

Monark Enterprises Vs. Kishan Tulpule and Others

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Court : Mumbai

Decided On : Oct-30-1991

Reported in : 1992(2)BomCR406; [1992]74CompCas89(Bom)

Judge : D.R. Dhanuka, J.

Acts : [Companies Act, 1956](#) - Sections 227, 227(2), 522, 529A, 531, 531(1), 531A, 536, 536(2), 537 and 537(1)

Appeal No. : Company Applications Nos. 136 and 137 of 1991 in Company Petition No. 756 of 1987

Appellant : Monark Enterprises; kishan Tulpule and Others

Respondent : Kishan Tulpule and Others; kishco Mills Pvt. Ltd. and Another

Advocate for Pet/Ap. : Shri. S. D. Puri, Shri. Puri, Mr. Puri

Judgement :

D.R. Dhanuka, J.

1. The principal question which arises for consideration of the court in these proceedings is whether the impugned transaction dated February 18, 1987, entered into by and between Kishco Mills Pvt. Ltd. (hereinafter referred to as 'the company') and Monark Enterprises relating to transfer of leasehold rights in plot No. 10, Government Industrial Estate, Kandivli, Bombay, and the structures

thereon is liable to be treated as void ab initio or is liable to be annulled by the company court under one or the other provisions of the Companies Act I of 1956 (hereinafter referred to as 'the Act').

2. On August 12, 1987, Shri Kishan Tulpule, Shri Ramakrishna Venkat, Shri Satyanarayan Ramsurat Tripathi and Shri Ramtirath Sukhanarayan Kahar, in their capacity as representatives of the Mill Mazdoor Sabha, an approved and recognised union for the textile processing industry, representing the workmen of the company, filed a winding-up petition in this court, being Company Petition No. 756 of 1987. The petitioners sought a winding-up order against the said company on the ground of non-compliance with the notice of demand of Rs. 70,74,282.59, being notice of demand dated July 13, 1987. The said petition was declared on August 5, 1987, and was filed on August 12, 1987. It was, inter alia, averred in the petition that the company had resorted to an illegal lock-out in July, 1986. The company employed about 423 workmen at the material time.

3. On June 9, 1988, this court passed an order for winding up of the company. The winding up order relates back to the date of presentation of the petition, i.e., August 12, 1987. By the said order, the Official Liquidator, High Court, Bombay, was directed to perform all the functions of the liquidator of the said company as contemplated under the Act.

4. At one stage, the company held two plots, i.e., plot No. 7A and plot No. 10, situate at Government Industrial Estate, Kandivli, Bombay, on lease granted by the Additional Collector of Bombay for and on behalf of the Governor of the State. Prior to the commencement of the winding up proceedings, the company had already mortgaged its right, title and interest in plot No. 7A and hypothecated its plant, machinery and other movables to the Central Bank of India in lieu of loan and other credit facilities availed of by the company from the said bank. The said secured creditors have filed Suit No. 2200 of 1986 in this court against the company and the guarantors for recovery of a sum Rs. 3,97,34,819.90, further interest and for other reliefs. By an order dated September 4, 1986, passed by this court, the Court Receiver, High Court, Bombay, was appointed receiver of the said plot No. 7A and the structures thereon and also of the machinery and movables

hypothecated to the bank. On September 12, 1986, the court receiver took possession of the said properties. Pursuant to a subsequent order dated November 20, 1986, the court receiver disposed of the movables of which the receiver had taken charge, realising a sum of Rs. 13,50,000. In pursuance of the orders passed by this court, a sum of Rs. 12,91,000 has already been released to the Central Bank of India after setting aside the balance of the amount towards costs, charges, expenses and commission of court receiver. Perhaps, the workmen are entitled to pari passu charge over the said sale proceeds and other securities held by the Central Bank of India.

5. Prior to the commencement of the winding up proceedings, i.e., on February 18, 1987, the company had entered into the impugned transaction to transfer its right, title and interest in plot No. 10 and the structures standing thereon to Monark Enterprises, a partnership firm, for a consideration of Rs. 32,74,294. The said transaction was in the nature of a firm commitment and a concluded contract subject to various sanctions and approvals. On the same day, the company handed over possession of the said property to Monark Enterprises. The said transaction was duly sanctioned by the Additional Collector of Bombay. The said transaction was duly implemented prior to the passing of the winding-up order. The relevant facts in respect of the aboveresferred impugned transaction shall be set out at some length in the latter part of this order.

6. On September 24, 1987, Monark Enterprises executed a deed of mortgage in respect of the same property, i.e., plot No. 10 and the structures thereon situate at Government Industrial Estate, Kandivli (leasehold rights) in favour of the Bank of Maharashtra. It is the contention of Monark Enterprises and the Bank of Maharashtra that plot No. 10 was not an asset of the company on the relevant date, that the impugned transaction dated February 18, 1987, and the aboveresferred mortgage were arrived at in good faith and for valuable consideration and that the said asset cannot be considered as an asset of the company on the relevant date. It is also the contention of Monark Enterprises that the said transaction dated February 18, 1987, cannot be treated as 'disposal of property' by the company after August 12, 1987, merely because the Collector of Bombay granted sanction thereto on September 14, 1987, the company having

already exercised its disposing power on February 18, 1987. It is the contention of the petitioners and the official liquidator that the impugned transaction dated February 18, 1987, is liable to be treated as void ab initio and that the leasehold plot No. 10 referred to hereinabove along with the structures thereon is liable to be treated as an asset of the company available to all the creditors for distribution in accordance with the provisions of the Act.

7. Sometime prior to September 6, 1988, the official liquidator took possession of plot No. 10 and the structures thereon the assumption that the said leasehold plot was not an asset of Monark Enterprises but was an asset belonging to the company under liquidation. By their advocate's letter dated September 6, 1988, addressed to the official liquidator, Monark Enterprises protested against the said action of the official liquidator and called upon the official liquidator to unseal the premises and return possession thereof to Monark Enterprises. Correspondence ensued between the parties.

8. On November 9, 1990, the official liquidator submitted his report to this court for directions on the question whether the official liquidator may take out proceedings under section 531A of the Act against the ex-directors and Monark Enterprises to declare the alleged transfer and sale of plot No. 10 void against the official liquidator. In paragraph 6 of the said report, the official liquidator referred to Summary Suit No. 2334 of 1986 filed by Monark Enterprises against the company for recovery of its outstandings and passing of a decree by this court in this suit. In the said paragraph of the report, the official liquidator referred to the fact that the said decree was made payable by instalments of Rs. 1.50 lakhs per month. In paragraph 6 and 7 of the said report, the official liquidator stated that the company had entered into an agreement dated February 18, 1987, to sell its right, title and interest in leasehold plot No. 10 situate at Government Industrial Estate, Kandivli, to Monark Enterprises for a total consideration of Rs. 32,74,294. In the said paragraphs of the report, the official liquidator stated that the decretal amount of about Rs. 20,76,056.40 was adjusted against the stipulated consideration of Rs. 32,74,294. It was further stated in the above-referred two paragraphs of the said report that Monark Enterprises had agreed to pay the outstanding dues of the company payable to the income-tax department, Collector of Bombay, Municipal

Corporation of Greater Bombay, etc., on behalf of the company and adjust much payments towards their obligation to pay the stipulated consideration of Rs. 32,74,294. It was further stated in paragraph 7 of the said report that Monark Enterprises had obtained a certificate under sections 230A and 269UL of the Income-tax Act and had also applied to the Collector of Bombay for transfer of leasehold rights in their favour. It was further stated in paragraph 7 of the said report that Monark Enterprises had subsequently mortgaged the said plot No. 10 to the Bank of Maharashtra by a deed of mortgage dated September 24, 1987.

