

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Original Side)

Reserved on: 10.06.2022
Pronounced on: 05.08.2022

APO/48/2020
IN

CP/2/1987

IA NO: ACO/2/2021, ACO/3/2021, ACO/4/2021, ACO/5/2021, ACO/6/2021,
ACO/7/2021, ACO/8/2021, ACO/9/2021, ACO/10/2022, ACO/11/2022,
ACO/12/2022, ACO/13/2022, ACO/14/2022, ACO/15/2022, ACO/16/2022,
ACO/17/2022, ACO/18/2022, ACO/19/2022, ACO/20/2022, ACO/21/2022,
ACO/22/2022, ACO/23/2022

THE BARANAGORE JUTE FACTORY PLC AND ORS.

AND

SHREEKISHAN OMPRAKASH

-VS-

THE OFFICIAL LIQUIDATOR

APO/195/2019

IN

CP/2/1987

IA NO: ACO/1/2020 (OLD NO: ACO/2/2020), ACO/2/2021

THE BARANAGORE JUTE FACTORY PLC (IN LIQN).

AND

BARANAGORE JUTE FACTORY PLC MAZDOOR SANGHA (BMS)

VS.

CHAITAN CHOUDHURY AND ORS.

APO/143/2020

IN

CP/2/1987

IA NO: ACO/2/2021, ACO/3/2021, ACO/4/2021, ACO/5/2021, ACO/6/2021,
ACO/7/2022, ACO/8/2022, ACO/9/2022

THE BARANAGORE JUTE FACTORY PLC (IN LIQN).

AND

NAMOKAR VINIMAY PVT. LTD.

-VS-

OFFICIAL LIQUIDATOR AND ANR.

APOT/74/2021

IN

CP/2/1987

IA NO: ACO/2/2021, ACO/3/2021, ACO/4/2021, ACO/5/2021, ACO/6/2021,
ACO/7/2021, ACO/8/2021, ACO/9/2021, ACO/10/2021, ACO/11/2022,
ACO/13/2022, ACO/14/2022, ACO/15/2022

BARANAGAR JUTE MILLS EMPLOYEES UNION (INTUC)

-VS-

OFFICIAL LIQUIDATOR, HIGH COURT CALCUTTA

APOT/76/2021

IN

CP/2/1987

IN THE MATTER OF:

THE BARANAGORE JUTE FACTORY PLC (IN LIQN)

AND

YASHDEEP TREXIM PRIVATE LIMITED

-VS-

OFFICIAL LIQUIDATOR, HIGH COURT & ORS.

APOT/80/2021

IN

CP/2/1987

IN THE MATTER OF:

THE BARANAGORE JUTE FACTORY PLC (IN LIQN)

-AND-

YASHDEEP TREXIM PRIVATE LIMITED

-VS-

OFFICIAL LIQUIDATOR & ORS.

Present:

Mr. Abhrajit Mitra, Sr. Advocate

Mr. Sarvapriya Mukherjee, Advocate
 Mr. Yashovardhan Kochar, Advocate
 Mr. Anirudha Agarwalla, Advocate

... for Baranagore Jute Factory, PLC
 (appellant in APO/48/2020)

Mr. K. Thaker, Advocate
 Mr. Jaydeb Ghorai, Advocate
 Mr. Suman Chatterjee, Advocate
 Mr. Diptesh Ghorai, Advocate

... for appellant in APO 195/2019

Mr. Anirban Ray, Advocate,
 Mr. Soumabha Ghose, Advocate ,
 Mr. Prasanta Naskar, Advocate.
 Mr. Yash Singhi, Advocate

... for Namokar Vinimay Pvt. Ltd.
 (appellant in APO 143 of 2020)

Mr. Jishnu Chowdhury, Advocate
 Mr. Balaji Chakraborty, Advocate

... for Baranagore Jute Mills Employees' Union (INTUC)
 (applicant in ACO/15/2022 in APOT/74/2021 and
 (appellant in APOT/74/2021)

Mr. Surajit Nath Mitra, Sr. Advocate
 Mr. Sankarsan Sarkar, Advocate
 Mr. Subhrangsu Ganguly, Advocate

... for Yashdeep Trexim Pvt. Ltd.
 (appellant in APOT 76/2021 and APOT 80/2021)

Mr. Kishore Dutta, Sr. Advocate
 Ms. Susmita Shaw, Advocate
 Mr. Rajib Mullick, Advocate
 Mr. Rakesh Sarkar, Advocate

... for Lakshmi Singh and INTUC

Mr. Jishnu Saha, Senior Advocate
 Mr. Deepak Jain, Advocate
 Mr. Ishan Saha, Advocate
 Mr. Lal Pratap Singh, Advocate
 Mr. Umesh Pratap Singh, Advocate

... for Chaitan Choudhury & Ridh Karan Rakecha.

Ms. Manju Bhuteria, Advocate.
 Mr. Arun Kumar Mishra, Advocate

Ms. Arundhati Barman Roy, Advocate

Ms. Tanvi Luhariwala, Advocate

... for Official Liquidator.

Ms. Manju Agarwal, Advocate

Mr. Bajrang Manot, Advocate

... for Radheshyam Ajitsaria & other unsecured creditors

Mr. Pradeep Aggarwal, Advocate

Mr. Arjun Aggarwal, Advocate

Mr. Sourav Kumar Mukherjee, Advocate

Ms. Anjana Banerjee, Advocate

... for Naveen Commodeal Pvt. Ltd.

Mr. Gaurav Kejriwal, Sr. Advocate

Mr. Arik Banerjee, Advocate

Mr. Anuran Samanta, Advocate

Mr. Suman Chakraborty, Advocate

... for Sun Biotech Pvt. Ltd. (Intervenor)

Mr. Ranjit Kumar, Sr. Advocate

Mr. Asish Kumar Mukherjee, Advocate

... for applicant in ACO/3/2021 (in APO/143/2020), ACO/6/2021 (in APO/48/2020), ACO/9/2021 (in APOT/74/2021)

Mr. Arik Banerjee, Advocate

... for applicant in ACO/16/2022 in APO/48/2020

Mr. Abhisekh Halder, Advocate

Mr. Jai Kumar Surana, Advocate

Mr. Dhruv Surana, Advocate

... for Baranagore Jute Mills (PLC) Workers' Union (UTUC)

Mr. Dhruva Ghosh, Sr. Advocate

Mr. A. Basu, Advocate

Mr. A. Kanodia, Advocate

... for K. M. Tapuria

Mr. Saptansu Basu, Sr. Advocate

Mr. Binay Kumar Jain, Advocate

Mr. Piyush Jain, Advocate

... for S.B. Overseas (Secured Creditor)

Mr. Sakya Sen, Advocate

Mr. Sumanta Biswas, Advocate

... for Petitioning creditor in CP/2/1987

Mr. Mukul Lahiri, Sr. Advocate

Mr. Snehatosh Majumder, Advocate

Mr. Sandwip Mukherjee, Advocate

... members of Committee of Management

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE SHAMPA SARKAR,
JUDGE**

Prakash Shrivastava, CJ:

1. These appeals are directed against the order of the learned Company Judge dated 04th December, 2019 in C.P. No.2 of 1987.
2. Against the above order of Company Judge, one of the aggrieved party had filed SLP (C) No. 11476/2020 before the Hon'ble Supreme Court which was disposed of by order dated 24.03.2021 with certain directions including the direction to decide the matter expeditiously. On account of restricted hearing due to COVID-19 the matter could not be heard at that time and has been heard finally after commencement of physical hearing. Arguments at length have been advanced by learned counsel for the parties.
3. This case has a chequered history, therefore, before entering into the merits of the matter it would be appropriate to ascertain the present status of the company petition.
4. The initial fact of incorporation of Baranagore Jute Factory PLC is noted in the judgment dated 11th November, 2009 of the Hon'ble Supreme Court of Judicature, Court of Appeal (Civil Division) in appeal from the High Court of Chancery Division in **Appeal No. A3/2009/0423** in the matter of **Chaitan Chowdhury and Others vs. Damodar Prasad Bhattar and Others** reported in **2010 (2) All ER 103** as under:

“2. The Company was incorporated in England on 22 July 1872 under the Companies Act 1862 for the purpose of carrying on the business of jute manufacturers at Barnagore, near Calcutta, in what is now the Republic of India. That remains the sole business of the Company. It is common ground that the Company has, now, no connection with England; save that it was incorporated here, maintains its registered office in London and is required to make annual returns to Companies House.”

5. C.P. No. 2 of 1987 was filed at the instance of a Partnership Firm being the creditor for winding up of the Baranagore Jute Factory PLC (for short, ‘BJF’) on the ground that BJF had failed to repay its debt.

6. The Company Judge by order dated 11th of February, 1987 had admitted the company petition subject to the scrutiny and had given directions for publication of advertisements. By the same order the Company Court had stayed its order for one week. The order dated 11th February, 1987 reads as under:

“Under these circumstances, this court admits this petition, subject to scrutiny, for the principal sum of Rs. 13,13,751.51 together with interest and cost of this application assessed at 80 Gms. This court gives necessary direction for publication of advertisement once in The Statesman and once in the Jugantar. Insertion in the official gazette is dispensed with. This application is made returnable 8 (eight) weeks hence. This court, however, stays the operation of this order for one week and directs the advocate-on-record of the petitioning creditor Mr. R. K. Fugalia to serve a copy of this order upon the company and also upon the workers who have entered appearance through Mr. Niharendu Dutt Majumdar. All parties to act on a signed copy of the minutes of this order on the usual undertaking.”

7. Thereafter on 28th October, 1987, the learned Company Judge had passed the order in terms of prayer (a) and (b) of the company petition and directed that the Official Liquidator will take possession on a signed copy of the minutes. Prayer clause (a) of the Company Petition is to wind up the BJF in terms of the provisions

of the Companies Act, 1956 (for short, “the Act”). In that order, it was noted that the claim of the petitioning creditor for the goods sold and delivered for a sum of Rs. 13,13,751.51 was admitted by the company and the company had no defence.

