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

APPEAL NO.442 OF 2012

WITH

OFFICIAL LIQUIDATOR REPORT NO.356 OF 2010

AND

COMPANY APPLICATION NO.597 OF 2010

IN

COMPANY PETITION NO.369 OF 2003

Mr. Mukesh Khemchandbhai Parmar
48 years old Indian Inhabitant -
claimant worker of the Company S.L.M.)
Maneklal Industries Ltd. - who has lodged)
claim with the Official Liquidator of)
SLM Industries Ltd., at High Court, Bombay –)
having address at Vivekanand Nagar,
Sector No.2/3, Hathijan, Taluka Dishkoi,)
Dist. Ahmedabad) ... Appellant

Versus

1. The Official Liquidator, as Liquidator for)
the SLM Industries Ltd. (In Liquidation),)
High Court, Bombay.)
2. M/s. Texraj Realty Private Limited,)
a Company incorporated under the)
Companies Act, 1956, having its)
Registered office at 16, 4th Floor,)
Agrawal Hall, Opp. Bhagwat Vidyapith,)
S.G. Highway, Ahmedabad – 380 061;)
through their Advocates M/s. Singhi & Co.)
having office at 609, Dalamal Tower, 211,)
Nariman Point, Mumbai – 400 021.)
3. S.L. M. Maneklal Industries Ltd.)
(Now SLM Industries Ltd.))
having its registered office at Hotel)
Heritage Building, Sant Savta Marg,)
Byculla, Mumbai – 400 027.) ... Respondents

Mr. V.M. Bhardwaj, for the Appellant.
Mr. Pankaj S. Shah for the Respondent No.2.
Mr. C.N. Mehta for the Respondent No.3.

CORAM : A.S. OKA AND M.S. KARNIK, JJ.

DATE ON WHICH SUBMISSIONS WERE HEARD : 21st NOVEMBER, 2016

DATE ON WHICH JUDGMENT IS PRONOUNCED: 30th JUNE, 2017

JUDGMENT (Per A.S. OKA, J.):

1 By this Appeal, an exception is taken to the judgment and order dated 21st October, 2011 passed by the learned Single Judge on Official Liquidator's Report No.356 of 2010. The question involved in this Appeal is whether the sale of the movable and immovable assets of a Company in liquidation should be declared as void.

2 With a view to appreciate the submissions made across the Bar, few facts will be necessary. In this case, we are concerned with a company S.L.M. Industries Limited (in liquidation) (for short “the said company”). By an order dated 14th March, 2007 passed by the learned Single Judge in Company Petition No.369 of 2003 (B.I.F.R. Case No.4 of 1991), the Official Liquidator was appointed as a Provisional Liquidator of the said company. By a subsequent order dated 26th July, 2010 passed in the said Company Petition, the said company was ordered to be wound up and the Official Liquidator has been appointed

as the Liquidator who has been conferred with various powers under the Companies Act, 1956 (for short “the said Act”).

3 Thereafter, the Official Liquidator took steps for ascertaining the details of the assets of the said company and for proceeding with the formalities of taking over possession of the assets of the Company. Notices were issued to Ex-Directors, Secured Creditors and Union of Workers. The Official Liquidator noticed that certain assets of the said company were sold in the year 2007. The Official Liquidator, therefore, submitted a Report bearing No.356 of 2010 before the learned Company Judge. The Official Liquidator gave a list of assets sold by the said company in the year 2007. In paragraph 7 of the report, he claimed that the sale of the assets was void in view of Sections 536(2) and 537 of the said Act. Paragraph 7 of the said report reads thus :-

- “7. That the Official Liquidator submits that on an examination of the details/ information furnished in the affidavits, it is noticed that the following assets were sold.
 - a) The Plant and Machinery (including entire building structure) situated at Vatva, Vinzol, Bibi Talav, Hailol – Kalol have been sold out by the company in favour of Mr. Yusufbhai I. Parmar and Mr. Deven Rameshbhai Patel on 17/1/2007.
 - b) The immoveable assets of non-agricultural land bearing Survey No.323 admeasuring about 6273 sq mts, situated at Moje Vinzol, Taluka Daseroi, Ahmedabad – 5 (Narol), were sold in favour of Taxraj Reality Pvt. Ltd. on 4th June 2007 for a sum of Rs.44,48,888/-.

