

(2009) 12 MAD CK 0078**Madras High Court****Case No:** C.A. No. 1000 of 2009 in C.P. No. 51 of 2007

K. Periasamy Gounder APPELLANT
Vs
Kothari Industrial Corporation
Ltd. and Kotak Mahindra Bank
Limited RESPONDENT

Date of Decision: Dec. 22, 2009**Acts Referred:**

- Companies Act, 1956 - Section 443(2), 536(2)
- Constitution of India, 1950 - Article 227
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 19, 19(25)
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13(13), 13(2), 13(4), 17, 34(1)

Citation: (2010) 1 CTC 62**Hon'ble Judges:** V. Ramasubramanian, J**Bench:** Single Bench**Advocate:** P.H. Arvind Pandian in CA 1000/2009, for the Appellant; P.L. Narayanan, Advocate for Kotak Mahindra Bank Ltd.; Mr. T.K. Seshadri, for Kothari Industrial Corporation Limited., for the Respondent**Judgement**

V. Ramasubramanian, J.

While the Company Application C.A. No. 1000 of 2009 is by one K. Periasamy Gounder, seeking permission to get a transfer of 3 properties, one in Nariman Point, Mumbai, another in Tiruchirappalli and a third in Coimbatore, belonging to Kothari Industrial Corporation Ltd., which is the Company sought to be wound up in C.P. No. 51 of 2007, the other 2 applications, C.A. Nos. 1740 and 1741 of 2009 are by the petitioning creditor viz., Kotak Mahindra Bank Ltd., seeking (i) an interim injunction restraining the Company-Kothari Industrial Corporation Ltd., from alienating, disposing of the shares of Glenworth Estate Ltd., and Adderley Estate Ltd., or in any

manner encumbering its movable and immovable assets, and (ii) a direction to the Company not to place any agenda in the Annual General Body meeting, regarding the transfer of any of the fixed assets of the Company to any third party. I have heard Mr. P.L. Narayanan, learned counsel appearing for the petitioning creditor Kotak Mahindra Bank Ltd., Mr. T.K. Seshadri, learned Senior Counsel appearing for the Kothari Industrial Corporation Ltd., which is the Company sought to be wound up, Mr. P.H. Arvind Pandian, learned counsel appearing for the third party prospective purchaser, who is the applicant in C.A. No. 1000 of 2009.

2. Though the Application C.A. No. 1000 of 2009 filed by the agreement holder (prospective buyer) seeking permission to complete the deal relating to the purchase of 3 properties of the Company in question, came up earlier for hearing and orders were reserved on 23.11.2009 and the other two Applications filed by the petitioning creditor came up later, all of them are disposed of in common by this order, since the question for my decision arise out of the same set of facts.

Pleadings and Prayer in C.A. No. 1000 of 2009:

3. The case of Mr. K. Periasamy Gounder, the applicant in C.A. No. 1000 of 2009, is that he entered into a Memorandum of Understanding on 16.3.2009 with the Company Kothari Industrial Corporation Ltd., and its Managing Director Pradip D. Kothari. In terms of the said Memorandum of Understanding, the applicant has to discharge the secured loans of the Company, to the tune of Rs. 12.50 crores, in consideration of the Company transferring the properties in (i) Trichy (ii) Coimbatore (iii) Coonoor, Nilgiris District, and (iv) Coimbatore. In terms of the Memorandum of Understanding, the applicant had already made payment of a sum of Rs. 3.90 crores by way of demand drafts into the Bank of Baroda, Rs. 75 lakhs by way of cash into the Punjab National Bank and Rs. 50 lakhs by way of cheques into the Central Bank of India, totalling to a payment of Rs. 5.15 crores. According to the applicant K. Periasamy Gounder and the first respondent Company, the payments already made and the balance to be made, are towards one time settlements reached by the first respondent with their bankers.

4. While the Memorandum of Understanding was allegedly entered into on 16.3.2009 and the above part payments were allegedly made on 31.3.2009, an order for winding up the Company Kothari Industrial Corporation Ltd., was passed on 8.4.2009 at the instance of the Kotak Mahindra Bank Ltd. However, on Appeal in O.S.A. No. 89 of 2009, the Division Bench granted interim stay of the order of winding up, on 27.4.2009. By a further order dated 30.4.2009, passed in M.P. No. 2 of 2009, the Division Bench also permitted the Company in question to proceed with the one time settlement proposals entered into with the Banks. Consequently, the applicant K. Periasamy Gounder paid a sum of Rs. 1.86 crores on 4.5.2009 to the Bank of Baroda, a sum of Rs. 12,36,800/- on 4.5.2009 to the Central Bank of India and Rs. 2.25 crores on 22.5.2009 to the Central Bank of India. All the payments made during the period from 16.3.2009 to 31.3.2009 and during the period from 4.5.2009

to 22.5.2009 totalled to Rs. 9,37,36,800/-. According to the applicant as well as the first respondent Company, the dues of Bank of Baroda stood fully settled and the dues of the Central Bank of India stood settled to the extent of Rs. 287.37 lakhs out of the OTS amount of Rs. 300 lakhs.

5. The Appeal O.S.A. No. 89 of 2009 filed by the first respondent Company, was allowed by the Division Bench on 10.7.2009 and the Petition for winding up was remanded back to the Company Court to proceed in accordance with law.

6. After the order of the Division Bench, the applicant K. Periasamy Gounder entered into a supplementary MOU on 14.7.2009 with the Company in question, for the purchase of the office premises bearing door Nos. 144 and 145, measuring about 1,895 sq. ft., in Mittal Court, Nariman Point, Mumbai, for a total consideration of Rs. 3 crores. According to the applicant, he was forced to enter into this supplementary MOU, to safeguard the payments already made to the extent of Rs. 9.37 crores under the first MOU.

7. Apart from entering into a supplementary MOU purportedly for safeguarding the payment of Rs. 9.37 crores made under the first MOU, the applicant also got a Sale Deed executed and registered in favour of his nominee, on 16.7.2009 in respect of one property at Coimbatore, measuring an extent of about 70 cents in T.S. No. 481/1, Uppilipalayam village, Singanallur, Coimbatore, taking a stand that the said property was free of encumbrances. Similarly, terming another property at Coonoor, Nilgris District, also as encumbrance free, the applicant got a Power of Attorney executed in favour of his nominee.