8. On 15th September, 1988, the learned Company Judge while considering an application for stay of winding up proceedings, taking note of the fact that there were 5,500 regular workers and the Baranagore Jute Factory was lying closed since November, 1986 and considering the issue of survival of the workers and scheme of revival, had directed as under:

“In the meanwhile the ad-hoc Court Committee of management of the Jute Mill of Barnagore Jute Factory constituted of the persons mentioned in the scheme for revival as annexed to the petition being Annexure ‘B’ is directed to take steps for reopening of the Jute Mill and to run the same in terms of the scheme as attached to the petition being Annexure ‘B’. It is made clear that such management by Ad-hoc Court Committee making by way of interim arrangement for the benefit of all concern the applications are not being decided on its merit. This order without prejudice to the rights and contentions of the Parties. Official Liquidator will forthwith take possession and remain in possession of the Company and will complete the inventory which is yet to be completed as also of the finished goods and will take the assistance of the valuer from the panel on valuers of the High Court and the cost of the Jute Mill to paid by Mr. Mitra’s client in the first instance.”

9. The order of the learned Company Judge dated 15th September, 1988 was the subject matter of challenge in the Company Appeal wherein the Hon’ble Division Bench by order dated 22nd September, 1988 had stayed the winding up proceedings for six months for the time being, by directing as under:-

“(cc) The winding up proceedings shall remain stayed for six months for the time being.”

10. In addition to staying the winding up proceedings the Division Bench had issued various directions including the following:

- (i) Mr. Nirmal Mitra, Barrister was appointed as Joint Special Officer.
- (ii) The Committee of Management consisting of one representative each of the three groups and one representative from State Bank of India, one from I.C.I.C.I. and two representatives of the workmen one Jute Technologist and a Chartered Accountant to be nominated by the six Unions, was directed to run the Mill under the Joint Special officer.
- (iii) The three groups who had submitted scheme for revival were directed to deposit the sum of Rs. 25 lakhs each to the Joint Special Officer for making payment to the workers and reopening the Mill and each group was directed to contribute equally for the funds required for running of the Mill.
- (iv) The Special Officer was directed to take possession of the records books, documents, papers and assets of the company. The Official Liquidator and receiver were directed to make over such assets books, documents, papers to the Special Officer.”

11. The Company Judge by order dated 19th of December, 2002 dismissed the C.A. No. 191 of 2002 and CA No. 186 of 2001 for permanent stay of winding up Order dated 28th of October, 1987 and directed that the winding up proceedings of the company (in liquidation) shall be taken by the Official Liquidator and finalized in accordance with law and directed the Official Liquidator to take over possession and control of the affairs of the company and represent the company in liquidation. The Company Judge by a separate order passed on the same day on the request of

the Counsel for the workers union had stayed the operation of the order up to 15.01.2003. The Division Bench had initially passed interim order and subsequently by order dated 18th of February, 2004 had set aside the order of the learned Company Judge dated 19th of December, 2002 and directed the Joint Special Officer to continue to oversee the management and affairs of the Company.

12. Thereafter, the order of winding up has not been given effect to and no steps have been taken by the Official Liquidator to take over the possession of the assets of the company in liquidation nor any steps have been taken to sell any of the assets of the company in liquidation.

13. Learned Single Judge has taken note of the sequence of events and various orders from 1987 till 2004 by quoting from the judgment **In Re: Radheshyam Ajitsaria** reported in **2006 (11) SCC 771** as under:

“BACKGROUND FACTS:

4. Baranagore Jute Mills PLC (for short 'the Company') was under the management of Jardine Henderson Limited. On the failure of the jute factory to pay dues of several of its creditors, various winding-up petitions were filed in the High Court under the provisions of the Companies Act, 1956. By an order dated 28.10.1987, the Company Judge directed winding-up of the Company. The Court appointed the Official Liquidator with a direction to take possession of the assets of the said Company. An application was made by one - Shri Raj Kumar Nemani praying for stay of the winding-up proceedings of the Company and for revival of the Company as per a Scheme submitted and for appointment of an ad hoc Committee of Management to run the affairs of the said Company. The six Unions agreed to the Scheme as it was to the benefit of the workers. The learned Company Judge stayed the winding up by order dated 15.9.1988 and appointed an ad-hoc Committee of Management to re-open the mills, but however maintained the assets of the Company under the Official Liquidator. One of the creditors filed an appeal against the order dated

15.09.1998. An interim order was passed by the Division Bench of the High Court appointing Joint Special Officers under whose supervision the Committee of Management was to be constituted on an ad-hoc basis with other directions.

5. Mr. Raj Kumar Nemani being aggrieved by the order dated 27.09.1988 passed by the Division Bench filed a special leave petition before this Court on 07.10.1988 and this Court, by an order dated 30.11.1988 directed that the scheme proposed by Raj Kumar Nemani supported by the workers and unsecured creditors be accepted with a direction for implementation of detailed Scheme. The learned Company Judge was directed to work out the Scheme.

6. The order passed by this Court on 30.11.1988 reads as under:-

"R.K. Nemani & Anr. .. Appellants

-Versus

Shiva & Co. & Others .. Respondents

ORDER

1. Special leave granted. Heard, learned counsel for the parties.
2. Having regard to the scope of this appeal and having considered the report of the Special Officer, dated 13th November 1988 made pursuant to the order of this Court, we are of the opinion that the scheme supported by the workers and unsecured creditors of Raj Kumar Nemani, be accepted and a detailed scheme on that basis be formulated. It is desirable that the scheme be implemented as soon as possible and the workers and the creditors should be paid in accordance with the scheme, approved today. Further, the appeal is disposed of with a direction to work out the scheme by the learned Company Judge, Calcutta High Court, who is seized of the matter. It is contended by some of the secured creditors that by the operation of the scheme, the assets of the secured creditors should not be allowed to be affected. This contention of the secured creditors may be agitated before the Company Judge, if they are so entitled. All

intervention applications are dismissed without prejudice to their rights, if any, to applicants move the Company Judge, Calcutta High Court.

3. We express our appreciation of the work of the Special Officer and on the report he has submitted. The remuneration of the Special Officer is fixed at Rs.5,500/- and to be paid out of the assets of the Company. The orders of the learned Single Judge and the Division Bench are modified to the aforesaid extent.

4. The appeal is disposed of accordingly. No order as to costs.”

7. The learned Company Judge approved the Scheme on 16.6.1989. The Scheme, inter alia, provides for payment to all unsecured creditors, workers, secured creditors, statutory dues etc. On 02.05.1990, appellant No. 1 resigned from the Management of the Company.

8. The learned Company Judge, while considering several applications made by unsecured creditors complaining that they were not paid by the Committee of Management, made an order dated 16.12.1991 cancelling the Scheme, observing that the Scheme had totally failed.

9. On an appeal preferred by the Committee of Management against the order dated 16.12.1991, the Division Bench of the High Court made an interim order dated 18.12.1981, reiterated on 24.3.1992 directing payment of 1% of the respective claims to all creditors on or before 7.1.1992. The Bench also stayed the order passed by the learned Company Judge dated 16.12.1991 ordering cancellation of the Scheme. A special leave petition was filed against the order dated 24.03.1992 by one of the creditors. This Court directed the appeal pending before the Division Bench of the High Court to be disposed of expeditiously, while also directing payment to the unsecured creditors to be made @ 2% per month from 01.03.1993. The said order dated 22.03.1993 in S.L.P.(C) No. 6505 of 1992 reads as follows:

"Acumen Trading Corporation & Anr. .. Petitioners

-Versus-

Committee of Management of Baranagore

Jute Factory & Ors. ..Respondents

ORDER

1. We have heard counsel for all the parties.
2. By an order dated 16th December 1991, the learned Company Judge of the Calcutta High Court cancelled the scheme earlier sanctioned on the ground that the terms of the scheme particularly in the matter of the schedule of payments to the creditors had not been complied with. That order was carried up in appeal before the Division Bench of the High Court, which by its order dated 24th March 1992 now under appeal, stayed the order of the learned single Judge. The Division Bench directed that instead of payment of 2% p.m. to the unsecured creditors contaminated by the scheme, there should be payment of 1% p.m. That was the effect of the order dated 24th March 1992 of the Division Bench, when it referred to and incorporated its earlier order dated 18th December 1991.
3. It is not disputed that payments to the unsecured creditors have not proceeded strictly in terms of the scheme. There is substantial shortfall. The parties who have taken over the company under the scheme and who are liable to effect payments to the creditors in terms of the scheme cannot take shelter behind the fact that auditors of the company have not scrutinised the books of account of the company. That is a matter over which the unsecured creditors have no control. Till the auditor examine the books of account and report that the claim of the extent of the claim of the unsecured creditors was not supportable, there could be no suspension of the scheme of payments.
4. On a consideration of the matter it appears appropriate that the appeal before the Division Bench of the High Court requires to be disposed of expeditiously. We request the High Court to dispose of the appeal within three months.
5. In the meanwhile payment to the unsecured creditors should proceed at the rate of 2% p.m. from 1st March 1993 and not at 1%. The

difference for the past on that calculation shall be made good within three months from today. If there is failure to do so, it will be appropriate for the Division Bench to put that circumstance also into scale in deciding whether the order of the learned single Judge setting aside the scheme should be interfered with in appeal or not.."

6. However, the order of the Division Bench staying the operation of the order dated 16th December 1991 of the learned single Judge will continue unless the Division Bench itself considers it appropriate to modify the same in the light of any subsequent event. The Division Bench shall also be at liberty to consider any applications for the modification of the scheme.

7. With these observations and directions the special leave petition is disposed of."

10. By subsequent orders, this Court directed the Committee of Management to deposit Rs. 40 lacs in two instalments which was to be deposited in the Registry of this Court. The said amount was kept in term deposits. On 11.03.1994, this Court set aside the order of the Division Bench of the Calcutta High Court passed on 24.03.1992 reducing rate of payment from 2% to 1%. This Court also directed the Committee of Management to deposit from the month of April, 1994 onwards a sum of Rs. 8 lacs per month with the Registry of Calcutta High Court. Further directions were also issued while remanding the matter back to the learned Company Judge for distribution of Rs. 40 lacs amongst the creditors. The above order reads as follows:-

"Acumen Trading Corporation & Anr. .. Petitioners

Versus

Committee of Management of Baranagore

Jute Factory & Ors. .. Respondents

ORDER

1. We have heard counsel on both sides, originally the learned Company Judge in the High Court directed the "Committee of

Management" to deposit sums equivalent to 2 per cent per month calculated on the basis of the extent of unsecured indebtedness of the company. Subsequently, there was a modification of this order as to the rate of the payment reducing the extent from 2 per cent month 1 per cent per month. This was done by the appellate bench. The unsecured creditors have come up against this order. The unsecured creditors claim that debts due and owing to them are in the neighbourhood of Rs.3.4 crores and that it would take a long time for payment if only 1% per month is paid.