9. I have carefully gone through the said report with the assistance of learned counsel. It is clear from the said report that the official liquidator did not dispute the validity of the decree passed by his court in Summary Suit No. 2334 of 1986 at the stage of making the said report or the fact that Monark Enterprises were bona fide creditors of the company for a large amount even prior to February 18, 1987, or that the company had defaulted in payment of the stipulated instalments. It is clear from the said report that the official liquidator did not dispute the fact that Monark Enterprises had already paid a total sum of Rs. 32,74,294 to the company partly by adjusting the decretal amount and partly by making payments to various third parties as well as to the company by cheques and bank drafts.

10. In paragraph 8 of the said report, the official liquidator set out the only ground on which he impugned the said transaction dated February 18, 1987, and the said ground must, therefore, be properly understood and summarised. Section 531A of the Companies Act, 1 of 1956, provides for 'avoidance of voluntary transfers' made by a company within a period of one year before the presentation of petition for winding up (1) if such transfer was not made in the ordinary course of its business, or (2) if such transfer was not made in good faith and for valuable consideration. If the court comes to the conclusion that such transfer, though made within a period of one year before the presentation of the petition, was made either in the ordinary course of business or in good faith and for valuable consideration, such transfer would not be annulled. The burden of proving that the impugned transaction was not entered into in the ordinary course of business or in good faith and for valuable consideration would be on the official liquidator or the creditors impugning the transaction. After referring to section 531A of the Act in his report, the official

liquidator stated in paragraph 8 of his report that the impugned transfer dated February 18, 1987, was liable to be annulled or treated as void on the ground that the transaction was not made in the ordinary course of business. It was also vaguely stated in paragraph 8 of the said report that the impugned transfer was fraudulent and void against the official liquidator pursuant to the provisions of section 531A of the Act. By this report, the impugned transfer was not challenged in terms as a fraudulent preference, but was challenged on the ground of the same being not in the ordinary course of business. It was not stated in the said report that the impugned transaction was not made in good faith and for valuable consideration.

11. In paragraph 9 of his report, the official liquidator stated that, from the sale proceeds received by the company from Monark Enterprises, the company had made payments of Rs. 1,20,000 and Rs. 1,95,000 to Kishinchand and Co., in which the directors of the company under liquidation had an interest and Rs. 80,000 to one Mr. Wadhoo Sakhrani. The official liquidator observed in paragraph 9 of his report that the said payments, according to him, amounted to preferential treatment over other creditors. The official liquidator sought directions from this court on this aspect of the matter also by posing the question as to whether the official liquidator may take out proceedings under section 531 of the Act against the ex-directors and Kishinchand and Co. and against Wadhoo Sakhrani to have the alleged preferential payment made to them as mentioned in paragraph 9 of the report declared void.

12. Before setting out the gist of Company Applications Nos. 136 and 137 of 1991 which are being heard along with the above-referred report, I consider it proper to grant leave to the official liquidator to take out separate proceeding against the ex-directors, Kishinchand and Co. and Mr. Wadhoo Sakhrani in respect of his alleged grievance regarding the alleged preferential treatment/payments referred to in paragraph 9 of the said report. This question is incapable of being decided in the present proceedings and must be decided in a separate proceeding to be taken out by the official liquidator of which due notice shall have to be given to Kishinchand and Co. and Mr. Wadhoo Sakhrani and the ex-directors.

13. On April 22, 1991, Monark Enterprises made an application to his court, numbered as Company Application No. 136 of 1991, for a direction to the official liquidator to remove the seal put on plot No. 10, ABCD, Government Industrial Estate, and the buildings and structures standing thereon. By prayer (b) of the said application, the applicants sought a direction against the official liquidator to pay to the applicants, Monark Enterprises, a sum of Rs. 65,000 as monthly compensation for preventing the use of the said property by the applicants from the date of sealing thereof till the seal thereon was removed. By my order dated April 22, 1991, I granted leave to the applicants to take out judge's summons numbered as Company Application No. 136 of 1991 and granted liberty to the parties including the applicants to use the affidavits already filed in response to the report of the official liquidator dated November 9, 1991. By my order dated April 22, 1991, I also directed that the said Application No. 136 of 1991, shall be heard along with the report of the official liquidator. The official liquidator is exhaustively heard on this application.

14. Monark Enterprises made the said application on footing that the impugned transaction was valid and was binding on the official liquidator and the petitioners-workmen.

15. On April 22, 1991, the petitioners-workmen made Company Application No. 137 of 1991 for a declaration that the impugned transfer of the property dated February 18, 1987, amounted to 'fraudulent transfer' within the meaning of section 531 and section 531A of the Act. By the said application, the petitioners also sought a declaration that the agreement dated February 18, 1987, entered into between the company and Monark Enterprises was void ab initio. By prayer (c) of the said application, the petitioners sought a further declaration to the effect that the workmen were entitled to their legal dues as per the provisions contained in section 529A of the Act. By my order dated April 22, 1991, I granted leave to the petitioners to take out the said chamber summons and directed that the same shall also be heard along with the report of the official liquidator. By the said order, I granted liberty to the parties to use the affidavits already filed in response to the report of the official liquidator dated November 9, 1990.

16. The official liquidator is heard by the court not merely on the report dated November 9, 1990, but also on the two applications, being Company Applications Nos. 136 and 137 of 1991. All the questions of fact and law arising from these two applications and the report of the official liquidator pertaining to the transaction dated February 18, 1987, are being adjudicated upon by this order except the claim for damages/compensation made by Monark Enterprises. It would be an exercise in futility to grant leave to the official liquidator to take out one more judge's summons to impugn the transaction dated February 18, 1987.

17. In the affidavit in support of Company Application No. 137 of 1991, Shri Ramkrishna Venkat, representing the workmen, impugned the said transaction dated February 18, 1987, on various ground. The said grounds are briefly summarised as under :

(a) The impugned transaction amounted to 'fraudulent preference' of one creditor in preference to other creditors within the meaning of section 531 of the Act and the same was liable to be treated a void or annulled.

(b) The impugned transaction was void also under section 531A of the Act.

(c) The impugned transaction was arrived at by the company with Monark Enterprises in collusion and intentionally with a view to defeat and frustrate the claim of the workmen of the company.

(d) The impugned transaction was entered into by and between the company and Monark Enterprises with a view to defeat the provisions of section 25FF of the Industrial Disputes Act, 1947.

(e) In any event, Monark Enterprises were liable to be considered in law as a successor-in-interest of the company under liquidation and were liable to pay the dues of the workmen.

18. The petitioners-workmen also contended that the company had no power to dispose of the asset as the workmen were liable to be treated as co-owners thereof along with the company.

19. During the course of arguments, learned counsel for the official liquidator as well as learned counsel for the petitioners-workmen raised additional grounds to impugn the transaction in question by invoking section 537 of the Act. The applicability or non-applicability of section 536(2) of the Act shall have to be examined by the court in due course as the said provision is an interconnected provision of the Act.

20. Shri Mohanlal Sharma, the official liquidator, has filed his affidavit dated August 20, 1991. In paragraph 20 of his affidavit, the official liquidator stated as under :

'I say that the entire alleged transaction of sale of goods is fraudulent. No goods appear to have been actually delivered but the entire transaction appears to be a hawala transaction only.'

21. This stand of the official liquidator was in direct conflict with the limited challenge to the impugned transaction in his report dated November 9, 1990. During the course of arguments, learned counsel for the official liquidator also orally applied for leave of this court to file a separate suit to impugn the decree dated September 5, 1986, passed in favour of Monark Enterprises and against the company in Summary Suit No. 2334 of 1986.

22. The Bank of Maharashtra has supported the impugned transaction dated February 18, 1987. Learned counsel for the Bank of Maharashtra has also contended that the Bank of Maharashtra has acted in good faith and has obtained mortgage of the property in question from Monark Enterprises for valuable consideration.

