Company Ltd (In Liquidation vs The Official Liquidator Of on 14 October, 2011

Author: S.C.Dharmadhikari

Bench: S.C.Dharmadhikari

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.243 OF 2011

IN
COMPANY PETITION NO.1068 OF 1997

In the matter of the Companies Act,

1956;

And

In the matter inter-alia Application under

section 466 and other relevant
ig provisions of the Companies Act, 1956,
and of inherent powers under Rule 9 of
the Companies (Court) Rules, 1959;

And

In the matter of the Swadeshi Mills

Company Ltd (In Liquidation), a

company incorporated under the Act of
VI of 1882 of the Legislature Council of

India, having its registered office at
Swadeshi Mills Compound, Sion,
Mumbai 400 022.

Ralli Brothers & Coney
Known as "Cargill Cotton", a
company incorporated under the

Laws of United Kingdom having
its registered office at Knowle Hill,
Park Fairmile Land, Cowham Surry,
KT 11, 2PD, England UK.

And

1 Forbes & Co Ltd (earlier known

as Forbes Gokak Ltd), a Company,
incorporated under the Companies

Act, 1956, having its registered
office at Forbes Building, Charanjit
Rai Marg, Fort, Mumbai 400 001

2 Grand View Estates Pvt Ltd, a
company incorporated under the
Companies Act, 1956, having its
registered office at 70, Nagindas
Master Road, Fort, Mumbai 400 023

and administrative office at SP Centre,
41/44, Minoo Desai Marg, Colaba,

Mumbai 400 005 .. Applicants

Versus

The Official Liquidator of
The Swadeshi Mills Company Ltd

(in liquidation), having its office at Bank
of India, 5th Floor, M.G.Road, Fort,

Mumbai 400 001. .. Respondent

Mr.Virag Tulzapurkar, Sr. Advocate with Mr.Cyrus Ardeshir and Mr.Tapan

Deshpande i/by Amarchand Mangaldas & S.A.Shroff & Co for the
applicants.

Mr.J.P.Cama, Sr.Advocate with Mr.K.S.Bapat i/by R.V.Sankpal for

RMMS.

Ms.Jane Cox for 735 workers from Mill and 28 staff members from the Head Office.

Dr.T.Pandian, O.L., present.

CORAM : S.C.DHARMADHIKARI, J.

RESERVED ON : 23rd September 2011.

PRONOUNCED ON : 14th October 2011.

JUDGMENT:

. This Company Application invokes the powers of this Court under section 466 of the Companies Act, 1956 ("Act" for short). The Application is by the Applicants who are a Public Limited Company, namely, Forbes & Company Ltd and a Private Limited Company Grand View Estates Pvt Ltd, both registered under the Act. They have prayed that order dated 5th September 2005 passed by this Court of winding up the Swadeshi Mills Company Ltd (company in liquidation), be permanently stayed and the applicants be permitted to deposit with the Official Liquidator attached to this Court an aggregate sum of Rs.86 crores as per the chart at Annexure A to the application. Then, there are further prayers for making payment of this sum to the secured creditors, workers and employees of the company. After such payment, the applicants pray that the assets and properties of the company in liquidation be handed over to them and the Official Liquidator to stand ca243-11.doc discharged.

2 An affidavit in support of this company application has been filed and it is stated therein by the

applicants that the 1st applicant is a promoter shareholder, secured and unsecured creditor of the company in liquidation. It is in the business of engineering goods, shipping and office automation. The 1st applicant alongwith its wholly owned subsidiary company owns 17,64,430 equity shares constituting 22.70% of total equity shareholding of the company in liquidation. Applicant No.2 is a private limited company, duly incorporated under the provisions of the Companies Act, 1956 having its registered office and administrative office at the address mentioned in the cause-title of this company application. It is a major shareholder, a secured and unsecured creditor of the company in liquidation. Real estate business is one of the objects of applicant No.2. It owns 22,83,210 equity shares constituting 29.29% of the total shareholding of the company in liquidation. The said shares were acquired by the applicant No.2 after the winding up order, for which it has obtained requisite leave of this Court, under the Companies Act, 1956 and had those shares transferred in its name. Thus, the applicants own, in aggregate, 52% of the total equity shares of the ca243-11.doc company. Further, the applicants are the only secured creditors of the company and thus are vitally interested in the affairs of the company.

Both the applicants are part of Shapoorji Pallonji Group. The said Shapoorji Pallonji Group is a 140 year old leading corporate house with significant experience, inter alia, in the Construction, Infrastructure and Real Estate Development Business.

3 Prior to its liquidation, the company was a public limited company, incorporated under the Act of VI of 1882 of the Legislature Council of India. The company is currently under winding up and is represented by the Official Liquidator, attached to this Court. The share capital of the company as per the last available financial statement with the applicants i.e as on 31st March 2001 was as under:

Particulars	Amount (Rs.)
AUTHORISED:	
(a) 15,000 unclassified shares of Rs.100 each	15,00,000
(b) 98,50,000 ordinary shares of Rs.10 each	9,85,00,000
Total	
ISSUED, SUBSCRIBED AND PAID UP:	
77,95,450 ordinary shares of Rs.10 each fully paid	7,79,54,500
Total	7,79,54,500

4 The company, prior to its winding up, was operating as a

composite textile mill, having spinning, weaving and processing sections for the manufacture of cotton, synthetics, interlining and non woven fabrics. It was engaged in the textiles business for more than 10 decades. It enjoyed a strong goodwill in the market and had drawn inspiration from Swadeshi movement of India. The operations of the company started deteriorating from 1982, because of prolonged textile strike in Mumbai, increase in cotton prices and recessionary conditions in the cotton textile industry. Factors like technological changes, high labour cost, higher cost of funds, sluggishness in textile industry and competitive disadvantage of mill against unorganized sector etc further deteriorated the financial condition of the company.

5 In the year 1997, Ralli Brothers and Coney filed a petition in this Court for winding up of the company. Thereafter, various other winding up petitions were also filed in this Court. Around February 1998, the company made a reference to the Board for Industrial and Financial Reconstruction (BIFR) under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The BIFR declared the company a sick company. The BIFR vide its order dated 5th February ca243-11.doc 2001, recommended to this Court for winding up of the company.

Appeal preferred against the said order by Rashtriya Mill Mazdoor Sangh, a registered trade union the Bombay Industrial Relations Act, 1946 and also the Representative and Authorized Union of the Company before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) was also dismissed vide its order dated 14th May 2001. Applicant No.1, from time to time, had provided financial assistance aggregating to approximately Rs.43,00,00,000/- (Rupees Forty Three Crores only) almost during the entire period of the proceedings before the BIFR and thus enabled the company to continue its operations. The details of financial assistance during the said proceedings are as follows:

> Year Rupees in Crore 1999 19 2000 16 However, due to the overall recessionary conditions and structural problems in the textile industry, the financial condition of the company did not improve. Pursuant to the recommendation of the BIFR, this ca243-11.doc Court commenced winding up of the company. The Official Liquidator of this Court was appointed as Provisional Liquidator of the company vide order dated 13th February 2002 with all powers available to him in terms of the Companies Act, 1956.

6 After referring to a sale of finished goods under the supervision of Court Receiver, it is stated that by resolution dated 20th September 2001 issued by the Government of Maharashtra, a High Power Committee was appointed to look into the matters relating to the workers dues, bankers and financial institutions. That Committee was empowered by this Court to dispose off the assets of the company. By order dated 21st June 2002, the High Power Committee disposed off the entire plant and machinery of the company and realised amount of Rs.15.53 crores. The amount received from the sale of finished goods and the entire plant and machinery was distributed for reimbursement of the cost of security agencies, other related expenses, part payment of the dues of the workers and employees dues and part payment of the statutory dues and that of these secured creditors.

7 The winding up order is then referred to and then in para 7 of the ca243-11.doc affidavit in support, this is what is stated:

> "In recent years, the Government of Maharashtra has initiated various activities for the promotion and facilitation of development of mill lands in Mumbai. Increasing the availability of housing has also been a thrust area. The said initiatives, alongwith the available immovable properties of the Company together, offer a favourable platform for the company to undertake real estate development operation. Though the company was in textiles business prior to winding up, due to disposal of all the stock in trade and entire plant and machinery, it is no longer viable to run the business as a manufacturer of textiles. In the present circumstances, in Mumbai even otherwise a textile mill is not viable. The applicants are part of the Shapoorji Pallonji Group, Shapoorji Pallonji Group has expertise in the real estate business and, therefore, intends to enable the company to undertake real estate development applicant No.2 has shown its willingness to bring in funds to meet all the legitimate liabilities of the company subject to the order of winding up being permanently stayed by this Court as sought by the applicants herein."