8. Therefore, in essence, the applicant had obtained a conveyance in respect of one property and completed all necessary steps for completing the conveyance in respect of another property, thereby gaining complete control over two out of the four properties covered by the first MOU dated 16.3.2009. In respect of the remaining two properties, one in Coimbatore and one in Trichy, covered by the first MOU and in respect of the property at Mumbai, covered by the supplementary MOU, the applicant wants the nod of this Court. Hence this Application.

9. As expected, the first respondent Company has filed a counter affidavit in C.A. No. 1000 of 2009, confirming all the above facts and contending that there is no legal impediment for them to sell any of its properties and that therefore they have no objection to the Application being allowed as prayed for.

10. However the petitioning creditor-Kotak Mahindra Bank, which is the second respondent in this Application, has claimed in their counter affidavit that proceedings under the SARFAESI Act, have already been initiated and that there is also a prohibitive order passed by the Debt Recovery Tribunal on 30.3.2007 in I.A. No. 586 of 2005 in O.A. No. 23 of 2005. They have also stated in the additional counter affidavit that though the Division Bench granted an order in M.P. No. 2 of 2009 in O.S.A. No. 89 of 2009 on 30.4.2009, the Bench ultimately dismissed the

Miscellaneous Petition, while allowing the main Appeal. The petitioning creditor claims that the Company in question availed various facilities from the State Bank of India and mortgaged various properties in their favour. According to the petitioning creditor, they obtained an assignment of the debt with the underlying security from the State Bank of India. No one time settlement has been reached by the Company in question either with the State Bank of India or with the petitioning creditor, though the assignment is questioned in other proceedings. As against the order passed in O.S.A. No. 89 of 2009 by the Division Bench, the petitioning creditor has already filed an Appeal in SLP (Civil) No. 25151 of 2009. While ordering notice in the Special Leave Petition, the Supreme Court passed an interim order on 9.11.2009, restraining the first respondent-Company from alienating its assets, without the prior permission of the Company Court. Therefore, according to the petitioning creditor, the permission sought for by the agreement holder K. Periasamy Gounder cannot at all be granted since both the applicant as well as the Company in question, lack bona fides.

Pleadings and Prayer in C.A. Nos. 1740 and 1741 of 2009:

11. As stated earlier, Kotak Mahindra Bank has come up with these applications praying for (i) an interim injunction restraining the Company in question viz., Kothari Industrial Corporation Ltd., from alienating or disposing of the shares of Glenworth Estate Ltd., and Adderley Estate Ltd., and from encumbering its movable and immovable assets and (ii) an interim direction to the Company not to place any agenda before the AGM, relating to the transfer of shares.

12. It is the case of the Bank that ICICI Bank extended two rupee term loans and two foreign currency loans to the Company in question and the Company mortgaged two Estates known as Glendale Tea Estate and Adderley Estate, both at Coonoor, Nilgris District. The Company committed default forcing the ICICI Bank to file an Application in O.A. No. 23 of 2005 before the Debts Recovery Tribunal-I, Chennai, u/s 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993. The claim of ICICI Bank in the said application was for recovery of Rs. 8,18,80,538/-, together with interest at the contracted rate from 1.10.2004.

13. The applicant Bank viz., Kotak Mahindra Bank obtained an assignment of the debt from ICICI Bank and filed an application for substitution of their name in the place of ICICI Bank. Though the Tribunal ordered substitution, the Appellate Tribunal and subsequently this Court, modified the same and the larger question of validity of similar assignments are now pending adjudication before the Supreme Court.

14. Though the applicant Bank sought an interim injunction in I.A. No. 586 of 2005 in O.A. No. 23 of 2005 against alienation of assets, the Company transferred Glendale Estate, to and in favour of a Company by name Glenworth Estate Ltd. Similarly they transferred the other Estate viz., Adderley Estate, to and in favour of a Company by

name Adderley Estate Ltd. The transferee companies were wholly owned subsidiaries of the Company in question. But these transferee companies, according to the applicant Bank, are only special purpose vehicles created with the sole object of transferring the assets of the Company. After transferring the above Estates to the subsidiary companies, the Company in question had sought to transfer its shareholding in these companies to a third party by name SPG Exim Pvt. Ltd. Since the applicant Bank gained an impression that the agenda relating to the transfer of shareholdings was about to be placed in the 39th Annual General Meeting scheduled to be held on 14.12.2009, the applicant Bank has come up with the present applications.

15. The Company in question has filed a counter affidavit contending primarily that the question of substitution has been left open now for a fresh consideration, after the orders of the Debts Recovery Appellate Tribunal and the order of the Division Bench of this Court. Apart from the said fact, the contention of the Company is that the transfer of the two Estates took place way back in September 2005 and that the transferee companies subsequently ceased to be subsidiary companies. Therefore, according to the Company, the prayer for an injunction restraining the transfer of shares, does not survive for adjudication. In so far as the prayer relating to the agenda for the 39th AGM is concerned, it is the contention of the Company that the notice for the AGM had already been issued. The notice does not contain an agenda for transfer of the shares, since the transfer had already taken place. Therefore, in the absence of an agenda, the prayer in the second Application cannot also be granted.

16. Before considering the rival contentions of the parties in these Applications, it is necessary to place on record certain background facts, without which, any appreciation may not be fruitful. Therefore, they are advanced to as follows:

Background Facts;

17. ICICI Bank Ltd. filed an Application in O.A. No. 23 of 2005 on the file of the Debts Recovery Tribunal-I, Chennai, u/s 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 against Kothari Industrial Corporation Ltd. and Kothari (Madras) International Ltd., seeking recovery of a sum of Rs. 8,18,80,538/-, allegedly due as on 30.9.2004 together with future interest and other charges at the contractual rate from 1.10.2004 from the first defendant and also seeking recovery of a sum of Rs. 210 lakhs together with future interest from 23.12.2004 from the second defendant. It was claimed by ICICI Bank in the said Application that the defendants had mortgaged (i) the lands of the extent of about 482.15 acres in Burliar village, the lands of the extent of about 51.57 acres in Yedlapalli village, the lands of the extent of about 301.18 acres in Melur village, the lands of the extent of about 8,497 acres in Coonoor, Hubathalai and Hulakal villages at Coonoor, all of which were described in Schedule "A" to the application before the Debts Recovery Tribunal, and (ii) an Estate known as Brooke lands Estate, Coonoor described in

Schedule "B". It was also claimed by ICICI Bank that the defendants hypothesized all the movable properties described in Schedule "C" to the application before the Tribunal.