- c) The immoveable assets of non-agricultural land bearing Survey No.1037 + 1038 + 1040 + 1041 + 1042 + 1043 + 1046 + 1568 + 1569 and 1572 admeasuring about 11634 sq mts, situated at Moje Vatva, Taluka – Daseroi, Ahmedabad – 5 (Narol) has been sold to Taxraj Reality Pvt. Ltd. on 4th June 2007 for a sum of Rs.82,50,408/-.
- d) The immoveable assets of non-agricultural land bearing Survey NO.322 + 693/ 1 admeasuring about 50686 sq mts, situated at Moje Vinzol, Taluka – Daseroi, Ahmedabad – 5 (Narol) were sold in favour of Taxraj Reality Pvt. Ltd. on 4th June 2007 for an amount of Rs.3,59,44,020/-.
- e) The immoveable assets of non-agricultural land bearing Survey No.321/1 to 321/12 admeasuring about 31971 sq mts, situated at Moje Vinzol, Taluka – Daseroi, Ahmedabad – 5 (Narol) had been sold in favour of Taxraj Reality Pvt. Ltd. on 4th June 2007 for a sum of Rs.2,26,72,038/-.
- f) The immoveable assets of non-agricultural land bearing Survey No.750/B admeasuring about 11,534 sq mts, situated at Moje Vatva, Taluka – Daseroi, Ahmedabad – 5 (Narol) were sold out in favour of Taxraj Reality Pvt. Ltd. on 4th June 2007 for a sum of Rs.76,81,644/-.”

4 The prayers (a) to (c) of the said report read thus :-

- “(a) In view of the para 6 and 7 of this report, whether this Hon'ble Court would be pleased to declare the sale of the moveable assets to Mr. Yusufbhai I. Parmar and Mr. Deven Rameshbhai Patel held in January 2007 and the sale of the immovable properties to M/s. Taxraj Reality Pvt. Ltd. in June 2007 as null and void and also direct the purchasers to return the said moveable and immovable assets to the Official Liquidator.
- (b) Whether this Hon'ble Court would be pleased to direct the ex-directors of the company (in liqn.) who had sold the moveable and immoveable properties to deposit the sale proceeds to the Official Liquidator within such period as this Hon'ble Court may determine.

- (c) In view of the para 10 of this report, whether this Hon'ble Court would be pleased to permit the Official Liquidator to take possession of the moveable and immoveable assets mentioned therein into his possession.”

5 A reply was filed by Shri K.M. Patel, Joint Secretary of Gujarat Rajya Shramajeevi Karmachari Union which claimed that the said Union was representing substantial number of workers of the said company. Shri Patel supported the prayers made in the Report. A reply was also filed to the report by one Shri Deven Rameshbhai Patel, a Director of M/s. Texraj Realty Private Limited. As pointed out earlier, according to the report submitted by the Official Liquidator, the said M/s. Texraj Realty Private Limited is the purchaser of certain immovable assets of the said company. The contention raised in the said reply was that the property was purchased by the purchaser pursuant to one time settlement scheme between the said company and its Bankers which was approved by the Debt Recovery Tribunal.

6 A rejoinder was filed by the present appellant to the reply of M/s. Texraj Realty Private Limited (Purchasers) in which he supported the report of the Official Liquidator and prayed for setting aside the sale.

7 By the impugned Judgment and Order, the learned Single Judge held that it was too late in the day to declare the alienation as void. Paragraphs 43 to 45 of the impugned order read thus:

“43] Mr.Bharadwaj and Mr.Ganguli appearing for Unions argued that company's properties worth more than Rs.250 Crores have been sold at a throw away price in favour of M/s.Tex Raj and that itself indicates the under hand dealing and dishonesty so also fraud of the company in liquidation. Even Mr.Sen appearing for Official Liquidator sought to argue that it is not a case of private sale under Rule 66. Once it is not so and the procedure was unfair and unjust, there were no bids invited, no valuation made, no safeguards as in the case of public auction or open bid, then, the sale will be void unless ordered otherwise is the submission of the Official Liquidator. The emphasis of arguments of all parties opposing M/s.Tex Raj was that this is not a statutory sale or a sale in terms of Rule 66. I have already dealt with that aspect of the matter. All that is then argued is that 353 workmen have not accepted any payment, they are not party to any settlement and today there is collusion between the company in liquidation and auction purchasers. There is also doubt raised about the settlement dated 12th April 2007. Some argument is raised about the stamp paper being not genuine. To my mind, some sweeping allegations without necessary proof either to show that there was a under valuation or that the property was sold at throw away price or that the workers and creditors were defrauded, cannot be accepted. Neither the secured creditors viz., the banks and financial institutions, save and except GIIC are before the Court nor the Official Liquidator is referring to any particulars and producing any proof to show that fraud has been perpetrated by the officers/ directors of Company in liquidation acting in collusion with M/s.Tex Raj.