8 It is stated that the applicants being major shareholders and secured creditors, are vitally interested in bringing the company out of ca243-11.doc winding up. Applicant No.2 by a letter dated 11th November 2010 addressed to the Official Liquidator, High Court, Bombay, sought information on various contributories of the company including its secured, unsecured and statutory creditors. In reply to the aforesaid letter, the Official Liquidator requested applicant No.2 to take inspection and after taking such information which was made available and on noticing the contents of the documents inspected, it is stated that the total liability of the company in liquidation as on 31st March 2011 is approximately Rs.375.33 crores. Out of that Rs.280.90 crores is the liability of the applicants, which they have agreed to defer, as more particularly set out in this affidavit and as far as the other claims and liabilities, the applicants will duly meet them.

9 A reference is made to the Rashtriya Mill Mazdoor Sangh, affiliated workers and employees and a Memorandum of Understanding dated 15th November 2010 signed by the applicants and the Rashtriya Mill Mazdoor Sangh which is stated to be a representative and authorised Union of the workers employed in the company in liquidation.

It is stated that the claim was filed by Rashtriya Mill Mazdoor Sangh on behalf of the workers. Seventy five percent of the claim has been paid ca243-11.doc off by the Official Liquidator out of the sale proceeds of the machinery of the company and as part settlement of the Memorandum of Understanding, amounts have been disbursed. In terms of the chart Annexure F, Rs.74,42,97,519/- are due and payable. There is also claim of 37 workers/employees who have opted for voluntary retirement scheme in about 1999 and that is referred to in chart at Annexure G. The claim of resigned/retired employees prior to 31st September 2001, it then adverted to and it is stated that, that is enlisted in the chart at Annexure H to the affidavit in support. It is in these circumstances and when these employees are in managerial cadre, whereas 75% of the claim has been paid up by the Official Liquidator from the sale proceeds, that the package of additional amount has been

drawn.

10 A reference is also made to the claim of the workers and employees affiliated to the Mumbai Mazdoor Sabha, claim of unsecured creditors, other claims and the total liability aggregating to the applicants is Rs.86 crores. Although, advertisements were published inviting claims from various creditors other than those which are referred, none have been received and it is on this basis that the computation of Rs.86 crores has been arrived at. It is stated that the applicants are part of ca243-11.doc Shapoorji Pallonji Group, who are experts in the business of construction, infrastructure and real estate. It is stated that the company is not in a position, now to carry on textile business as the entire finished goods, plant and machinery have been already sold. There is always a scope for diversification and in the present circumstances when in the city of Mumbai, no textile manufacturing business is feasible or practicable that the applicants prayed that this application be allowed.

Mr.Tulzapurkar, learned senior counsel appearing on behalf of the applicants invites my attention to section 466(1) of the Companies Act, 1956 and submits that, the provision vests the Company Court with a discretion to permanently stay the winding up. By the application, the applicants have demonstrated their bonafides. The permanent stay has to be granted, provided the Court is satisfied that there is concrete material, which in this case is produced in the form of payment to creditors and all claims which are outstanding are adequately and sufficiently protected. In the present case, there is no question of the application lacking in bonafides or being opposed to commercial morality. The public interest is also subserved inasmuch as 52% of the shareholding in the company in liquidation, is that of the applicants. In ca243-11.doc the present case, if the substantial secured creditors like applicants have deferred their claims and objection to the relief claimed is that the applicants want to take over the company and start some other business, then, that can be taken care of by clarifying that if the object clause in the memorandum does not include the business that is proposed to be carried out, subject to such modification or amendment thereof, the same would be carried out, that would suffice and protect the interest of all concerned. The law does not prohibit other business being carried on by the company in liquidation after the winding up order is stayed. Once such is the legal position, the application is bonafide and no factor militates against the exercise of the power of stay, then, the discretion in terms of section 466(1) of the Companies Act, 1956 be exercised in favour of the applicants.

12 Mr.Tulzapurkar submits that the section 466(1) imposes no condition, nor it states anywhere that the same business should be carried on. Once the objecting workers are being paid full dues as adjudicated by the Official Liquidator including interest accumulated in accordance with law, then, all the more the objections be over ruled.

Mr.Tulzapurkar takes instructions and makes a statement that in the ca243-11.doc present case, the Provisional Liquidator was appointed on 13th February 2002. The applicants are entitled to interest in terms of Rule 179 of the Companies Court Rules, 1959. If interest is to be computed, the applicants state that the same may be made payable with effect from the date of appointment of the Provisional Liquidator. For all these reasons, it is submitted that this application be allowed. Mr.Tulzapurkar has placed reliance on the following decisions in support of his above contentions:

(1)[1981] 51 Company Cases (Bom) 20 - Vasant Investment Corporation Ltd Vs. Official Liquidator, Colaba Land and Mill Co Ltd;

(2)[2000] 99 Company Cases 189 (Guj.) - Textile Labour Association Vs. Official Liquidator of Jubilee Mills Ltd;

(3)2003(4) Bombay Cases Reporter 836 - Maharashtra State Textile Corporation Ltd Vs. Gopal Balu Saikar, since deceased by his heirs & another (Writ Petition No.4998/1987 decided on 7.1.2003);

(4)[2009] 150 Company Cases 829 (Guj) - P.Chandrasekharan Vs. O.L of Ahmedabad Mfg & Calico PTG Co Ltd & others;

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(5)(2010) 1 Company Law Journal 74 (Guj.) - Shaan Zaveri & Ors Vs. Gautam Sarabhai (P) Ltd

13 On the other hand, Ms.Jane Cox submits that she is appearing on behalf of 748 workmen. Each one of them have lodged their claim with the Official Liquidator. Each one of them is entitled to the amount in accordance with law. As far as their dues are concerned, there has to be a adjudication by the Official Liquidator. She invites my attention to the report of the Official Liquidator and submits that the Official Liquidator has referred to the sale of movables and she further submits that as per the records the Official Liquidator had received/adjudicated the claims which have been mentioned at para 46 of the report of the Official Liquidator dated 12th July 2011. She submits that the payment in terms of the statement made in the Official Liquidator's report does not constitute discharge of liability of workers dues in full.

14 Ms.Cox submits that the workers dues cannot be restricted or computed only in terms of the Memorandum of Understanding. It is not as if the Rashtriya Mill Mazdoor Sangh is the sole arbiter or decision ca243-11.doc maker of the claims and, therefore, once the aggrieved workers have clarified that they do not wish to accept the terms of Memorandum of Understanding signed by the Rashtriya Mill Mazdoor Sangh, then, their claims have to be adjudicated independent of the Memorandum of Understanding and in accordance with law. The workers would then get much

more amount which is assured in terms of the Memorandum of Understanding. Therefore, the Memorandum of Understanding with Rashtriya Mill Mazdoor Sangh ought not be held to be conclusive and decisive of all claims and dues of the workers.

15 Ms.Cox submits that once the company is in liquidation, then, the Bombay Industrial Relations Act, 1946 or the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971, are inapplicable. There is no concept of representative Union or recognised Union any longer governing or operating in the field. The dues of all workers have to be adjudicated and determined by the Official Liquidator. That has to be done by him in terms of the powers conferred by the Companies Act, 1956. The workers are placed in the position of secured creditors. Their claims cannot be given a go bye or diluted by any unilateral compromise by one union. The Memorandum of ca243-11.doc Understanding does not give any benefit to these workmen. She submits that winding up order is of 2005 and the balance that has been calculated is as of 30th September 2001. In this context, she invites my attention to page 112, viz., Schedule II to the Memorandum of Understanding and submits that the dues subsequent to the 30th September 2001 upto date of winding up and outstanding payable even thereafter is much more. That cannot be restricted by any Agreement or Memorandum of Understanding. This amounts to contracting out of a statue and giving up the statutory benefits permanently. She, therefore, submits that merely because a Memorandum of Understanding has been executed by the applicants with the Rashtriya Mill Mazdoor Sangh, that by itself will not enable the Court to exercise its discretionary powers under section 466(1) of the Companies Act, 1956. By unilateral act of parties, this Court cannot be called upon to exercise its discretion in granting permanent stay of the winding up. She submits that different considerations and tests will have to be applied and there is no right vested in the applicant to seek permanent stay of winding up and particularly on the grounds which are set out in the affidavit in support.

