Darshan Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO. 421 OF 2024

IN

INTERIM APPLICATION NO. 3663 OF 2022

IN

COMPANY PETITION NO. 385 OF 2002

1. **Bipin J. Bagadia**,]
Shareholder of Swadeshi]
Mill Co. Ltd. (in liquidation),]
Residing at 803, Alaknanda,]
8th Floor, Neelkanth Valley,]
Rajawadi, Ghatkopar (E),]
Mumbai-77]

2. **Ashish Jagmohan Mooni alias**]
Ashish Jagmohan Muni]
Shareholder of Swadeshi]
Mill Co. Ltd. (in liquidation),]
Residing at, 101, Alaknanda,]
Neelkanth Valley, Rajawadi,]
Ghatkopar (E), Mumbai-400077] …Appellants

VERSUS

1. **Grand View Estates Private Limited**]
A company incorporated under the]
Provisions of the Companies Act,]
1956, Having its registered]
address at 70, Nagindas Master]
Road, Fort, Mumbai – 23]

2. **The Official Liquidator of the**]
Swadeshi Mills Company Limited,]

having its office At Bank of India]
Building, 5th Floor, M. G. Road,]
Fort, Mumbai – 23]

3. **Forbes and Co. Ltd.**,]
a Company Incorporated under]
Indian Companies Act VII of 1913,]
having its registered Office at]
Forbes Building, Charanjit Rai]
Marg, Mumbai – 01]

4. **Rashtriya Mill Mazdoor Sangh**,]
A representative Union under the]
Provisions of the Maharashtra]
Industrial Relations Act, 1946,]
Having its address at Mazdoor]
Manzil, GD Ambekar Marg,]
Bhoiwada, Parel,]
Mumbai – 400 012]

5. **The Svadeshi Mills Company**]
Limited, Having registered office]
at, Svadeshi Mills Compound,]
Chunabhatti, Sion,]
Mumbai – 400022] …Respondents

APPEARANCES-

Mr Mohit Khanna, i/b Mr Vaibhav Jagdale, for the Appellants.

Mr Virag Tulzapurkar, Senior Advocate, a/w S. A. K. Najam-es-sani, Ms Pooja Shah, i/b Maneksha & Sethna Advocates, for Respondents No.1.

Mr Ranjiv Carvalho, a/w Smt Aparna Thipsay, for Respondent No.2/Official Liquidator.

Mr Amir Arsiwala, a/w Mr Rahul Gupta, for Respondent Nos.3 and 5.

Mr Cyrus Ardeshir, Senior Advocate, i/b Yash Jariwala a/w Neha Samji, for Respondent No.4.

CORAM : M.S.Sonak &
Jitendra Jain, JJ.

RESERVED ON : 13 January 2025

PRONOUNCED ON : 22 January 2025

JUDGMENT (*Per MS Sonak J*):-

1. Heard learned counsel for the parties.

2. By order dated 02 September 2024, this appeal was posted for final disposal at the admission stage, subject to any overnight part-heard matters.

3. Admit. Considering the orders made from time to time earlier and with the consent of the learned counsel for the parties, the appeal was heard finally.

4. This appeal questions the order of 09 October 2023, read with the order dated 21 December 2022, made by the Company Court disposing of the Interim Application No. 3663 of 2022 made by the first Respondent under Section 466 of the Company's Act, 1956, and staying the proceedings for the winding up of Swadeshi Mills Company Limited (in liquidation) ("said company").

5. The first and second Appellants hold 5400 and 250 shares, respectively, in the said company. The first Respondent is a group company of the Shapoorji Pallonji Group of Companies and has 29.29% shares in the said company. The third Respondent is also a group company of Shapoorji Pallonji Group of Companies and holds 22.72% shares in the said company. Collectively, the first and third Respondents hold 52% of the shares in this said company. The fourth Respondent is a trade union of the erstwhile workers of the

said company. The second respondent is the Official Liquidator.

6. Under a reference made by the said company to the Board for Industrial and Financial Reconstruction (BIFR), the BIFR declared the said company as a "sick company" under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and recommended the winding up of the said company. By a composite order dated 05 September 2002, this Court, ordered the said company to be wound up and directed the provisional liquidator to act as the Official Liquidator and exercise all the powers under the Companies Act.

7. When the winding up under this Court's order dated 05 September 2002 was in progress, the first and third Respondents jointly filed Company Application No. 243 of 2011, seeking an order staying the winding up proceedings. By a detailed order dated 14 October 2011, the learned Company Judge (S C Dharmadhikari, J) rejected Company Application No. 243 of 2011. The Appeal No. 34 of 2012 instituted by the first and third Respondents before the Appeal Court comprising Dr D Y Chandrachud J., as his Lordship then was, and S C Gupte J. challenging the Company Court's order dated 14 October 2011 was dismissed on 23 August 2013. The Special Leave Petition against the Appeal Court's judgment and order dated 23 August 2013 was dismissed by the Hon'ble Supreme Court on 23 February 2016, noting that the Court did not find any legal and valid grounds for interference.

8. After about four years, the first and fourth Respondents entered into an agreement dated 28 February 2020 and a supplementary agreement dated 29 June 2021 concerning the settlement of dues of the company's ex-workmen. This was possibly because the workmen represented by the fourth Respondent had opposed Company Application No. 243 of 2011, instituted by the first and third Respondents, for the stay of the winding-up proceedings.

9. Based on, inter alia, the above agreements, the first Respondent instituted yet another Interim Application No. 3663 of 2022 sometime in 2022 under Section 466 of the Companies Act, seeking a stay on the winding-up proceedings. The third and fourth Respondents supported the prayers in Interim Application No. 3663 of 2022.

10. On 21 December 2022, the learned Company Court (N J Jamadar, J) made an order and issued the following directions.

> "(i) The Applicant in IA No.3663 of 2022 – Grand View, shall deposit an amount of Rs.240 Crores with the Official Liquidator within a period of six weeks from the date of uploading of this order.
>
> (ii) The Applicant shall file undertakings to the effect :
>
> (a) that in case the amount of Rs.240 Crores, to be deposited by the Applicant with the Official Liquidator, falls short to satisfy the liabilities of the Company in liquidation, the Applicant will deposit such further amount as may be necessary to discharge those liabilities;
>
> (b) that it will pay to any individual ex-worker who is not willing to accept the amount in accordance with the Agreement for Settlement, higher of the amount that may be adjudicated by the Official Liquidator in accordance with the order of the Division Bench dated 22 December

> 2015 and the amount which is payable under the Agreement for Settlement;
>
> (c) that it will make necessary provision for rehabilitation of the SSP ex-workers and/or their families who are in occupation of the residential quarters/chawls situated on the premises of the company and also those ex-workers and/or their families who were made to vacate the residential quarters/chawls, as they were rendered inhabitable and dilapidated.
>
> (iii) The Official Liquidator shall publish a notice in two local newspapers i.e. Free Press Journal (English) and Navshakti (Marathi), inviting the attention of the stake holders of the company in liquidation to the proposal for permanent stay of the winding up order and revival of the company in liquidation and the aforesaid directions passed by this Court.
>
> (iv) Such notices be also pasted at the premises of the company in liquidation and given to the claimants whose names are mentioned in the list of claims Exhibit S to the Application.
>
> (v) The Applicant shall deposit a sum of Rs.1,00,000/- with the Official Liquidator for the publication of the aforesaid notices on or before 7 January 2023.
>
> (vi) List on 8 February, 2023.
>
> (vii) Based on the aforesaid compliances and response, if any, the Court would consider the prayer for permanently staying the winding up order and revival of the Company, and consequential reliefs."