23. I have heard learned counsel for all the parties at some length. Written submissions have been filed. Compilations have also been filed. Some of the affidavits were taken on record subject to objection. All the affidavits filed by the parties are duly considered. I shall have to consider the various grounds of challenge to the impugned transaction while deciding Company Applications Nos. 136 and 137 of 1991, and the connected aspect of challenge contained in the report of the official liquidator and his affidavit. While deciding the said

proceedings which are being decided after hearing the official liquidator, the court shall record its findings on the question whether the impugned transaction is liable to be treated as void ab initio or is liable to be annulled under sections 531, 531A, 537 or 536(2) of the Act. Since these questions are being adjudicated upon on merits after hearing the official liquidator while disposing of the two judge's summonses, the question of granting leave to the official liquidator to take out separate proceedings under section 531A of the Act for annulment of the suit transaction does not arise.

24. The first question which arises for consideration of the court is as to whether, on the relevant date, Monark Enterprises were bona fide creditors of the company or not. It emerges from the voluminous record before the court that during September, 1984, and March, 1985, Monark Enterprises supplied yarn to the company worth about Rs. 35 lakhs. It has been provided with reference to documentary evidence before me that, on several occasions, Monark Enterprises used to purchase yarn from Petrofils Co-operative Ltd. and, at their instance, at least in 13 cases, goods were directly delivered by Petrofils Co-operative Ltd. to the company under liquidation. The company was engaged in the business of manufacturing suitings and shirtings. Monark Enterprises used to supply goods to the company on credit and had a bill-discounting facility with the Bank of Maharashtra as well as Dena Bank. The company used to accept bills of exchange or hundis drawn by Monark Enterprises for purchase of goods sold and delivered payable to the bank on expiry of the credit period of 60 days. It emerges from the record that the company had honoured several such hundis and had made payment of Rs. 17,48,762.95 to Monark Enterprises during the period from September, 1984, to March 20, 1985. Monark Enterprises have offered to produce their audited books of account. The company made part payment of Rs. 2,84,047.95 to Monark Enterprises by various cheques in respect of balance of the bills supported by hundis which were duly encashed by the company. Monark Enterprises have not merely produced copies of the invoices, delivery challans and bills of exchange duly accepted by the company during the course of years and copies of their audited profit and loss account and balance-sheet for the period ending September 30, 1985, and September 30, 1986, but have also produced other unimpeachable evidence on this aspect. Monark Enterprises have

filed a compilation of documents to prove that they were bona fide lawful creditors for the amounts claimed by them in the above-referred summary suit in which the decree was passed by this court. Since the official liquidator has taken courage to describe the transactions as hawala transactions and 'probably collusive transaction', to use his own words from his affidavit, a detailed reference will have to be made to the documentary evidence produced by Monark Enterprises at least to some extent.

25. By a letter dated August 3, 1985, the Bank of Maharashtra informed Monark Enterprises that a sum of Rs. 14.63 lakhs was overdue for payment since February, 1985. It was stated in the said letter, if the said amount was not paid within a short time, the bank will be constrained to proceed legally against Monark Enterprises as well as against Kishco Mills Pvt. Ltd. Kishco Mills Pvt. Ltd had accepted the hundis. The Bank of Maharashtra discounted the said hundis. Some of these hundis were honoured and some were not honoured. Thus, it is clear from the said letter dated August 3, 1985, that both Monark Enterprises as well as Kishco Mills Pvt. Ltd. were jointly and severally liable to pay the above-referred amount to the Bank of Maharashtra. It is also clear from the said letter that Monark Enterprises were also entitled to recover the amount for the price of goods sold to and, delivered to, Kishco Mills Pvt. Ltd.

26. Monark Enterprises have also produced copies of three certificates of noting and protest dated July 21, 1986, issued by Phadke and Co. certifying that some of the relevant hundis were not honoured by the company which now under liquidation. From the audited accounts (profit and loss account as well as balance-sheet) of Monark Enterprises for the period ending on September 30, 1985, it appears that a sum of Rs. 18,01,101.50 is shown to be due and payable by 'sundry debtors' to Monark Enterprises and that a sum of Rs. 16,76,937.50 was obtained by the said firm from the bank on account of bill-discounting facility. A similar picture emerges from the audited balance-sheet and profit and loss account of Monark Enterprises for the period ending on September 30, 1986. From the said balance-sheet, it also appears that Monark Enterprises had a turnover of Rs. 1,22,22,254.16 on account of sales for the period ending on September 30, 1985, and that it had purchased goods from various parties valued

at Rs. 1,18,90,897.36. The balance-sheet of the said firm for the period ending on September 30, 1986, shows that the said firm had dealings with Orkay Silk Mills, Morarji Mills, Simplex Mills and various other parties. The Bank of Maharashtra has, by its letter dated February 25, 1987, addressed to Monark Enterprises, confirmed that as on February 15, 1987, the bills of exchange returned unpaid by the 'company', i.e., Kishco Mills Pvt. Ltd., were for Rs. 13,47,773.50 and the company was also liable to pay interest from the respective due dates for the period up to February 15, 1987, in a sum of Rs. 4,95,105.55. It has also been averred in the affidavits filed on behalf of Monark Enterprises that sales tax was duly paid on all these transaction. The question which I have to ask myself is as to whether there is any material whatsoever on record to justify the extreme contention raised by the official liquidator in paragraph 20 of his affidavit to the effect that no goods were delivered at all by Monark Enterprises to the company under liquidation and the transactions appeared to him to be hawala transactions.

27. It has been pointed out by learned counsel on behalf of the official liquidator that the duplicate of the invoices forming part of the compilation do not show the order numbers. It has been pointed out by learned counsel for the official liquidator that some of the delivery challans show that the goods in question are supposed to have been delivered on Sunday. It has been pointed out by learned counsel that Shri Ravi Nariman, executive director/managing director of Kishco Mills, himself is supposed to have signed on the duplicate of the invoices and delivery challans which would create suspicion in the mind of any reasonable person as more than 400 employees were on the pay roll of the company at the relevant time. It has also been pointed out that, in some of the delivery challans, the address given is not the factory address. The alleged discrepancies have been well relied to in the affidavits filed on behalf of Monark Enterprises. Since every single hundi/bill of exchange was to be discounted by Monark Enterprises with the Bank of Maharashtra or with the Dena Bank, as the case may be, it was a condition stipulated by the bankers that the basic documents like duplicates of the invoices and delivery challans should be signed by the executive director of the company. In my judgment, the submissions made on behalf of the official liquidator and the petitioning workmen can be reasonably described as speculative arguments having no legal foundation for the submission that the goods in question must not

have been delivered by Monark Enterprises to the company and the decretal claim was a fictitious claim. The company did receive goods from Petrofils Co-operative Ltd. The company did honour a large number of hundis. Monark Enterprises did pay sales tax on the sales of all these goods. Audited accounts of the firm for the periods ending on September 30, 1985, and September 30, 1986, clearly prove the case of Monark Enterprises and the company. Even the ledger book of the company for the year 1985 supports the transaction. The company has not produced all the books of accounts and all the records for reasons which may or may not be satisfactory. It does not follow therefrom that a very large number of documents and audited accounts of Monark Enterprises duly supported by nationalised banks should be discharged by the court. Having regard to the overwhelming documentary evidence produced by Monark Enterprises duly supported by the Bank of Maharashtra and also the ledger of the company, though not all the books, it is not possible to accept the ipse dixit of the official liquidator and hold that no goods have been supplied by Monark Enterprises to the company under liquidation. Supplies were made by Monark Enterprises to the company from the month of September, 1984, when no one contemplated that the company would be wound up at a subsequent date. The factory of the company did work at least up to July, 1986. Even if Monark Enterprises had not taken any legal action against the company under liquidation, the Bank of Maharashtra would have been entitled to take action against the company under liquidation for recovery of almost the same amount as the company had already accepted each one of the bills of exchange/Hindis in question and had dishonoured the same. The Negotiable Instruments Act raises a statutory presumption of consideration in respect of such instruments and such presumption is required to be rebutted by the party assailing the same by producing cogent evidence and not merely by attempting to create some sort of suspicion with the help of so-called minor discrepancies. In any event, the alleged discrepancies lose significance when viewed in the context of overwhelming documentary evidence produced by Monark Enterprises to prove their bona fides.