She submits that in this case, the discretion should not be exercised because the applicants are not reviving the company in liquidation. They ca243-11.doc are interested in exploiting immovable assets and properties of the company. She submits that after the manufacturing activities have stopped, the plant and machinery has been sold according to the applicants, then, all that they are interested in, is the land. They propose to develop it by constructing multi-storeyed buildings thereon. They are in real estate business and, therefore, looking at profits by development of land. They want to exploit the potential of the land in the present real estate market. There is nothing in the scheme which would enable this Court to be satisfied that the applicants have a bonafide intent of reviving the business of the company in liquidation. The real estate business is not the business of the company in liquidation. In such circumstances and when the intent of section 466(1) is to confer discretion on the Court to stay the winding up proceedings permanently so as to enable the revival of the company in liquidation, then, all the more the applicants are not entitled to any relief. They cannot in the garb of seeking such relief, firstly acquire and then sell and dispose of the assets to a third party. This is a malafide act and the intent is to overreach the company Court by taking away the assets and properties of the company in liquidation from the control of this Court. The applicants desire to achieve indirectly what is prohibited directly in law.

ca243-11.doc This is nothing but an attempt to show revival of the company in liquidation on paper and thereafter to sale it off completely. There is no scheme for diversification nor of running the industry. In these circumstances, this application should not be granted.

16 Ms.Cox submits that as the applicants are seeking permanent stay of winding up, then, once the discretion is exercised in their favour and the winding up proceedings are stayed, the employment of the workmen with the company in liquidation stands revived. There is no legal termination of their services. There is no compliance with section 25N and 25O of the Industrial Disputes Act, 1947. There is no guarantee that those who are not consenting for settlement of their dues in terms of the Memorandum of Understanding, will get full payment including interest.

Those claims may go to the tune of Rs.5,000 crores. She, therefore, submits that in any event what is offered is less than what the creditors would get on winding up that the discretion under section 466(1) should not be exercised. If the applicants desire to take over the company or present a scheme or arrangement with the creditors, then, they cannot resort to section 466(1), but, they must comply with sections 391 and 394 of the Companies Act, 1956. Merely to by-pass the same, that this ca243-11.doc application is filed. Once their intent is as aforestated, then, the application may be dismissed and the Official Liquidator should be directed to take steps to sell the assets and properties in winding up. It will be more beneficial for the creditors of the company including these workers. Ms.Cox, therefore, submits that the application be dismissed.

17 Ms.Cox relies upon following decisions in support of her contentions:

> (1)[2005] 127 Company Cases 752 (Bom) - Shree Niwas Girni Kamgar Kruti Samiti & Ors Vs. Rangnath Basudev Somani & Ors;

18 Mr.Cama, learned senior counsel appearing on behalf of the Rashtriya Mill Mazdoor Sangh states that the Sangh represents 2800 workers. He submits that the plight of the workers is deplorable. They have not earned any wages from 2001. The company has been wound up in 2005. There are no benefits. The claim as stated by Ms.Cox is highly inflated and there are no documents to justify figure of Rs.5,000 crores. This is not an admitted sum. Mr.Cama submits that on the other hand, by virtue of Memorandum of Understanding and the efforts ca243-11.doc initiated by Rashtriya Mill Mazdoor Sangh, 75% of the wages have been paid by the Official Liquidator. This was after sale of movables. Now, there is no plant, no finished goods, no materials. Therefore, there is no possibility of revival of textile business nor is the company in a position to carry on the same. Taking into consideration the present day government policy and the position in the market, textile business has no future. In such circumstances and when there are no efforts of revival for past ten years, then, all the more the Memorandum of Understanding with the applicants is the only relieving factor. That atleast has brought in some monies for the workers. Rs.30,000/- have been paid to each worker. The balance disbursement is of Rs.754.42 crores. A sum of Rs.86 crores is deposited in the Court. In these circumstances, when the liability is to the tune of the sum stipulated in the Memorandum of Understanding and if no monies are going to come in the near future, then, the Memorandum of Understanding should be permitted to be enforced. By refusing to exercise the discretion in favour of the applicants, the process initiated by Rashtriya Mill Mazdoor Sangh upon execution of the

Memorandum of Understanding, will be halted or obstructed. That would not be beneficial for the workers who are waiting for receipt of the monies. For all these reasons, this Court should take a ca243-11.doc pragmatic and practical view of the situation and grant the reliefs as claimed.

19 Mr.Cama has also relied upon the following decisions to support his contentions:

> (1) [1991] Vol.71 Company Cases 473 - Bombay Metropolitan Transport Corporation Ltd Vs. Employeesig of Bombay Metropolitan Transport Corporation Ltd (CIDCO) and Ors;
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> (2) (2008) 13 Supreme Court Cases 323 -

Shivanand Gaurishankar Baswanti Vs. Laxmi Vishnu Textile Mills and others;

(3) Company Application No.14 of 2011 decided on 3rd February 2011 - Ganesh Dattaram Shitap and Ors Vs. M/s.Swadeshi Mill Co Ltd (In Lqn) and Ors.

20 With the assistance of the learned counsel appearing for the parties, I have perused the application, the annexures thereto and the Official Liquidator's report on record. I have also perused with their assistance the legal provisions and the decisions brought to my notice.

21 For properly appreciating the rival contentions, a reference to ca243-11.doc section 466 is necessary. That provision reads thus:

> "466. Power of Tribunal to stay winding up.-(1) The Tribunal may at any time after making a winding up order, on the application either of the Official Liquidator or of any creditor or contributory, and on proof to the satisfaction of the Tribunal that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Tribunal thinks fit.
>
> (2) On any application under this section, the Tribunal may, before making an order, require the Official Liquidator to furnish to the Tribunal a report with respect to any facts or matters which are in his opinion relevant to the application.
>
> (3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the company."

22 Perusal thereof would indicate that the Court may at any time after making a winding up order on the application either of the Official Liquidator or of any creditor or contributory and on proof to the satisfaction of the Court, that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either ca243-11.doc altogether i.e permanently or for a limited time that means temporarily, on such terms and conditions as the Court thinks fit. The Court

may before making an order, require the Official Liquidator to furnish a report in respect of the facts or matters which are relevant to the application.

23 On this application being placed before the Court earlier, an order was made on 23rd June 2011 directing the Official Liquidator to submit his report within a period of three weeks from the date of the order. On 14th July 2011, this Court perused the Liquidator's report and made an order without prejudice to the rights and contentions of the parties in the following terms:

> "(i) The applicant shall deposit an amount of Rs.86 crores with the Official Liquidator within a period of two weeks from today.
>
> (ii) Upon such deposit by the applicant, the Official Liquidator shall forthwith invest the said amount in fixed deposit/s of nationalised bank/s.
>
> (iii) The Official Liquidator shall adjudicate the claims of the remaining workers."

24 In terms of both orders, the Official Liquidator has placed a report and his final report dated 20th August 2011 records the proceedings that ca243-11.doc were conducted by him pursuant to the order and direction of this Court.

He stated that Official Liquidator has received 1138 individual claim of workers for adjudication. Letters have been already sent to the workers for submission of further documentary proof/evidence to prove their individual claim. Rashtriya Mill Mazdoor Sangh vide its letter dated 15th June 2011 forwarded to the Official Liquidator, 1909 letters received by them from the workers accepting the terms of the Memorandum of Understanding dated 15th November 2010 between Rashtriya Mill Mazdoor Sangh and the applicants have also confirmed the receipt of Rs.30,000/- by each of the workers towards advance payment. On the other hand, Ms.Cox submitted the letters of 10th August 2011 and 17th August 2011 forwarding therein Letter of Authority from 699 workers and 24 office staff. The Official Liquidator, therefore, sought permission to adjudicate and pay such claims in accordance with law and to pay remaining workers as per the terms of Memorandum of Understanding with Rashtriya Mill Mazdoor Sangh. He seeks orders of the Court permitting him to disburse the sums and also allow the aggrieved workers to file their claims with him within such period as may be prescribed and permit the Official Liquidator to adjudicate and pay such claims in accordance with law.

ca243-11.doc 25 Thus, there is a situation where the Rashtriya Mill Mazdoor Sangh on the strength of the Memorandum of Understanding executed with the applicants dated 15th November 2010, seeks to press the claims of those workers who are covered by the Memorandum of Understanding and whose consent and letter of Authority/acceptance has been forwarded by it to the Official Liquidator. On the other hand, there are bout 700 and odd workers who do not wish to abide by Memorandum of Understanding but are pressing for adjudication of their individual claims in accordance with law.