18. After filing the main Original Application O.A. No. 23 of 2005, in January 2005, ICICI Bank and Kotak Mahindra Bank Ltd., joined together and filed an Interim Application in June 2005 in I.A. No. 559 of 2005 in O.A. No. 23 of 2005 u/s 19(25) of the Act, seeking to substitute Kotak Mahindra Bank Ltd., in the place of the applicant ICICI Bank Ltd., and to permit consequential amendments. It was the claim of ICICI Bank Ltd., and Kotak Mahindra Bank Ltd., in that application that ICICI Bank Ltd., assigned the debts due by the defendants, in favour of Kotak Mahindra Bank Ltd., confirmed under an Agreement dated 20.4.2005.

19. When the Application for substitution was pending, Kotak Mahindra Bank Ltd., also filed another Application in December 2005 in I.A. No. 586 of 2005, seeking an interim order of injunction restraining the defendants in the main Original Application from alienating, encumbering or transferring their assets and shares pending disposal of the main Original Application. In the said Application, an ad interim order was passed by the Tribunal on 15.12.2005 (before the Interim Application got numbered), directing the defendants to maintain status quo as on that date, in respect of their immovable properties/shares possessed by them.

20. After the order of status quo was granted by the Tribunal, the Kothari Industrial Corporation Ltd. (first defendant before the Tribunal) filed an Application in February 2006 in I.A. No. 67 of 2006 in I.A. No. 586 of 2005 in O.A. No. 23 of 2005. The prayer of Kothari Industrial Corporation in that I.A. No. 67 of 2006, read as follows:

For the reasons stated it is therefore prayed, that this Hon"ble Tribunal may be pleased to permit the petitioner to complete the transfer of the Adderley Estate to and in favour of its wholly owned subsidiary Company i.e., M/s. Adderley Estate Ltd., and pass such further or other orders as this Hon"ble Tribunal may deem fit and proper and thus render justice.

21. In the affidavit in support of I.A. No. 67 of 2006, Kothari Industrial Corporation claimed (i) that they had offered their plantation properties described in Schedule "A" to O.A. No. 23 of 2005 as collateral security for the financial assistance rendered by ICICI Bank Ltd.; (ii) that in order to avoid various legal entanglements, they had decided to transfer an estate owned by them in Coonoor and known as Adderley Estate to a wholly owned subsidiary Company by name M/s. Adderley Estate Ltd., which was specifically incorporated for the purpose; (iii) that the Company had already resolved to transfer the estate as a going concern to the subsidiary Company and to enter into joint venture with any person for managing the estate or otherwise to dispose of the said estate; (iv) that a resolution was passed by the shareholders through postal ballots, approving the transfer, as seen from the

scrutiny report dated 8.10.2005; (v) that all formalities for the transfer have already been effected and only the registration of the Transfer Deed was yet to be completed; (vi) that though Kotak Mahindra Bank communicated the ex parte interim order of status quo passed on 15.12.2005, without enclosing necessary copies of the affidavits, etc., the Company did not effect transfer, based on the letter issued by Kotak Mahindra; (vii) that all transactions with regard to the passing of resolutions of shareholders and other transfer formalities have been completed except registration; (viii) that the transfer will not come in the way of the Banks enforcing the charge, since the transfer would be along with charges, mortgages, liabilities and all encumbrances; and (ix) that therefore, the Tribunal should grant permission to complete the transfer of the estate to the wholly owned subsidiary Company of the applicant Kothari Industrial Corporation.

22. It is pertinent to point out here that the above Application I.A. No. 67 of 2006 was filed by Kothari Industrial Corporation, in I.A. No. 586 of 2005, which was the application for injunction filed by Kotak Mahindra Bank, since an interim order of status quo was operating in that application and that interim order was construed as an impediment for proceeding with the transfer.

23. In the meantime, Kotak Mahindra Bank took out another Application in I.A. No. 122 of 2006, praying for a direction to the Company and its managerial personnel to file an affidavit into the Tribunal, disclosing the present status of affairs, its shares, various assets and properties. In the affidavit in support of this application, Kotak Mahindra Bank stated that the Company had floated a wholly owned subsidiary Company by name Glenworth Estates Ltd., and that there was an attempt to transfer the assets, including those which formed the subject matter of the proceedings before the Tribunal. It was also contended by the Bank in that Application that third parties are inducted into the management of the Estate and that there was an attempt to cut and remove huge trees in the Estate.

24. On 2.5.2006, the DRT-I, Chennai, passed an order in I.A. No. 122 of 2006, directing the Company and its managerial personnel to file an affidavit before the Tribunal, disclosing the present status of the affairs of the Company, its shares and its various assets, within two weeks.

25. Subsequently, Kotak Mahindra Bank filed two more Applications in I.A. Nos. 135 and 136 of 2006 in O.A. No. 23 of 2005, praying inter alia for (i) setting aside the transaction relating to the transfer of Adderley Estate in favour of Adderley Estates Ltd., under the Deed of Transfer presented for registration on 15.3.2006 and pending registration with the Sub-Registrar, Coonoor as pending document No. 5 of 2006, and (ii) directing Sub-Registrar to deposit the document pending with him, into the Tribunal. These two Applications were filed by Kotak Mahindra Bank in the third week of May 2006.

26. In the meantime, the DRT-I, Chennai, passed orders on 2.2.2006, showing the Application I.A. No. 559 of 2005 for substitution of the name of Kotak Mahindra Bank in the place of ICICI Bank. As against the said order, the Company filed an Appeal in M.A. No. 138 of 2006 before the Debts Recovery Appellate Tribunal. The Appellate Tribunal disposed of the said Appeal by an order dated 21.7.2006, directing the DRT-I, Chennai, to frame a specific issue as to "whether the substitution was valid ?" and to decide the said issue along with all other issues at the time of disposal of the main Application O.A. No. 23 of 2005.

27. Thereafter, I.A. No. 67 of 2006 filed by Kothari Industrial Corporation, seeking permission to complete the transfer of Adderley Estate and I.A. No. 135 of 2006 filed by Kotak Mahindra Bank for setting aside the transaction relating to the transfer of Adderley Estate were taken up together for disposal by the DRT-I, Chennai. By a common order dated 30.3.2007, the Tribunal directed both parties to maintain status quo till the disposal of the main O.A. While passing the said order, the Tribunal recorded a finding in paragraph-9 that there was a *prima facie* case and balance of convenience in favour of the Bank.