11. The first Respondent, claiming to have complied with the above directions, sought an order to stay the winding up proceedings against the said company, which was the main relief in Interim Application No. 3663 of 2022. By the impugned order dated 09 October 2023 (Manish Pitale, J), Interim Application No. 3663 of 2022 was allowed (paragraph No.7); consequential directions were issued (paragraph No.8), and even the Official Liquidator's Report No. 149 of 2023 was allowed in terms of prayers A, B, C and D and Official

Liquidator's Report No. 56 of 2022 was allowed in terms of prayer clause E. Directions were also issued to distribute the funds to the creditors of the said company after handing over the company and its affairs to the first Respondent and its reconstituted board of directors.

12. Aggrieved by the impugned order dated 09 October 2023, read with the order dated 21 December 2022, the Appellants instituted this appeal. The order dated 01 August 2024 granted no interim relief, but directions were issued to dispose of this appeal at the admission stage.

13. Between 01 August 2024 and the final hearing of the appeal in January 2025, the articles and memorandum of association of the said company were amended to enable the said company to undertake the business of real estate, construction and development.

14. Mr Mohit Khanna, learned counsel for the Appellants, raised several grounds, including that the impugned order dated 09 October 2023 does not even advert to Section 466 of the Companies Act and the principles to be followed for deciding such an application. He submitted that the impugned order dated 09 October 2023 also does not take any cognizance of the Company Court's order dated 14 October 2011, the Appeal Court's judgment and order dated 23 August 2013 and the Hon'ble Supreme Court's order dated 23 February 2016, by which the Company Application No. 243 of 2011, again seeking a stay on the winding up proceedings under Section 466 of the Companies Act was dismissed with strong observations and findings.

15. Mr Khanna submitted that such non-consideration vitiates the impugned order dated 09 October 2023, even if such order is read along with the order dated 21 December 2022. He submitted that even the order dated 21 December 2022, apart from making a cursory reference to the dismissal of an earlier application under Section 466 of the Companies Act, does not advert to or in any event consider the orders made by the Company Court, Appeal Court and the Hon'ble Supreme Court declining to stay the winding up of proceedings on the behest of the first and third Respondents.

16. Mr Khanna submitted that even if it were to be assumed that the principles of res-judicata would not apply to the second application under Section 466 of the Companies Act, still, the first Respondent was duty bound to plead and demonstrate a change of circumstances (if any)and further, that the findings recorded in the earlier order disposing of a similar application under Section 466 of the Companies Act, were no longer valid. He submitted that in all probabilities, the orders dismissing the earlier application under Section 466 of the Companies Act were not shown by the first Respondent to the Company Court when the impugned order dated 09 October 2023 or the order dated 21 December 2022 was made by the Company Court. He submitted that the non-consideration of such vital orders/material vitiates the impugned orders. He submitted that the non-consideration of the provisions of Section 466 and the principles based upon which an application under Section 466 of the Companies Act may be granted also vitiate the impugned order and the orders.

17. Mr Khanna submitted that the first Respondent could not have been permitted to stay out of the winding-up proceedings based merely on a private settlement with the workmen or some of the company's creditors. He submitted that the application under Section 466 of the Companies Act could not have been allowed based only upon such settlements. He submitted that there were clear and categorical findings that the first and third Respondents were in the real estate business. Their entire objective was to acquire the said company's properties for real estate purposes without facing any public auction through which the best possible price could have been realized for the benefit of all the company's shareholders. He submitted that there are no circumstances to displace the clear and categorical findings recorded in the earlier proceedings. Accordingly, he submitted that the impugned orders may be set aside.

18. Mr Khanna strongly relied on the orders made by the Company Court, Appeal Court, and the Hon'ble Supreme Court dismissing the earlier application under Section 466 of the Companies Act and submitted that the law laid down therein was wholly ignored in passing the impugned orders were made. Mr Khanna also relied upon certain precedents concerning the scope of Section 466 of the Companies Act. He submitted that the Company Court was not even alive to the principles laid down in the decisions.

19. For the above reasons, Mr Khanna submitted that the impugned orders should be quashed and set aside.

20. Mr Tulzapurkar, learned Senior Advocate for the first Respondent; Mr Amir Arshiwalla, learned counsel for the third

and fifth Respondents; and Mr Cuyrus Ardeshir, the learned Senior Advocate for the fourth Respondent, defended the impugned orders based on the reasoning reflected therein.

21. The learned counsel for the above Respondents submitted that though the impugned order dated 09 October 2023 may not have referred to the orders dismissing the earlier application under Section 466 of the Companies Act, the order dated 21 December 2022 did refer to the rejection of an identical prayer in the past in paragraph 16. The learned counsel, therefore, urged that the orders dated 21 December 2022 and 09 October 2023 must be considered together, and based upon the same, no case is made out to warrant interference in this Appeal.

22. The learned counsel for the above Respondents submitted that the earlier application under Section 466 of the Companies Act was rejected due to the opposition of the workmen, with whom there were no agreements at the relevant time. The learned counsel submitted that the workman's dues were substantially settled by Agreements dated 28 February 2020 and 29 June 2021. They submitted that the dues of even the other creditors were settled significantly. Pursuant to the directions in the order dated 21 December 2022, the first Respondent deposited an amount of Rs.240 Crores in the Court, which amount was then distributed amongst the workmen. The learned counsel, therefore, submitted that there was a drastic change of circumstances since the dismissal of the earlier application under Section 466 of the Companies Act. The learned counsel submitted that principles of res-judicata do not apply in a matter of this nature. In any event, given the drastic change in

circumstances implicitly noted in the orders dated 21 December 2022 and 09 October 2023, there was no legal infirmity in the orders made warranting interference in this Appeal.

23. The learned counsel for the above Respondents, without prejudice, submitted that if this Court felt that the orders dated 21 December 2022 and 09 October 2023 may not have articulated the principles required to be followed when disposing of an application under Section 466 of the Companies Act or may not have elaborately expressed their consideration of the orders disposing of the earlier application under Section 466 of the Companies Act, still, in the peculiar facts of this case, this Appellate Court, could as well consider all these matters and not interfere with the impugned orders.

24. The learned counsel submitted that since no interim relief was granted in this Appeal, the first Respondent consented to the disbursal of Rs.240 Crores to the workmen. Therefore, it would be quite harsh and inequitable at this stage to interfere with the impugned orders and set the clock back. Accordingly, they submitted that the Appeal Court should consider the entire material afresh and, if satisfied that a case was made out for grant of stay under Section 466 of the Companies Act, then refrain from interfering with the impugned orders either because such orders contained no reasons or that the consideration of material facts and circumstances may not have been adequately articulated in the impugned orders.

25. Mr Tulzapurkar referred to the discussions in paragraphs 25, 26 and 27 of the Appeal Court’s order dated 23 August

2013. He submitted that in appropriate cases and for a good cause, the Court may still order a stay of winding up even if none of the three criteria for grant of stay in normal circumstances are made out. He submitted that in the present case, the first Respondent had shown sufficient cause for making an exception to the normal rule regarding grant of stay to the winding up proceedings. He submitted that this Appeal Court should consider this case, and based upon such consideration, this Appeal should be dismissed instead of remanding the matter to the Company Court for fresh consideration.