26 To my mind, as far as the contentions of Mr.Cama on the issue of locus of the workers represented by Ms.Cox is concerned, that is a matter which need not be gone into and decided in this application. The status of Rashtriya Mill Mazdoor Sangh as a representative/recognised union, would hold good or not, is a matter which must be left for the Official Liquidator to decide. It will be open to him to scrutinise such material as is placed by the parties and then determine as to whether he must undertake scrutiny of individual claims as prayed by Ms.Cox or disburse the sums to such workers who wish to abide by the terms of ca243-11.doc the Memorandum of Understanding. It will be open for both to place before the Official Liquidator the necessary documents so as to either seek enforcement of the terms and conditions of the Memorandum of Understanding or adjudication of individual claims in terms of the Companies Act, 1956 and the Companies Court Rules, 1959. All contentions in that behalf including with regard to the status and locus of the Union and of individual workman, are kept open. It is not necessary to go into the other aspects as to whether the claims have to be adjudicated with effect from the date of winding up or the date of appointment of the Provisional Liquidator and even contentions in that behalf can be kept open. This is not a stage where this Court should accept the statement of the applicants that they are ready and willing to settle the claims, not with effect from any prior date but from the date of appointment of the Provisional Liquidator. This is not a stage where this Court should determine the relevant date and decide as to whether it is from the date of the order of winding up or any date prior to the order of winding up. All pleas of parties in relation thereto are also kept open and they be dealt with and decided at an appropriate stage.

27 Once this course is adopted, then, it is not necessary to refer to ca243-11.doc decisions which have been cited by Mr.Cama with regard to the locus of the Union. The judgment in the case of Bombay Metropolitan Transport Corporation Ltd Vs. Employees of Bombay Metropolitan Transport Corporation Ltd (CIDCO) and others rendered by Division Bench of this Court on 5th/6th September 1990 (Appeal No.747 of 1987 in Company Petition No.138/1986) need not, therefore, be referred in any further details. Equally, it would not be necessary to refer to the decision of the Hon'ble Supreme Court in the case of Shivanand Gaurishankar Baswanti Vs. Laxmi Vishnu Textile Mills and others reported in (2008) 13 Supreme Court Cases 323. As far as the ambit and scope of section 466 of the Companies Act, 1956 is concerned, the principles in that regard are summarised in a decision of a learned single Judge of the Calcutta High Court reported in AIR 1996 Calcutta 171 [Nilkanta Kolay Vs. The Official Liquidator (Company Petition No.120 of 1986, decided on 30th August 1995)]. There, an application was made by the said petitioner under section 466 of the Companies Act, 1956 by stating that winding up petition was filed against the company and a winding up order came to be passed on 5th July 1988. The Liquidator took possession of the company and he filed a complaint against the Ex-

Directors including Nilkanth Kolay for taking cognizance and for ca243-11.doc punishment of the offence of not filing the statement of affairs in terms of section 454 of the Act. The summons was served and Nilkanth appeared in pursuance thereof. He thereafter stating that there are three contributories and during the course of hearing of the appeal against an order on the winding up petition and when directions were issued for sale of the properties, belatedly made an application on 20th January 1992 under section 466 of the Companies Act, 1956. That application was made before the Appellate Court and that is how the matter was remanded for a decision on that application in

terms of section 466 of the Companies Act, 1956. The learned single Judge of the Calcutta High Court made reference to earlier decisions of the said High Court summarising the principles as under:

> "23 ....
>
> "Therefore, from the above principles which have been summarised in different authorities and the decision referred to hereinbefore it appears that the discretion for stay under Section 466 can only be exercised by the Court (1) if the Court is satisfied on the materials before it that the application is bonafide; (2) the Court would be guided by the principles and definitely come to the finding that the principles ca243-11.doc are applicable to the facts of a particular case; (3) mere consent of all the creditors for stay of winding up is not enough; (4) that offer to pay in full or make satisfactory provisions for the payment of the creditors is not enough; (5) Court will consider the interest of commercial morality and not merely the wishes of the creditors and contributories; (6) Court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation; (7) a firm had accepted proposal for satisfying all the creditors must be before the Court with material particulars; (8) the jurisdiction for say can be used only to allow in proper circumstances a resumption of the business of the Company; (9) the Court is to consider whether the proposal for revival of the company is for benefit of the creditor but also whether the stay will be conducive or detrimental to commercial morality and to the interest of the public at large; (10) before making any order Court must see whether the Ex-Directors have complied with their statutory duties as to giving information to the Official Liquidator by furnishing the statement of affairs; (11) and any other relevant fact which the Court thinks fit to be considered for granting or not granting the stay having regard to the peculiar facts of a particular case."

28 The learned Judge also made reference to an earlier decision reported in the matter of East India Cotton Mills Ltd reported in AIR ca243-11.doc 1949 Calcutta 69 wherein it was held thus:

> "In the said case Justice S.R.Das (as his Lordship then was) held as follows:
>
> "In this application the petitioners also pray for stay of the winding up proceedings under section 173, Companies Act. This section comes into play after an order for winding up has been made. It presupposes a good and valid winding up order. In an application under this section, there can be no question of attacking the order. Any creditor or contributory may make an application under this section. Therefore, each of the petitioners is fully qualified to maintain this application insofar as it is one under this section. The company, however, independently of the Liquidator, does not appear to me to have any locus standi in such an application. The section requires proof of the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed. What has happened to justify a stay of proceedings? I have already dealt with and rejected the allegations of collusion between Shiva Prosad and

Manabendra and the suppression of service of the petition. Has anything happened since the order was made? All that has happened is that the petitioning creditor has been satisfied, not by the company but by Dulichand a creditor of the company. But is the satisfaction of the petitioning creditor's debt by itself sufficient to stay the winding up when there are other creditors? It is said that ca243-11.doc Dulichand who in his firm of Murarilal Dulichand claims about Rs,90,000, Jewraj Ram Kissen who claims about also Rs.

90,000 and is represented by Mr.M.N.Banerjee are supporting this application. On the other hand there is the creditor Manabendra. Manabendra claims to be a creditor in the sum of Rs.5,24,651/-. It is probable that he agreed to accept Rs.25,000/-. I do not propose to go into the question whether the settlement with him was on any condition or whether the condition has been broken. Admittedly Rs.25,000 is due to him. The petitioners through their counsel offer to pay Rs.25,000 to him in full settlement which Manabendra is not prepared to accept. There is also one Khagendra Lal Saha who appeared before Edgley, J and filed an affidavit claiming Rs.6,444-4-6 and objected to any stay but who has not been served with the present summons. Lastly there are the Banks and other creditors shown in the balance sheet as on 31st December 1944 about whose claim nothing has been said in the petition and the affidavits before me. Further even if all the creditors consent to stay, is the Court bound to grant a stay? The principles on which the Court proceeds on an application of this kind have been summarised in Halsbury's Laws of England, 2nd Edition, Vol.2, Art.1209 at p.724 in the following terms:

"In the exercise of its jurisdiction to stay, the Court so far as possible, acts upon the principle applicable in ca243-11.doc exercising jurisdiction to rescind a receiving order annulled an adjudication in bankruptcy against an individual. The Court refuses, therefore, to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large. In particular the Court will have regard to the following facts that the Directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement of affairs that there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid up shares forming the consideration for the purchase of property by the company on formation; that the promoter has made gifts of fully paid up shares to the Directors, that there are other matters connected with the promotion, formation or failure of the company of the conduct of its business or affairs, which appear to the Court to require investigation. The same principles are apparently applicable whether the company has or has not invited the public to subscribe for its shares except, possibly, in the case of a private company, where all the shareholders have full knowledge of what has been done."