28. Though the Tribunal granted only an order of status quo on 30.3.2007 in I.A. Nos. 135 of 2006 and 67 of 2006, the Tribunal took up the earliest Injunction Application I.A. No. 586 of 2005 separately for consideration. It may be recalled that in this I.A. No. 586 of 2005 (prior to its getting numbered) the Tribunal granted a status quo order *ex parte* on 15.12.2005 and directed notice to be issued. In this application, the Tribunal heard the parties and passed a separate order on 30.3.2007 (the very date on which I.A. Nos. 135 of 2006 and 67 of 2006 were disposed of). By this order, the Tribunal allowed I.A. No. 586 of 2005. In other words, an interim order of injunction was granted in this Application restraining the Company Kothari Industrial Corporation Ltd. and Kothari (Madras) International Ltd., from alienating, encumbering or transferring their assets/shares pending disposal of the main O.A. No. 23 of 2005.

29. Despite succeeding in getting I.A. No. 586 of 2005 for interim injunction allowed by the Tribunal on 30.3.2007, Kotak Mahindra Bank was not satisfied with the grant of a mere status quo order on 30.3.2007, in I.A. No. 135 of 2006. Therefore, Kotak Mahindra Bank filed an Appeal in M.A. No. 83 of 2007. The Debts Recovery Appellate Tribunal disposed of the said Appeal by an order dated 12.11.2007, directing the DRT-I, Chennai, to dispose of the main O.A., within 3 months and also directing both parties to maintain status quo.

30. After filing a Review before the Appellate Tribunal and losing the same, Kotak Mahindra Bank filed a Revision Petition under Article 227 of the Constitution, before the Division Bench of this Court in C.R.P.(PD) No. 1953 of 2008. This Revision Petition was disposed of by the Division Bench, by an order dated 15.7.2008. By the said order, the Division Bench set aside the orders of the Appellate Tribunal and remitted the matter, for a determination of the question relating to substitution and

thereafter for a determination of the legality and propriety of the transfer of the mortgaged property in question. However, the Division Bench also directed both parties to maintain status quo in the meantime.

31. On 11.9.2008, the Bank of Baroda, along with other creditors viz., Central Bank of India, Kotak Mahindra Bank, State Bank of Travancore and Punjab National Bank, issued 2 statutory notices u/s 13(2) of the SARFAESI Act, to Kothari Industrial Corporation and to the guarantor Pradip D. Kothari, calling upon them to pay the amounts due to each of the secured creditors, including the Kotak Mahindra Bank, within 60 days. Two more notices were issued u/s 13(2) on 13.10.2008 by the Bank of Baroda on behalf of themselves and also on behalf of the other secured creditors, including the Kotak Mahindra Bank Ltd. to Kothari Industrial Corporation and to the guarantor. The properties of the Company at Trichy, Coimbatore, Mumbai, Hasan and Ennore were covered by the 4 notices issued u/s 13(2) of the SARFAESI Act. The Authorised Officer of the Bank of Baroda also issued public notices in newspapers on 4.12.2008 and 13.12.2008, cautioning the public not to deal with the properties described in those notices.

32. The Company raised objections to the notices issued u/s 13(2) of the SARFAESI Act, but the objections were overruled by the Bank of Baroda and possession notices u/s 13(4) of the Act, were published in newspapers on 29.12.2008, 20.2.2009, 24.2.2009 and 24.2.2009. Therefore, the Company filed a statutory Appeal u/s 17 of the SARFAESI Act, 2002 in S.A. No. 97 of 2009, on the file of the DRT-II, Chennai.

33. In the meantime, on 8.4.2009, the Company Petition C.P. No. 51 of 2007, out of which the present applications have arisen, was allowed, ordering the winding up of the Company and directing advertisements in the prescribed form to be issued in newspapers. But the said order was challenged by the Company on Appeal in O.S.A. No. 89 of 2009, primarily on the ground that the winding up order was passed, without even admitting the Company Petition and that the order was violative of the provisions of Section 443(2) of the Companies Act, 1956 and Rules 96 and 99 of the Companies (Courts) Rules, 1959.

34. The appeal O.S.A. No. 89 of 2009 was admitted by the Division Bench on 27.4.2009 and an interim stay was also granted. After the Appeal was admitted, the Company filed a Miscellaneous Petition in M.P. No. 2 of 2009, seeking permission of the Court to transfer the properties mentioned in the Schedule to the Judges Summons, in favour of K. Periasamy Gounder, in terms of the MOU dated 16.3.2009 entered into with him. That Miscellaneous Petition was taken up by the Division Bench on 30.4.2009 and an order was passed, to the following effect:

As the relief sought for in this Petition requires elaborate consideration after hearing the arguments of the respective learned counsel, in view of the fact that one time settlement arrived at with the Bank of Baroda, State Bank of Travancore and Punjab National Bank expires today i.e., on 30.4.2009 and yet another one time

settlement entered with Central Bank of India also expires on 20.5.2009, pending further order in this Application and keeping the last date for honouring the one time settlement we permit the payment of the said amount.

2. The respondents shall file counter, post the matter on 16.6.2009.

35. Ultimately, by an order dated 10.7.2009, the Division Bench allowed the Appeal O.S.A. No. 89 of 2009 and set aside the order of winding up passed on 8.4.2009 in C.P. No. 51 of 2007 and remitted the matter back to the Company Court, for proceeding afresh in accordance with the statutory provisions. While doing so, the Division Bench dismissed M.P. No. 2 of 2009, whereby permission was sought by the Company to transfer the properties in favour of K. Periasamy Gounder in terms of the MOU dated 16.3.2009. The last para of the order of the Division Bench dated 10.7.2009 in O.S.A. No. 89 of 2009, reads as follows:

The Appeal stands disposed of in the above terms. However, there will be no order as to costs. The application in M.P. No. 2 of 2009 is taken out seeking for permission from the Court to permit the applicant-Company to transfer the properties in favour of the purchasers in terms of the Memorandum of Understanding dated 16.3.2009. In as much as the order passed by the Company Court is set aside and the matter is remitted back to the Company Court, we are not entertaining this Application and the Application is dismissed. The connected M.P. No. 1 of 2009 is closed.