28. On or about August 20, 1986, Monark Enterprises filed against Kishco Mills Pvt. Ltd. Suit No. 2334 of 1986 for recovery of Rs. 20,76,056.40 and interest at 19.5 per annum on the principal amount of Rs. 16,17,223.55 from the date of filing

of the suit and cost of the suit. I have gone through a copy of the plaint in the said suit. It appears from the detailed annexures to the plaint that the company was liable to pay the amount of suit claim to the plaintiffs therein on account of the unpaid bills of exchange, i.e., a sum of Rs. 16,47,566.45 in respect of unpaid hundis drawn in favour of the Bank of Maharashtra in consideration of the goods supplied by Monark Enterprises to the company. It appears that the company was also liable to pay a sum of Rs. 2,39,899.65 in respect of unpaid hundis drawn in favour of the Dena Bank and a further sum of Rs. 1,88,590.30 to Monark Enterprises in respect of transaction referred to in the plaint. It appears from the plaint that the plaintiffs had filed the said suit on the basis of confirmation of accounts and confirmation of liability duly signed by Shri Ravi Nariman, executive director of the company under liquidation. It has been contended by learned counsel for the official liquidator that the said suit was not filed to enforce unpaid hundis but was filed for the price of goods sold and delivered. Each of the unpaid hundis was discounted by Monark Enterprises. Monark Enterprises were entitled in law to recover the said amount from Kishco Mills P. Ltd. The banks concerned were also entitled to recover the said amount from Kishco Mills Pvt. Ltd. and Monark Enterprises jointly and severally. There could not be double recovery of the said amounts and there has been none. Parties obtained consent decree in the said suit which provided for payment of decretal dues by instalments.

29. The impugned transaction is of February 18, 1987. By a letter dated August 3, 1985, much prior to the impugned transaction, the Bank of Maharashtra had already called upon Monark Enterprises to pay Rs. 14.63 lakhs with overdue interest threatening to take legal proceedings both against Monark Enterprises as well as against Kishco Mills Ltd. If such an undisputed and indisputable liability was acknowledged by the company and a summary suit was filed by Monark Enterprises on August 20, 1986, on the basis thereof, I cannot infer any dishonesty or collusion on the part of Monark Enterprises or on the part of the company merely because a consent decree was obtained by the parties in the said suit on September 5, 1986, in respect of a claim which is shown to be bona fide and legitimate. Under the said consent decree dated September 5, 1986, the amount was made payable by the company by instalments of Rs. 1.50 lakhs per month. In the absence of the said consent arrangement, the entire amount would

have been recovered perhaps at one stretch without any facility of instalments. If the banks concerned had filed suits against the company to recover the amounts payable in respect of unpaid hundies, the company would have no valid defence to the claim.

30. It has come on record that, at one stage, the company was intending to mortgage plot No. 10 and the structures situate thereon at Government Industrial Estate in favour of the Bank of Maharashtra and it had even applied for requisite permission to the Collector of Bombay for the said purpose. In respect of the very same transaction, the company was liable to pay the amount of the claim to the banks concerned and to Monark Enterprises and either of the creditors could take legal steps against the company to recover the amount. At all material times, the Bank of Maharashtra and Monark Enterprises were jointly and severally entitled to recover large amounts from Kishco Mills Pvt. Ltd. and all these creditors were exerting lawful pressure on the company for payment of the amounts lawfully due and payable by the company to them. In this view of the matter, I have no hesitation in holding that Monark Enterprises were bona fide lawful creditors of the company under liquidation under the decree dated September 5, 1986, until February 18, 1987. No prima facie case is made out of assailing the decree itself or to justify the contention that the decree was obtained by Monark Enterprises against the company in respect of fictitious claim. There are two more aspects which deserve to be dealt with before I wind up the discussion on this question.

31. Learned counsel for the official liquidator has rightly commented on the books of account of the company under liquidation. Learned counsel for the official liquidator has also tendered a copy of the statement of affairs filed by Shri Ravi Nariman as ex-director with the official liquidator. It has been pointed out in the said statement of affairs that the company is still supposed to continue to be liable to pay a sum exceeding Rs. 10 lakhs to Monark Enterprises when, according to Monark Enterprises, no amount is outstanding in view of the adjustment made of the decretal claim against the sale price fixed under the agreement dated February 18, 1987. It appears to me that the conduct of Shri Ravi Nariman, managing director or executive director of the company under liquidation, is blameworthy. The question which I have to ask myself is whether an adverse inference should

be drawn against Monark Enterprises for non-production of all the books of account or unsatisfactory books of account by the company under liquidation or for filing of a suspicious statement of affairs filed by Shri Ravi Nariman with the official liquidator. I am afraid I cannot do so unless I can discover collusion, conspiracy or fraud on the part of Monark Enterprises.

32. The next question which arises for consideration of the court is whether the impugned transaction is liable to be treated as a 'fraudulent preference' within meaning of section 531(1) of the Act. Shri S. D. Puri, learned counsel for the petitioners, admitted that every transaction of transfer of property effected within six months before the commencement of winding up of the company without anything more is liable to be treated as a fraudulent preference within the meaning of section 531(1) and nothing more need be investigated once it is shown that the impugned transaction was effected within six months prior to August 12, 1987, when the winding-up petition herein was filed. Shri Puri submitted that, admittedly, the date of the impugned transaction was February 18, 1987, i.e., within six months prior to filing of the winding-up petition and this fact by itself was sufficient to nullify the transaction. It is not possible to accept this interpretation of section 531(1) of the Act. If the transaction of transfer amounts to a fraudulent preference under the bankruptcy law or the insolvency law and if it is entered into within a period of six months prior to the commencement of winding up, then alone the transaction is question can be treated as void under section 531(1) of the Act or otherwise. It appears to me to be well-settled that the law does not presume the transaction to be a fraudulent preference merely because it was entered into within a period of six months prior to the commencement of winding up. In my humble view, no authority is required to support the above proposition of law.

33. The next question which arises is whether the company had entered into the transaction dated February 18, 1987, with Monark Enterprises with a view to preferring one creditor to another creditor and that too fraudulently. The question which arises for consideration of the court is whether the company entered into the said transaction as a result of lawful pressure exercised by Monark Enterprises to recover its legitimate dues forthwith. It is well-settled that, if the transaction was entered into as a result of lawful pressure of a bona fide creditor to recover his

dues, the transaction of transfer could not be treated as a fraudulent preference. Another connected aspect of the same question is as to whether the company entered into the said transaction to save its own skin for its own benefit in the circumstances then prevailing or whether the dominant motive of the company in effecting the said transaction was to favour one creditor to another.

34. By its letter dated August 3, 1985, the Bank of Maharashtra had already threatened in writing to the effect that it would adopt legal proceedings both against Monark Enterprises as well as against 'the company' if the sum of Rs. 14.63 lakhs with overdue interest remained unpaid. The threat of legal proceedings was an imminent threat. It is an admitted fact that the company did not pay the decretal instalments which had fallen due from November 1, 1986. By reason of the default clause provided in the consent terms, Monark Enterprises were entitled to execute the decree or present a winding-up petition against the company or resort to such other legal remedies as were available to them under the law.