2. In the meanwhile, the Committee of Management has deposited in the Registry of this Court, a sum of Rs.40 lacs under directions of this Court. The said sums are in term- deposits with the bank.
3. On a consideration of the matter, we set aside the order of the Division Bench reducing the amount from 2 per cent per month to 1 per cent per month. The Committee of Management shall from the month of April 1994 onwards, deposit every month sum of Rs.8 lacs. Deposits will be made in the High Court.
4. The matter will now go back to the learned company Judge, Calcutta High Court who will issue necessary directions as to the appropriation and distribution of Rs. 40 lacs now in deposit, amongst the creditors and also as to the distribution of the sum of Rs. 8 lacs to be deposited every month by the Committee of Management. It is made clear that if the Committee of Management commits default in the matter of these deposits and fall in arrears for any two months, it will be appropriate for the Company Court to replace the Committee of Management by an appropriate alternative mechanism. The amount of Rs.40 lacs in deposit in this Registry shall be transferred to the account of the Registrar (Original Side), High Court of Calcutta, together with accrued interest immediately after the present deposits mature.
5. A grievance was aired by the petitioners that the Committee of Management is appropriating to itself the funds of the Company towards its alleged claims as unsecured creditor. Sri Santosh Hegde

says this is impermissible. It is open to the petitioners to move the Company Judge in this regard. The contention of the Committee of Management on this point is also left open.

6. The interlocutory applications are disposed of accordingly.”

11. On 13.12.1994, the learned Company Judge appointed a new Committee of Management composed of the Jain-Jalan group, while issuing necessary directions for deposit of Rs. 64 lacs by the Jain-Jalan group with the Registrar of the High Court. The Company Judge also directed certain lump sum payments to six substantial creditors, except Nemani Group on the basis of the list approved in the Court's Scheme prior to cut- off dates in October, 1987 before issuing advertisement inviting claims from creditors, while directing payments to be made to certain parties.

12. In appeal against the said order dated 13.12.1994, the Division Bench allowed the Jain-Jalan group to continue and carry on with the process of the Scheme, but set aside the direction for preferential payment to six named unsecured creditors.

13. The learned Company Judge by order dated 23.12.1996 also directed all unsecured creditors to lodge their claims with the Registrar of the High Court. The learned Company Judge, on the note of the Registrar, directed, inter alia, the Registrar of the High Court to confine to the claims of those unsecured creditors as on 28.10.1987 i.e. the date of winding-up order and the amounts quantified against their names in the list of unsecured creditors appended to the Company Application No.63 of 1987 affirmed on 27.4.1997. Pre-scheme unsecured creditors including the appellants lodged their respective claims with the Registrar on 27.02.1997. The Registrar submitted the second report excluding the names of the appellants (Radheshyam Ajitsaria) while including the name of the Nemani group. The Company Judge, on an application filed by the appellants (Ajitsaria's group) directed the Registrar to hear to the submissions of the appellants with regard to their exclusion. The appellants made their submissions and filed written notes in support of their contentions before the Registrar and thereafter the Registrar, on 23.04.1997, submitted a report including names

of the appellants (Ajitsaria's group) as persons entitled to receive payments in terms of the Scheme. The Company Judge, by a detailed judgment dated 9.9.1998 directed the Registrar to make payments of all creditors as per the revised statement enclosed to the Supplementary (Second) Report, except to the Nemani group. The Division Bench, in an appeal against the order dated 09.09.1998 filed by Jardine Handerson Ltd., made an order on 30.11.1998/1.12.1998 set aside the Registrar's report insofar as the same exceeded the amount mentioned in the list annexed to Company Appln. No.63 of 1987. The Registrar, despite the appellants not being held as part of the Nemani group, however, did not make any payments to the appellants. The appellants filed an application by way of Notice of Motion, inter alia, praying for modification of the order dated 09.09.1998 and for a further direction not to treat the appellants as part of the Nemani group with a further prayer for immediate payment in terms of the sanctioned Scheme. On 08.03.2001, the learned Company Judge directed payments to be made to the appellants, inter alia, holding that the appellants were not the part of the Nemani group and that their claims were already adjudicated upon and settled by the Registrar, Original Side.

14. One Shri Chetan Chowdhury claiming himself to be one of the Directors of the Company filed an appeal against the order dated 08.03.2001. The Division Bench, while granting liberty to the appellants to withdraw the amount deposited against its name/claim by furnishing a Bank Guarantee also recorded that it is not clear as to why Chetan Chowdhury and his group could be in the possession of the Company and listed the appeal for further directions.

15. On 14.05.2001, the appellants - Ajitsaria's group received payments from the Registrar of the High Court upon furnishing the requisite Bank Guarantee. Learned single Judge of the High Court passed an order on 19.12.2002, inter alia, holding that the possession of the Company by the alleged Board of Directors was wrongful, while directing the Official Liquidator to take possession of the Company (in liquidation). Several appeals were preferred from the order. The Division Bench, while staying the operation of the order dated 19.12.2002, directed the Joint Special Officers to take possession.

16. The Division Bench in appeals filed against the order dated 08.03.2001 made an order dated 3.3.2004 directing re- adjudication of the claims of the appellants which had already been adjudicated. According to the appellant, the Division Bench without appreciating that the appeal itself was not maintainable having been filed by 9 outsiders having no locus standi is not correct in directing readjudication of the claims of the petitioner. The Bench also dis-allowed the appellant's rights to claim the said amount as a member approved in the list of unsecured creditors distinct from the Nemani group. Being aggrieved by the impugned judgment dated 3.3.2004, the appellants filed the above appeals in this Court. This Court, on 08.04.2004, issued notices in the special leave petitions and also directed that the Bank Guarantee filed by the appellants with the Registrar of the High Court on the original side shall be kept renewed until further orders. By order dated 12.07.2004, leave was granted.

17. The Registrar of the High Court issued two certificates, inter alia, certifying that the last instalment of Rs. 8 lacs was deposited on 8/9.12.1999 and also certified that a sum of Rs.2,09,70,647.56 p. was lying with the Registrar in a separate account.”

14. Thus, above judgment covers the events up to March, 2004. In continuation of above sequence of events it is noticed that the Division Bench of this Court by order dated 03rd March, 2004 in APOT No. 271 of 2001, APOT No. 162 of 2001 and APOT No. 272 of 2001 had held that the appellants Radheshyam Ajitsaria and Others, who were considered as Members of the Nemani Group, were not entitled to receive payment on the ground that the said group being the profounder of the scheme and also that the dues shown by them had not been adjudicated either by the Court or by the Registrar. The matter went to the Hon'ble Supreme Court against this order. The appeal was disposed of by the Hon'ble Supreme Court by order dated 24th May, 2006 in the matter of **Radheshyam Ajitsaria and Anr. Vs. Bengal Chatkal Mazdoor Union and Others** reported in (2006) 11 SCC 771.

The Hon'ble Supreme Court had examined the matter in details and had reached to certain conclusions which are as under:

“39. The above facts clearly go to show and administer that the workers do not have a right to oppose the payment to all unsecured creditors out of the funds lying with the Registrar, Original Side, High Court. The reasons for our conclusion are as under:

(a) By order of this Court the said funds are meant for disbursement only for unsecured creditors. Separate arrangements have been made under the scheme for payment of other dues including workers' dues. The said scheme sanctioned in 1989 is still in operation and the present Committee of Management is operating under the same scheme.

(b) Since 1994 i.e. after the petitioner Group was superseded by the Jain-Jalan Group, no demands of any nature relating to any outstanding payments were ever raised by the workers.

(c) In any event, it has been clearly recorded in the order dated 18-11-2004 whereby the said Chetan Choudhary Group has been allowed to continue in management, that the said Chetan Choudhary Group is being allowed to be continued on the same terms and conditions as under the original sanctioned scheme, thus making them liable to make payments of all dues, past or present.

(d) Therefore, the Company being a running concern, the alleged dues of the workers cannot be claimed against any specific member of the Management Committee. The dues, if any, are against the Company and not against any individual members of the Committee of Management. There is no question therefore of holding up payment due to the unsecured creditors on the ground that workers' dues are alleged to be outstanding.

(e) Further, since the Company still continues to function, Section 529-A of the Companies Act cannot be pressed into service by the workers. The protection of Section 529-A is available only when a company has been wound up, the Official Liquidator has taken over the assets and disbursements are being made by the Official Liquidator in the course of winding up of the company. There is no

question of the worker claiming a preferential right or payment while a company is running and carrying on business in the usual course and incurring daily expenses and liabilities.”

15. Sub-para (e) above clearly mentions that the company was continuing to function and Section 529-A of the Companies Act, 1956 could not be pressed into service by the workers as the same was directed only when company was wound up and the Official Liquidator had taken over. The Hon’ble Supreme Court in paragraph 46 of the above judgment had held that:

“46. In any event since the Company is functioning as a going concern on and from the date of implementation of the scheme of arrangement as formulated and approved by the High Court as well as this Court, the question of the workers at this stage when the winding-up proceedings have been permanently stayed under Section 466 of the Companies Act, 1956 to state to have a better claim by virtue of Section 529-A of the Companies Act, 1956 does not and cannot arise. The workers having a priority over creditors can come into play only when the winding-up process is in motion and the Official Liquidator takes steps to formalise winding up. In the instant case, after the scheme had been sanctioned, the question of winding up would arise only if the order of permanent stay granted was to be lifted on any party's complaining of failure of the scheme or inability on the part of the Company to make payments either in terms of the scheme or otherwise. The contention to the contrary raised by Mr Nariman has no force.”