44] In these circumstances, to accept the arguments canvassed, such as by Mr.Bharadwaj that the valuation of company's property was Rs.250 Crores will not be possible. The said allegations are being made more than 3 years after the sale and now when even Tex Raj

has alienated part of the property in favour of a third party. Therefore, much water has flown under the bridge. Pursuant to the sale and settlement of claims of the financial institutions and the banks referred to above so also the satisfaction of the claims of some workmen, it will not be proper to declare the sale as void. On the other hand, applying the settled principles that the sale by the company in liquidation was in the backdrop of the settlement proposals with the financial institutions and commitments made in pursuance thereof, **it will be proper to hold that the private sale may not be permissible, yet, several measures and steps in pursuance thereof having been initiated and concluded, it is too late in the day to set aside the same.**

- 45] The apprehension of Mr.Dhond appearing for GIIC can be taken care of by clarifying that none of the statements made in the affidavits filed by M/s.Tex Raj may be held to be conclusive and binding on GIIC particularly in the light of the present order. It is open for GIIC to urge in the pending proceedings that the sale in favour of Tex Raj is not binding on it and the property continues to be a security for the claim of GIIC and the sale effected by the company in liquidation in favour of M/s.Tex Raj nor any further steps by M/s.Tex Raj would in any manner defeat the rights and contentions of GIIC. All pleas of both sides in that behalf are kept open and can be raised irrespective of the conclusion rendered in this report. The findings and conclusions in this order should be read as confined to this report and the request of the purchaser M/s.Tex Raj not to disturb or set aside the sale. Beyond that neither the claim of GIIC nor that of the workers can be said to be prejudiced or concluded by this order. Equally this order does not prevent the Liquidator from taking possession of the other assets and properties, particularly, those enlisted in para 10 of his report dated 3rd November 2010. All such steps may be taken irrespective of the conclusions and findings in this order and it would be open for the Liquidator to proceed in winding up in accordance with law. Subject to above, all applications and reports stand disposed of. No costs. ”

(emphasis added)

8 The learned counsel appearing for the appellant submitted that the winding up of a company shall be deemed to have commenced at the time of presentation of the Petition for winding up which in the present case commenced on 29th April, 2003. He pointed out that movable assets of the said company were sold on 21st March, 2007. He strongly relied upon the provisions of Sub-Section (2) of Section 536 and Sub-Section (1) of Section 537. His submission is that the learned Single Judge committed an error by holding that the objections raised to the sale cannot be entertained after lapse of three years. He relied upon several decisions of this Court and the Apex Court in support of his contention. He urged that the learned Single Judge has not followed the law laid down by the First Court in the case of *Laxman Anant Prabhudesai and others vs. NRC Limited*¹. He also relied upon some other decisions. The learned counsel appearing for the second respondent supported the impugned judgment by pointing out various findings recorded by the learned Single Judge.

9 We have given careful consideration to the submissions. We have already quoted paragraph 7 of the report of the Official Liquidator. Clause (a) of paragraph 7 of the report refers to the sale of plant and machinery of the company on 17th January, 2007 in favour of Yusufbhai

1 2011(Supp.) Bom. C.R. 243 (O.S.)