26. The learned counsel for the above Respondents submitted that the Appellants hold a miniscule percentage of shares in the said company. They submitted that some shares were purchased even after an order for a winding up was made. Accordingly, they submitted that there were no bonafide in instituting this Appeal. The learned counsel for the above Respondents submitted that the Appellants' insistence about the said company carrying on the mill business smacks of unreasonableness. They pointed out that such a business is now banned. They submitted that the Articles and Memorandum have been suitably amended after following the due procedure and obtaining the consent from a majority of shareholders present at the AGM. Accordingly, they submitted that there is no merit in this Appeal.

27. Mr Tulzapurkar also submitted that the Company Court's order dated 14 October 2011 has been merged with the Appeal Court's Judgment and Order dated 23 August 2013. He also submitted that the Hon'ble Supreme Court's order dated 23 February 2016, by which the SLP was

dismissed, does not constitute a merger. Based on this, Mr Tulzapurkar submitted that we should not even look into the Company Court's order dated 14 October 2011 or consider the findings recorded therein.

28. For all the above reasons, the learned counsel for the above Respondents submitted that this Appeal may be dismissed.

29. No submissions were made on behalf of the Official Liquidator.

30. Mr Khanna, by way of rejoinder, pointed out that even the first and third Respondents had purchased shares in the said company after the winding up order. He submitted that the entire endeavours of the first and third Respondents, who were well-known builders and real estate developers, was to acquire the said company's prime properties for a throwaway price, thereby prejudicing the company's remaining shareholders. He submitted that the findings to this effect were recorded while dismissing the earlier application under Section 466 of the Companies Act. There is no change of circumstance to re-visit such findings.

31. Mr. Khanna, therefore, submitted that this Appeal ought to be allowed and that the impugned orders be set aside.

32. The rival contentions now fall for our determination.

33. The impugned orders are made in Interim Application No.3663 of 2022 in Company Petition No.385 of 2002 (on Pages 258 to 450 of the Compilation of Documents).

34. On perusing the said application, we find that the first Respondent has mainly stressed the settlements with the erstwhile workers and secured and unsecured creditors of the said company. The first Respondent pointed out that together with the third Respondent, they owned around 52% of the total shareholdings of the said company, and if the company is out of liquidation, even the remaining shareholders would benefit from the process. The first Respondent has referred to its incurring security charges and offering to pay liquidation costs.

35. In the Interim Application No.3663 of 2002, the first Respondent also referred to the public interest involved in reviving the said company. Here, the first Respondent has pleaded that the revival of the said company will allow the re-development of chawls located on its lands and the re-development of the land, which will lead to the construction of low-cost housing by MHADA as per law. There is also a statement that erstwhile workers would be entitled to participate and apply for these low-cost housing units, a portion of which will also be offered free of cost to eligible erstwhile workers. The first Respondent also stated that it proposes establishing and operating a textile educational institution on the company's property.

36. The first Respondent has also referred to "*future business*" that could be undertaken after the revival of the said company. Again, the emphasis is on diversifying its business activities into other fields, "*including real estate development*". The first Respondent has explained how continuing the company's earlier business of manufacturing textiles is no longer feasible. The first Respondent has

reiterated how the company can utilize its immovable property "*for the purposes of real estate development as per law*" and how the first Respondent, being a part of the Shapoorji Pallonji Group, which has expertise in real estate business, is competent to guide the company in undertaking real estate development.

37. The first Respondent also offered to deposit approximately Rs.240 crores within ninety days of an order passing for the permanent stay of winding up of the said company. This amount could then be used to clear certain immediate liabilities of the said company. The first Respondent admitted that the company's total liability as of 31 March 2022 was approximately Rs.1100.52 crores.

38. The first Respondent, along with the Interim Application No.3663 of 2022, annexed several exhibits and charts. However, though a reference was made in paragraph 23 about the dismissal of the earlier application under Section 466 of the Companies Act, the copies of the orders of the Company Court, Appeal Court and the Hon'ble Supreme Court rejecting the said application do not appear to have been annexed. Only leave was sought to refer to and rely upon the papers and proceedings of the Company Application No.243 of 2011, order dated 14 October 2011 and further proceedings arising out of the same.

39. The first Respondent's central prayer in Interim Application No. 3663 of 2022 was for a permanent stay on the order dated 05 September 2005, by which the said company was ordered to be wound up. For this, the first Respondent

had invoked the provisions of Section 466 of the Companies Act.

40. Accordingly, reference is necessary to the provisions of Section 466 of the Companies Act, which read as follows: -

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

41. The principles based on which an application under Section 466 of the Companies Act ought to be decided were summarized by the learned Single Judge of the Calcutta High Court in **Neelkantha Kolay Vs. The Official Liquidator**[1] in the following terms: -

> "23 ....
>
> "Therefore, from the above principles which have been summarised in different authorities and the decision referred to hereinbefore it appears that the discretion for stay under Section 466 can only be exercised by the Court (1) if the Court is satisfied on the materials before it that the application is bonafide; (2) the Court would be guided by the principles and definitely come to the finding that the principles are applicable to the facts of a particular case; (3) mere consent of all the creditors for stay of winding up is not

[1] AIR 1996 Calcutta 171

> enough; (4) that offer to pay in full or make satisfactory provisions for the payment of the creditors is not enough; (5) Court will consider the interest of commercial morality and not merely the wishes of the creditors and contributories; (6) Court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation; (7) a firm had accepted proposal for satisfying all the creditors must be before the Court with material particulars; (8) the jurisdiction for say can be used only to allow in proper circumstances a resumption of the business of the Company; (9) the Court is to consider whether the proposal for revival of the company is for benefit of the creditor but also whether the stay will be conducive or detrimental to commercial morality and to the interest of the public at large; (10) before making any order Court must see whether the Ex-Directors have complied with their statutory duties as to giving information to the Official Liquidator by furnishing the statement of affairs; (11) and any other relevant fact which the Court thinks fit to be considered for granting or not granting the stay having regard to the peculiar facts of a particular case."

42. The learned Single Judge of the Calcutta High Court relied upon the decision of another learned Single Judge, Justice S. R. Das (as His Lordship then was), in the matter of **East Indian Cotton Mills Ltd**[2].

43. *Nilkanta Kolay (Supra)* was reiterated in *Mahabir Prasad Agarwalla v. Ashkaran Chattar Singh*[3]*.* The Courts have held that bonafide must be established before a stay on winding up proceedings can be granted. Mere consent of the creditors or an offer of full payment to them is insufficient. The Court must consider the interests of commercial morality, not merely the wishes of the creditors or contributories. The jurisdiction to stay can be used to revive the company or its business and not merely for the benefit of its creditors. This jurisdiction certainly cannot be used to acquire immovable

[2] AIR 1949 Calcutta 69

[3] (1980-81) 85 CWN 581

properties or assets of the company at some throwaway price or at a price that bears no proportion to the price that the liquidator could have obtained at a free, fair, transparent public auction.

