price. It is only for the purpose of giving such permission, the said price is taken note of. It does not represent the market price. All the attending circumstances had to be taken into consideration. That could be done only after hearing all the creditors of the Company who are the persons who are directly going to be affected by such transfer of assets of the Company. Therefore, without proper appreciation of the material on record, without proper investigation, the finding recorded on the basis of the National Stock Exchange price quoted in the National Stock Exchange on the date of the agreement, 9.11.2012, cannot be said to duly represent the market price and, therefore, the said finding is also vitiated and requires to be set aside.

117. Fifthly, the learned Company Judge while granting permission to sell the shares held by the Company in USL virtually went into the extent of deciding the claims of M/s HDFC, YES Bank, Axis Bank, IDBI Bank Limited, Eddlewiss Securities Limited, Sicom Limited, Religare Finwest Limited, IL and FS Financial Services Limited, SBI Industrial Finance Branch, Bangalore, Religare Securities Limited and IFCI Financial Services Limited and held after looking into the share certificates that the Company has prima facie complied with Regulation 58(1) of the Regulations and other provisions dealing with securities, a finding which is totally outside its jurisdiction. It is an exercise which ought to have been done by the Official Liquidator after an order of winding up is passed while entertaining the claims of secured creditors. However, it further held though the pledge in favour of the aforesaid creditors was prior to the filing of the petition, the Company pledged the shares of USL in favour of Motilal, LKP Finance, SICOM, SREI and Narayan Shriram and ICICI to a total extent of Rs.490.92 crores and, therefore, as these pledges are created after the filing of the Company Petition, they do not prima facie qualify for repayment. According to him, in order to effect repayment to the pledges, it is required of the applicant, who admits to have made pledge of shares after 31.3.2012 to establish transaction bona fide entered into and completed in the ordinary course of trade. To be protected, the disposition should have been made for the purpose of preserving the business as a going concern. Further it held, regard being had to the nature of business of the Company and the on going projects of construction activity over its immovable properties, it is possible that the Company may have bona fide, for preserving the business, pledged shares in USL with reputed financial institution. But merely because pledge of shares of USL is made by the applicant in favour of the aforesaid institutions, does not mean that the disposition during the pendency of the Company Petition calls for validation.

118. Therefore, the learned Company Judge makes a distinction between pledges before the filing of the petition and pledges after the filing of the petition and records a finding that the pledges made prior to the filing of the petition are all bona fide, whereas in respect of the pledges made subsequent to the petition, the bona fides of the transaction have to be gone into. A reasoning very difficult to accept. It is to be noticed that the petitioners have disputed the pledges made even before the filing of the petition. Before the Court can act upon such pledges and grant permission the relevant documents and the circumstances under which the said pledges were made should have

been taken note of by the learned Judge after giving ample opportunity to the petitioners to substantiate their contention that the pledges were not genuine. In fact, after the winding up order, even though all these pledges are recorded in the relevant books and requisite entries are made on the share certificates, the Official Liquidator would not make any payment on that basis. The law requires such pledgees to put forth their claim, establish their claim and then only payment could be made to them. That is precisely what the learned Company Judge said in respect of pledges made subsequent to the filing of the petition. He ought to have followed the same procedure even in respect of the pledges made prior to the filing of the petition. Therefore the impugned order is illegal and requires to be set aside.

119. Sixthly, granting permission to alienate the shares is one aspect and permitting the respondent to pay the creditors on the basis of the said pledge is totally different. By permitting the respondent to make payment to such pledgees, not only a separate preferential creditors are constituted, the Company is permitted to pay the entire amount due to them in total exclusion to others who are ultimately entitled to payment from the respondent. This is totally contrary to the mandatory provisions of the Companies Act. Thus, in the final order passed, the learned Company Judge permitted the Company to make payment of dues to the secured creditors disclosed in its annual report for 2011-12 as extracted at para 31 in the order. So, virtually the Court by making such an order has created a new class of creditors other than provided in the statute under Section 529 and 529A of the Companies Act. To give recognition to such preferential right would certainly mean to recognise preferential right which has no sanction of law and it would also operate to the great prejudice in the matters of discharge of obligations of the company at the stage when the company is wound up. Further, the said order violates the fundamental principle that the assets of the Company should be made available for distribution pari passu amongst the creditors of the Company and that no creditor should obtain an advantage over his fellow creditors. Certainly the creditors who are not before the Court and who are now paid the entire amount due to them, are placed in an advantageous position over the other secured creditors and unsecured creditors including the petitioner. Therefore, the order passed by the learned Company Judge is contrary to the statutory provisions as well as the spirit behind the said provisions, as such it is illegal and requires to be set aside.