I. Parmar and Mr. Deven Rameshbhai Patel. Clauses (b) to (f) refer to immovable properties of the Company described therein which were sold to Texraj Realty Pvt. Ltd. (second respondent). We have perused the reply filed by the second respondent. In the reply, in paragraphs 4 to 6, the second respondent stated thus :-

- “4. I say that the said company arrived at a One Time Settlement (OTS) with four of its secured creditors i.e. Bank of Baroda, Bank of India, Dena Bank and Banque Nationale De Paris, Consortium Partners (hereinafter referred to as the “said Banks”). I repeat that the Purchaser has paid total amount of Rs.19,22,53,098/-. Out of that amount paid to the Banks is Rs.10,59,43,855/- + other dues cleared like :- Ahmedabad Municipal Corporation = Rs.1,99,99,411/-, to Land Revenue Taxes = Rs.30,19,033.65 + Bank of Baroda Debenture Holders = Rs,80,00,000/- + Torrent Power Limited = Rs.24,00,000/- + PF Dept = Rs.1,10,04,799/- + other creditors = Rs.5,52,173.25. All the above payments have been made as per the instructions of the said Company thereby settling all dues of the said Banks. The purchasers have deposited the entire amount in the Hon'ble Debt Recovery Tribunal. The Purchasers have also cleared the dues of 1310 workmen as a full and Final Settlement along with their individual affidavits amounting to Rs.3,70,90,515/-, vide registered Labour Unions and approved by the concerned Labour Commissioner. I crave leave to refer to and rely upon the said Settlement Orders and Affidavit filed by the Workers. Further the said amount as per the settlement has been duly accepted in installments by the workmen without any disputes whatsoever.
5. The Purchasers have been informed by the Company that the claims of the Secured Creditors viz. Bank was to the tune of over Rs.70,00,00,000/- which was under the OTS agreed to be settled at Rs.10,59,43,855/- and the said OTS amount has been paid out of the aforesaid total amount of Rs.19,22,53,098/- paid by the Purchaser.

6. I say that the said properties of the Company were mortgaged with the said Banks and were transferred to the purchasers by the Company with a view to honour the OTS as sanctioned by the DRT and the entire payment has been made by the Purchasers in the DRT and to the other creditors of the Company, including statutory creditors, labourers and other creditors. The total consideration paid by the Purchaser is Rs.19,22,53,098/-, out of which Rs.10,59,43,855/- have been used to honour the OTS. Hereto annexed and marked **Exhibit 'A'** is a statement giving the details of the payments made by the Purchasers, pursuant to the payments made under the OTS by the purchasers on behalf of the said Company. The Purchasers crave leave to refer to and rely upon the Sale Deeds being Registration Nos.i.e. 3814/2007, 3815/2007, 3816/2007, 3817/2007, 3818/2007, 3819/2007 when produced.”

10 In paragraph 7, there is a reference to original application filed by Bank of Baroda before the Debt Recovery Tribunal, Mumbai for recovery of a sum of Rs.44 Crores from the said company. A reference is made to orders passed by the Debt Recovery Tribunal and in particular the order dated 16th January, 2007 under which the DRT accepted deposit of Rs.1 Crore made by the second respondent. The amounts agreed to be accepted by the four Banks by way of One Time Settlement have been set out in clause (g) of paragraph 7. It is claimed that apart from the OTS amount of Rs.10,59,43,855/-, additional amounts were paid by the second respondent to other creditors towards PF dues and other dues. It is claimed by the second respondent that total amount of Rs.19,22,53,098/- was paid by the second respondent. It is claimed that

a sum of Rs.3,70,90,515/- was paid by the second respondent towards the dues of the workmen of the said company.

11 Before we refer to the findings recorded by the learned Single Judge, it will be necessary to advert to Sections 536 and 537 of the Companies Act which read thus :-

“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.

537. Avoidance of certain attachments, executions, etc., in winding up by Tribunal. - (1) Where any company is being wound up by Tribunal -

(a) any attachment, distress or execution put in force, without leave of the Tribunal against the estate or effects of the company, after the commencement of the winding up; or

(b) any sale held, without leave of the Tribunal of any of the properties or effects of the company after such commencement shall be void.

(2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government.”