35. The prospect of further legal proceedings by Monark Enterprises against the company to recover the decretal dues was too obvious. Reasonable inferences can be easily drawn if required. The court must endeavour to take a view consistent with common sense and the ordinary course of human conduct. It is obvious to me that the impugned transaction dated February 18, 1987, was entered into by and between the company with Monark Enterprises after hard bargaining not with a view to preferring one creditor to another creditor but in view of the lawful pressure exercised by Monark Enterprises on the company. Learned counsel for Monark Enterprises filed a compilation of judgment and passages from various text books on the subject. I do not propose to deal with all the cases included in the compilation though I have considered all the cases cited by learned counsel for all the parties. I propose to refer to only one case to justify the approach of the court to the problem under consideration. In *Maneckchowk and Ahmedabad Mfg. Co. Ltd., In re* [1970] 40 Comp Cas 819, D. A. Desai J. (as His Lordship then was) of the High Court of Gujarat summed up the legal principle applicable in such a situation in his own inimitable style, after referring to the judgment of the House of Lords in *Sharp, Official Liquidator V. Jackson* [1899] AC

419. The High Court of Gujarat observed that, if the transaction was done not with a view to prefer one of the creditors but to save one's own skin, the transfer could not, in such circumstances, be treated as a fraudulent preference. After referring to a passage from Buckley on the Companies Acts, 13th edition (1957), the learned judge observed that the expression 'preference' implied selection and selection implied freedom of choice. The learned judge observed that a payment, in order to constitute a preference, must be voluntarily made, and that a payment made under pressure, e.g., in the context of proceedings, actual or threatened, by the creditor concerned, or fear of such proceedings, could not be considered as a fraudulent preference under the company law. In the instant case, the facts are quite eloquent. Learned counsel for the official liquidator and the petitioners have submitted that Monark Enterprises had not issued any notice to the company to the effect that it would execute the decree in view of the default committed. No such notice need be actually issued. Since Monark Enterprises were receiving threatening letters from the Bank of Maharashtra, Monark Enterprises must have threatened the company to pay its dues as the primary liability in respect of unpaid hundis executed by the company for the price of goods sold and delivered by Monark Enterprises were facing threats from the Bank of Maharashtra mainly because of the company having defaulted in respect of its obligation to discharge its liability to pay the amount in question.

36. Paragraphs 908, 909, 913, 915, 918 and 920 of the Halsbury's Laws of England, Volume 2, 4th edition, set out the statement of law on the subject of fraudulent preference neatly and clearly. The principles of law operating in the field of bankruptcy/insolvency law are imported into the Companies Act. In order that a transaction may be set aside as a fraudulent preference, it is necessary to prove that it was carried out with the view, that is to say, the principal or dominant view, of giving the creditor a preference over the other creditors. Paragraph 914 of the said volume formulates the statement of law on the subject of test to be applied in the following words :

'914. Test to be applied. - In order to ascertain whether the giving of a preference was the principal or dominant view in the debtor's mind, the test to be applied is : was the act done voluntarily ...'

37. Paragraph 915 of the said volume summarises the statement of law to the effect that the pressure by the creditor negated fraudulent preference, that the pressure must be real, the debtor must have some genuine apprehension, the transaction must have been entered into by reason of it. The said paragraph further stated as under :

'The pressure need not be a threat of legal proceedings; there need not even be an immediate power of taking proceedings, but where proceedings have been threatened, or where the debtor believes, even erroneously, that proceedings are about to be taken, the case in favour of the validity of the transaction is all the stronger ...'

38. I am satisfied that, in the instant case, the possibility of immediate execution of the decree by Monark Enterprises coupled with the lawful pressure by the Bank of Maharashtra constituted the immediate cause of the settlement culminating in the transaction dated 17th February, 1987, and the intention of the company to enter into the said transaction was to salvage the situation as far as possible and not in preferring one creditor to another.

39. In this view of the matter, I hold that the impugned transaction is not vitiated under section 531 of the Act.

40. Before I consider the next ground of challenge to the impugned transaction based on section 531A of the Act, it is necessary to state some more facts in respect of the indenture of lease pertaining to plot No. 10 between the Collector of Bombay and Kishco Mills Pvt. Ltd. and also the correspondence which followed on execution of the agreement dated February 18, 1987 :

(a) On January 11, 1983, the Additional Collector of Bombay had executed an indenture of lease in respect of plot No. 10, Government Industrial Estate, Kandivli, in favour of the company for a term of 30 years ending on October 22, 1991. The period of the lease has now expired. It is beyond my comprehension as to how the creditors would be able to auction the leasehold rights which have come to an end particularly when the Collector has recognised Monark Enterprises as a lessee of the property since February 18, 1987, in view of his letter of

sanction dated September 14, 1987, after according 'No objection' approval or sanction of several other statutory authorities. The said indenture of lease imposed an obligation on the company to pay the amount of stipulated rent regularly and in advance. The said indenture of lease provided for revision of rent. Clause X of the said indenture of lease provided that the lessee shall not, at any time, assign or underlet the said plot or any part thereof or transfer his rights or interest therein to anybody without the previous consent in writing of the Collector. Clause X of the said indenture of lease permitted the Collector to impose conditions while granting sanction requiring the lessee to pay to the Government half of the unearned increment, etc. Clause XI of the said indenture of lease empowered the Government to issue forfeiture notices on the lessee in case the lessee failed to observe any of the conditions of the lease or failed to pay the rent. The said clause provided that, on such forfeiture notices, being served, it shall be lawful for the Collector to enter upon the plot and take possession, not merely of the lands but also of the building constructed by the lessee. Clause XII provided for renewal of the said lease in the discretion of the Government, provided the lease was not forfeited under the proceeding clauses of the said indenture of lease.

(b) By the impugned agreement dated February 18, 1987, the company had agreed to assign its leasehold rights in the said plot and the structures thereon to Monark Enterprises for an aggregate consideration of Rs. 32,74,294. The said agreement clearly provides as to how the said amount was to be paid and/or adjusted. The said agreement provided that the decretal claim of a sum of Rs. 22,29,847.70 was adjusted as part payment against the obligation to Monark Enterprises to pay the above amount. Under the said agreement, Monark Enterprises agreed to discharge various liabilities on account of the company, like income-tax liabilities, liability to pay various amounts to the Collector of Bombay, unearned increment, arrears of rent, occupancy charges, liability to Bombay Suburban Electric Supply Ltd., etc. The said agreement provided that Monark Enterprises shall pay the balance of the amount to the company. By clause 6 of the said agreement, it was provided that all the outgoing by way of lease rent, municipal taxes in respect of the said plot and the structures thereon from the date thereof, i.e., from February 18, 1987, shall be borne and paid by Monark Enterprises from the date of the said agreement. Prior to entering into the said

transaction dated February 18, 1987, the Additional Collector of Bombay and the Tahsildar has issued several notices of demand to the company on account of arrears, including forfeiture notices as a result whereof, in all probability, the company had incurred liability to forfeiture of the plot and structures thereon unless the forfeiture notices were waived.

(c) Prior to execution of the said agreement, the company had executed a solemn declaration before a notary public, i.e., Shri Diwanji. It has been stated on affidavit, and it is believable, that Monark Enterprises had caused a search to be undertaken in respect of the title of the company to the plot by engaging the services of professional experts. By a letter dated February 18, 1987, the company had recorded that Monark Enterprises were placed in actual possession of the said property on that very day. A joint application was made on the same day both by the transferor and the transferee to the Additional Collector, Bombay Suburban District, for his sanction and/or permission to the said transaction. By a letter dated March 3, 1987, the Additional Collector of Bombay made a reference to the Director of Industries in that behalf. Correspondence ensued. In the meanwhile, Monark Enterprises discharged certain liabilities and made certain payments on account of the said transaction. Monark Enterprises obtained some bank drafts from the Bank of Maharashtra for purpose of implementation of the said transaction.

(d) On July 24, 1987, a meeting was held of the secretaries of the Government at which the said transaction was discussed.

(e) By letter dated September 3, 1987, the Director of Industries informed his views to the Additional Collector to the effect that the directorate will be in a position to grant a 'no objection certificate' to Monark Enterprises, provided the leasehold rights in respect of the said plot were transferred in the name of Monark Enterprises by the Collector of Bombay.