16. In the above paragraph, again it was reiterated that the company was functioning as a going concern. Though in this paragraph, it is observed by the Hon’ble Supreme Court that the winding up proceedings were permanently stayed under Section 466 of the Companies Act, 1956 but learned Counsel for the

appellant has fairly stated that there is no order of the Company Court or the Hon'ble Division Bench staying the winding up proceedings permanently.

17. In the above judgment, Hon'ble Supreme Court had again reiterated that:

49. In our view, the provisions as contained under Section 529-A of the Companies Act, 1956 are not applicable in the facts and circumstances of the case as the order of winding up has been stayed and the Company is being run under the scheme as a going concern.

“50. One Committee of Management is being replaced by another Committee of Management on the same terms and conditions with an object to implement the same scheme. Thus the dues of the creditors including the workers and other statutory dues are to be paid by the Committee of Management. Even at present the Company is being run by a Committee of Management and is now supported by the workers as would appear from the order dated 18-11-2004.”

18. In paragraph 59 of the above judgment, it was very clearly found by the Hon'ble Supreme Court that the Company was not wound up but allowed to continue as a going concern by holding as under:

“59. It is important to note that by orders of the Court, the Company (in liquidation) was not in fact wound up but was allowed to continue as a going concern. This was undoubtedly in the interest of the workers. So long as the Company continued as a going concern, the workers not only continued to get their wages and other benefits and also retained their rights to be reimbursed out of the assets of the Company in the event that the assets have to be sold in winding up. In fact, the fixed assets of the Company are enormously valuable. It has land in excess of 50 acres in prime locations out of which 17 acres was acquired by the National Highway Authority upon payment of compensation of Rs 41 crores recently to the present Company. The dues of workers are, therefore, in no jeopardy whatsoever. When the Company continues as a going concern, it is the dues of the unsecured

creditors which are most vulnerable and it is for that purpose this Court by its various orders ensured that a separate fund should be created for the unsecured creditors. In our opinion, it is fair and proper that the funds so created should only be utilised for the purpose of the unsecured creditors and not for workers' dues and other dues.

60. It was contended by the respondent that for the purposes of Sections 441 and 529-A of the Companies Act, the phrase “in winding up” should refer to “in the course of winding up”. In our view, this cannot be the position because, if so, no part of the fixed or movable or any other assets of the Company including raw material and working capital can be alienated by the Company in the usual course of its business activities for only such time as the winding-up proceedings are permanently stayed. This would mean that no order could ever be made exploring the possibility of running the Company as a going concern during the pendency of the winding-up proceedings. Such an interpretation would not only be contrary to the interest of the workers and the industry as a whole but would not be pragmatic and would be contrary to long-settled practice in the company jurisdiction.”

19. Thus, as per the above judgment of the Hon’ble Supreme Court, company was a going concern.

20. In the meanwhile, the proceedings before the BIFR were also initiated as the BIF had filed a reference with the BIFR under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 vide Form ‘A’ dated 16th of September, 2004. The BIFR on 7th of June, 2006 had recorded a finding that the company had become a sick industrial company as on March, 2003 and accordingly, declared it to be so and the BIFR appointed IDBI as the Operating Agency with the direction to prepare a revival scheme for it, if feasible. The IDBI had submitted the revival scheme by letter dated 30th of June, 2008 and the BIFR had prepared a Draft Rehabilitation Scheme (DRS) for revival of the company which was circulated

vide order dated 2nd of December, 2008 and this scheme was sanctioned by the BIFR with some modification on 4th of November, 2009. It is worth noting that Section 22 of SICA, 1985 relating to suspension of legal proceedings, contracts, etc. provides that pending any enquiry under Section 16 or scheme referred to under Section 17, no proceedings for winding up of the industrial company or for execution, distress, etc, shall lie or be proceeded with further except with the consent of the Board or by the Appellate Authority.

21. At this stage, it would not be out of place to note that in **Madura Coats Limited vs. Modi Rubber Limited and Another** reported in (2016) 7 SCC 603 the Hon'ble Supreme Court, in a case wherein a company directed to be wound up but the winding up proceedings were stayed, has held that when proceedings are pending both before BIFR and the Company Court but no order of winding up has been passed against the company, in such a situation the provisions of SICA would prevail over the provisions of the Companies Act. It has been held that the reference can also be made to the BIFR and then SICA will over-ride the Companies Act.

22. Three separate writ petitions bearing No. 12377, 12406 and 12412 of 2010 were filed challenging the jurisdiction of BIFR to entertain the reference and to frame the scheme. The learned Single Judge had disposed of these petitions by order dated 25th January, 2011 holding that SICA was not applicable to the respondent company as it was incorporated outside India and consequently, setting aside the scheme framed by BIFR. The Hon'ble Division bench by order dated 19th October, 2012 had set aside the order of the learned Single Judge and had held that provisions of SICA will be applicable to the respondent company. The order of the Hon'ble Division Bench was subject matter of challenge before the Hon'ble

Supreme Court and the Hon'ble Supreme Court by judgment dated 23rd September, 2013 had decided the appeal in the matter of **Yash Deep Trexim (P) Ltd. v. Namokar Vinimay (P) Ltd.** reported in **(2014) 1 SCC 545**.

23. In the matter of **Yash Deep Trexim (P) Ltd. (supra)**, Hon'ble Supreme Court had taken note of certain relevant facts and found that the company no longer fell within the ambit of sick industrial company. Therefore, the question raised in appeal was found to be academic and redundant. But while deciding the appeal, the Hon'ble Supreme Court found that in 1988, 24 acres of land owned by the company was acquired for the purpose of building, maintenance, management and operation of Second Vivekananda Bridge across river Hoogly and in the year 2003, provisional compensation was assessed at Rs. 21,28,21,000/- and on deposit of the said amount, possession of the land was taken over. It was further found that the award was passed on 30th January, 2006 and on account of further dispute between the parties, the matter was referred to the sole arbitrator who had passed the final award on 13th September, 2012 by awarding an additional compensation package of Rs. 57,00,00,000/- along with interest which on computation would amount to Rs. 50,00,00,000/-. On 09th November, 2012, a sum of Rs. 95,00,00,000/- was deposited by the National Highway Authority of India with the Registrar of the High Court at Calcutta. Thus, it was found that the respondent company had received or was entitled to receive a total sum of Rs. 170 crores on account of compensation for acquisition of land. It was further found that on the basis of the precise details of its liabilities even after meeting of its statutory and contractual applications, the company would be left with surplus of nearly Rs. 50,00,00,000/- and would not be a sick company anymore. The observations of the Hon'ble Supreme Court in the matter of **Yash Deep Trexim (P) Ltd. (supra)** in this regard are as under:

“14. Having noted the broad features of the grievances raised in each of these appeals we may now take note of certain connected facts on the basis of which we will be required to decide the necessity and expediency to adjudicate the core question arising in these appeals and the other issues that have been sought to be agitated before us. It has already been stated in the earlier part of this order that the respondent Company is the owner of vast tracts of immovable property in and around Kolkata which has, with the passage of time, appreciated in value. Way back in the year 1988 an area of about 24 acres of land owned by the Company was acquired for the purpose of building, maintenance, management and operation of the second Vivekananda Bridge across River Hoogly. In the year 2003 provisional compensation was assessed at Rs 21,28,21,000 and on deposit of the said amount possession of the land was taken over. The acquisition of the land came to be challenged before the High Court and the said challenge was also carried to this Court. The net result of the aforesaid exercise(s) was an enhancement of the compensation initially by the High Court to the extent of 30% and thereafter by this Court by fictionally shifting the date of entitlement of compensation from the date of acquisition to the date of taking over of possession.

15. An award dated 30-1-2006 was made in terms of the order of this Court which had led to further disputes between the parties. Eventually, all parties agreed to refer the matter to the sole arbitration of a retired Chief Justice of this Court who by a final award dated 13-9-2012 awarded an additional compensation package of Rs 57 crores along with interest, which on computation, would amount to about Rs 50 crores. A sum of Rs 95 crores has been deposited by the National Highways Authority of India with the Registrar of the Calcutta High Court on 9-11-2012 in the account of the respondent Company. In this manner the respondent Company has received/entitled to receive a sum of nearly Rs 170 crores on account of compensation for acquisition of the land. The respondent Company has clearly and categorically and on the basis of the precise details of its liabilities has contended that even after meeting all its statutory and contractual

obligations and liabilities it would still be left with a surplus of nearly Rs 50 crores and, therefore, would not be a “sick company” any more.”

24. In the aforesaid background, the Hon’ble Supreme Court in **Yash Deep Trexim (P) Ltd. (supra)** reached to the conclusion that the company is no longer a sick company and held as under:

“19. In the present case the entitlement of the respondent Company to receive a total amount of Rs 170 crores (approximately) by way of acquisition compensation and the payment of Rs 95 crores by NHAI which is presently lying in deposit with the Registrar of the Calcutta High Court is not in dispute. That the respondent Company would be left with a surplus of about Rs 50 crores after meeting all its losses and liabilities is a common ground amongst all the contesting parties. The rehabilitation scheme framed by the Board by its order dated 4-10-1999 is yet to be implemented. In the aforesaid situation keeping in view the object and scheme of the Act and the virtual consensus of the contesting parties with regard to the present financial health of the respondent Company it is clear that the Company can no longer fall within the ambit of the expression “sick industrial company” as defined in Section 3(1)(o) of the Act. Further applicability of SICA to the respondent Company, therefore, does not arise.

20. If the respondent Company no longer falls within the ambit of a “sick industrial company” as defined by Section 3(1)(o) of the Act and the Act has ceased to apply to the Company and the rehabilitation package worked out by the Board has not yet been implemented, the question(s) arising in the present appeals have surely become academic and redundant. If that be so, we do not see why we should answer the said question(s) in the present group of appeals. Instead, in the fitness of things, we should leave the said question(s) open for determination in an appropriate case and as and when the occasion would arise.”