(underlines supplied)

12 The learned Single Judge considered the arguments made on behalf of the Official Liquidator that the sale of the assets of the said company is void unless it is in terms of Sub-Section (2) of Section 536 of the Companies Act, the Court orders otherwise. His submission was that the sale being a private sale and not through DRT, best price could not be fetched. The learned Single Judge also considered the argument canvassed on behalf of the Gujarat Industrial Investment Corporation (GIIC) that the liabilities of the said Corporation have not been cleared. The learned Single Judge proceeded to consider the scheme of RDB Act and rules 52 and 66 of the Income Tax Act (Certified Proceedings) Rules, 1962. The learned Single Judge considered the case made out by the appellant on merits on behalf of the 353 workers. The learned Single Judge accepted the case made out by the second respondent regarding the settlement of claims including the claims of 1300 workers. What is material is the conclusion and finding recorded by the learned Single Judge in paragraph 34 which reads thus :-

“34. Once a conclusion is reached that the sale in favour of M/s. Tex Raj is illegal, then, all that remains for consideration is whether this Court should grant the request of the Official Liquidator to nullify it or consider the request made by the purchaser to save the transaction.”

13 Thereafter, the following factors were taken into consideration by the learned Single Judge:-

- (a) The Liquidator has not questioned the sale of immovables to private parties;
- (b) The second respondent deposited a sum of Rs.10,59,43,855/- with the Debt Recovery Tribunal and claimed that all statutory dues have been paid;
- (c) Claims of 1350 workers have been settled out of 1600 workers;
- (d) The second respondent has entered into an agreement for sale on 7th August, 2008 with a third party for sale of land admeasuring 1,08,153 square meters out of total land admeasuring 2,86,419 square meters;
- (e) The third party purchaser has been put in possession of the land and since then, the said third party is developing he said land;
- (f) There is nothing on record to show that any fraud has been perpetrated by the officers/ Directors of the said Company acting in collusion with the second respondent.
- (g) Though private sale may not be permissible, several measures and steps in pursuance thereof have been initiated and concluded it is too late in the day to set aside the sale.

14 As regards the claim of GIIC and workers in paragraph 45, the learned Single Judge concluded thus :-

“45. The apprehension of Mr. Dhond appearing for GIIC can be taken care of by clarifying that none of the statements made in the affidavits filed by M/s. Tex Raj may be held to be conclusive and binding on GIIC particularly in the light of the present order.”

15 In paragraph 10 of the Liquidator's Report, details of immovable properties such as office premises flats etc., have been set out. The learned Single Judge permitted the Official Liquidator to take possession of the assets.

16 Thus, the limited question is about the correctness of the reasons given by the learned Single Judge for not declaring the sale of assets as void after holding that private sale was not permissible. It will be, therefore, necessary to consider various decisions relied upon by the learned counsel appearing for the appellant.

17 In the case of *Laxman Anant Prabhudesai and others vs. NRC Limited (supra)*, the First Court dealt with the scope of Sub-Section (2) of Section 536. The First Court held thus:-

“19. With the assistance of the learned Counsel appearing for parties, we have perused the impugned order, some of the relevant documents and the statutory provisions in question. The principles on which Company Court exercises its power

under section 536(2) are well settled. In a decision (*Pankaj Mehra and another v. State of Maharashtra and others*), reported in AIR 2000 SC 1953, the Supreme Court noticed relevant sections of the Company Act and in paras 14 to 18 this is what is observed by the Hon'ble Supreme Court :-

- “14. In the above backdrop alone we can consider the impact of the legislative direction in S. 536(2) that any disposition of the property of the company made after the commencement of the winding up (i.e. after the presentation of a petition for winding up) shall be void. There are two important aspects here. First is that the word “void” need not automatically indicate that any disposition should be ab initio void. The legal implication of the word “void” need not necessarily be a stage of nullity in all contingencies. Black's Law Dictionary gives the meaning of the word “void” as having different nuances in different connotations. One of them is of course “null, or having no legal force or binding effect.” And the other is “unable in law, to support the purpose for which it was intended.” After referring to the nuances between void and voidable the Lexicographer pointed out the following :

“The word ‘void’ in its strictest sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force, but frequently the word is used and construed as having the more liberal meaning of ‘voidable’. The word ‘void’ is used in statutes in the sense of utterly void so as to be incapable of ratification, and also in the sense of voidable and resort must be had to the rules of construction in many cases to determine in which sense the legislature intended to use it. An act or contract neither wrong in itself nor against public policy, which has been declared void by statute for the protection or benefit of a certain party, or class of parties, is voidable only.”