44. Both the decisions of the Calcutta High Court were followed by the Company Court in this matter (S. C. Dharmadhikari, J) when dismissing the earlier application under Section 466 of the Companies Act vide order dated 14 October 2011. In paragraph 29, the learned Company Judge broadly summarised the principles to be adopted while dealing with an application under Section 466 of the Companies Act. Paragraph 29 of the Company Court's order dated 14 October 2011 reads as follows: -

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

45. The Company Court, in its order dated 14 October 2011, while rejecting the earlier application under Section 466, observed that public interest, commercial morality and corporate responsibilities are not alien concepts in the era of

globalisation, liberalisation and privatisation. So therefore, the Courts must apply the above principles and be vigilant and on guard against any action by which its control over companies as envisaged by the statute, particularly when companies under liquidation, are sought to be interfered with. The Company Court held that it could not permit, even by the exercise of discretion, any shareholder or creditor to carry forward a scheme or proposal by which the matter gets out of its hands and control altogether.

46. The Company Court, in its order dated 14 October 2011, also made the following significant observations: -

> "When an order of winding up is passed by a Court and an Liquidator is appointed to manage and administer the affairs of a company, the matter comes under supervision and control of the company Court. **Parties who have a vested interest and particularly in valuable assets and properties of the company in liquidation will always make an attempt to get out of the clutches of the company Court so as to have a free hand in dealing with the assets and properties of the company. The erstwhile directors, shareholders and other stake-holders including influential secured creditors would be interested in either putting an early end to the affairs of the company in liquidation or by taking advantage of the delay seek to take charge or intermeddle in the affairs and matters relating to winding up in an indirect or oblique manner.** The very purpose of the Act is defeated if such attempts are allowed to succeed. Section 447 of the Companies Act, 1956 states that an order for winding up of a company shall operate in favour of all the creditors and all the contributories of the company as if it had been made on the joint petition of a creditor and of a contributory." (See para 33)
>
> "As held by the Hon'ble Supreme Court, the Company Court cannot take a narrow and pedantic view of the matter and proceed on the basis that the company is the property of the shareholders and it is their wish which has to be given effect to. Similarly, it is only the interest of the shareholders and the creditors which has to be borne in mind. The larger role that has now been highlighted

makes it abundantly clear that a company is a social institution. It is not the interest of those who invest their money in a company which has primacy or they alone have to be placed in the forefront. **Once the society as a whole has a stake in a company, then, the company Court cannot overlook that aspect, for it would be shirking its duty and ignoring public interest. The company Court has to keep public interest and public good in the forefront as well. Therefore, while exercising its powers under section 466, the company Court cannot do anything which shakes the confidence of the public at large in the functioning or working of the company Court or that of the Liquidator. Once commercial morality and corporate responsibility are inbuilt in the administration and management of companies, then, these principles would have to be applied even by the company Court**. We, in India, follow the principle and philosophy emphasised by the Father of Nation, namely, "Commerce Without Morality is a Social Sin". The company Court cannot permit any arrangement or scheme or grant any relief which would defeat public interest or would contravene public policy. Ultimately, whether it is a compromise between conflicting stake holders or persons having same interests, when it comes to winding up the affairs of a company, the Court must necessarily act for public good and in public interest. If the discretion vested in the company Court is not exercised on sound judicial and social principles, then, people at large would lose faith in the administration of justice itself. They would carry an impression that the company Court places its seal of approval on any arrangements or schemes brought before it by interested parties, mechanically."(See para 37)

"What is further interesting and relevant to note is, that the Supreme Court frowned upon an arrangement which was of a like nature. There, Supreme Court was considering the correctness of the view taken by the Division Bench under which it permitted modification or replacement of an earlier scheme. That earlier scheme envisaged revival of the company in liquidation. **However, the modifications that were suggested in the compromise or arrangement envisaged not revival, but taking over of the lands of the company which was carrying on identical, viz., textile business and placing them in the hands of developers and builders, namely, M/s. Lodha Builders Pvt Ltd. The said M/s. Lodha Builders Pvt Ltd were not at all interested in revival of the company or its business by**

> **taking over the undertaking of the company as a going or running union. It was interested in starting an industry of its own in that property. This was not approved by the Supreme Court as a modification in the scheme necessary for proper working of the compromise or arrangement earlier arrived at.** This was a substitution of the scheme itself. Therefore, unless the scheme with the modifications was placed before the general body by reconvening the meeting in terms of section 391 of the Act, the modification could not have been sanctioned, was the view taken by the Supreme Court. **Therefore, howsoever laudable the object may be, the company Court cannot approve an arrangement by which the assets of the company in liquidation are disposed off or taken over by some private arrangement and to put it more clearly by circumventing the company Court itself. The Court even in matters of sections 391 to 394 and 466 of the Companies Act, 1956 has to take into consideration the aspect of public interest, commercial morality and the intention to revive the company."** (See para 39)

47. Apart from laying down the above principles and observations, in the precise context of Company Application No. 243 of 2011 filed by the first and third Respondents, the Company Court, in its order dated 14 October 2011, held the following:-

> "I will have to test the present application and the request of the applicants therein on the touchstone of the above principles. All discretion has to be exercised judiciously and not arbitrarily. The Court cannot pick and choose shareholders and creditors. The Court cannot in the garb of conflicting claims of workers or because of any rift inter-se between them, allow the claims of the said workers and other creditors to be compromised or defeated altogether. **Ultimately, the applicants may claim to be shareholders and substantial secured creditors, but if the purpose in presenting this application is to enable them to take over the company's properties and assets which are indeed valuable at a price or value which they unilaterally determine, then, that cannot be permitted.** A careful scrutiny of this application would reveal that what the applicants are projecting is, that they have the necessary wherewithal and strength. The applicant No.1 claims to be a promoter, secured creditor and unsecured creditor of the

company in liquidation. It has projected that it alongwith its wholly owned subsidiary owns 17,64,430 shares of the company in liquidation constituting 22.70% of the total equity shares of the company in liquidation, whereas the applicant No.2 owns 22,83,210 equity shares of the company constituting 29.29% of the total shareholding of the company in liquidation. **On the own showing of the applicants, applicant No.2 has acquired this shareholding after the winding up order. Therefore, they may be owning in aggregate about 52% of the total equity shares of the company, they may claim to be vitally interested in its affairs as well, but they are part of a distinct group of companies, viz., Shapoorji Pallonji Group which is not in textile business admittedly. That group is in the business of Construction, Infrastructure and Real Estate Development Business."** (See para 40)

"**The initiative alongwith available immovable properties of the company together, offer a favourable platform for the company to undertake real estate development operation. Now, if para 7 of the affidavit in support, which is reproduced herein above is carefully perused, it is apparent that the applicants do not desire to revive the business of the company in liquidation by developing part of its properties or portions of its lands, but desire to take over the said lands for exploitation in the real estate market. It is clearly their motive that these lands should be taken over without offering the market price, but via this application so that once the permanent stay of winding up is obtained or granted, that would mean that the company's prime assets and properties can no longer be controlled by the Court. They would develop these lands by constructing buildings and sell off the units therein and earn profits."** (See para 41)