25. In respect of the issue of management of the company, in **Yash Deep Trexim (P) Ltd. (supra)** it was directed that for the present, the management of the company as on date would continue until further order, by holding as under:

“21. Insofar as the other issues, particularly, with regard to the management of the Company is concerned we have already found that none of the said issues arise from the order of the High Court under appeal before us. Even otherwise, we will not be justified to go into any of the said issues and express any opinion thereon inasmuch as this Court exercising jurisdiction under Article 136 of the Constitution is not the appropriate forum to adjudicate grievances/claims with regard to the right of management of the affairs of the Company by one group of shareholders or the other. It has been urged before us that several contentious issues with regard to the rights of one group of shareholders or the other to be in control of the management of the Company had been raised and some of such claims are still pending before the High Court. Coupled with the above is the pendency of several other proceedings with regard to permanent stay of the winding up of the Company. Taking into account all that has been stated above we are of the view that it would be just, proper and equitable to leave the contesting parties to pursue their remedies before the High Court or such other forum as may be competent in law. For the present, the management of the Company as on date will continue until orders, if any, varying the current position are passed by any forum competent in law. It is made clear that the above is a mere working arrangement that we have considered appropriate for the present and the same should not be understood as any expression of opinion by us on the entitlement of any particular group of shareholders to run and manage the affairs of the Company which issue is left open.”

26. Before the Company Court, several applications were filed and learned Company Judge in the order dated 28th of April, 2014 observed that by virtue of the winding up order, the proceedings have acquired representative character. This

order was subject matter of challenge before the Hon'ble Division Bench in ACO 38 of 2016 and connected matters. The Hon'ble Division Bench while passing the order dated 14.08.2014 had expressed doubt about permanent stay and observed as under:

“Such contentions of Mr. Sengupta, was refuted by the learned Counsels appearing for different groups of interveners, i.e, the shareholder, the workers union and the unsecured creditors, as according to them the issue as to whether the winding up proceeding has been permanently stayed or not is still an alive issue which is required to be resolved by the Company Court.

Contradictory stand, taken by the parties against each other on the issue of permanent stay of the winding up proceeding, leads us to investigate deep into the matter to find out the present stage of the said winding up proceeding. In this regard, it is worth mentioning here that apart from mentioning that the Company is a going concern and the winding up proceeding against the said company has been permanently stayed under Section 466 of the Companies Act, 1956, by the Hon'ble Supreme Court in the said judgment dated 24th May, 2006 passed in the Civil Appeals No.4101-4103 of 2004, the order passed by the Company Court and/or any other competent Court staying the winding up proceeding against the said company permanently under Section 466 of the Companies Act, 1956, could not be produced before this Court by the appellant/petitioner in spite of repeated insistence of this Court. An order of permanent stay of the winding up proceeding is a judicial order to be passed by the Company Court under Section 466 of the Companies Act, 1956, which the appellant/petitioner has failed to procedure before this Court.”

“If the winding up proceeding was permanently stayed, then how the affairs and the management of the said company were directed to be managed by the Committee of Management and/or the Board of Management and/or under the supervision of the Special Officer. Was the Official Liquidator who was directed to take charge of the assets of the company was ultimately discharged by the Company Court? When and in which opportune moment the appellants took control over the management

of the said company? Whether exclusion of Chaitan Chowdhury and Ridh Karan Rakecha from the Board of Directors was justified or not? Whether the Committee of Management and/or Board of Management was ultimately dissolved by the Court or not? Whether the Special Officer appointed by the Court was discharged or not? Whether the company is still running its business as per the revival scheme or not? Thus the ultimate question is: Is the company still under liquidation? We do not find any answer to these questions from the materials on record and without resolving these issues, we cannot come to a definite conclusion as to whether the winding up proceeding against the said company was permanently stayed or not.”

“While passing the said order, it was recorded by the Company Court that the said company was described as a company in liquidation as already winding up order was passed by this Court and the fuller effect of that order was yet to be examined. The parties accepted the said order. However, we feel that there is a grey area on the issue as to whether the winding up proceeding against the said company has been permanently stayed or not and we feel that some further research is yet to be made to resolve the said dispute. Such research is necessary to ascertain the right of the appellant to manage the affairs of the said company as the Directors of the company inasmuch as the management of the company cannot be controlled by the Board of Directors of the company when the company is in liquidation. Thus we hold that the appellants’ right to withdraw the deposited money depends upon the fate of such research. However, such research cannot be completed without affidavits being exchanged between the parties. We do not want to do the exercise as the Company Court has not yet decided these applications finally, and if we do this exercise at this stage, the aggrieved party will lose a forum of appeal for challenging our order on this issue.

Considering the amount of deposit which the appellants want to withdraw, and the company’s indebtedness to its various creditors and the quantum of its liability, coupled with the facts that even the workers have not been paid their dues, we do not feel it safe to allow a particular group of shareholders, who are described as interloper by the creditors, to withdraw the money deposited with the Registrar, Original Side of this Court without deciding the said issue finally, particularly when we find that the

appellant/applicant themselves have filed an application being C.A.No. 957 of 2010 praying for permanent stay of the company petition No.2 of 1987 which is yet to be decided finally. In the aforesaid context, we do not find any illegality in the impugned order passed by the Learned Company Court proposing to dispose of all the pending applications simultaneously.”

27. The Hon’ble Division Bench with the aforesaid observation had affirmed the order of the learned Single Judge.

28. Against this order, SLP (C) No. 2814-2815 of 2015 was preferred wherein, Hon’ble Supreme Court by order dated 12th of March, 2015 granted leave and by a reasoned order found that the proper remedy would be to dispose of all the pending applications and directed the learned Company Judge to dispose of the pending applications. The appeal was also disposed of by the Hon’ble Supreme Court without interfering with the order of the Hon’ble Division Bench.

29. Hon’ble Supreme Court subsequently has passed the order in **SLP (C) No. ____/2014 CC No. 16278 of 2014** in the case of **Radheshyam Ajitsaria Vs. Baranagore Jute Factory PLCE (in liquidation) and Others** whereby the SLP was permitted to be withdrawn with a request to the Company Judge to dispose of the pending matters as expeditiously as possible preferably within a period of three months. The Hon’ble Supreme Court in Civil Appeal No. 4298-4299/2017 in the case of **Baranagore Jute Factory PLC. Mazdoor Sangh (BMS) vs. Baranagore Jute Factory PLC. Etc** had also passed the order dated 30th August, 2017 directing the Company Judge, not to entertain any fresh application in Company Petition No. 2/1987, without leave of Hon’ble Supreme Court. By this order, Company Judge was directed to dispose of the company petition within four months.

30. Learned Company Judge by the order under challenge in this appeal has disposed of various applications and has reached to the following conclusion:

- (i) No terms and conditions were fixed In Re: Ajitsaria excepting that the Company/BJF was treated as a going concern for which reason the workers were denied access to Section 529A of the 1956 Act.
- (ii) It cannot be said that the Company was intended not to function under the supervision of Court.
- (iii) Literally and classically following the letter and spirit of the law apropos the present factual matrix, it is the Court, through successive appointment of Committees of Management (CoMs), Joint Special Officers, the Official Liquidator and the like has transformed the Company/BJF into an entity custodia legis.
- (iv) The Company/BJF continues to be monitored by the Court at various stages through its CoMs, Joint Special Officers, the Official Liquidator.
- (v) The sudden infusion of the compensation money by NHAI has turned the balance-sheet of the Company from red to black. The Company's performance per se has not been credited with the paper turn-around, although the Company continues to claim the status of a going concern which will be left with a cash surplus after pending debts/obligations are met from out of the funds pumped in by NHAI.
- (vi) Sum of Rs. 8 lacs only directed to be periodically deposited by the Company to the Registry of this Court towards satisfaction of part of the Company's dues, has remained largely unpaid till date.

(vii) About cut-off date the Company Judge found the argument to be more deserving that the status of the creditors and/or other claimants to the dues has acquired a representative character.

(viii) The creditors, workers, bankers, financial institutions, then and now can be considered to be in queue for their dues up to the stage of their proximate transactions with the Company at the time the Company was referred to the BIFR.

(ix) The Company's Books of Accounts remain a mystery wrapped in an enigma.

31. The Company Judge in the impugned order has recorded further findings and has issued following directions:

(a) The Company Court continues to be in the position of custodia legis of the Company/BJF.

(b) Ipso facto there is no permanent stay of winding up.

(c) The Company Judge appointed a three member Committee of Management (CoM) and held it entitled to appoint an auditor to do complete audit, and to hold consultation with professionals.

(d) The creditors, workers etc. are directed to submit claims to the CoM and CoM is directed to quantify and prioritise the claims and submit a schedule of payments.

(e) The cut-off date for filing claim before CoM is treated to be the period when the Company was referred to BIFR.

- (f) CP 2 of 1987 is kept alive formally on record to enable the Court to pass appropriate and further orders after CoM places the recommendation before the Company Court.

32. In the aforesaid factual background, now this Court is required to examine if the order of learned Company Judge suffers from any illegality and also examine the legal position and ascertain if the winding up proceedings have been permanently stayed or a case is made out to permanently stay the winding up proceedings.

33. It is worth noting that the order of the learned Company Judge under challenge as also Registry Report dated 24th of August, 2018 reflect that initially the record of C.P. 2 of 1987 could not be traced but subsequently the record of C.P. 2 of 1987 was traced out and reconstructed with the assistance of the parties.

34. This being an appeal against the order of the Company Judge it is required to be decided in the light of the well-settled principles relating to scope of interference by the appellate Court. If the view taken by the Company Judge is a possible view then no interference in the order of learned Single Judge is required merely because another view is possible. In similar circumstances in the matter of **Forbes & Company Ltd. and Ors. Vs. The Official Liquidator of the Hon'ble Bombay High Court and Ors., 2013 (7) ALLMR 388**, in a case where the Company Judge had dismissed an application for permanent stay, while considering appeal, the Division Bench of the Bombay High Court had held that:

“16. Now it is in this background that the court would have to consider whether the exercise of the discretionary jurisdiction of the company court under Section 466 has to be interfered with in appeal. At the outset, it must be noted that this Court in appeal is not called upon to determine in the first instance as to whether a case was made out for the exercise of the discretion

under Section 466 but whether the judgment of the learned Single Judge would warrant interference in appeal, based on well settled principle of law that the court in the exercise of its jurisdiction under Clause 15 of the Letters Patent would not interfere with an order of the learned Single Judge even if the learned Single Judge has taken a possible view. The judgment of the learned Single Judge is, in our view, not merely a possible view to take but the only correct view based on the facts and circumstances of the case.”