15. For discerning the legislative idea in employing the word “void” in the context set out in S. 536(2) of the Companies Act the second aspect to be noticed is that the provision itself shows that the word ‘void’ is not employed peremptorily since Court has power to order otherwise. The words “unless the Court otherwise orders” are capable of diluting the rigor of the word “void” and to choose the alternative meaning attached to that word.
16. In *Chittoor District Co-operative Marketing Society Ltd. v. M/s Vegetols Ltd.*, 1987 (suppl) SCC 167 a two-

Judge Bench of this Court considered a plea for validation of payments made by a Company after presentation of a petition for winding up. One set of payments were made thereafter. This Court declined to validate such payments on the ground that “there is no evidence to show that those payments were made either under compulsion of circumstances in order to save or protect the property of the company or that there was any commercial compulsion to enable it to run its business”. The decision only indicates that such payments could have been made valid if evidence was adduced to show that there was compulsion of circumstances. In fact, this decision lends support to the interpretation that the payments which were made after the commencement of winding up proceedings, would not become ab initio void.

17. An early decision of a Division Bench of the Bombay High Court in *Tulsidas Jasraj Parekh v. Industrial Bank of Western India*, AIR 1931 Bombay 2 was sought to be relied on by most the learned counsel who argued for different appellant. The question which the Court considered therein pertained to S. 227(2) of the old Companies Act, 1913 which was identical to S. 536(2) of the present Act. Certain payments made by a Company after commencement of the winding up proceedings were questioned and the Division Bench considered the scope of the sub-section and noticed that the principle had been borrowed from the English Companies Act. Hence some of the English authorities were also referred to by Marten, C.J., who spoke for the Division Bench. Learned Judges stated thus :

“Now here as regards S. 227(2) 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. For instance, a mill company might not be able to buy a ton of coal for the use of its furnaces, or, on the other hand, it might not to be able to sell any of its goods in the ordinary course of business. Consequently, the Court has very properly laid down that, speaking generally at any bona fide transaction carried out and completed in the ordinary course of current business will be sanctioned by the Court under S. 227(2). On the other hand, 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 the preferential debts enumerated in S. 230 a further category of all debts which the company might choose to pay wholly or in part.”

18. It is useful to refer to the reasoning adopted by a Division Bench of the Gujarat High Court in *Navjivan Mills Ltd.*, In re (1986) 59 Comp Case 201 : (1986 Tax LR 1817) in favour of adopting a pragmatic attitude when a Company Court was approached for approval of certain dispositions which a company made after presentation of a petition for winding up. A clear distinction was drawn by the Division Bench between the period till the passing of the order for winding up and thereafter, so far as dispositions are concerned. The following reasoning is useful for consideration of the issues involved:

“The Court can exercise the jurisdiction under S. 536(2) of the Companies Act, 1956, of giving directions validating proposed transactions pending a petition for winding up but before the winding up order is made for the obvious reason that unless these transactions are saved from the consequence which may ensue, if at all, on an order of winding up being made, the company might find it difficult to keep itself going and its business might be paralysed. The purpose underlying the investment of the power in Court is for the benefit and interest of the company so as to ensure that a company which is made the subject of a winding up petition may nevertheless obtain the money necessary for carrying out its business and so as to avoid its business being paralysed. If that is the purpose and object of the section, it would hardly be proper and just to stultify the power and restrict its operation since otherwise it is bound to be counter productive in the sense that the very purpose of keeping the company as a going concern so as to ensure the interest of the shareholders and creditors would be defeated.”

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.”

(emphasis added in paragraph 20)

18 Thus, the test laid down by the First Court is that power under Sub-Section (2) of Section 536 of declaring a transaction as not void can be exercised when the transaction has been undertaken under compulsion of circumstances in order to save or protect the property of the Company. It is further held that evidence is required to be produced of such compulsion. It is also held that if business of the company is going to be paralyzed then the Court may, in appropriate cases, for benefit and interest of the Company, save the transaction.

19 The First Court has considered its earlier judgment in the case of *Tulsidas Jasraj Parekh Vs. Industrial Bank of Western India*². In the said decision, the First Court considered the provision of Section 227(2) of the Indian Companies Act, 1913 (for short “the Old Companies Act”) which is *pari materia* with Sub-Section (2) of Section 536. In fact, Sub-Section (2) of Section 227 of the Old Companies Act is quoted in the judgment. It is observed in the said judgment that Sub-Section (2) of Section 227 intends to prevent any improper alienation and disposition of the property of a Company under liquidation. It was

2 A.I.R. 1931 Bombay 2

observed that disposition of the property after commencement of the winding up proceedings shall be void unless the Court otherwise orders.