(f) Ultimately, on September 14, 1987, the Additional Collector of Bombay, informed the company that the company was allowed to transfer the said leasehold rights in respect of the said plot and the structures thereon on the conditions set out therein. On September 24, 1987, Monark Enterprises deposited

a sum of Rs. 3,38,000 with the Additional Collector of Bombay as required by him, by a pay order obtained from the Bank of Maharashtra. By a letter dated October 19, 1987, the Additional Collector informed Monark Enterprises that, in view of the said deposit having been made and in view of compliance with conditions Nos. 5 and 8 of letter dated September 14, 1987, the leasehold rights in respect of the said plot along with the factory building constructed thereon were transferred to the name of Monark Enterprises. It was stated in the said letter that the sanad will have to be executed in due course and till the sanad was executed, the conditions prescribed by the lease agreement shall bind Monark Enterprises. Monark Enterprises have given the break-up of the amounts paid by it to the various authorities and the company under liquidation after adjusting the decretal amount so as to show that it has already paid the consideration amount to the transferor. Monark Enterprises also executed an undertaking in favour of the Additional Collector to the effect that, if any additional amount was payable, it would pay the same. If the lessor recognises the proposed transferee as a lessee, the transaction of transfer of lease is not invalidated merely because of a registered conveyance having not been executed by the original lessor. At any rate, this aspect is not germane for the purpose of considering the question of 'good faith' and 'valuable consideration' in respect of the impugned transaction.

41. The net picture which emerges from a narration of the above facts is as under :

(a) On February 18, 1987, the company had made a firm commitment and had entered into a binding contract to transfer the said plot along with structures thereon in favour of Monark Enterprises for valuable consideration and the said transaction was entered into by and between the parties thereto in good faith. The said transaction could be finally implemented only after the necessary permission was obtained from the Additional Collector of Bombay in respect of the said transaction and only after a 'no objection certificate' was issued by the appropriate authority under the relevant provision of the Income-tax Act, 1961. A 'No objection certificate' was issued by the appropriate authority under the Income-tax Act, 1961, on May 5, 1991. The income-tax authorities have also issued a certificate under section 230A of the Income-tax Act, 1961. Permission or no objection certificate was also obtained by the parties from the Directorate of Industries and

the authority under the Urban Land (Ceiling and Regulation) Act. The transaction was entered into with the aid of advocates after making a search, investigating title and execution of declaration and was implemented after several statutory authorities approved and/or sanctioned the same, much before the passing of winding up order.

(b) The said transaction was finally completed on September 14, 1987, on issue of a letter of sanction by the Collector of Bombay or on issue of letter dated October 19, 1987, by the Collector after all the amounts required to be deposited were deposited by Monark Enterprises and necessary undertakings to pay further amounts whatever payable were filed. The Additional Collector of Bombay has sanctioned the transfer of leasehold rights in the land and the structures thereon both presumably because the forfeiture notices were also issued to the company by the Collector and, in the absence of waiver thereof, the Collector would have taken charge of plot No. 10 along with the structures thereon. Such a transaction could be completed also by obtaining a letter of sanction from the Collector of Bombay approving the transaction and treat Monark Enterprises as lessee in place of the company and his promise to execute a 'sanad' in due course.

(c) In its letter dated August 12, 1985, addressed to the Additional Collector, the company stated that the company was entitled to recover a very large amount of dues from its upcountry customers in Punjab and that it was only in temporary financial difficulties. The company has shown in its last balance-sheet that it had to recover more than Rs. 1 crore from its creditors. All these statements made by Shri Ravi Nariman on behalf of the company may be true or false but a third party like Monark Enterprises or the Bank of Maharashtra cannot be affected in respect of transactions entered into in good faith and for valuable consideration. In matters of this kind, the court has to address itself also to the question whether the conduct of the transferee was proved to be blameworthy, so as to vitiate the transaction.

(d) On October 16, 1987, Monark Enterprises made an application to the Additional Collector of Bombay for permission to create a mortgage in respect of the same plot and structures thereon in favour of the Bank of Maharashtra. An

application was also made by the parties concerned to the Collector of Bombay to cancel the permission which was already granted to the company on February 2, 1987, to create a mortgage of the said plot and structures thereon by the company in favour of the Bank of Maharashtra. A deed of mortgage was executed by Monark Enterprises in favour of the Bank of Maharashtra on September 24, 1987. The Additional Collector of Bombay granted his permission to create the said mortgage by his letter dated October 19, 1987. The said permission cures the alleged defect, if any, in the creation of the mortgage in favour of the Bank of Maharashtra on September 24, 1987, and the said mortgage binds the Collector of Bombay and all the parties to the deed of mortgage.

(e) Till October 16, 1987, Shri Ravi Nariman of the company was a consenting party to the transaction dated February 18, 1987. The company has received the amounts stipulated under the contract dated February 18, 1987. As a matter of fact, a joint application was made to the Collector of Bombay to effect transfer of the leasehold rights in favour of Monark Enterprises as far back as on February 18, 1987. It is unfortunate that Shri Ravi Nariman developed an afterthought and tried to back out of the transaction. By its letters dated October 16, 1987, and November 12, 1987, the company wrote to the Collector that no transfer should be effected in the record of the Collector in favour of Monark Enterprises in respect of the said plot No. 10 and structures thereon unless a no objection letter was issued by the company thereafter. Several allegations were made in these letters. To my mind, it was improper on the part of Shri Ravi Nariman to do so. The Additional Collector of Bombay, by his letter dated November 4, 1987, informed the company and its executive director, Shri Ravi Nariman, that the transfer in question was already effected by the Collector and it was lawfully effected in pursuance of the request received from the original lessor itself. By the said letter, the Additional Collector of Bombay informed the company that the decision to effect the transfer was taken by the Collector as far back as on September 14, 1987, and the said decision was already communicated to Monark Enterprises. It shall have, therefore, to be held that Shri Ravi Nariman acted unreasonably and illegally by attempting to back out from the transaction duly executed, completed and implemented after receiving all the benefits thereunder. When the official liquidator called upon the company to give an explanation in respect of the transaction dated

February 18, 1987, propounded by Monark Enterprises on January 16, 1989, the company, under the signature of Shri Ravi Nariman, informed the official liquidator that merely an agreement was entered into between the company and Monark Enterprises and that the said agreement was entered into subject to an understanding that Monark Enterprises will be liable to pay all the dues of the workmen. The ex-directors of the company have given up the stand taken in the said letter dated January 16, 1989, and the above-referred letters to the Additional Collector of Bombay. In my opinion, the said letter dated January 16, 1989, does not represent the truth and is in conflict with the plain provisions of the written agreement dated February 18, 1987, which was duly acted upon by the parties at the material time. I can attach no importance to the letter dated January 16, 1989, addressed by the company to the official liquidator or to the letters dated October 16, 1987, and November 12, 1987, addressed by the company to the Additional Collector of Bombay as the said letters are in the nature of an afterthought only and are in conflict with the reliable documentary evidence executed between the parties at the relevant time.

42. It has been contended by Mr. Puri that the properties are worth crores of rupees. Prima facie, there is no material of any nature whatsoever to indicate that the transaction is undervalued. The impugned transaction was cleared by the Income-tax Department. In the absence of any reliable material and in view of the detailed particulars set out in the affidavit dated September 7, 1991, and reference to the book value of the asset reflected in the balance-sheet of the company, I hold that this allegation is not at all proved. Prima facie, the transaction was entered into in good faith and for valuable consideration.