36. As against the said order of the Division Bench, setting aside the order of winding up, Kotak Mahindra Bank filed a SLP before the Supreme Court in SLP (Civil) No. 25151 of 2009. On 9.11.2009, the Supreme Court ordered the issue of notice in the SLP and passed the following order:

Issue notice.

Mr. P.H. Parekh, learned Senior Counsel accepts notice on behalf of respondent No. 1.

Pending hearing and final disposal of this SLP, we direct respondent No. 1 herein not to alienate its assets without the permission of the Company Court and when respondent No. 1 seeks to alienate any of its assets in any form, it can do so after obtaining prior permission of the Company Court. This order will not come in the way of the petitioners in carrying on its normal business.

Tag with SLP (C) Nos. 2241-2253 of 2009.

37. SLP (Civil) Nos. 2241 to 2253 of 2009, to which a reference is made in the last line of the above order of the Supreme Court dated 9.11.2009, is a batch of cases in which the larger question relating to validity of assignment of debts has been raised. Kothari Industrial Corporation has nothing to do with the said batch of Special Leave Petitions. But SLP (Civil) No. 25151 of 2009 arising out of the Division Bench order in O.S.A. No. 89 of 2009 has been directed to be tagged along with the

said batch of cases, presumably on the ground that Kotak Mahindra Bank also claims to be an assignee of the debts of the Company and the assignment is questioned by the Company in the proceedings before the Debts Recover Tribunal. It appears that in the said batch of cases where the larger question of validity of assignment is involved, the Supreme Court had passed an order on 16.2.2009, to the following effect:

Indian Bank Association and Reserve Bank of India are permitted to intervene.

Office is directed to list these matters for final hearing on 14th April, 2009.

Pending hearing and final disposal of the Special Leave Petitions, on furnishing undertakings, both by the assignor Banks and assignee Banks, the assignee Banks shall be permitted to participate in proceedings held by Asset Sales Committee, as also proceedings before the Company Court, without prejudice to the rights and contentions of the parties before us. It is made clear that in the event of dismissal of these Special Leave Petitions, the assignor Banks and the assignee Banks will reverse the transactions which they enter into during the interim period within the period to be stipulated by this Court at the final hearing of the matters. This order is required to be passed in order to see that the secured debts do not go unrepresented.

Pending hearing and final disposal of the Special Leave Petitions, we further direct that any disbursement to secured creditors shall, where the debt stands assigned, be made to the assignees. This order will not be construed as an acceptance of the assignments pending the present Special Leave Petitions.

Parties to complete their pleadings within three weeks from today. Liberty to file documents, if so advised.

38. The above order of the Supreme Court passed in the batch of cases SLP (Civil) Nos. 2241 to 2253 of 2009, is extracted only for the purpose of completion of the narration of facts, since the Supreme Court has referred to this batch of cases, while issuing notice in SLP (Civil) No. 25151 of 2009 arising out of O.S.A. No. 89 of 2009.

39. It is interesting to note that the first order of status quo passed by the DRT-I, Chennai in I.A.S.R. No. 1932 of 2005 (which later got numbered as I.A. No. 586 of 2005) on 15.12.2005, was not challenged by the Company. In the very Application filed by the Company in I.A. No. 67 of 2006, seeking permission to complete the transfer of Adderley Estate, the Tribunal passed an order of status quo. The Appellate Tribunal as well as the Division Bench of this Court also directed status-quo to be maintained till the disposal of the main Original Application OA. No. 23 of 2005. The DRT-I, Chennai, allowed the Application for injunction I.A. No. 586 of 2005, by an order dated 30.3.2007. This order has not so far been challenged by Kothari Industrial Corporation. On the other hand, the Company chose to challenge the very maintainability of further proceedings in OA. No. 23 of 2005, by way of a

Civil Revision Petition in C.R.P. No. 3331 of 2009. Pending the disposal of the Revision Petition, the Company filed a Petition in M.P. No. 1 of 2009 for interim stay of further proceedings before the Tribunal in O.A. No. 23 of 2005. In the said Miscellaneous Petition, the Division Bench passed an order on 24.10.2009, to the following effect:

There shall be an order of interim stay on condition the petitioner deposits a sum of Rs. 4 crores in the name of the petitioner in the interest bearing account within a period of four weeks from today, failing which, the interim stay granted shall stand vacated automatically without any further reference to this Court. It is also made clear that no further extension will be granted.

It is further directed that the deposit should be kept alive. The withdrawal or the payment of the amount so deposited will depend upon the further orders passed by this Court after hearing the parties. Notice.

40. The prayer of Kothari Industrial Corporation in M.P. No. 1 of 2009 in C.R.P. No. 3331 of 2009, as extracted in the preamble portion of the order dated 24.10.2009 is to the following effect:

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to pass an order of stay of all further proceedings in O.A. No. 23 of 2005 before the Honourable Debt Recovery Tribunal-I at Chennai (in M.P. No. 1 of 2009) pending disposal of the above C.R.P.P.D. No. 3331 of 2009.

Therefore, there is only a stay of further proceedings before the Debts Recovery Tribunal-I, Chennai, in O.A. No. 23 of 2005 and there is no interim suspension of the order of injunction granted on 30.3.2007 in I.A. No. 586 of 2005 in O.A. No. 23 of 2005. Consequently, the original order of status quo granted on 15.12.2005 remained unaltered till it merged with the order of interim injunction granted on 30.3.2007 and the order of interim injunction granted on 30.3.2007 still remains in force. However, the Company has complied with the conditional order and hence further proceedings in O.A. No. 23 of 2005 remain stayed, though the interim injunction continues to remain in force.

In the light of the above background facts, let me now take up the applications on hand, for consideration.

C.A. No. 1000 of 2007:

41. The Application filed by K. Periasamy Gounder, the third party agreement holder, is for permission of this Court to have the transfer of the properties described in Schedules 1, 2 and 3 registered in his favour in pursuance of the MOU dated 16.3.2009 and supplementary MOU dated 14.7.2009.

42. The properties, for the purchase of which, the applicant seeks the approval of this Court are (i) office premises bearing Door Nos. 144 and 145, measuring 1895 sq. ft., in the 14th Floor of Mittal Court, Nariman Point, Mumbai for a total consideration of Rs. 300 lakhs (ii) the lands comprised in Survey No. 125, K. Abishekapuram village, Tiruchirappalli, measuring an extent of 75 cents, for a consideration of Rs. 550 lakhs, and (iii) the lands of an extent of 99 cents in T.S. No. 480/1A and 488/1A1, Uppilipalayam village, Singanallur, Coimbatore, for a consideration of Rs. 264 lakhs.