20 We may also make a useful reference to a decision of the learned Single Judge of the Madras High Court in the case of *Andhra Bank Ltd. Vs. D.P. Narayana Rao, Provisional Liquidator*³. The learned Single Judge of the Madras High Court laid down the parameters discretion of the Court under Sub-Section (2) of Section 227 of the Old Companies Act. The relevant portion of paragraph 3 reads thus :-

“The result of judicial decisions is that a transaction bona fide entered into and completed in the ordinary course of the company's current trade should be protected; for, otherwise, the result would be that the presentation of a petition, groundless or well founded, would ipso facto paralyse the trade of the company, and great injury would be done to those interested in the assets of the company, as was pointed out by Lord Cairns. It is equally clear from the decisions that even if a winding up petition is well founded, if the disposition is made for the purpose of preserving the business as a going concern, then also the discretion of the court should be exercised, as neatly summarised, if I may say so with respect, in – 'Ramalal V. Official Liquidator Benares Bank Ltd.', AIR 1942 All 141 (E), at p.144:

“The principle must prevail, that is, the principle of 'pari passu' distribution among the creditors. It was not a case of salvage, of real necessity, nor of the transaction having been the only means of keeping the company going.”

It may be that in this case, the Andhra Bank were bona fide (sic, lenders/) in having advanced the said sums to the company without any notice of the presentation of the winding up petition. Merely because

3 A.I.R. 1955 MADRAS 247 (Vol.42, C.N.67)

they were bona fide lenders, it does not at once follow that the transaction in their favour should be validated. This is a case in which one of two innocent parties has to suffer, - the applicant Bank to make out a case why they should be preferred to the general body of creditors and why the discretion of the court should be exercised in their favour under S.227 (2) of the Act.”

We respectfully agree with the said conclusions.

21 Lastly, we make a reference to a decision of the Apex Court in the case of *Chitoor District Co-operative Marketing Society Ltd. Vs. Vegetols Ltd. and Another*⁴. In paragraph No.3, the Apex Court held thus :-

“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 payment 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 payment 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.”

(emphasis added)

4 (2002) 2 Comp LJ 44 (SC)

22 Now, coming back to the impugned judgment, we have already quoted paragraphs 43 to 45 of the judgment. The substantive reasons given by the learned Single Judge for not declaring the transactions as void are in paragraph 44 wherein the learned Single Judge observed that the sale by the Company in liquidation was in the backdrop of the settlement proposals with the financial institutions and commitments made in pursuance thereof, it is too late in the day to set aside the sale as several measures and steps having been initiated and concluded. The finding recorded by the learned Single Judge is that the sale was a private sale and not by way of auction. The learned Single Judge has observed that the private sale was not permissible. There is no finding recorded by the learned Single Judge that there was any evidence produced about any such compulsion of circumstances in order to save or protect the property of the Company or in order to avoid paralyzing of the business of the Company. The learned Single Judge has not tested the case made out by the purchasers on the touchstone of test laid down by the Apex Court in the decision in the case of *Chitoor District Co-operative Marketing Society Ltd.*, as well as by the First Court in the case of *Laxman Yeshwant Prabhudesai & Ors.*, and in particular paragraph 20 thereof.

23 As there is a finding of the learned Judge that several measures have been taken and third party is put in possession of the immovable property, we propose to pass an order of remand directing the learned Single Judge to consider the case afresh so that the concerned respondents can get an opportunity to show to the Company Court that there was an element of compulsion. Accordingly, we pass the following order :-

ORDER

- (i) The impugned order is set aside;
- (ii) A fresh adjudication shall be made on the Official Liquidator's Report in the light of the observations made by this Court in this Judgment. We request the learned Company Judge to give necessary priority to the disposal of the report;
- (iii) Appeal is partly allowed on above terms with no order as to costs.

(M.S. KARNIK, J)

(A.S. OKA, J)

23 After the Judgment is pronounced, the learned counsel appearing for the second respondent prays for stay of the judgment and order. The prayer is rejected.

(M.S. KARNIK, J)

(A.S. OKA, J)