"However, the desire to cash on the lands with a view to fully exploit their potential is not matched with the same approach as far as the creditors of the company. **By not reviving the company after taking it out of winding up shows that the applicants are primarily concerned with the benefits attached to these lands. By exploiting and utilising them to their advantage, the applicants are not agreeable to the Liquidator and the Court controlling their actions in interest of all creditors and general public. The business opportunities on account of spiraling prices in the Real Estate Market is the only attraction for the applicants. The proceeds and gains from such opportunities ought to have**

been shared by them with all. However, that is not their intent, is clear from their stand. If these lands are sold by the Official Liquidator under the supervision of this Court and at open, fair and transparent public auction, the applicants may not stand any chance and hence they desire to obtain the lands at a throwaway price by a back-door method. That is the sole intent in making this application. By invoking sympathy of some creditors and stating that the monies to meet the claims of the workers would be brought in immediately, what the applicants are seeking to do is to take away entire proceedings in winding up from the supervision and control of this Court. They may make give or seek some concessions here and there. However, their object is not to run the business of the company in liquidation. They have not brought anything on record by which it could be conclusively held that textile manufacturing business is altogether prohibited or not permitted in the Island city. **In fact, if the affidavit in support is perused carefully, it is evident that the Shapoorji Pallonji Group is interested in the lands of this textile company and if they have to obtain the same at public auction or by bidding at a sale of this land and assets of the company in liquidation under the aegis of the Liquidator and pursuant to the sanction of this Court, they may not be able to acquire these lands. Thus, to avoid participation at a public auction and at a sale which will be conducted in a transparent and fair manner, that the application has been filed.** The applicants have not come out with a positive case that business of the company in liquidation cannot be revived at all. They do not say that the textile business cannot be carried on or is totally prohibited. They claim that it is not practicable and feasible to carry on such business. However, it is their perception. The Liquidator has not come forward with any conclusive or decisive report on this aspect. **In such circumstances, if all the above tests and principles are applied, it is evident that this company application is filed for seeking a stay of the winding up not for revival of the company's business or to smoothen the process of liquidation and winding up, but to take over the company itself in an indirect and oblique manner.** There is substance in the objection of Ms.Cox that this is a take over of the company without recourse to the provisions in law enabling such take over and particularly sections 391, 392 to 394 of the Act. **To by pass and avoid compliance with such provisions, that this application is filed. Once such is the motive, then, the enormity of the funds, the applicants**

> **are willing to pump in, the schemes or arrangements of settlement of the dues of creditors, cannot persuade this Court to grant any discretionary relief to them and prevent the Liquidator from proceeding to wind up the company in accordance with law. If ultimately it is impossible to revive the company, then, it is better that the Liquidator carries on its affairs till the dissolution of the company. It is only through the mechanism and participation of the Liquidator, that the Court can ensure settlement of claims of the secured and unsecured creditors in accordance with law.”**
> (See para 42)

48. After explaining the principles that should guide a Company Court in deciding application under Section 466 of the Companies Act and after recording clear and categorical findings that the first and third Respondents, who are a part of the Shapoorji Pallonji Group, were only interested in acquiring the said company’s immovable properties at a throwaway price and by a backdoor method by taking away the entire proceedings in winding up from the supervision and control of the Court, the Company Court, dismissed the application under Section 466 of the Companies Act.

49. The Company Court also held that if the affidavits of the first and third Respondents were perused carefully, it was evident that it was the Shapoorji Pallonji Group that was interested in the lands of the said company, and if they had to obtain such lands at a public auction or by bidding at a sale of these lands and assets of the said company in liquidation under the aegis of the liquidator and pursuant to the sanction of the Company Court, they may not be able to acquire these lands. Thus, to avoid participation at a public auction and at the sale, which would be conducted transparently and fairly, the application under Section 466 was filed. The Court held that once this was found to be the motive for filling the

application under Section 466 of the Companies Act, then the enormity of the funds that the first and third Respondents had stated that they were willing to pump in, could not persuade the Company Court to grant any discretionary relief and displaced the liquidator from proceeding to wind-up the company in accordance with the law.

50. The Company Court, in its order dated 14 October 2011 also referred to the interplay between Sections 391 to 394 and Section 466 of the Companies Act. The Company Court held that there was no incongruity in looking into the aspect of public interest, commercial morality and the bonafide intention to revive a company while considering whether a compromise or an arrangement put forward in terms of Section 391 of the Companies Act should be accepted or not. Accordingly, the Court saw no conflict in applying the provisions of Sections 391 to 394 and Section 466 of the Companies Act and in harmoniously construing them.

51. The Company Court, after considering the matter involving M/s Lodha Builders Pvt Ltd and noticing that the builders were not at all interested in the revival of the company or its business by taking over the undertaking of the company as a going or a running concern but the real interest was in acquiring the property of the company for real estate exploitation, held that such attempts should not be allowed to pass muster. **The Company Court also held that howsoever laudable the object may be; the Company Court cannot approve an arrangement by which the assets of the company in liquidation are disposed of or taken over by some private arrangement and, to put it more clearly by circumventing the Company Court itself.** The Court held even in matters of

Section 391 to 394 and 466 of the Companies Act, the Court must consider the aspects of public interest, commercial morality and the intention to revive the company.

52. In all probabilities, despite vague contentions to the contrary, we suspect that the Company Court's order dated 14 October 2011 and the strong observations therein concerning precisely the first and third Respondents and their attempt to stay the winding up proceedings with the intent to obtain the said company's immovable properties, without having to go through the process prescribed under Sections 391 to 394 of the Companies Act or without having to purchase such property in free, fair and transparent auction proceedings that the Official Liquidator would be obliged to hold, was not brought to the notice of the Company Court when the Company Court made the impugned order dated 09 October 2023 and for that matter the order dated 21 December 2022. If this order were brought to the notice of the Company Court, we are quite sure that at least the same would have been referred to and some attempt made to distinguish the same before allowing the application under Section 466 of the Companies Act.

53. The Company Court's detailed order, running into 68 pages, was challenged by the first and third Respondents by instituting Appeal No. 34 of 2012. By yet another detailed order that ran into almost 24 pages, the Appeal Court upheld the Company Court's order dated 14 October 2011 and dismissed the Appeal.

54. Mr Tulzapurkar's contention that since the Company Court's order dated 14 October 2011 had merged with the

Appeal Court's judgment and order dated 23 August 2013, we must not even "look into or refer the Company Court's order dated 14 October 2011" cannot be accepted. This is more so because the Appeal Court, in its judgment and order dated 23 August 2013 clarified that its non-interference with the Company Court's order dated 14 October 2011 was not on the ground that the view taken by the Company Court was merely "*a possible view*" but the Appeal Court held that the view was "*the only correct view*" based on the facts and circumstances of the case.

55. It was not as if any execution was claimed based on the merged order dated 14 October 2011 or that there was a variance between the original and appeal Court order on a principle or facts. We believe the two orders could not have been lightly ignored or departed from unless some significant circumstance variation was pleaded and established. Perhaps a chance was taken after settling the worker's demands and hoping that none of the parties would point out the contents of the earlier orders. Therefore, to now say that we must not even look at the Company Court's order dated 14 October 2011 for any purpose is not a suggestion that appeals to us in the facts and circumstances of this case.

56. In the above regard, we refer to paragraph 17 of the Appeal Court's order, which reads as follows: -

> "17. 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."**

57. The Appeal Court also discusses, in some detail, the scope and import of Section 466 of the Companies Act and the principles on which the Company Court would exercise its powers to stay the proceedings in winding up either altogether or for a limited time on such terms and conditions as it thinks fit. The Appeal Court has held that Section 466(1) confers a discretion on the Court and not a mandate. The discretion must be exercised on the satisfaction that a 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 brought before the Court based on which it is satisfied that the proceedings ought to be stayed.

58. The Appeal Court referred to several decisions of the English Courts and the Indian Courts interpreting provisions like Section 466 of the Companies Act. Reference was made to an early decision of **Lord Esher, M.R.,** speaking for the Court of Appeal in **Re Flatau**[4].