> "The summary of the law is based on the observation of ca243-11.doc Buckley, J in the case of In re: Telescriptor Syndicate Ltd., (1903) 2 Ch.174 pp.180-181: (72 LJ Ch 480), wherein reference was made to the Trenchand observation of French, L.J.in the earlier case of In re: Hester, (1882) 22 QBD 632 at p.641 : (60 LT 943). I, therefore, proceed to consider the facts in the light of these principles."

29 Thus, the broad principles are that the Court must be satisfied on the materials before it that the application is bonafide, mere consent of all creditors for stay of winding up is not enough; that offer to pay in full or make satisfactory provisions for payment of the creditors is not enough; the Court will consider the interest of commercial morality and not merely the wishes of the creditors and contributories; the Court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation; the jurisdiction for stay can be used only to allow in proper circumstances a resumption of the business of the company and the Court is to consider whether proposal for revival of the company is for the benefit of the creditor but also whether the stay will be conducive or detrimental to commercial morality and to the interest of the public at large; any other relevant fact which the Court thinks fit be considered for granting or not granting the stay having regard to the ca243-11.doc peculiar facts in a particular case also would govern the exercise of the power.

30 In my view, what the submissions canvassed by Mr.Tulzapurkar overlook is, that a company is not a enterprise only of the shareholders.

It is not only they who are interested in setting up and running companies. The status of a company incorporated and registered under the Indian Companies Act, 1956 has been best summarised in the judgment of the Hon'ble Supreme Court in the case of National Textile Workers Union Vs. P.R.Ramakrishnan reported in AIR 1983 Supreme Court 75 in the following words:

> "4 There is one very important consideration which we must bear in mind while dealing with this question and it is necessary to advert to it at the present stage. The concept of a company has undergone radical transformation in the last few decades. The traditional view of a company was that it was a convenient mechanical device for carrying on trade and industry, a mere legal frame work providing a convenient institutional container for holding and using the powers of company management. The company law was at that time conceived merely as a statute intended to regulate the structure and mode of ca243-11.doc operation of a special type of economic institution called company. This was the view which prevailed for a long time in juristic circles all over the democratic world including United States of America, United Kingdom and India. That was the time when the doctrine of laissez faire held sway and it dominated the political and economic scene. This doctrine glorified the concept of a free economic society in which State intervention in social and economic matters was kept at the lowest possible level. But gradually this doctrine was eroded by the emergence of new social values which recognised the role of the State as an active participant in the social and economic life of the citizen in order to being about general welfare and common good of the community. With this change in socio-economic thinking, the developing role of companies in modern economy and

their increasing impact on individuals and groups, through the ramifications of their activities, began to be increasingly recognised. It began to be realised that the company is a species of social organisation, with a life and dynamics of its own and exercising a significant power in contemporary society. The new concept of corporate responsibility transcending the limited traditional views about the relationship between management and shareholders and embracing within its scope much wider groups affected by the trading activities and other connected operations of companies, emerged as an ca243-11.doc important feature of contemporary thought on the role of the corporation in modern society. The adoption of the socialistic pattern of society as the ultimate goal of the country's economic and social policies hastened the emergence of this new concept of the corporation. The socio-economic objectives set out in Part IV of the Constitution have since guided and shaped this new corporate philosophy. We shall presently refer to some of the Directive Principles of State Policy set out in Part IV which clearly show the direction in which the corporate sector is intended to move and the role which it is intended to play in the social and economic life of the nation. But, one thing is certain that the old nineteenth century view which regarded a company merely as a legal device adopted by shareholders for carrying on trade or business as proprietors has been discarded and a company is now looked upon as a socio- economic institution wielding economic power and influencing the life of the people.

5 It is now accepted on all hands, even in predominantly capitalist countries, that a company is not property. The traditional view that the company is the property of the shareholders is now an exploded myth. There was a time when a group controlling the majority of shares in a company used to say: "This is our concern. We can do what we like with it." The ownership of the concern was ca243-11.doc identified with those who brought in capital. That was the outcome of the property-minded capitalistic society in which the concept of company originated. But this view can no longer be regarded as valid in the light of the changing socio-economic concepts and values. Today social scientists and thinkers regard a company as a living, vital and dynamic,social organism with firm and deep rooted affiliations with the rest of the community in which it functions. It would be wrong to look upon it as something belonging to the shareholders.

ig It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors which contributes to the production of national wealth. There is another equally, if not more, important factor of production and that is labour. Then there are the financial institutions and depositors, who provide the additional finance required for production and lastly, there are the consumers and the rest of the members of the community who are vitally interested in the product manufactured in the concern. Then how can it be said that capital, which is only one of the factors of production, should be regarded as owner having an exclusive dominion over the concern, as if the concern belongs to it?A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities

towards the community in which it functions. The Supreme Court pointed out as far back as 1950 in Chiranjeetlal v. Union of ca243-11.doc India (AIR 1951 SC 41 at p.59):

"We should bear in mind that a corporation, which is engaged in production of commodities vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it." Pt.Govind Ballabh Pant also pointed out in one of his speeches:

"... ... ... industry is
ig not an isolated concern of the

shareholders or the managing agents alone. It reacts on the entire people in the country, on their economic conditions, on employment or standard of living, on everything that conduces to the material well being."

The same view was also expressed at the International Seminar on Current Problems of Corporate Law, Management and Practice held in New Delhi where it was observed that "an enterprise is a citizen. Like a citizen it is esteemed and judged by its actions in relation to the community of which it is a member as well as by its economic performance." That is why it is regarded as one of the paramount objectives of a company to bring about maximisation of social welfare and common good. This necessarily involves reorientation of thinking in regard to the duties and obligations of a company not only vis-a-

ca243-11.doc vis the shareholders but also vis-a- vis the rest of the community affected by its operations such as workers, consumers and the Government representing the society.

There was at one time a serious controversy between two schools of thought, one represented by Adolf Berle and the other by Professor Dodd, as regards the nature of duties and obligations owed by director representing management of a company. Adolf Berle took the view that directors are trustees only for shareholders-that is the traditional view which directly flows from a purely capitalistic approach which identifies ownership and dominion with capital-while Prof. Dodd believed that directors are trustees not only for shareholders but also for the entire community.

Ultimately, however, in his subsequent book, "Twentieth Century Capitalist Revolution", Adolf Berle conceded that Prof.Dodd was right and that modern directors are not omitted to running business enterprise for maximum profit motive alone, but are in fact administrators of community system or of a social institution. That is why we find that in recent times there is considerable thinking on the subject of social responsibilities of corporate management and it is now acknowledged even in highly developed countries like the United States and England that maximisation of social welfare should be the legitimate goal of a company and shareholders should be regarded not as proprietors

of the company, but merely as suppliers of capital entitled to no ca243-11.doc more than reasonable return and the company should be not only to shareholders but also to workers,consumers and the other members of the Community and should be guided by considerations of national economy and progress. This new concept of a Company was felicitously expressed by Desai, J sitting as a Judge of the Gujarat High Court in Panchmahal Steel Ltd. v. Universal Steel Traders(1) in the following words:

> "Time-honoured approach ig that the company law must safeguard the interest of investors and shareholders of the company would be too rigid a framework in which it can now operate. New problems call for a fresh approach. And in ascertaining and devising this fresh approach, the objective for which the company is formed may provide a guide line for the direction to be taken. As Prof. De Wool of Belgium puts it, the company has a three-fold reality economic, human and public-each with its own internal logic. The reality of the company is much broader than that of an association of capital; it is a human working community that performs a collective action for the common good. In recent years a debate is going on in the world at large on the functions and foundations of corporate enterprise. The "preservationists" and the "reformers" are vigorously propounding their views on the possible reform of company, the modern trend emphasising the public ca243-11.doc interest in corporate enterprise."

The learned Judge elaborated this "modern trend" by quoting from Prof. Gower's book on "The Principles of Modern Company Law": "One section of the community whose interests as such are not afforded any protection, either under this head or by virtue of the provisions for investor or creditor protection, are the workers and employees of the taken-over company. This is a particularly unfortunate ig facet of the principle that the interest of the company means only the interest of the members and not of those whose livelihood is in practice much more closely involved."