35. The moot question in these appeals is if there is a permanent stay of winding up proceedings. Rival submissions have been advanced by the learned counsel for the parties on the observation of the Hon’ble Supreme Court about permanent stay in the matter of **Radheshyam Ajitsaria & Anr. (supra)**. Submission of Mr. Mitra, learned Senior Counsel for the appellant, placing reliance upon the judgment of the Hon’ble Supreme Court in the matter of **S. Nagaraj (Dead) by LRs. And Others vs. B.R. Vasudeva Murthy and Others [(2010) 3 SCC 353]** is to the effect that even if the judgment of the Hon’ble Supreme Court is per incuriam, bar of res judicata operates and that once the Hon’ble Supreme Court has held that there is permanent stay of the winding up proceedings, then even if the said observation is held to be obiter and is per incuriam, the order would be treated as final and binding. Opposing the submission, learned Counsel for the other side have placed reliance upon the judgments of the Hon’ble Supreme Court in the matter of **Dadu Dayalu Mahasabha, Jaipur (Trust) vs. Mahant Ram Niwas and Another** reported in (2008) 11 SCC 753, **Vishal N. Kalsaria vs. Bank of India and Others** reported in (2016) 3 SCC 762 and **Union of India and Another vs. Pfizer Limited and Others** reported in (2018) 2 SCC 39 in support of the submission that the observation made by the Hon’ble Supreme Court about permanent stay of winding up proceedings is not binding because it was not an issue before the Hon’ble Supreme Court.

36. After perusing the judgment of the Hon'ble Supreme Court in the matter of **Radheshyam Ajitsaria & Anr. (supra)**, we find that in paragraph 34 of the judgment while formulating the questions of law for determination, Hon'ble Supreme Court had not formulated any separate question of law relating to permanent stay, but in the facts of the case there was occasion to examine this aspect of the matter, therefore, the Hon'ble Supreme Court in paragraph 46 of the judgment had observed that the winding up proceedings were permanently stayed under Section 466 of the Act. The fact that no order of permanent stay was passed by the Company Judge, was not brought to the notice of the Hon'ble Supreme Court. Subsequently, the Division Bench of this Court by order dated 14th of August, 2014 in ACO 38 of 2016 taking note of the judgment of the Hon'ble Supreme Court in the case of **Radheshyam Ajitsaria & Anr. (supra)** had expressed doubt about the said observation of the Hon'ble Supreme Court and had noted that there was a grey area on the issue as to whether the winding up proceedings of the company have been permanently stayed or not. This order of the Division Bench was the subject matter of challenge before the Hon'ble Supreme Court in SLP (C) No. 2814-2815 of 2015. Nothing has been pointed out to show that the above observation of the Division Bench of this Court was interfered with or set aside by the Hon'ble Supreme Court in the appeal. Hence, the issue relating to permanent stay is now required to be dealt with by this Court by examining the factual and legal position in this regard.

37. Section 466 of the Act deals with power of tribunal to stay winding up and provides as under:

“466. Power of Court to stay winding up.—(1) 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 altogether or for a limited time, on such terms and conditions as the Court thinks fit.

(2) On any application under this section, the Court may, before making an order, require the Official Liquidator to furnish to the Court 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.”

38. A bare reading of the said Section reveals that following two conditions are required to be satisfied for bringing an order of permanent stay of winding up in existence:

- (i) filing of an application either of the Official Liquidator or of any creditor or contributory for stay of winding up proceedings.
- (ii) proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed.

39. If the above two conditions are satisfied, the Company Judge has the discretion to stay the winding up proceedings, either altogether or for a limited time and impose appropriate terms and conditions. A copy of the order of the stay is required to be forwarded to the Registrar forthwith who is required to make a minute of the order in his books relating to the company.

40. In the present case, applications for permanent stay of winding up proceedings being CA 191 of 2002 and CA 186 of 2001 are pending. Proof to the

satisfaction of the Court as required by Section 466 is yet to be recorded by the Company Judge.

41. It is worth noting that Section 466(1) does not use the phrase “permanent stay” but the expression “order staying the proceedings altogether” has the effect of permanent stay of proceedings.

42. The Division Bench of Bombay High Court has considered the scope of Section 466 of the Act in the matter of **Forbes & Company Ltd. and Ors. (supra)** in a case where the Company Judge had dismissed the application for permanent stay of the proceedings under Section 466 of the Act, Hon’ble Justice Dr. D. Y. Chandrachud (as he then was) taking note of the legal position on the issue and after considering Section 466 of the Act has held as under:

“11. Sub-section 1 of Section 466 empowers the Company court to stay the proceedings in winding up either altogether or for a limited time on such terms and conditions as it thinks fit. Such an order can be passed on the application either of the Official Liquidator or of any creditor or contributory. The fundamental requirement of Section 466(1), is that the court may do so "on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed." Section 466(1) confers a discretion on the court and not a mandate. The discretion has to be exercised on satisfaction that stay of the proceedings in relation to winding up ought to be granted. The legislature has carefully used the expressions "on proof to the satisfaction" and "ought to be stayed". Before the court grants a stay, the statutory requirement is that there must be proof which is brought before the court on the basis of which it is satisfied that the proceedings ought to be stayed.

12. The language of Section 466 of the Companies Act, 1956 has been interpreted, as we shall indicate, by courts in India having due regard to the

corresponding principles under the provisions of the English Companies Act. An early decision on the subject in the UK was a judgment of Lord Esher, M.R. speaking for the Court of Appeal in *Re Flatau* 2. The judgment of the Court of Appeal followed an earlier decision in *re Hester* 3 which had laid down the rules for a rescission of a receiving order in bankruptcy. In that context, Lord Esher had held as follows:

18-A. In the Court of Appeal, Lord Esher, M.R., stated (p.639):

Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The Court has gone still further, and, I think rightly so, and has said that under the present Bankruptcy Act it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large; and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger. The Court has said this before, and I adhere to it now.

Fry, L.J., observed (at p. 641):

We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country.

(emphasis supplied)

The same principle was followed in the subsequent decision in *Flatau* by Lord Esher, M.R. while holding that even though the present creditors are fully satisfied and are entirely indemnified, the court must yet consider as to whether its jurisdiction should be exercised. This principle was subsequently followed in a judgment of Buckley J. in *re Telescriptor Syndicate Ltd.*⁴ Buckley, J held as follows :

I have here to see whether it is proved to my satisfaction that all proceedings in relation to this winding-up ought to be stayed. I

decline to say that I am satisfied as to that by the mere fact that since the winding-up order was made the assent of all the creditors and of a large majority of shareholders has been obtained.

In a judgment of more recent origin in the UK, Mergarry, J. in *Re Calgary and Edmonton Land Co.Ltd. (In Liquidation)*, held as follows :

Under Section 256 itself the court

may ... on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed" make an order for the stay "on such terms and conditions as the court thinks fit.

Quite apart from any authority (and I may mention *In re Telescriptor Syndicate Ltd.* [1903] 2 Ch. 174) this language seems to me to make it abundantly clear that the jurisdiction is discretionary, and that it lies on those who seek a stay to make out a sufficient case for it. In particular, the words "satisfied," "just and beneficial," "satisfaction of the court" and "ought to be stayed" seem to me to indicate that the applicant for a stay must make out a case that carries conviction.

(emphasis supplied)

13. In an early decision of the Calcutta High court in the matter of *East India Cotton Mills Ltd.*, Justice S.R. Das (as the learned Judge then was adverted to the position in English law as summarised in *Halsbury's Law of England*, thus :

In the exercise of its jurisdiction to stay, the Court, so far as possible, acts upon the principles applicable in exercising jurisdiction to rescind a receiving order or annul 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 directors have not complied with their statutory duties as to giving information to the

official receiver or furnishing a statement of the 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 its 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 or 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 Calcutta High Court also proceeded on the basis of the law laid down in *re Telescriptor Syndicate Ltd.* (supra) and in *re Hester* (supra).

14. The effect of an order of stay under Section 466 is to place "the order of winding up in a state of suspended animation" as held by the judgment of the Supreme Court in *Sudarsan Chits (I) Ltd. vs. G. Sukumaran Pillai and others* MANU/SC/0037/1984: AIR 1984 SC 1579 at para 13 as follows :

When winding up order is kept in abeyance it is in a state of suspended animation. The fact that the Appellate Bench directed that pending the implementation of the scheme as sanctioned by the High Court, the winding up order will be kept in abeyance itself without anything more shows that the order was neither cancelled nor recalled nor revoked nor set aside. It continued to exist but was inoperative.

In other words, despite the grant of the stay, order of winding up continues to exist but is rendered inoperative.”

43. The Single Bench of this Court in the case of **Mahabir Prasad Agarwalla and Ors. vs. Ashkaran Chattarsingh and Ors.**, 85 CWN 557 has summarized the principles for exercising the discretion under Section 466 as follows:

“28. Therefore, from the above principles which has been summarised in different authorities and the decision referred to hereinbelow 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 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 and accepted proposal for satisfying all the creditors must be before the Court with material particulars, (8) the jurisdiction for stay 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 the 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 for granting or not granting the stay having regard to the peculiar facts of a particular case.”

44. The above judgment has been duly noted by the Division Bench of Calcutta High Court in the matter of **Bank of India vs. Official Liquidator and Others** reported in **1999 (1) Cal LT 322**.