43. It has been argued by learned counsel for the official liquidator as well as by learned counsel for the petitioners-workmen that Monark Enterprises must have been aware of the circumstances indicating virtual bankruptcy of the company on the date of the transaction and the impugned transaction shall have to be scrutinised in the context of the insolvent position of the company on the date of the transaction to the knowledge of Monark Enterprises. Monark Enterprises denies that it had knowledge of the so-called alleged bankruptcy of the company on February 18, 1987. Learned counsel for the official liquidator and the

petitioners-workmen have emphasised that the court receiver appointed in the suit of the Central Bank had already taken charge of plot No. 7A and the machinery and if Monark Enterprises had taken due care and caution and made responsible enquiries in the matter, they would have definitely come to the conclusion that the transferor was in embarrassed circumstances. Before I analyse this submission, I consider it necessary to refer to the leading judgment of the Supreme Court indicating the approach which the court is enjoined to follow in cases of this kind. In the case of *N. Subramania Iyer v. Official Receiver*, : [1958]1SCR257 , the apex court dealt with an identical question under insolvency legislation. It was held by the apex court that the burden of proof was entirely on the official liquidator who impugned the transaction of transfer. In paragraph 10 of his judgment, Sinha J., speaking for the Bench of the Hon'ble Supreme Court, observed that it was not necessary for upholding the transaction that the transferor who had been subsequently adjudged as an insolvent should have been honest and straightforward in the matter of the transaction impeached. It was observed in paragraph 11 of the said judgment the both the transferor and the transferee must have shared a common intention to defraud the creditors. It was held that unless the conduct of the transferee was blameworthy, the transaction could not be annulled. In that case, the High Court had accepted the submission of the official liquidator who represented the estate of the insolvent that the burden of proof was on the transferee to prove that the transaction was bona fide. Relying on several judgments of the Privy Council, the apex court negated this proposition of law propounded in the judgment of the High Court under appeal. The definition of 'good faith' in the General Clauses Act (X of 1987) is in these terms :

'A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not.'

44. The same definition of 'good faith' is not adopted under the Indian Limitation Act, 1963. The definition of 'good faith' as set out in the Limitation Act, 1963, states that a thing shall not be deemed to be done in good faith if not done without due care or caution. The definition of good faith as enacted in the Limitation Act was erroneously adopted in the High Court's judgment in support of its finding that the impugned transaction of transfer or usufructuary mortgage was not a transaction in

good faith. The High Court held that the mortgagee had not acted with due care and caution and, therefore, the transaction could not be considered to have been effected in good faith. Overruling this approach of the High Court and its ultimate decision, our Supreme Court held that the definition of 'good faith' given in the General Clauses Act (X of 1987) shall have to be read in all Central statutes unless some other definition was provided in the specific statute. It was, therefore, held that the act of the transferee shall have to be held to have been done in good faith if it was done honestly, whether it was done negligently or without due care and caution. No definition of 'good faith' is to be found in the Companies Act I of 1956. Applying the ratio of this judgment to the facts of this case and their assessment and overall impact, I hold that Monark Enterprises had acted honestly in obtaining the transfer of the leasehold right in the plot in question and the structures thereon and their conduct is not blameworthy, although the conduct of the transferor is not free from doubt. It is not possible to hold that Monark Enterprises knew that the company was insolvent or that they acted in collusion or fraudulently or shared any common intention to defraud. The petitioning workmen have a valid claim. Merely because Monark Enterprises realised their lawful claim by obtaining a transfer, it cannot be inferred that Monark Enterprises acted fraudulently or not in good faith. Having regard to the totality of facts and circumstances of the case, it is impossible to hold that the transferor and the transferee shared the common intention to defraud other creditors or the workmen as directly or indirectly sought to be imputed to them. Monark Enterprises had supplied goods to the company. The company could have been sued also by the Bank of Maharashtra as well as by the Dena Bank by reason of the company having accepted the hundis for valuable consideration. In this view of the matter, I hold that the impugned transaction was entered into in good faith and for valuable consideration. The impugned transaction is not fraudulent or collusive. Accordingly I hold that the impugned transaction is not vitiated under section 531A of the Act. The official liquidator missed the point when he observed in paragraph 9 of his report that the said transaction could be avoided if it was not entered into in the ordinary course of business. The company was a company engaged in manufacture of suitings and shirtings. To deal in real estate was not the business of the company. No one can legitimately state that the impugned transaction was

entered into in the ordinary course of business. But that is not all. Section 531A of the Act provides for two contingencies. The said section saves transactions entered into in good faith and for valuable consideration though not entered into in ordinary course of business.

45. Learned counsel for the official liquidator has highlighted two more aspects of the impugned transaction and submitted that the said transaction cannot be said to have been arrived at in good faith by reason of these suspicious features apparent on the face of the record. Learned counsel has invited my attention to clause 1(VII) of the impugned agreement dated 18th February, 1987, which reads as under :-

'There is no claim of the employees of the assignors on the said plot or the said building or any part thereof and there is no judgment or order from any appropriate court or Tribunal or any court or authority having jurisdiction in India against the said plot or the said building or any part thereof and there is no decree, order or attachment ordered or granted by any court or authority against the said plot or the said building.'

46. Certain dues of the workmen were admittedly outstanding on 18th February, 1987. Learned counsel submits that this clause in the agreement shows the mala fides of the company and clearly proves that the conduct of the company and its directors entering into the impugned transaction was not straightforward. This clause merely states that the said plot or the building thereon was not encumbered by any claim of workmen or decree or order of the court or tribunal. The said clause does not state that no claim of workmen was pending against the company. The company is not prohibited in law from disposing of one or other of its assets in good faith and for valuable consideration merely because of the subsistence of the claim of the workmen. Even if the bona fides of the transferor are to be suspected, it does not automatically follow that the transferee acted in bad faith. In my judgment, the above clause of the agreement by itself is not sufficient to invalidate the impugned transaction or warrant a finding that the transaction was not entered into in good faith and for valuable consideration. The court is required to take an overall view of all the facts and circumstances. It is most unfortunate that the workmen's dues are still outstanding. However, on this ground alone I am not

prepared to treat the impugned transaction as void ab initio or set aside the transaction as fraudulent or otherwise illegal.

47. The second suspicious feature of the transaction, according to Mr. Cama, becomes obvious from the fact that the resolution dated 27th November, 1986, purported to have been passed by the board of directors of the company at plot No. 7A, Government Industrial Estate, Kandivli, Bombay, could not have been so passed as the said premises were then in charge of the court receiver and were duly sealed by the receiver. Monark Enterprises contends that they cannot throw any light on this aspect as a copy of the said resolution was furnished by Shri Ravi Nariman, managing director of the company to them. To my mind, the validity of the impugned transaction is not affected even if no such resolution was actually passed by the board of the company as the company has entered into and adopted the transaction throughout and implemented the same after receiving consideration therefor. The doctrine of indoor management protects the transferee and the transferor. There is nothing to show that the transferee was aware of the alleged infirmity in respect of the resolution. No director or shareholder of the company has impugned the transaction at the hearing before me. Shri Merchant, learned counsel for the former management of the company, has endeavoured to explain the alleged discrepancy regarding the alleged venue of the board meeting. It is not necessary to pursue this aspect further in view of there being no evidence whatsoever to prove blameworthy conduct of the transferee or any knowledge on the part of the transferee, Monark-Enterprises, about the alleged infirmity in the passing of the board resolution. Taking an overall view of all the facts and circumstances of the case, I hold that the official liquidator and the petitioners-workmen have failed to discharge the onus to prove fraud or collusion or any other ground sufficient in law to vitiate the impugned transfer. There is no material whatsoever to show lack of good faith on the part on the Bank of Maharashtra in accepting the mortgage of the said property. To my mind, the transaction of mortgage dated 24th September, 1987, was also entered into in good faith and for valuable consideration and the same is not affected by reason of the passing of the order for winding up the company.

48. Shri Puri, learned counsel for the petitioners-workmen, submitted that the provisions of section 25FF of the Industrial Disputes Act, 1947, are applicable to the present case. I am not at all impressed by this contention. Section 25FF has no application to this case.