31 Lest it may be said, that after globalisation, liberalisation and privatisation so also the change in economic scenario since 1990, these principles may no longer hold good, in a judgment which was once again delivered by five Judges Bench of the Hon'ble Supreme Court post this era and reported in AIR 1994 Supreme Court 2696 (Workmen of Meenakshi Mills Ltd etc Vs. Meenakshi Mills Ltd and another), this is what is held:

> ..... "Assuming that the factors mentioned in sub-s (3) S.25N ca243-11.doc as substituted by Amending Act 49 of 1984, are declaratory in nature and are required to be taken into consideration by the appropriate Government or the authority while passing an order under sub-s.(2) of S.25-N, as originally enacted, it is not possible to hold that the interests of the workmen is not a relevant factor for exercising the said power. As pointed out by Prof. Gower in his treatise on Principles of Modern Company Law:
>
> "In so far as there is any true association in the modern public company it is between management and workers rather than between shareholders inter se or between

them and the management. But the fact that the workers from an integral part of the company is ignored by the law". (4th Edn., p.10).

45 The Indian Constitution recognises the role of workers in the management of the industries inasmuch as Article 43A requires that the State shall take steps by suitable legislation or in any other way to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. While holding that the workers have the locus standi to appear and be heard in a petition for winding up of the company both before the petition is admitted and also after the admission until an order is made for winding up of the company, Bhagwati, J., (as the learned Chief Justice then was), in ca243-11.doc National Textiles v. P.R.Ramakrishnan, [1983] 1 SCR 922, has thus elaborated this idea:

46 In the same case, Chinnappa Reddy, J., in his concurring judgment, has stated:

"The movement is now towards socialism. The working classes, all the world over, are demanding 'workers' control and 'Industrial Democracy. They want security and the right to work to be secured.They want the control and direction of their lives in their own hands and not in the hands of the industrialists, bankers and brokers. Our Constitution has accepted the workers' entitlement to control and it is one of the Directive Principles of State Policy that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. It is in this context of changing norms and waxing values that one has to judge the workers' demand to be heard". (p.958) (of (1983) 1 SCR

922) : (at p.83 AIR 1983 SC 75).

47 Similarly, Baharul Islam, J. has observed:

"Our 'Democratic Republic' is no longer merely 'Sovereign' ca243-11.doc but is also 'Socialist' and 'Secular'. A Democratic Republic is not Socialist if in such a Republic the workers have no voice at all. Our Constitution has expressly rejected the old doctrine of the employers' right to 'hire and fire'. The workers are no longer cipher; they have been given pride of place in our economic system". (p.980) (of SCR) : (at p.105 of AIR).

32 Once again, the view in the case of P.R.Ramakrishnan (supra) has been followed and applied. In a later decision reported in AIR 1995 Supreme Court 1811 (L.I.C of India and another Vs. Consumer Education and Research Centre and others), the Hon'ble Supreme Court held thus:

"In National Textiles Workers' Union etc. Vs P.R. Ramkrishnan, 1983 (1) SCR 922, the constitution bench per majority held that the socio-economic objections set down

> in the directive principles of the Constitution should guide and shape the new corporate philosophy. The management of the private company should show profound concern for the workers. The socio-economic justice will inform all the institutions of textiles in the nation to promote fraternity and dignity of the individuals. In Workmen of Meenakshi Mills Ltd v. Meenakshi Mills ca243-11.doc Ltd., 1992 (3) SCC, 336, the right of the management to declare lay off under s.25-N of the Industrial Disputes Act, 1984 under Article 19(1)(g) of the Constitution are subject to the mandates containing Arts.38, 39A, 41 and 43. Therefore, right under Article 19(1)(g) was held to be subject to the directive principles. In Consumer Education & Research Centre v. Union of India, JT 1995 (1) SC 637, the right of the management in Asbestos industry to carry on its business is subject to their obligation to protect the health of the workmen and to preserve pollution free atmosphere and to provide safety and healthy conditions of the workmen.
>
> 42) The authorities or private persons or industry are bound by the directives contained in part IV, Part III and the Preamble of the Constitution. It would thus be clear that the right to carry on trade is subject to the directives contained in the Constitution, the Universal Declaration of Human Rights, European Convention of Social Economic and Cultural right and the Convention on Right to development for socio-economic justice. Social security is a facet of socio-economic justice to the people and a means to livelihood."

ca243-11.doc 33 Thus, it is not as if public interest, commercial morality and corporate responsibility are alien concepts in the Era of Globalisation, Liberalisation and Privatisation. The Courts have to apply the above principles and be vigilant and onguard against any action by which its control over companies as envisaged by the statute and particularly in the cases of companies under liquidation is sought to be interfered with.

The company Court cannot permit even by exercise of a discretion, any shareholder or creditor to carry forward a scheme or proposal by which the matter gets out of its hands and control altogether. When an order of winding up is passed by a Court and an Liquidator is appointed to manage and administer the affairs of a company, the matter comes under supervision and control of the company Court. Parties who have a vested interest and particularly in valuable assets and properties of the company in liquidation will always make an attempt to get out of the clutches of the company Court so as to have a free hand in dealing with the assets and properties of the company. The erstwhile directors, shareholders and other stake-holders including influential secured creditors would be interested in either putting an early end to the affairs of the company in liquidation or by taking advantage of the delay seek to take charge or intermeddle in the affairs and matters relating to ca243-11.doc winding up in an indirect or oblique manner. The very purpose of the Act is defeated if such attempts are allowed to succeed. Section 447 of the Companies Act, 1956 states that an order for winding up of a company shall operate in favour of all the creditors and all the contributories of the company as if it had been made on the joint petition of a creditor and of a contributory.

34 The provisions of the Companies Act, 1956 commencing with the presentation of a petition for winding up, go to show that the company Court has very wide powers. It can dismiss such petition with or without costs. It can adjourn its hearing conditionally or unconditionally. It can make any interim order as it thinks fit or make an order for winding up of the company with or without costs or any other order that it thinks fit.

However, once a winding up order has been passed, the consequences are that the order has to be communicated to the Official Liquidator. The suits and other proceedings against the company get stayed on winding up order and cannot be initiated or proceeded with, save and except, with the sanction of the Court winding up the company. Section 447 has already been noted above. Section 448 to section 450 enumerate the appointment and powers of the Official Liquidator. The Official Liquidator ca243-11.doc then has to ensure that a statement of affairs of the company is submitted to him. He can call for such particulars as are necessary and if default is made in complying with the requirement of furnishing and submitting the statement of affairs then that act is viewed very seriously, and, it is an offence in terms of the relevant provisions.

35 Section 455 is entitled "Report by Official Liquidator". The Liquidator's report has to be comprehensive. It may be preliminary or final. He can seek sanction of the company Court for taking such steps as are necessary to preserve, protect and safe-guard the properties and assets of the company. The custody of the company's property in terms of section 456 is with the Official Liquidator. He must take into his custody or control all the property, effects and actionable claims to which the company is or appears to be entitled. He has very wide powers including seeking assistance of the police for taking possession of the company's properties and effects. Sub-section 2 of section 456 states that all the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order winding up of the company. This provision is salutary in nature. The legislature was conscious of the fact that it may be assumed that on winding up ca243-11.doc order being passed, the properties and assets are in custody or under control of the Official Liquidator, but that is not what is really intended by the statute. It is the company Court which has the custody as and from the date of the order of winding up. For the Court to exercise its powers under the Act and to enable it to take custody, that the Official Liquidator is appointed. The powers of the Official Liquidator have to be exercised by him with the sanction of the Court and that is evident by section 457.

In section 457, in sub section (1) in addition to clauses (a) to (c), clause (ca) has been added by Act 11 of 2003 and that confers power on the Official Liquidator to sell whole of the undertaking of the company as a going concern. This is evident by the fact that once the Liquidator has taken custody of the property and puts it under the control of the Court, he can with the sanction of the Court and to ensure effective so also proper winding up of its affairs, sell whole of the undertaking of the company as a going concern so as to enable him to meet the claims that may be received from all the creditors. There is a discretion in the Liquidator and that is evident by section 458.