43. In the counter affidavit filed by Kothari Industrial Corporation to C.A. No. 1000 of 2009 filed by K. Periasamy Gounder, it is admitted by them in para-4 that (i) the land of the extent of 75 cents in K. Abishekapuram village, Tiruchirappalli and (ii) the lands of the extent of 99 cents in Uppilipalayam village, Singanallur, Coimbatore, are encumbered in favour of Bank of Baroda, Central Bank of India, State Bank of Travancore, Punjab National Bank and State Bank of India. It is also admitted in para-9 of the counter affidavit that the property in Mumbai is also encumbered to all the 5 Banks, including the State Bank of India. It is claimed by the Company that they had entered into one time settlements with all the other 4 Banks except the State Bank of India and that in pursuance of those settlements, the Bank of Baroda and Central Bank of India have been fully paid. It is their further claim that upon receipt of the balance sale consideration from the applicant K. Periasamy Gounder, the dues payable to State Bank of Travancore and Punjab National Bank would also be settled.

44. However, it is also admitted by the Company in their counter affidavit that they are disputing the validity of the claim of Kotak Mahindra Bank to be an assignee (i) of the debts due to State Bank of India, and (ii) of the corporate guarantee given to ICICI Bank. It is the claim of the Company that their dues to the State Bank of India and ICICI Bank have not yet crystallised. While ICICI Bank filed O.A. No. 23 of 2005, the State Bank of India had filed O.A. No. 48 of 2004 on the file of the Debts Recovery Tribunal. Therefore, the Company claims in para-10 of their counter affidavit that they are also prepared to deposit the balance consideration of Rs. 3 crores, received from the applicant, into a no-lien account with the State Bank of India, till the conclusion of O.A. No. 48 of 2004 filed by State Bank of India.

45. All the above averments contained in the counter affidavit filed by Kothari Industrial Corporation, on their face, would give an impression to any one that their intentions are noble and highly commendable. But if we carefully scan the background facts that I have extracted earlier in the preceding section of this order, it may not be difficult to find out what is hidden behind the sweet words contained in the counter affidavit.

46. Admittedly, the properties described in Schedules 1, 2 and 3 to the Judges Summons in this Application C.A. No. 1000 of 2009, are mortgaged to the State Bank of India, who have already filed O.A. No. 48 of 2004 on the file of the Debts Recovery Tribunal. No one time settlement has been reached: by the Company with the State

Bank of India. The State Bank of India is not a party to this application. Though Kotak Mahindra Bank is a party to this application and though they claim to be the assignee of the debts due to the State Bank of India, their claim of assignment, is contested by the Company tooth and nail. As a matter of fact, the Company has gone to the extent of stating in paragraph-10 of the counter affidavit that the Kotak Mahindra Bank has no right to object to the sale as there was no privity of contract with them. Having said so and having taken a tough stand against Kotak Mahindra Bank as though they have nothing to do with the Company's affairs, the Company did not choose to implead the State Bank of India as a party to this application. Nor did they advise the applicant to implead the State Bank of India as a party to this Application. It means that the applicant as well as the Company have now joined together, to dispose of a property, which is mortgaged to the State Bank of India, behind their back. They may do so outside the Court at their own peril. But they cannot make the Company Court, a party to the same, by seeking its approval.

47. Moreover, the Company Kothari Industrial Corporation is guilty of suppressio veri and suggestio falsi. In paragraph-3 of the counter affidavit sworn to by Mr. P.D. Kothari, on behalf of the Company, it is stated by him as follows:

I submit that as on date, there is no impediment for the first respondent to alienate any of its properties by order of any Court or any Tribunal

Again in paragraph-9 of the counter affidavit, he has stated as follows:

I submit that the first respondent is not under legal impediment to sell any of its immovable properties. There is no interim order before any Court or Tribunal, restraining the first respondent from alienating its properties. Therefore, proceeds from the said sale is payable to the first respondent. I submit that the first respondent is entitled to transfer any of its properties

48. But, the background facts which I have extracted in the preceding part of this order, would show -

(a) that an order of status quo was passed on 15.12.2005 at the instance of Kotak Mahindra Bank itself, by DRT-I, Chennai in I.A.S.R. No. 1932 of 2005 (which later got numbered as I.A. No. 586 of 2005 in O.A. No. 23 of 2005);

(b) that I.A. No. 586 of 2005 was allowed by the Tribunal on 30.3.2007 and an order of injunction was granted in favour of Kotak Mahindra Bank restraining the Company from alienating, encumbering or transferring their assets and shares pending disposal of the O.A. No. 23 of 2005;

(c) that in a Revision filed under Article 227 of the Constitution in C.R.P. No. 3331 of 2009, the Company merely sought for and obtained an interim stay of further proceedings in O.A. No. 23 of 2005, but did not either challenge the order of injunction granted on 30.3.2007 or seek interim suspension of the order of injunction;

(d) that by a separate order dated 30.3.2007 passed in I.A. No. 135 of 2006 filed by Kotak Mahindra Bank and I.A. No. 67 of 2006 filed by the Company itself, the DRT directed both parties to maintain status quo;

(e) that the DRAT, by its order dated 12.11.2007 passed in M.A. No. 83 of 2007 also directed both parties to maintain status quo;

(f) that by an order dated 15.7.2008 passed in C.R.P.PD. No. 1953 of 2008, the Division Bench of this Court also directed both parties to maintain status quo; and

(g) that admittedly the notices u/s 13(2) and the possession notices u/s 13(4) of the SARFAESI Act, 2002, were issued by the Authorised Officer of the Bank of Baroda, not only on behalf of that Bank, but also on behalf of all the other 4 Banks, including the Kotak Mahindra Bank and that consequently, there is a statutory bar u/s 13(13) of the SARFAESI Act, 2002 for the alienation of any of the properties covered by such notices, except with the prior written consent of all the secured creditors on whose behalf such notices were issued.

49. Thus, there are factual impediments in existence from 15.12.2005, till date, in the form of various orders of status quo granted by DRT, DRAT and by the Division Bench of this Court and an order of interim injunction in force from 30.3.2007 till date. There is also a legal impediment in the form of Section 13(13) of the SARFAESI Act, 2002, so long as the notices issued u/s 13(2) are not withdrawn by all the 5 Banks on whose behalf, those notices were issued by one Authorised Officer. It must be remembered that SARFAESI Act, 2002 is a special enactment, which has overriding effect upon other laws, by virtue of Section 34(1) of the Act. Section 536(2) of the Companies Act, 1956, under which the present application is filed, is not one of the provisions saved by Section 34(2) of SARFAESI Act, 2002.