> "The judgment of the Court of Appeal followed an earlier decision in re Hester[5] which had laid down the rules for a rescission of a receiving order in bankruptcy. In that context, Lord Esher had held as follows:

[4] 1893 (2) Queen's Bench 219

[5] 22 Q.B.D. 632

"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 condusive 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.[6] 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."

[6] 1903 2 Chancery Division 174

59. The Appeal Court also referred to a more recent judgment in the UK, Megarry, J., in **Re Calgary and Edmonton Land Co. Ltd. (In Liquidation)**[7].

> "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)"

60. The Appeal Court also referred to and approved the decision of Justice S R Das (as the learned Judge then was) in the matter of *East India Cotton Mills Ltd (supra)*. The Appeal Court also referred to the Hon'ble Supreme Court's decision in **Sudarsan Chits (I) Ltd Vs. G. Sukumaran Pillai & Ors**[8] in which it was held that an order of stay under Section 466 is to place the order of winding up in a state of suspended animation. In other words, despite the grant of the stay, the order of winding up continues to exist but is rendered inoperative. The Appeal Court also referred to the decision in *Mahavir Prasad Agarwala (supra)* in which the principles for exercising discretion under Section 466 had been summarized.

[7] 1975 1 W.L.R. 355

[8] AIR 1984 SC 1579

61. The Appeal Court also referred to the decision of the Delhi High Court in **Shyam S. Rastogi Vs. Nona Sona Exports P. Ltd.**[9] dealing with the importance of the role of the Company Court in relation to the exercise of discretion while ordering a stay of winding up:-

> "Company court is not a mere conduit pipe or stamping authority to whatever scheme that may be laid before it. Not unoften, motivations in the moving of such schemes are oblique. It is in fact for the court to first look at the scheme whether it has any strength or merits of its own and is financially viable or a mere attempt to take back the affairs and the assets of the company which had been earlier perforce taken over at the time of winding up. In my considered opinion, there is no scheme worth giving a trial which has been put forth by the applicant and, therefore, has to be rejected."

62. The Company Court also referred to a decision of the Gujarat High Court in **Shaan Zaveri and Others vs. Gautam Sarabhai (P) Limited**[10]**,** which emphasised the principle that mere creditors' consent is not sufficient to grant a stay under Section 466 of the Companies Act.

63. The Appeal Court, after explaining the principles on which the Company Court must act when dealing with an application under Section 466 of the Companies Act, considered the facts of the present case in some detail in paragraphs 18, 19, 20, 21, 22, 23 and 24 of its judgment and order dated 23 August 2013. The Appeal Court, in its judgment and order dated 23 August 2013, appears to have rejected the first and third Respondents' contention that when the court exercises its discretion for the purposes of Section 466, what is postulated is the revival of the corporate

[9] 1986 59 Company Cases 832

[10] (2010) I Company Law Journal 74 (Guj.)

existence of the company, and not necessarily the revival of the business activity, which the company carried on before its liquidation.

64. The Appeal Court held that the law laid down by the Supreme Court does not support such a proposition as a matter of principle. But even as a matter of first principle, it was not possible to accept the submission at a near revival of the corporate existence of the erstwhile company in liquidation, which would be sufficient for the intervention of the court to grant a stay on winding up. The Court held that once the stay is issued under Section 466, that would necessarily result in the revival of the corporate existence. Hence, that, itself, is not sufficient for the exercise of discretion. When winding up has been ordered under the direction of the Court, the provisions of Section 466 mandate that the Court must be satisfied on proof that an order of stay ought to be granted. *These words place an affirmative duty and obligation on the Court to consider several aspects of the case, not just the interests of the creditors in determining as to whether an order of stay should be granted.*

65. The Appeal Court considered in detail the decision of the Hon'ble Supreme Court in the case of **M/s Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girni K.K.Samiti & Ors**[11] in which it was held the Company Court was bound to consider whether the liquidation was liable to be stayed for a period or permanently while adverting to the question whether the scheme is one for the revival of the company or that part of the business of the company which it is permissible to revive

[11] AIR 2007 SC 3079

under the relevant laws or whether it is a ruse to dispose of the assets of the company by private arrangement. If it comes to a later conclusion, then it is the duty of the Court in which the properties are vested on liquidation to dispose of the properties, realise the assets and distribute them following the law.

66. The Appeal Court thwarted the attempt of the first and third Respondents to distinguish the judgment of the Hon'ble Supreme Court in the case of *Meghal Homes Pvt. Ltd. (supra)* by giving cogent reasons in paragraph 22 of its judgment and order dated 23 August 2013. Applying the test enunciated by the Supreme Court in *Meghal Homes Pvt. Ltd. (supra),* the Appeal Court held that the exercise of discretion by the Company Court was correct and proper. *The Appeal Court also held that the object of the company application was not to revive the company's business, but its whole purpose was to dispose of the assets by embarking upon real estate construction and development.*

67. The Appeal Court considered in detail the judgment of Megarry J. in *Re Calgary (supra)*. It held that this decision was a clear authority for the proposition that in normal circumstances, no stay should be granted of winding up unless each member (1) either consents to it; (2) or is otherwise bound not to object to it, (3) or else there is secured to him the right to receive all that he would have received had the winding up proceeded to its conclusion. The expression "*in normal circumstance"* in this formulation also recognises that in an appropriate case and for a good cause, the Court may still order a stay of winding up even if none of the three

criteria are met. But that still requires a sufficient cause to be made out to the satisfaction of the Court to make an exception to the normal rule. At the very minimum, this would indicate that the non-existence of any of these conditions is an important criterion that would contribute to the exercise of discretion by the Court on an application for a stay of winding up.

68. The Appeal Court noted that the formulation of Megarry J. in Re Calgary (supra), was accepted in a judgment of this court delivered by Mrs Justice Sujata Manohar (as the learned judge then was) in **Vasant Investment Corporation Ltd. Vs. Official Liquidator, Colaba Land and Mill Co. Ltd.**[12].

69. In paragraph 27 of its judgment and order dated 23 August 2013, the Appeal Court made the following significant observations in the context of the provisions of Sections 391 to 394 of the Companies Act.

> "27 That brings us to the last aspect of the present appeal. In the present case, all the shareholders of the erstwhile company in liquidation did not join in the application for stay of winding up nor have they consented to it. Learned Senior Counsel appearing on behalf of the Appellants had, in fact, during the course of hearing submitted that the Appellants were unaware of and had no material available to them at present of how the other shareholders would respond when a meeting is called. **In a situation such as the present, where all the shareholders have not been joined in the application for the stay of an order of winding up, it would be more appropriate if the company court were to be moved by way of an application for reconstruction under Section 391 to take the company out of winding up. In such a case, the members of the company have an opportunity to consider and vote on a proposal and the company court has the benefit of the commercial wisdom of the members (3/4th of them in value) and would still consider the aspects of commercial**

[12] (1981) Volume 51 Company Cases 20

> **morality and public interest in order to bind the dissenting minority while sanctioning the scheme. The Appellants have clearly shied away from doing that. Without mustering a 3/4th majority, the Appellants want the court to stay winding up so as to interfere with the proprietary interest of a substantial percentage of members (48%) without placing any material before the court in regard to the exercise of preference by that substantial body of shareholders. This, in our view, would clearly be impermissible."**

70. Thus, the observations in paragraph 27 of the Appeal Court's judgment and order suggest that in a situation such as the present one, where all shareholders have not been joined or joined in the application for a stay of an order of winding up, it would be more appropriate if the Company Court were to be moved by way of an application for reconstruction, under Section 391 to take the company out of winding up. In such a case, the members of the company would have an opportunity to consider and vote on the proposal, and the Company Court has the benefit of the commercial wisdom of the members, (3/4 of them in value) and would still consider the aspects of commercial morality and public interest in order to bind the dissenting minority while sanctioning the scheme.