45. So far as the effect of order of permanent stay of winding up proceedings is concerned, in the case of **Sudarshan Chits (I) Ltd. vs. O. Sukumaran Pillai, (1984) 4 SCC 657** Hon'ble Supreme Court has held in para 14 that when winding up order is kept in abeyance it is in the state of suspended animation meaning

thereby it was effectively subsisting but inoperative for the time being. In this regard it is held that:

“14. However, the narrow question which is required to be considered in this appeal is: whether the winding-up proceedings were pending or had come to an end when the Appellate Bench froze the winding-up order by keeping it in abeyance? Let it be made at once clear that the winding-up order made by the learned Company Judge in respect of the appellant Company has neither been quashed, set aside, cancelled, revoked nor recalled. On the contrary after directing that the winding-up order shall be held in abeyance, the Appellate Bench directed that Official Liquidator shall continue to act as Provisional Liquidator as provided by Section 450 and that itself is a stage in the winding-up proceedings. When winding-up order is kept in abeyance it is in a state of suspended animation. The fact that the Appellate Bench directed that pending the implementation of the scheme as sanctioned by the High Court, the winding-up order will be kept in abeyance itself without anything more shows that the order was neither cancelled nor recalled nor revoked nor set aside. It continued to exist but was inoperative. Any default on the part of the Company in carrying out its obligation under the scheme by itself without anything more would revive the winding-up order. Therefore, the winding-up order was effectively subsisting but inoperative for the time being. Having all the potentiality of being rejuvenated or being brought back to life.

15. Now if the winding-up order was merely held in abeyance i.e. it was not operative for the time being, but it had not ceased to exist, the winding-up proceedings are in fact pending and the court which made the winding-up order would be the court which is winding up the Company. It is now well-settled that a winding-up order once made can be revoked or recalled but till it is revoked or recalled it continues to subsist. That is the situation in this case. If the winding-up order is subsisting the court which made that order or the court which kept it in abeyance will have jurisdiction to give necessary directions to the Provisional Liquidator to take recourse to Section 446(2).”

46. The Division Bench of this Court in the case of **Asset Reconstruction Company (India) Ltd. vs. Bengal Shelter Housing Development Limited, 2017(3) CHN (CAL) 192** has held that Company petitions even when dismissed on merits are traditionally not recorded or disposed of but permanently stayed.

“11. A note by way of a post-script: Company petitions, even when dismissed on merits are traditionally not recorded as dismissed or disposed of; but are permanently stayed. Dismissal is recorded only when the petition is not maintainable or is barred by law. The effect may not be any different from recording a disposal, but there is a history of more than a century that goes behind such recording, which must be respected.”

47. Calcutta High Court in the matter of **In Re: Prudential Capital Markets Ltd., (2008) 1 CompLJ 314 (Cal)** has held that even if there is an order of stay, it is not a permanent stay without effect of completely obliterating the order of winding up, so the order of stay keeps the order of winding up in abeyance or suspended animation but does not altogether wipe it off.

48. It is also not in dispute that none of the following steps which are required to be taken after passing of the winding up order, have been taken in the present case:-

- a. Under Section 456 of the Companies Act, 1956, copy of winding up order is required to be filed before the Registrar.
- b. Under Section 456 of the Act, the Official Liquidator is to take into his custody or under his control all the assets and business of the company.
- c. Under Sections 454 and 455 of the Act, the statement of affairs is required to be filed within stipulated time from the date of winding up order and the Official Liquidator is required to file the preliminary report.

- d. The priorities are required to be fixed as per Section 530 of the Act for preferential payments. Under Rule 139 of Company (Court) Rules, 1959, the Official Liquidator is required to take out summons with regard to statement of the list of contributories and creditors.
 - e. In terms of Rules 147 and 148, the Official Liquidator is required to fix a date for proving debt and publish an advertisement in the prescribed form inviting creditors to prove their claim.
 - f. In terms of Section 547 of the Act, all requisite documents pertaining to the company are required to contain the statement that the company is being wound up.
 - g. Under Section 551 of the Act read with Rule 311 and Form 48, in case the winding up of a company is not concluded within one year after its announcement, the Official Liquidator is required to file the annual statement in the prescribed form.
 - h. In terms of Rule 286, the Official Liquidator is required to maintain the prescribed registers and books of various natures. After the affairs of the company are completely wound up or other conditions prescribed are satisfied, the Official Liquidator is to file an application under Section 481 of the Act for dissolution.
 - i. No steps have been taken by the Official Liquidator so far to sell any of the assets of the company.
49. It is not a case of any of the parties before us that any steps as mentioned above or as required under the Act or Rules after passing of the winding up order, for winding up of the company have been taken in the present case. Thus, so far as

the winding up proceedings are concerned, they are at the same stage in which they were on the date of passing of the winding up order, about 35 years back as on 28th of October, 1987.

50. The fact that Official Liquidator is not in possession of the assets of the company in liquidation, is clearly mentioned in the affidavit of the Official Liquidator dated 26th of February, 2015 filed before the Hon'ble Supreme Court, relevant part of which is quoted as under:

“...4. That in terms of the orders passed by the Hon'ble High Court at Calcutta from time to time on 26.12.1994 the Official Liquidator handed over all the assets and properties of the company to the then Committee of Management appointed by the Hon'ble High Court at Calcutta. A godown space which was given on rent to the Central Warehousing Corporation was kept in possession under the office of the Official Liquidator and the Official Liquidator continued to receive the rent from the Central Warehousing Corporation. A copy of the minutes of handing over the properties dated 26.12.1994 is annexed hereto and marked as “A”.

5. It is stated that after the stay of the winding up order by the Hon'ble Court, the company was running as a going concern under different Committees of Managements appointed initially Management Committee appointed by the Board for Industrial and Financial Reconstruction (BIFR) on a sanctioned Scheme propounded by the IDBI, the Operating Agency.

7. That a writ proceedings was filed before the Hon'ble Calcutta High Court challenging the sanctioned approved by BIFR. In the said proceedings the Hon'ble High Court of Calcutta quashed the reference of the company to BIFR. Thereupon the Company was running as a going concern under a Committee of Management appointed by the Hon'ble Division Bench vide interim order dated 01.04.2011. This Committee superseded all other Committees appointed earlier. The

said Interim Order merged into the final order of the Hon'ble Calcutta High Court dated 19.10.2012 and the Committee appointed by the High Court seized from 10.12.2012.

8. It is submitted that since the year 1994, other than one godown, possession of which was kept inadvertently in the custody of the Official above godown space being let out to CWC in their possession and was collecting rent for payment of various establishment charges and other expenses relating to the said company.
9. I state that there was no other activity in the office of the Official Liquidator relating to the said company as the winding up of the Company has been permanently stayed and the company was and is running as a going concern. The order of winding up of the High Court at Calcutta dated 19.12.2002 was ultimately stayed by the order Division Bench dated 18.11.04. The permanent stay of the winding up was also being observed by the Hon'ble Supreme Court in its order dated 24.05.2006. Accordingly, the Official Liquidator on 16th January, 2012, handed over the said Godown Space. Copies of the order dated 01.04.2011, 18.11.2004, 24.05.2006 and the said letter of handing over dated 16.01.2012 are annexed herewith marked as "B".
10. I state that there is no claim of any creditors in the books of the office of the Official Liquidator, a statement of accounts comprising of receipts and payments made on account of the company since winding up till date was prepared and a sum of Rs. 46,00,000/- being the balance in hand with this office on account of the company was also handed over to the said company by way of a cheque in favour of the company on 8th May, 2012.
11. I state that presently the Official Liquidator is in no way concerned with the Baranagar Jute Factory PLC, which is now running and operating independently as a going concern. This office has no other Books, Accounts and documents which is left to be handed over to the Respondent No. 1 company."

51. In the present case, it is also worth noting that the Hon'ble Supreme Court in the order dated 30th of November, 1988 had opined that the scheme supported by the workers and unsecured creditors of Raj Kumar Nemani, be accepted and a detailed scheme on that basis be formulated and be implemented as soon as possible, therefore, the Company Judge was directed to work out the scheme. The Record further reflects that the Company Judge had approved the scheme dated 16.06.1989. Though the Company Judge by order dated 16.12.1991 had cancelled the scheme observing that the scheme had totally failed but the Division Bench in appeal had passed the interim order dated 18.12.1981 staying the order of the Company Judge dated 16.12.1991. In S.L.P.(C) No. 6505 of 1992 by the order dated 22.3.1993, Hon'ble Supreme Court had directed the Division Bench to dispose of the appeal by observing that the stay of operation of the order of the learned Single Judge dated 16th December, 1991 will continue. The judgment of the Hon'ble Supreme Court in the matter of **Radheshyam Ajitsaria & Anr. (supra)** clearly mentions that the Company is functioning as a going concern on and from the date of implementation of the scheme of arrangement as formulated by the High Court as well as the Supreme Court.

52. The Division Bench of this Court headed by Hon'ble Justice Ruma Pal (as she then was) by the order dated 07th of September, 1998 passed in T 1013 of 1998 in APOT 523 of 1998, Abhudya Trading Limited has held that the only provision under which the scheme could be propounded once an order of winding up has been passed, is for revival of company under Section 391 of the Act. In this regard it has been held that:

“The only provision under which a scheme could be propounded once an order for winding up has been passed is for revival of the company under Section 391 of the Act. A scheme under Section 391 envisages a

compromise or arrangement (a) between the company and its creditors or any class of them or (b) between the company and its members of any class of them. In such an event the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs before approving the scheme. In this case it is neither the company nor the creditor nor any member of the company which has proposed either by Maxlife either with any of the creditors of the company whether secured or unsecured or the shareholders of the company. Maxlife is a total stranger to the company.”