50. While so, it was absolutely false on the part of the Company to claim in para-3 of their counter affidavit that there are no impediments to alienate the properties by order of any Court or Tribunal. It was equally false on their part to claim in para-9 of the counter affidavit that there is no interim order before any Court or Tribunal restraining them from alienating the properties.

51. Today, the Company is taking refuge under the order of the Supreme Court dated 10.7.2009 passed in SLP (Civil) No. 25151 of 2009, giving a leverage to them to approach the Company Court and take its prior permission if they seek to alienate any of their assets. But it is seen from the said order of the Apex Court that it was passed at the time of admission of the SLP filed by Kotak Mahindra Bank. It does not appear to have been passed at the instance of the Company. The Company does not appear to have moved any motion for permission to sell, before the Apex Court, posting the Apex Court with the information- (i) about the spate of status quo orders passed right from 15.12.2005 by the DRT, DRAT and the Division Bench of this Court (ii) the order of injunction passed by the Tribunal on 30.3.2007 which continues to be in force till date, and (iii) the possession notices issued on behalf of 5 Banks under

the SARFAESI Act.

52. As a matter of fact, the present Petition for winding up C.P. No. 51 of 2007, out of which the above applications arise, was filed by Kotak Mahindra Bank as an assignee of ICICI Bank Ltd., in whose favour the Company gave corporate guarantee for the dues of another Company by name Dayanand Mills Ltd. (formerly known as D.C. Kothari Textiles Ltd.), now under liquidation. Thus ICICI Bank had made two sets of claims against Kothari Industrial Corporation, one in respect of the corporate guarantee executed by them for the dues of Dayanand Mills Ltd., and another in respect of their own borrowings. In respect of the dues arising out of the corporate guarantee, the Bank has come up with the winding up Petition. In respect of the dues arising out of their own borrowings, the Bank has already gone before the Debts Recovery Tribunal, seeking to enforce the security. Neither ICICI Bank nor Kotak Mahindra Bank (claiming to be an assignee of ICICI Bank) have given up their securities, in respect of the dues arising out of the borrowings made by Kothari Industrial Corporation from ICICI Bank. Therefore, the order of injunction granted by the Debts Recovery Tribunal on 30.3.2007, which continues to be in force till date, cannot be superseded by the Company Court granting permission for the sale of the very same properties, in respect of which an injunction is operating against the Company.

53. Moreover, as stated earlier, the properties for the sale of which this application has been filed, are admittedly mortgaged to State Bank of India. The Bank has already filed an Application in O.A. No. 48 of 2004 before the DRT and it is pending. Therefore, by granting permission for the sale, I would only be permitting the sale of the equity of redemption of the mortgage and not a sale free of all encumbrances. But what is expected by the applicant in this Application, is a permission for the sale of the mortgaged properties free of encumbrances and that too behind the back of the mortgagee, at a price fixed by the mortgagor. This is impermissible.

54. Apart from the above, the Company does not appear to have acted fairly in the matter of transfer of two estates viz., Adderley Estate and Glendale Estate. I shall deal with it more elaborately while considering the other two Applications C.A. Nos. 1740 and 1741 of 2009. Suffice it to record here that the deal had been struck by the Company in a clever manner by hoodwinking the shareholders, secured creditors and the Tribunal. Therefore, I am of the considered view that the permission sought for by the applicant in C.A. No. 1000 of 2009 cannot be granted.

55. The applicant in C.A. No. 1000 of 2009 may argue that he cannot bear the cross for the sins, even if there are any, committed by the Company. But that would hardly be a reason to grant permission to him to go ahead with the transaction, since the very purpose of the transaction is to bail out the Company, which has not come out clean.

56. To drive home the point that this Court has inherent powers and a discretion to permit a sale and even validate a transaction already entered into by the Company, Mr. P.H. Arvind Pandian, learned counsel for the applicant relied upon the following decisions:

- (i) [Smt. Usha R. Shetty and others Vs. Radeesh Rubber Pvt. Ltd. and another,](#)
- (ii) Altos India Ltd. v. Bharti Telecom Ltd., 2001 (30) SEBI & Corporate Laws Reports 347 (P & H).

Similarly, the learned Senior Counsel appearing for the Company also relied upon the following decisions:

- (i) [In Re: J. Sen Gupta Private Ltd., \(In Liquidation\),](#)
- (ii) [In Re: Navjivan Mills Ltd.,](#)
- (iii) [Travancore Rayons Ltd. Vs. Registrar of Companies,](#)

57. I have carefully considered the principles of law laid down in the above decisions. I have no doubt about the power of the Company Court u/s 536(2) of the Act, either to validate a transfer of the Company's assets made after the commencement of the winding up proceedings or to permit the Company to go ahead with a transaction. In J. Sen Gupta Pvt. Ltd., the Calcutta High Court, after referring to various English decisions, elicited the following principles, governing the exercise of discretion u/s 536(2) of the Act:

- (a) The Court has an absolute discretion to validate a transaction.
- (b) This discretion is controlled only by the general principles which apply to every kind of judicial discretion.
- (c) The Court must have regard to all the surrounding circumstances, and if from all the surrounding circumstances it comes to the conclusion that the transaction should not be void, it is within the power of the Court u/s 536(2) to say that the transaction is not void.
- (d) If it be found that the transaction was for the benefit of, and in the interests of, the Company or for keeping the Company going or keeping things going generally, it ought to be confirmed.

58. Similarly, in Navjivan Mills Ltd., case, the Division Bench of the Gujarat High Court held that the Company Court not only has a discretion, but also a duty to validate transactions, necessary or expedient in the interest of the Company, its creditors and shareholders. But while holding so, the Gujarat High Court pointed out that the transactions must have been entered into bona fide. Even the Kerala High Court in Travancore Rayons Case, indicated that the honesty and good faith of the Company should be the touchstone on which the question of validation should be tested. It was further pointed out therein that the Court is bound to remember

realistically, the interest of the creditors and particularly the interest of the creditors who had come up with the winding up Petitions.