71. The Appeal Court noted that the first and third Respondents "*have clearly shied away from doing that. Without mustering a 3/4 majority, the Appellants want the Court to stay winding up so as to interfere with the proprietary interest of a substantial percentage of members (48%) without placing any material before the Court in regard to the exercise of preference by that substantial body of shareholders. This, in our view, would be clearly impermissible*".

72. After explaining the principles governing the exercise of discretion under Section 466 of the Companies Act and applying those principles, the Appeal Court dismissed the appeal against the Company Court's order dated 14 October 2011 because there was no merit in the appeal. A Special Leave Petition against the Appeal Court's judgment and order between 03 August 2013 was also dismissed by the Hon'ble Supreme Court on 23 February 2016.

73. As noted earlier, we suspect that the Company Court's order and the strong observations therein, the Appeal Court's judgment and order dated 23 August 2013 and the reiteration of the strong observations therein and the order of the Hon'ble Supreme Court dated 23 February 2016 were not brought to the notice of the Company Court when the learned judges of the Company Court made their orders dated 21 December 2022 and 09 October 2023. If these judgments and orders had been brought to their notice, we are sure they would have been considered and discussed by the learned judges before the impugned orders were made.

74. The parties' vague reference to earlier applications being dismissed due to the workmen's resistance was insufficient. The copies should have been annexed, and the judgments and orders should have been explicitly brought to the Company court's attention. Since the first Respondent was seeking a discretionary order under Section 466 of the Companies Act, it was their duty to have placed copies of such judgments and orders before the Company Court and not merely rest content by the pleading in paragraph No. 23 of the Interim Application No. 3663 of 2022 and after that, craving leave of

the Court to refer to and rely upon the papers and proceedings of the earlier application and the orders made therein. In *Dabriwala Vanijya Udyog Ltd. v. Alka Dalmia*[13], a stay of the winding-up order was obtained by suppressing material facts, and the reasons for the grant of the stay order were not recorded. The stay order was set aside.

75. We get an impression that the first Respondent took advantage of the fact that there was no opposition to the application under Section 466 of the Companies Act after settling the matters with the workers' union and some creditors. It was the duty of the first respondent not only to have placed the copies of the Company Application No. 243 of 2011 (earlier application) and the orders made by the Company Court, Appeal Court and Hon'ble Supreme Court before the Company Court at the time when the Company Court was persuaded to make the orders dated 21 December 2022 and 09 October 2023.

76. Mr Tulzapurkar submitted that the order dated 21 December 2022 does contain a reference to the earlier application and the orders made therein. For this, he referred to paragraph No.16 of the order dated 21 December 2022, which reads as follows: -

> "16. Apart from the workers, none participated in the instant proceedings. Having regard to the huge potential of the assets of the company in liquidation, and the claims which have been made by the government agencies like MHADA, in my view, it is imperative that the Court has full assurance that the rights of the parties who have the stake of the winding up order is passed. **An identical prayer, in the past, came to be rejected upto the Supreme Court, albeit on account of resistance by some workers.**

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[13] (2010) 154 Com cases 131

> Therefore, to provide an opportunity to the Applicant to establish its bonafide, it may be expedient to pass an order calling upon the Applicant to make deposit and file requisite undertakings and direct the Official Liquidator to publish a notice inviting the attention of all the stake holders to the proposal to permanently stay the winding up order and revive the Company."

77. From the aforesaid, we cannot decipher whether the copies of the Company Court, Appeal Court and Hon'ble Supreme Court orders, which would have included strong observations made therein, were placed before the Company Court. There was no clear answer to this issue. In any event, even if we were to hold that such orders were placed before the Company Court, there is nothing to suggest that the Company Court considered such orders. The earlier application's rejection was not only due to the worker's resistance. That may have been one of the considerations. The company court and the appeal Court recorded far weightier reasons supporting the rejection.

78. At least regarding the Company Court's order dated 21 December 2022, we understand that the Company Court, at that stage, had merely issued some directions to test the financial capacity of the first Respondent. Therefore, the order dated 21 December 2022 (made by N J Jamadar, J.) stipulates that "*based on the aforesaid compliances and response, if any, the Court would consider the prayer for permanently staying the winding up order and revival of the company, and consequential reliefs".*

79. Therefore, it could be argued that the non-application of the various principles required to be applied when considering an application under Section 466 of the Companies Act may

not be very relevant. Similarly, it could be argued that the non-consideration of the orders dismissing the earlier application, and the strong observations may not be relevant at that stage. However, this argument could not have been raised when the Interim Application was finally heard and disposed of by order rated 09 October 2023. At that stage, it was necessary to apply all the principles set out in the various decisions of this Court, Calcutta High Court, and the Supreme Court. Further, since the orders made by the Company Court, Appeal Court and Hon'ble Supreme Court were highly relevant to exercising discretion one way or the other, the same should have been considered before making the order dated 09 October 2023.

80. The impugned order dated 09 October 2023 refers to no principles governing the discretion to stay proceedings in winding up on an application under Section 466 of the Companies Act. The Company Court's order dated 14 October 2011, the Appeal Court's order dated 23 August 2013 and the Hon'ble Supreme Court's order dated 23 February 2016 is not even adverted to, much less considered. The impugned order only refers to the compliance of the directions issued in the orders dated 21 December 2022 and, based upon the same, allows the application under Section 466 and passes various consequential orders. Thus, the principles governing the evaluation of a stay application were not noticed and applied at either stage.

81. Again, we suspect that the Company Court's order dated 14 October 2011, the Appeal Court's order dated 23 August 2013, and the Supreme Court's order dated 23 February 2016

were not even shown to the learned Company Judge when he made the order dated 09 October 2023. Otherwise, we see no reason why such relevant and material orders were not even discussed in the impugned order dated 09 October 2023. At that stage, we note that there was no opposition to the first Respondent's application under Section 466. Still, since the first Respondent was invoking the Court's discretion under Section 466 of the Companies Act, it was the first Respondent's duty to have invited the Court's attention to the binding precedents explaining the scope and import of Section 466 and the principles to be adopted by the Court when exercising discretion and under Section 466 of the Companies Act.

82. Similarly, it was the duty of the first Respondent to have shown the Company Court the orders made on the Company Application No. 243 of 2011 and the further proceedings therein because most of the observations in such orders were most relevant and material even for deciding the Interim Application No. 3663 of 2022. After showing all this material, it was, no doubt, open to the first Respondent and the other supporting Respondents to attempt to distinguish the orders or make out the case of a change of circumstances. However, no such case was made out either in the Interim Application No.3663 of 2022 and any discussion on the aspect of change of circumstances, etc., is not even reflected in the orders dated 21 December 2022 and 09 October 2023.