36 Then comes section 459 under which the Court can sanction legal assistance to Liquidator. The exercise and control of Liquidator's powers ca243-11.doc is subject to the provisions of the Act, but in the administration of the assets of the company and distribution thereof among its creditors, the

Liquidator shall have regard to any directions which may be given by the resolution of the creditors or contributories at any general meeting or by the committee of inspection. The Liquidator may apply to the Court in the manner prescribed, if any, for directions in relation to any particular matter arising in the winding up. Therefore, by sub-section (6) of section 460, it is evident that anything that the Liquidator does even by using his own discretion, is ultimately subject to the confirmation by the Court.

The Liquidator has to keep books and he has to also have audit conducted of his accounts is clear from the further provisions. The Central Government has control over Liquidators but as is evident, in individual matters it is ultimately the Court, which has all the powers. It is in this backdrop that section 466 must be construed. It is not proper to see this provision in isolation for that would mean that the affairs of the company in winding up is the absolute prerogative of the Liquidator and the Court has only to act on the reports of the Liquidator. The Court has the paramount duty and obligation and it has to uphold the object of the Companies Act, 1956.

ca243-11.doc 37 As held by the Hon'ble Supreme Court, the Company Court cannot take a narrow and pedantic view of the matter and proceed on the basis that the company is the property of the shareholders and it is their wish which has to be given effect to. Similarly, it is only the interest of the shareholders and the creditors which has to be borne in mind.

The larger role that has now been highlighted makes it abundantly clear that a company is a social institution. It is not the interest of those who invest their money in a company which has primacy or they alone have to be placed in the forefront. Once the society as a whole has a stake in a company, then, the company Court cannot overlook that aspect, for it would be shirking its duty and ignoring public interest. The company Court has to keep public interest and public good in the forefront as well. Therefore, while exercising its powers under section 466, the company Court cannot do anything which shakes the confidence of the public at large in the functioning or working of the company Court or that of the Liquidator. Once commercial morality and corporate responsibility are inbuilt in the administration and management of companies, then, these principles would have to be applied even by the company Court. We, in India, follow the principle and phiolosphy emphasised by the Father of Nation, namely, "Commerce Without ca243-11.doc Morality is a Social Sin". The company Court cannot permit any arrangement or scheme or grant any relief which would defeat public interest or would contravene public policy. Ultimately, whether it is a compromise between conflicting stake holders or persons having same interests, when it comes to winding up the affairs of a company, the Court must necessarily act for public good and in public interest. If the discretion vested in the company Court is not exercised on sound judicial and social principles, then, people at large would lose faith in the administration of justice itself. They would carry an impression that the company Court places its seal of approval on any arrangements or schemes brought before it by interested parties, mechanically.

38 Even as late in 2007 the Hon'ble Supreme Court in the case of M/s.Meghal Homes Pvt Ltd v. Shree Niwas Girni K.K.Samiti & Ors reported in AIR 2007 Supreme Court 3079, while reversing a decision of the Division Bench of this Court modifying the scheme of arrangement in exercise of the powers under section 392 of the Companies Act, 1956 had the following to say:

"22. When a Company is ordered to be wound up, the ca243-11.doc assets of it, are put in possession of the Official Liquidator. The assets become custodia legis. The follow up, in the absence of a revival of the Company, is the realization of the assets of the company by the Official Liquidator and distribution of the proceeds to the creditors, workers, and contributories of the company ultimately resulting in the death of the company by an order under Section 481 of the Act, being passed. But, nothing stands in the way of the Company Court, before the assets are disposed of, to accept a Scheme or proposal for revival of the Company. In that context, the Court has necessarily to see whether the Scheme contemplates revival of the business of the Company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them in terms of Section 529 and Section 529A of the Act. Of course, the Court has to see to the bonafides of the Scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the Company in liquidation.

23. In fact, it was on this basis that the Division Bench of the High Court proceeded when it passed the order dated 4.4.1995. Apart from the fact that the correct principle was adopted, the directions therein are binding on the Company Court and the Division Bench of the High Court of coequal jurisdiction when the proposal for amendment of the earlier scheme came up. It has to be ca243-11.doc noted that it was not a fresh scheme that was being mooted, but it was a proposal for an amendment of the scheme already considered by the Division Bench when it passed the order dated 4.4.1995. It was the plain duty of the Division Bench on the latter occasion to keep in focus the suggestions earlier made.

24. It was argued before us on behalf of the appellant that Sections 391 to 394A were procedural provisions and when once a company was under liquidation, the Chapter dealing with winding up applied and the only provision or substantive provision conferring power of stopping the winding up was conferred on the court by Section 466 of the Act, and unless the court is satisfied that the Company is being taken out of liquidation by way of revival and that it will sub-serve public interest and will conform to commercial morality, the court cannot accept a scheme proposed under Section 391 of the Act. The argument on the side of the respondents is that Section 391 is a self-contained code and read with Section 392 of the Act, which was peculiar to our Act, it was clear that a Company Court could approve, independently of Section 466 of the Act, a scheme and could take the company out of liquidation and even pass an order of stay in terms of Section 391 read with Section 392 of the Act. Section 466 of the Act was not attracted when a scheme approved by the shareholders, creditors, members ca243-11.doc of the Company and so on was put forward before the Company Court.

25. It is a well settled rule of interpretation that provisions in an enactment must be read as a whole before ascertaining the scope of any particular provision. This Court has held that it is a rule now firmly established that the intention of the legislature must be found by reading the statute as a whole. In Principles of Statutory

Interpretation by Justice G.P. Singh, it is stated:

> "The rule is referred to as an "elementary rule" by VISCOUNT SIMONDS; a "compelling rule" by LORD SOMERVELL OF HARROW; and a "settled rule" by B.K. MUKHERJEE, J."

(See pages 31 and 32 of the Tenth Edition) When we accept this principle, what we have to do is to read Sections 391 to 394A not in isolation as canvassed for by learned counsel for the respondents, but with reference to the other relevant provisions of the Act. We see no difficulty in reconciling the need to satisfy the requirements of both Sections 391 to 394A and Section 466 of the Companies Act while dealing with a Company which has ca243-11.doc been ordered to be wound up. In other words, we find no incongruity in looking into aspects of public interest, commercial morality and the bona fide intention to revive a company while considering whether a compromise or arrangement put forward in terms of Section 391 of the Companies Act should be accepted or not. We see no conflict in applying both the provisions and in harmoniously construing them and in finding that while the court will not sit in appeal over the commercial wisdom of the shareholders of a company, it will certainly consider whether there is a genuine attempt to revive the company that has gone into liquidation and whether such revival is in public interest and conforms to commercial morality. We cannot understand the decision in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd. (supra) as standing in the way of understanding the scope of the provisions of the Act in the above manner. We are therefore satisfied that the Company Court was bound to consider whether the liquidation was liable to be stayed for a period or permanently while adverting to the question whether the scheme is one for revival of the company or ca243-11.doc that part of the business of the company which it is permissible to revive under the relevant laws or whether it is a ruse to dispose of the assets of the company by a private arrangement. If it comes to the latter conclusion, then it is the duty of the court in which the properties are vested on liquidation, to dispose of the properties, realize the assets and distribute the same in accordance with law."

What is further interesting and relevant to note is, that the Supreme Court frowned upon an arrangement which was of a like nature. There, Supreme Court was considering the correctness of the view taken by the Division Bench under which it permitted modification or replacement of an earlier scheme. That earlier scheme envisaged revival of the company in liquidation. However, the modifications that were suggested in the compromise or arrangement envisaged not revival, but taking over of the lands of the company which was carrying on identical, viz., textile business and placing them in the hands of developers and builders, namely, M/s.Lodha Builders Pvt Ltd. The said M/s.Lodha Builders Pvt Ltd were not at all interested in revival of the company or its business by taking over the undertaking of the company ca243-11.doc as a going or running union. It was interested in starting an industry of its own in that property. This was not approved by the Supreme Court as a modification in the scheme necessary for proper working of the compromise or arrangement earlier arrived at. This was a substitution of the scheme itself. Therefore, unless the scheme with the modifications was placed before the general body by reconvening the meeting in terms of section 391 of the Act, the modification could not have been sanctioned, was the view taken by the Supreme Court. Therefore, howsoever laudable the object may be, the company Court cannot approve an arrangement by which the assets of the company in liquidation are disposed off or taken

over by some private arrangement and to put it more clearly by circumventing the company Court itself.