49. Section 537 of the Companies Act was invoked by learned counsel for the official liquidator and the petitioners-workmen as an additional ground for impeaching the transaction. Section 537 invalidates attachments, distress or execution put in force, without leave of the court, against the estate or effects of the company, after the commencement of the winding up. Both learned counsel relied on section 537(1)(b) of the said Act and submitted that the expression 'any sale held' would vitiate the impugned transaction as the agreement of 18th February, 1987, culminated in a sale only on 14th September, 1987, or 19th October, 1987, when the winding up proceedings has already commenced and it was admitted that no leave of the court was obtained. In my judgment, section 537(1)(b) of the Act has no relevance at all to the problem. The said section shall apply only to such sales which were held in pursuance of attachment, distress or execution levied by the court or by any other competent authority. The present transaction was a voluntary transaction and not a transaction in pursuance of attachment, distress or execution put in force. In taking this view, I am supported by the judgment of the Supreme Court in the case of *M. K. Ranganathan v. Govt. of Madras* : [1955]2SCR374 . Whilst scrutinising the argument based on section 537 of the Act, I came across section 536 of the said Act. The said section clearly provides that 'voluntary dispositions' of the property during the relevant period shall be treated as void unless the court otherwise validates the same. Thus, all transactions effected during the relevant period prior to the commencement of winding up are dealt with under sections 531(1) and 531A of the Act and all voluntary transactions of disposition after the commencement of winding up are dealt with under section 536(2) of the said Act. The matter was, therefore, placed on board inviting submissions by learned counsel on the interpretation of section 536(2) of the Act.

50. In *Estates Development Ltd., In re* [1957] 27 Comp Cas 581, the High Court of Punjab held, at page 587, that section 227(2) of the Indian Companies Act, 1913,

which is in pari materia with section 536(2) of the [Companies Act, 1956](#), shall have no application where a contract was already concluded prior to the commencement of the winding up and the transaction was merely completed during the period of winding up in pursuance of such contract which was concluded prior to the commencement of winding up. In that case an auction sale was already held prior to the presentation of the winding up petition. It was held by the court that the contract was complete in all respects and only the conveyance remained to be drawn up and completed. It was held that the transaction completed in pursuance of the contract already arrived at prior to the commencement of the winding up could not be annulled under the said section. The basic principle is clear. Section 536(2) of the Act cannot be invoked unless the transferor exercises disposing power after the commencement of winding up. In this case, the disposing power had already been exercised by the transferor prior to the commencement of the winding up and the only thing which remained to be done was obtaining of sanctions and permissions from various authorities. Thus the transaction cannot be treated as 'disposition of property' effected after the commencement of the winding up. The impugned transaction is, therefore, not vitiated either under section 537 or section 536(2) of the Act.

51. On this aspect, it is useful to refer also to the judgment of Vinelott J. of the Chancery Division in French's (Wine Bar) Ltd., In re [1987] BCLC 499. In this case, the company had entered into a contract in October, 1985, for sale of its leasehold premises, goodwill, fixtures and fittings and its stock-in-trade. The contract provided that the company could rescind the contract if it was unable to obtain the necessary consent to the assignment from the lessor. The purchaser was allowed to get into possession on payment of deposit in October, 1985. On 5th December, 1985, a petition for winding up was presented to the court. During the pendency of this petition, i.e., on 17th January, 1986, the contract was completed and the lease was transferred to the purchasers and proceeds of the sale distributed to the company's bank. An order for winding up the company was passed on 31st January, 1986. The question before the court was as to whether the transaction was liable to be avoided under section 522 of the English Companies Act, 1985. It was held by the court that where a company had entered into an unconditional contract for sale of the property before the petition for winding up was presented

and the contract was duly completed in accordance with its terms after the petition had been presented, the transaction did not constitute a disposition of the property of the company within the meaning of the relevant provisions. The court relied on the observations made in the judgment of Buckley J. in the case of Gray's Inn Construction Co. Ltd., In re [1980] 1 All ER 814. The said observations are as under :

'It is a basic concept of our law governing the liquidation of insolvent estates, whether in bankruptcy or under the Companies Act, that the free assets of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent's unsecured creditors as at that date. In bankruptcy this is achieved by the relation of the trustee's title to the bankrupt's assets back to the commencement of the bankruptcy. In a company's compulsory winding up it is achieved by section 227. (That is of the 1948 Act, the predecessor of section 522).'

52. Analysing the said observations of Buckley L.J., Vinelott J. felt that the company must be beneficially entitled to the assets on the relevant date and the asset must be such as is capable of being released for the benefit of its creditors.

53. In the instant case also, the contract was arrived at between the parties much before the presentation of the petition for winding up and it was merely completed during the pendency of the winding up petition inasmuch as the necessary sanction of the Collector was received during that period. Prior to the presentation of the winding up petition Monark Enterprises were already put in possession of the property and the said purchaser had already parted with substantial amounts in pursuance of the contract already concluded.

54. Relying on the judgment of the High Court of Punjab in the case of Estates Development Ltd., In re [1957] 27 Comp Cas 581, already referred to hereinabove and the above-referred English case, I hold that the impugned transaction is not affected by the provisions contained in section 536(2) of the Act. In substance, the company had already exercised its disposing power prior to the presentation of the petition for winding up and the instant case cannot be considered as a case of disposition of property effected after the presentation of winding up petition merely

because the permission or sanction of the Collector was received in September, 1987. Viewed in this perspective and taking an overall view of the matter, the impugned transaction shall have to be treated as valid as it does not suffer from any legal infirmity.

55. Mr. Puri, learned counsel for the petitioners-workmen, then argued that without the workmen's consent, no transfer could be effected as the workmen are deemed to be co-owners of the undertaking. There is no merit in this contention also.

56. In view of the above discussion, I pass the following order :

(1) Report of the official liquidator dated 9th November, 1990 :

(a) Leave is granted to the official liquidator to take out proceedings against the ex-directors of Kishco Mills Pvt. Ltd. and Mr. Wadhoo Sakhrani in respect of the alleged preferential payments out of the sale proceeds received by the said Kishco Mills Pvt. Ltd. from Monark Enterprises.

(b) Application of the official liquidator for leave to take out proceedings to impugn the transaction of 18th February, 1987, is rejected in view of the findings recorded and orders passed on Company Applications Nos. 136 and 137 of 1991 after hearing the official liquidator.

(2) Company Application No. 136 of 1991 :

(a) Judge's summons is made absolute in terms of prayer (a). This order shall be operative after 10th December, 1991, in order to enable the petitioners and the official liquidator to consider filing of an appeal, if so advised.

(b) Prayer (b) of the judge's summons is adjourned for recording oral evidence.

(c) Having regard to the facts and circumstances of the case, there shall be no order as to costs.

(d) Since the conduct of Shri Ravi Nariman appears to be blame-worthy, the official liquidator shall probe into the question and make a report to the learned company judge at the earliest possible opportunity as to whether any proceeding

should be taken in the matter for alleged misfeasance or non-feasance.

(di) The workmen appear to have a pari passu charge in respect of the assets belonging to the company on the date of winding up. No final opinion is expressed. The official liquidator shall apply to the learned company judge for permission to adopt proceedings for sale of plot No. 7A after taking necessary legal advice and for return of the part of the amount already disbursed to the Central Bank from the sale proceeds of movables for the benefit of the workmen who appear to have a pari passu charge on the securities along with the secured creditors of the company under section 529A of the Act.

(e) Oral application of the official liquidator for leave to file a suit to challenge the decree dated 5th September, 1986, is rejected.

(3) Company Application No. 137 of 1991 :

Judge's summons is dismissed, with no order as to costs. (4) The Central Bank of India is directed to pay to the petitioners-workmen 'on account' a sum of Rs. 2,000 without prejudice to their legal rights and contentions to enable the petitioners to file an appeal against this order, if so advised, and to meet the cost of litigation in part. Such payment shall be made on or before 25th November, 1991, to the petitioners or their advocate.

(5) Costs of the official liquidator to come out of the assets of the company in liquidation.

(6) Issue of a certified copy of this order is expedited.