53. Since in this case scheme of revival has been framed and committee of management has been appointed to run the BJB, therefore, it has been submitted that stay is operating under Section 391 of the Act. Section 391 of the Act deals with power to compromise and make arrangements with creditors and members and provides for making arrangements with the creditors and members and empowers the Company Court to sanction arrangements. Sub-section 6 of Section 391 empowers the Company Court to grant stay. In the matter of **Meghal Homes (P) Ltd. vs. Shree Niwas Girni K.K. Samiti and Others [(2007) 7 SCC 753]** the Hon’ble Supreme Court has considered the scope of Sections 391 and 466 of the Act and has held that there is no difficulty in reconciling the need to satisfy the requirement of both Sections 391 to 394-A and Section 466 of the Companies Act. There is no incongruity in looking 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. The Judgment in the matter of **Meghal Homes (P) Ltd. (supra)** has been noted with approval by the Hon’ble Supreme Court in the matter of **Arun Kumar Jagatramka vs. Jindal Steel and Power Limited and**

Another [(2021) 7 SCC 474]. Hon'ble Supreme Court in the matter of **M/s. J.K. (Bombay) Private Ltd. vs. M/s. New Kaiser-I-Hind Spinning and Weaving Co. Ltd. [AIR 1970 SC 1041]** has held that the scheme of payment to creditors has statutory force and is binding on creditors and share holders. So long as company is carrying out the scheme no winding up order can be passed. The Hon'ble Supreme Court in this regard has held that:

“35. The principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties: it becomes binding on the Company, the creditors and the shareholders and the statutory force, and therefore, the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of Section 391 of the Act, a scheme is statutorily binding even on creditors and shareholders who dismantled from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration, (cf. 1938-4 All ER 337) (supra). The effect of the scheme is “to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity”. (Palmer's Company Law, 20th Edn. 664) Sub-Section (2) of Section 391 of the Act allows the decision of the majority prescribed therein to bind the minority of creditors and shareholders and it is for that reason that a scheme is said to have statutory operation cannot be varied by the shareholders or the creditors unless such variation is sanctioned by the court. The effect, therefore, of a scheme between a company and its creditors is that so long as it is carried out by the company by regular payment in terms of the scheme a creditor who is bound by it cannot maintain a winding-up petition. But if the company commits a default, there is a debt presently due by the company and a petition for winding-up can be sustained at the instance of a creditor. The scheme, however, does not have the effect of creating a new debt; it simply makes the original debt payable in the manner and to the extent provided in the scheme. The proposition that a winding-up order can only be passed after

compelling the company to complete the rights which are still incomplete is not borne out by the decisions relied on by Mr Sen.”

54. Hon’ble Supreme Court in the matter of **S.K. Gupta and Another vs. P. Jain and another**, AIR 1979 SC 734 has reiterated that the scheme when sanctioned does not merely operates as an agreement between the parties but has statutory force and is binding not only on Company but even dissenting creditors or members as the case may be.

55. This court cannot lose sight of the settled legal position that winding up should be resorted to as the last resort after exhausting all remedies. In the facts of this case and especially considering the fact that the Company is operating as a going concern, it is not in the interest of justice to direct winding up of the company. It is worth noting that a large sum of Rs. 170 crores is lying in deposit with the Registrar of this Court and possibility of some of the contesting parties having an eye on it cannot be ruled out. Hence, every effort is required to be made to ensure the amount is utilized for rightful purposes.

56. Thus, on the basis of the aforesaid analysis and after perusal of the record, we find that:

- a. The winding up order passed by the Company Judge on 28th of October, 1987 was stayed by the Division Bench by order dated 22nd of September, 1988 for a period of 6 months. Thereafter, there is no material available on record indicating that the order of stay was extended by the Division Bench any further.
- b. On staying the winding up order for six months by order dated 22nd of September, 1988, the Division Bench had appointed Joint Special Officer and Committee of Management and had directed the Committee of Management to run the mill under the Joint Special Officer.

- c. There is no order of the Company Court or the Division Bench of this Court in appeal, granting permanent stay of winding up proceedings in terms of Section 466 of the Companies Act, 1956 or granting stay in terms of Section 391 of the Act.
- d. There is no consideration earlier either by the Company Judge or the Division Bench or any other Court of the principles which have been laid down for grant of permanent stay by this Court in the case of **Mahabir Prasad Agarwalla and Ors. (supra)** and also the Division Bench of the Bombay High Court in the case of **Forbes & Company Ltd. and Ors. (supra)**.
- e. Though the winding up order was passed by the Company Judge dated 28th of October, 1987 but thereafter almost 35 years have passed but no steps in pursuance to the winding up order have been taken till now in the company petition to wind up the company.
- f. The Official Liquidator is not in possession of any of the assets of the company and has also not taken any of the steps which are required to be taken by the Official Liquidator under the Companies Act, 1956 on passing the winding up order. No asset of the BJB has been sold in winding up proceedings till now though about 35 years have passed after the order of winding up.
- g. In the present case, as already noted above, the scheme of arrangement as formulated by the High Court and approved by the Hon'ble Supreme Court is operating and the company is functioning as a going concern. The Hon'ble Supreme Court on 30th of November, 1988 had opined that the scheme supported by the workers and unsecured creditors

of Raj Kumar Nemani, be accepted and a detailed scheme on that basis be formulated and implemented as soon as possible and thereafter the Company Judge had approved the scheme on 16.6.1989 and the judgment of the Hon'ble Supreme Court in the case of **Radheshyam Ajitsaria & Anr. (supra)** indicates that the scheme, arrangement so formulated and approved has been implemented and the Company is running as a going concern.

h. We also find that the company is a going concern and is no longer a sick company after receiving the compensation amount from NHAI as has already been observed by the Hon'ble Supreme Court in the matter of **Yash Deep Trexim Private Limited (supra)**. It has also been noted by the Hon'ble Supreme Court in the case of **Yash Deep Trexim Private Limited (supra)** that even after meeting its statutory and contractual obligations and liabilities the company would be left with a surplus of nearly 50 crores.

57. The aforesaid fact situation clearly indicates that for all practical purposes there is permanent stay of the winding up proceedings and only a formal order of permanent stay is required to be passed by Company Judge after obtaining audit report and recording a finding relating to satisfaction of settled conditions for such order.

58. The Company Judge is right in observing that the Company/BJF continues to be monitored by the Court at various stages through its CoMs, Joint Officers etc. In the facts of the case, we also find no error in the conclusion of the learned Company Judge about the transformation of BJF into an entity custodia legis. However, we are unable to concur with the conclusion of the learned Company

Judge about the cut-off date for creditors, workers, financial institutions and bankers as the period when the company was referred to BIFR for rehabilitation scheme. Rule 154 of the Company (Court) Rules provides estimated value of all debts and claims against the company as far as possible according to the value thereof at the date of the order of the winding up of the Company. Hence, 28th of October, 1987 should be treated to be the cut-off date for such claim which is the date of passing of the order of the winding up in the present case. Since, large sum is in deposit with the Registrar of this Court, therefore, we are of the view that claim of creditor on the cut-off date as also of the worker as per direction of the Hon'ble Supreme Court in the order dated 14.03.0221 can be settled with no difficulty and, therefore, there will be no impediment for the learned Company Judge to pass formal order of permanent stay. Though, the Company Judge had constituted the Committee of Management consisting of three members to ascertain the financial health of the company, to quantify and prioritise the respective claims of the creditors, workers etc. but all the three members of the Committee of Management have categorically stated before this Court that they do not wish to continue in the Committee of Management. Therefore, the order of the learned Company Judge in respect of constitution of three members Committee of Management is set aside and members of the Committee are discharged.

59. Hence, in view of the above analysis, we dispose of the appeal by modifying the direction of the learned Company Judge and directing as under:

- i. Hon'ble Justice Bhaskar Bhattacharya, former Chief Justice of Gujarat High Court is appointed as a one member Committee to get the accounts of the company audited through any reputed chartered accountant firm with the approval of the Company Judge and to take

inventory of all the movable and immovable assets of the company in liquidation with the help of the Official Liquidator or any other competent authority and to invite the claims of creditors, workers etc. upto the cut-off date and to quantify the same with the help of the chartered accountant and Official Liquidator.

ii. The above exercise will be completed and the audited reports, inventory of movable and immovable assets of the company as also the ascertained claims will be placed before the Company Judge by the above one member Committee within three months hence.

iii. On receipt of the same and after taking into account the amount which is already kept in deposit before the Registrar of this Court as also the observation of the Hon'ble Supreme Court in the judgments noted above as also of this Court in this order about the circumstances relating to permanent stay, the Company Judge will settle the claims upto the cut-off date and pass appropriate order for permanent stay of winding up proceedings in accordance with law.

iv. All other claimants, including the PF authorities, having their claims after the cut-off date will be at liberty to approach the competent Forum/take action in accordance with law.

v. On passing the order of permanent stay of winding up proceedings, the parties will be at liberty to approach NCLT or any other appropriate forum for settling their dispute relating to right of management and issue of mismanagement, oppression, etc. in accordance with law.

vi. This Court has the responsibility to ensure that the amount in deposit with the Registrar of this Court does not go to the wrong hands, therefore, it is directed that on passing the order of permanent stay by the Company Judge, the amount in deposit with the Registrar will not be released to any of the parties for six months or till such further time as the Company Judge deems proper from the date of the order of the Company Judge, to enable the parties to approach the competent Court/Forum for necessary orders about their entitlement.

vii. The one member Committee with the help of the Official Liquidator will also indentify the workers or their legal heirs entitled to receive their dues in compliance of the order of the Hon'ble Supreme Court dated 24.03.2021 in SLP (C) No. 11476/2020 and will quantify the amount and submit the report to the Company Judge, who after approval of the same will pass an appropriate order for release of requisite amount in deposit with Registrar to the one member Committee and will ensure its disbursement to workers or their legal representatives.

viii. We also direct that till the aforesaid exercise is completed by the learned Company Judge, the assets of the company will not be sold or encumbered with.

ix. The Official Liquidator is directed to extend all possible cooperation and help to the one member Committee appointed by this Court and also provide secretarial support.

x. The Hon'ble Retired Chief Justice appointed as one member Committee is entitled to receive the tentative honorarium of Rs. 2 lacs

at this stage from the funds which are already with the Registrar of this Court. This will not preclude the Company Judge from passing any further order for additional honorarium to the one member Committee.

xi. In the above circumstances, the prayer for withdrawal of the company petition cannot be allowed at this stage. However, the applications for withdrawal of the company petition are kept pending which can be pressed at the appropriate stage if need so arises.

60. The appeal and pending applications in these appeals are accordingly disposed of.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(SHAMPA SARKAR)
JUDGE

Later,

After the judgment was pronounced, learned counsels for some of the parties have made a prayer for stay of the judgment.

We find no ground to accept the said prayer. Accordingly, the prayer is rejected.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(SHAMPA SARKAR)
JUDGE

Kolkata
05.08.2022

PA (RB/SS)

(A.F.R./ N.A.F.R)