The Court even in matters of sections 391 to 394 and 466 of the Companies Act, 1956 has to take into consideration the aspect of public interest, commercial morality and the intention to revive the company.

40 I will have to test the present application and the request of the applicants therein on the touchstone of the above principles. All discretion has to be exercised judiciously and not arbitrarily. The Court cannot pick and choose shareholders and creditors. The Court cannot in ca243-11.doc the garb of conflicting claims of workers or because of any rift inter-se between them, allow the claims of the said workers and other creditors to be compromised or defeated altogether. Ultimately, the applicants may claim to be shareholders and substantial secured creditors, but if the purpose in presenting this application is to enable them to take over the company's properties and assets which are indeed valuable at a price or value which they unilaterally determine, then, that cannot be permitted. A careful scrutiny of this application would reveal that what the applicants are projecting is, that they have the necessary wherewithal and strength. The applicant No.1 claims to be a promoter, secured creditor and unsecured creditor of the company in liquidation. It has projected that it alongwith its wholly owned subsidiary owns 17,64,430 shares of the company in liquidation constituting 22.70% of the total equity shares of the company in liquidation, whereas the applicant No.2 owns 22,83,210 equity shares of the company constituting 29.29% of the total shareholding of the company in liquidation. On the own showing of the applicants, applicant No.2 has acquired this shareholding after the winding up order. Therefore, they may be owning in aggregate about 52% of the total equity shares of the company, they may claim to be vitally interested in its affairs as well, but ca243-11.doc they are part of a distinct group of companies, viz., Shapoorji Pallonji Group which is not in textile business admittedly. That group is in the business of Construction, Infrastructure and Real Estate Development Business.

41 The applicants have stated in the affidavit in support that the company in liquidation is a Public Limited Company incorporated and registered under the Companies Act VI of 1882 of the Legislative Council of India. Its shareholding and activities are set out and admittedly the company was operating composite textile mills having spinning, weaving and processing sections for the manufacture of cotton, synthetics and non-woven fabrics. Although the company ran into rough weather, what has been placed for this Court's consideration and seeking reliefs in its equitable and discretionary jurisdiction is, that Government of Maharashtra has initiated various measures for promotion and facilitation of development of mill lands in Mumbai. It is projected that in accordance therewith, the availability of houses has also been a thrust area. The initiative alongwith available immovable properties of the company together, offer a favourable platform for the company to undertake real estate development operation. Now, if para ca243-11.doc 7 of the affidavit in support, which is reproduced herein above is carefully perused, it is apparent that the applicants do not desire to revive the business of the company in liquidation by developing part of its properties or portions of its lands, but desire to take over the said lands for exploitation in the real estate market. It is clearly their motive that these lands should be taken over without offering the market price, but via this application so that once the permanent stay of winding up is obtained

or granted, that would mean that the company's prime assets and properties can no longer be controlled by the Court. They would develop these lands by constructing buildings and sell off the units therein and earn profits.

42 However, the desire to cash on the lands with a view to fully exploit their potential is not matched with the same approach as far as the creditors of the company. By not reviving the company after taking it out of winding up shows that the applicants are primarily concerned with the benefits attached to these lands. By exploiting and utilising them to their advantage, the applicants are not agreeable to the Liquidator and the Court controlling their actions in interest of all creditors and general public. The business opportunities on account of spiraling prices in the ca243-11.doc Real Estate Market is the only attraction for the applicants. The proceeds and gains from such opportunities ought to have been shared by them with all. However, that is not their intent, is clear from their stand. If these lands are sold by the Official Liquidator under the supervision of this Court and at open, fair and transparent public auction, the applicants may not stand any chance and hence they desire to obtain the lands at a throwaway price by a back-door method.

That is the sole intent in making this application. By invoking sympathy of some creditors and stating that the monies to meet the claims of the workers would be brought in immediately, what the applicants are seeking to do is to take away entire proceedings in winding up from the supervision and control of this Court. They may make give or seek some concessions here and there. However, their object is not to run the business of the company in liquidation. They have not brought anything on record by which it could be conclusively held that textile manufacturing business is altogether prohibited or not permitted in the Island city. In fact, if the affidavit in support is perused carefully, it is evident that the Shapoorji Pallonji Group is interested in the lands of this textile company and if they have to obtain the same at public auction or by bidding at a sale of this land and assets of the company in liquidation ca243-11.doc under the aegis of the Liquidator and pursuant to the sanction of this Court, they may not be able to acquire these lands. Thus, to avoid participation at a public auction and at a sale which will be conducted in a transparent and fair manner, that the application has been filed. The applicants have not come out with a positive case that business of the company in liquidation cannot be revived at all. They do not say that the textile business cannot be carried on or is totally prohibited. They claim that it is not practicable and feasible to carry on such business.

However, it is their perception. The Liquidator has not come forward with any conclusive or decisive report on this aspect. In such circumstances, if all the above tests and principles are applied, it is evident that this company application is filed for seeking a stay of the winding up not for revival of the company's business or to smoothen the process of liquidation and winding up, but to take over the company itself in an indirect and oblique manner. There is substance in the objection of Ms.Cox that this is a take over of the company without recourse to the provisions in law enabling such take over and particularly sections 391, 392 to 394 of the Act. To by pass and avoid compliance with such provisions, that this application is filed. Once such is the motive, then, the enormity of the funds, the applicants are willing to pump in, the ca243-11.doc schemes or arrangements of settlement of the dues of creditors, cannot persuade this Court to grant any discretionary relief to them and prevent the Liquidator from proceeding to wind up the company in accordance with law. If ultimately it is impossible to revive the company, then, it is better that the Liquidator carries on its affairs till the

dissolution of the company. It is only through the mechanism and participation of the Liquidator, that the Court can ensure settlement of claims of the secured and unsecured creditors in accordance with law.

43 At this stage, when claims of certain workmen have been given a preference over others or non-consenting employees, then, all the more it would not be in public interest and commercial morality to grant any reliefs.

44 As a result of the above discussion, this company application fails and it is dismissed.

45 In the view that I have taken, it is not necessary to refer to all the decisions that have been brought to my notice. Suffice it to note that the decisions that have been brought to my notice by Mr.Tulzapurkar deal ca243-11.doc with a situation in which the Court has permitted carrying on a distinct business under a scheme of arrangement or compromise by adherence to the provisions of law. That was a case where on a over all view, the scheme proposed and the arrangement placed before this Court in terms of sections 391 to 394 of the Companies Act, 1956 was in the interest of the shareholders, creditors and general public. It is in that backdrop, that the Court took the view relied upon by the applicants. It is in such circumstances that the amendment to the object clause or to the memorandum, was permitted. The judgment in the case of Maharashtra State Textile Corporation Ltd Vs. Gopal Balu Saikar (supra), is also distinguishable. There, the Government of Maharashtra had acquired the assets of the mill and the question was whether the employment of respondent No.1 continues on such acquisition. It was argued that it was re-employment after the take over whereas the dispute was whether it is a fresh employment in law. It is in that context, that the observations have to be seen.

46 The decision of the learned single Judge of the Gujarat High Court in Shaan Zaveri & Ors Vs. Gautam Sarabhai (P) Ltd (supra), once again must be seen in the backdrop of a relief of permanent stay of voluntary ca243-11.doc liquidation of the company and seeking discharge of the Liquidator.

There, the scheme was found to be not contravening any of the provisions of law that the discretion was exercised on the sound judicial principles. That must be seen in the facts of that case and that this judgment does not lay down any general rule.

47 Thus, finding that the none of the grounds enabling exercise of discretion under section 466 have been made out, this company application is dismissed but without any order as to costs. The Official Liquidator should now proceed expeditiously and adjudicate the claims received and take all such steps as are necessary and permissible in law for winding up the company in liquidation. With such directions, his report also is disposed off.

48 At this stage, it is requested that an amount of Rs.86 Crores which is deposited in this Court by the applicants be directed to be returned with accrued interest. Mr.Tulzapurkar submits that this withdrawal will be without prejudice to the rights and contentions of the applicants to challenge this order in higher court.

ca243-11.doc 49 In the light of this request, the applicants are allowed to withdraw the amount of Rs.86 Crores with accrued interest, without prejudice to their rights and contentions.

(S.C.DHARMADHIKARI, J)