83. Mr Tulzapurkar referred to the first Respondent's case falling within the exceptions referred to by Megarry J. in *Re Calgary (supra).* As noted earlier, the said decision is a clear

authority for the proposition that "*in normal circumstances no stay should be granted of winding up, unless each member, (1) either consents to it; (2) or is otherwise bound not to object to it; (3) or else there is secured to him, the right to receive all that he would have received had the winding up proceeded to its conclusion."* Therefore, if the first respondent was confident that its case fell within the exception from the normal circumstances, then it was for the first Respondent to have made out an exceptional case, firstly in the pleadings, and then by placing adequate material on record regarding the exceptional circumstances. Since the attempt before the Appeal Court was to rely upon the exception, the first Respondent had a very significant burden to discharge. At least from the reading of Interim Application No. 3663 of 2022, we do not think any circumstances based on which the normal rule could be deviated were pleaded, let alone established.

84. At least prima facie, the only change of circumstance that is pleaded and, to some extent, established is the settlement of the worker's dues. To some extent, some pleadings and material about the creditors' settlement exist. However, as was repeatedly emphasised, mere settlement of the creditors or workers does not entitle any party to a stay of the winding up proceedings under Section 466 of the Companies Act. That may be one of the considerations, but surely, that could not be the sole consideration. In *ARC Holdings Ltd. v. Rishra Steels P. Ltd.*[14], the Court found that the stay application did not address the gaps it had pointed out while rejecting an earlier similar application. It held that the

[14] (2010) 157 Com Cases 364 (Cal)

application was not so much for the revival of the company as for distributing its assets through private arrangements.

85. The aspects of public interest, commercial morality, and intention to revive the company are relevant, and all these matters have not been considered in the impugned orders. There are findings while rejecting the earlier application for a stay that the first and third Respondents were never genuinely interested in reviving the company's business, but this was only a ruse for acquiring the said company's properties for their real estate business.

86. The earlier orders specifically noted that the Shapoorji Pallonji Groups, of which the first and third Respondents are group companies, were interested in acquiring the properties of the said company at a throwaway price without facing a free, fair and transparent public auction that the Court would have supervised. At least, Interim Application No.3663 of 2022 contains no pleadings to dispel or vary these findings. At the cost of repetition, we add that the failure to annex copies of the Company Court's order dated 14 October 2011, the Appeal Court's judgment and order dated 23 August 2013 and the Hon'ble Supreme Court's order dated 23 February 2016 was the cause due to which the Company Court could make the impugned orders without adverting to the principles governing the exercise of discretion under Section 466 of the Companies Act and also perhaps oblivious of the strong observations concerning the first and third Respondents and their attempt to acquire the said company's immovable properties at a throwaway price without free, fair and

transparent auction process that the Official Liquidator would have held under the supervision of the Court.

87. The Appeal Court, in its judgment and order dated 23 August 2013 at paragraph 27, has noted that where all the shareholders have not been joined in the application for the stay of an order of winding up, it would be more appropriate if the company court was to be moved by way of an application for reconstruction under Section 391 to take the company out of winding up. Despite such precise observations and even though, in the Interim Application No.3663 of 2022, not all shareholders have been joined, the impugned order has stayed the winding up proceedings so that the first and third Respondents are now in complete control of the assets of the said company. This was, as observed in paragraph 27 of the Appeal Court's judgment and order, without evidence of the first Applicant mustering a 3/4th majority. The shareholding of the first and third Respondents comes to 52%. This means that a substantial percentage of members (i.e. 48%) are not involved in the process.

88. All this was possible, perhaps only because the Appeal Court's judgment and order was not shown to the Company Court. Suppose the orders made by the Company Court, Appeal Court and Hon'ble Supreme Court were to be shown to the Company Court. In that case, we believe that no stay would have been granted to the winding up process by exercising discretion under Section 466 of the Companies Act. Even the liquidator's report has not sufficiently addressed the concerns in the previous orders or opined any substantial change in material circumstances. At least the liquidator

should have specifically invited the Court's attention to the strong observations in the earlier orders of the company court and the appeal Court.

89. There is no question of this Court for the first time considering the materials on record and deciding whether the discretion should be exercised for grant of stay under Section 466 of the Companies Act. Perhaps, on the ground that there was no substantial change of circumstances or that no material was placed on record to displace the strong findings recorded regarding the motives of the first and third Respondents, we would have declined to exercise our discretion and stayed the proceedings under Section 466 of the Companies Act. But that is, to some extent, besides the point. The impugned orders deserve to be set aside for failure to consider vital material in the form of the order dated 14 October 2011, the judgment and order dated 23 August 2013 and the Hon'ble Supreme Court's order dated 23 February 2016.

90. The impugned orders will also have to be set aside because they do not even refer to the principles governing discretion under Section 466 of the Companies Act. The impugned orders contain no reasons why the discretion was exercised for staying the winding up proceedings and whether any case was made out by the Applicants based on which it could be said that the stay ought to be granted. The impugned orders will have to be set aside because they do not consider binding precedents, including the law laid down by the Appeal Court in its judgment and order dated 23 August 2013.

91. For all the above reasons, we allow this Appeal and quash and set aside the impugned orders dated 09 October 2023 and 21 December 2022. The stay on the winding-up proceedings of the said company is dissolved. Consequently, the winding-up proceedings, which were in abeyance, revive. The orders for the appointment of the liquidator also revive. The orders concerning the liquidator's reports were also consequential to or in the context of the stay application. Since the impugned orders on the stay application are dissolved or set aside, such orders on the liquidator's reports would also not survive. Interim Applications, if any, would not survive and the same are disposed of.

92. After arguments, Mr Tulzapurkar submitted that if this Court allows the Appeal, the stay on the winding-up proceedings should be continued for a reasonable period so that the Respondents can challenge our judgment and order. He pointed out that the first Respondent had already deposited Rs.240 Crores in the Court, which has already been disbursed to the workers.

93. The amount was deposited before the impugned order dated 9 October 2023 was made. The disbursal was subject to the orders in this appeal. Therefore, no equities as such could be claimed. There would have been no difficulty continuing the stay for, say, four weeks. However, if the stay on the winding-up proceedings is continued. In that case, the Official Liquidator may be powerless to exercise any control over the assets and properties of the said company. The first and third Respondents, who now appear to be in control of the said company, could then fritter away the assets and immovable

properties without any restriction and control. Also, we are not made aware of the financials of the said company and the extent to which the first and third respondents have dealt with the company's properties and assets. Therefore, we are hesitant to continue the stay on the winding up proceedings, and that too, unconditionally.

94. Suppose the relief applied for by the first Respondent is refused. In that case, all that will happen is that the affairs and the properties of the said company would revert to the Official Liquidator and remain custodia legis. If there is anything that the first and third Respondents wish to achieve specifically, it is always open to them to apply to the Company Court and obtain suitable orders. But a blanket continuance of the stay on the winding up proceedings, as was prayed, would not be in the interest of the said company or its remaining shareholders, who have, under the stay, been left out from the process. Accordingly, the request for the unconditional continuance of the stay on the winding-up proceedings is denied.

95. Now that we have set aside the impugned orders, we direct the Official Liquidator to forthwith re-take charge of the affairs of the said company and its assets, properties, etc., on the usual terms. The first and third Respondents, or those in control of the company's affairs, must desist from agreeing to sell, convey, encumber, or otherwise deal with the company's immovable properties without the leave of the company court.

96. Nothing in this order will preclude any party from filing a fresh application under Section 466 of the Companies Act after complete disclosures and after annexing all relevant

documents, judgments, and orders. If such an application is made, we are sure that it will be considered in accordance with the law and the principles that govern the discretion to grant a stay under Section 466 of the Companies Act.

(Jitendra Jain, J) **(M. S. Sonak, J)**