120. In the course of the hearing of the appeal it is not disputed by the parties that in pursuance of the impugned order, the Company has sold the shares and realized the amounts and in fact discharged all the secured creditors in whose favour the shares were pledged prior to the filing of the petition. The material on record discloses that, the purchaser-Diageo was aware of the pendency of the proceedings, the application made by the Company for permission to sell the shares to them and the impugned order passed permitting such sale. Therefore, as they have purchased the shares during the pendency of this proceedings, it is hit by the doctrine of lis pendens. More over, the permission granted by the learned Company Judge is subject to intra Court appeal, a fact which is fully within their knowledge. Therefore, they have entered into the agreement after the filing of the Company Petition and purchased these shares during the pendency of the proceedings, which of course is subject to the result of this appeal. Now that we have held that the Company Court had no jurisdiction to pass an order for sale of the shares and even otherwise it is not a bona fide transaction, we are setting aside the impugned order which granted permission to sell. The resultant

position would be that the purchaser has purchased the shares without the leave of the Court and it is void. However, the right of the purchaser would be subject to the ultimate result of the Company Petition. Now, that the Company Petition is also admitted, they have to await the decision of the Company Petition on merits.

121. It is clear from the interim order passed on 27- 08-2013 in OSA No.26 of 2013, and connected matters, out of 13,612,591 equity shares, permitted to be sold by the impugned order, the respondent - Company has sold 1,01,41,437 (one crore, one lakh, forty one thousand, four hundred thirty seven) equity shares at a price of Rs.1,440/-

per equity share and has realized a sum of Rs.1460,36,69,280/- (Rupees one thousand four hundred sixty crores, thirty six lakhs, sixty nine thousand, two hundred eighty only). The respondent - Company has deposited Rs.250 crores with the Bank of Maharashtra in favour of Registrar General, High Court of Karnataka. The respondent - Company has invested the balance sale consideration of Rs.379,75,6012 (Rupees three hundred seventy nine crores seventy five lakhs six thousand and twelve only) in fixed deposit with Lakshmi Vilas Bank, which is a Scheduled Bank. The Company Court directed that the respondent-Company shall not sell the balance shares i.e., 3,471,154 without permission of the Court. Further the respondent-Company was directed to invest the entire amount of Rs.14,75,6012/- (Rupees fourteen crores seventy five lakhs six thousand and twelve only) lying in the current account of the respondent-Company as per the audit report submitted by the respondent in pursuance of the direction No.III in the operative portion of the impugned order in the fixed deposit in Lakshmi Vilas Bank pending the final disposal of the appeal on merits.

122. In the interim order dated 22-07-2013 passed in OSA No.25 of 2013, this Court has directed, in the interest of the creditors, in addition to the conditions imposed and directions contained in clause (iv) of the impugned order of the learned Company Judge, that the respondent-Company should not in any way sell, transfer, part with possession or do any act in respect of all other assets of the Company, pending further order in this appeal.

123. Now that we have held that the impugned order granting permission to sell the shares is without jurisdiction and is setting aside the said order, in view of the subsequent events which has transpired as set out above, it is necessary for this Court to protect the interest of the Company, its creditors, its shareholders as well as the purchasers of the shares. Hence, we pass the following order.

ORDER

1) Appeals are partly allowed

2) The impugned order granting permission to sell

13,612,591 equity shares of USL held by the Company to Relay B.V. and DIAGEO Plc and others acting in concert, at a sale price of Rs.1,440/- per equity share, is set aside.

3) The Company - respondent had deposited Rs.250 crores with the Bank of Maharashtra, which was drawn in favour of the Registrar General, High Court of Karnataka, as per the interim order passed on 27.8.2013. Subsequently, the said amount is withdrawn and deposited with the High Court of Karnataka, Bangalore. The said amount is kept in Fixed Deposit by the Registrar General, High Court of Karnataka, Bangalore. The disbursal of the amount would be decided by this Court while disposing of the Company Petitions on merits.

4) The Company-respondent shall also handover the fixed deposit of Rs.379,75,6012/- (Rupees three hundred seventy nine crores seventy five lakhs six thousand and twelve only) with Lakshmi Vilas Bank, to the Registrar General of the High Court of Karnataka, within a week from the date of receipt of a copy of this order.

5) The Company-respondent shall hand over the fixed deposit in a sum of Rs.14,75,6012/- (Rupees fourteen crores seventy five lakhs six thousand and twelve only) with Lakshmi Vilas Bank, to the Registrar General of the High Court of Karnataka, within a week from the date of receipt of a copy of this order.

6) The Company-respondent shall not sell the balance shares, i.e., 3,471,154 which was the subject matter of the impugned order, pending disposal of the Company Petition on merits.

7) The Company-respondent shall not in any way sell, transfer, part with possession or do any act in respect of all other assets of the Company including the shares, pending disposal of the Company Petition on merits.

8) As the appeals were heard on merits, the interlocutory applications filed in all these appeals except the application for condonation of delay in preferring the appeal in O.S.A. 43/2013, is not heard, as the main appeals itself were disposed of.

9) Parties to bear their costs.

Sd/-

JUDGE Sd/-

JUDGE knm/nvj/cksl/ksp/dh/ujk