59. The language of Section 536(2) is declaratory in nature. It declares, as a Rule, (i) any disposition of the properties of the Company (ii) any transfer of shares in the Company, and (iii) any alteration in the status of its members, made after the commencement of the winding up, void. The exception to the rule is inbuilt in the Section itself, in the form of the phrase "unless the Court otherwise orders". The Section corresponds to Section 227 of the (English) Companies Act, 1948. The phrase "unless the Court otherwise orders" has been construed to confer a discretion upon the Court to permit or validate post facto, any transaction. Since the provision does not indicate any particular principles that should govern the exercise of the discretion vested in the Court Vaishy, J., pointed out in *Re Steane*"s (Bournemouth) Ltd., 1950 (1) All. E.R. 21, that it must be deemed to have been left entirely at large and controlled by general principles which apply to every kind of judicial discretion.

60. Therefore, a Survey of the English as well as Indian decisions on the issue shows-

- (i) that the disposition made or sought to be made, must be honest and bona fide;
- (ii) that the transaction is in furtherance of the Company's business/interest and in the interest of the creditors; and
- (iii) that no creditor should obtain an advantage over his fellow creditors.

61. In Andhra Bank Ltd., Bhimavaram Vs. D.P. Narayana Rao, Provisional Liquidator, Godavari Sugar and Refineries Ltd., Madras, this Court, after referring to the observations of Lord Cairns In *Re Wiltshire Iron Co.*, 1868 L.R. 3 Ch. App. 443, and after pointing out the provisions of Section 227 of the English Act of 1948, held that the transactions that would be validated by the Court are transactions which are bona fide entered into. This Court also referred to the observations of Marten C.J. in Tulsidas Jasraj Parekh Vs. The Industrial Bank of Western India, to the effect that the fundamental principle in a winding up is that all unsecured creditors are to be paid pari passu, the object being to prevent the injustice and scrambles and intrigues which would arise if the Company were to be at liberty to prefer one creditor to another. This Court also observed that the fundamental principle to be borne in mind is that the assets of the Company should be made available for distribution pari passu amongst the creditors of the Company and that no creditor should obtain an advantage over his fellow creditors. A similar view was echoed by Buckley, L.J. in *Gray*"s *Inn Construction Co. Ltd.*, 1980 (1) All. E.R. 814, in the following words:

In considering whether to make a validating order, the Court must always, in my opinion, do its best to ensure that the interest of the unsecured creditors will not be prejudiced.

A disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a Petition has been presented may, it seems,

normally be validated by the Court (see *Re Wiltshire Iron Co*, *Re Neath Harbour Smelting and Rolling Works* and *Re Liverpool Civil Service Association*), unless there is any good ground for thinking that the transaction may involve an attempt to prefer the disponee, in which case the transaction would probably not be validated. In a number of cases reference has been made to the relevance of the policy of ensuring rateable distribution of assets: See *Re Civil Service and General Store Ltd.*, *Re Liverpool Civil Service Association* and *Re Leslie Engineers Co. Ltd.* In the last mentioned case Oliver, J., said:

I think that in exercising discretion the Court must keep in view the evident purpose of the section which, as Chitty J. said in *Re Civil Service and General Stores Ltd.* is to ensure that the creditors are paid pari passu"

The above decision was cited by the Chancery Division in *Fairway Graphics Ltd.*, *Re, 1991 BCLC 468.*

62. If tested on the above principles, it will be clear that the transaction of which approval is sought, does not appear to be an honest and bona fide one and the same is intended to keep at least two of the creditors viz., ICICI Bank and State Bank of India, at bay. This will be clear from the following sequence of events:

(a) The State Bank of India, to which the properties are mortgaged, filed an Application before the Debts Recovery Tribunal, way back in the year 2004 in O.A. No. 48 of 2004 and it is still pending. ICICI Bank has also filed an Application in O.A. No. 23 of 2005 on the file of the Debts Recovery Tribunal and the same is also pending. Even if I accept the argument of Mr. T.K. Seshadri, learned Senior Counsel for the Company and assume that Kotak Mahindra Bank is a poacher and their assignment is wholly invalid, there is no bar for the State Bank of India or the ICICI Bank to proceed further in their Applications before DRT. The present Company Petition for winding up was filed on 20.12.2006. As a matter of fact, the Authorised Officer of the Bank of Baroda, initiated proceedings under the SARFAESI Act, in September 2008, not only on behalf of the Bank of Baroda but also on behalf of Kotak Mahindra Bank, describing them as the assignee of State Bank of India. Despite the pendency of the Application of the State Bank of India in O.A. No. 48 of 2004, despite the pendency of the Application of the ICICI Bank in O.A. No. 23 of 2005, despite the pendency of the present Petition for winding up in C.P. No. 51 of 2007 and despite the issuance of the notices under the SARFAESI Act, 2002 in September 2008, the Company entered into a Memorandum of Understanding on 16.3.2009.

(b) After this Court ordered winding up on 8.4.2009 and the same was set aside by the Division Bench on 10.7.2009, a Supplementary MOU is entered into on 14.7.2009. No application seeking approval for the transaction u/s 536(2) is filed either before entering into the first MOU dated 16.3.2009 or before entering into the Supplementary MOU dated 14.7.2009. As a matter of fact, the first MOU dated

16.3.2009 was in respect of 4 items of properties, out of which 2 were allegedly under mortgage to 5 Banks and 2 were alleged to be unencumbered. After the Division Bench set aside the order of winding up on 10.7.2009 and remitted the matter back to the Company Court, the applicant herein and the Company has taken a stand that the transfer of the 2 unencumbered properties covered by the first MOU dated 16.3.2009, is already complete. Under the Supplementary MOU dated 14.7.2009, a new item of property, viz., the one in Mumbai, which is also encumbered to 5 Banks, is included in the Schedule to the Supplementary MOU. Neither the applicant herein nor the Company thought fit to seek approval for the transfer of the 2 unencumbered properties described in Schedules "C" and "D" to the first MOU dated 16.3.2009, either before the MOU was entered into or after it was entered into, till 30.4.2009.

(c) After the order of winding up dated 8.4.2009 was stayed by the Division Bench on 27.4.2009, the Company moves an Application before the Division Bench in M.P. No. 2 of 2009, seeking approval for the transfer of all the 4 properties under the MOU dated 16.3.2009. The permission sought for was not granted by the Division Bench, as seen from the order dated 30.4.2009, which reads as follows:

As the relief sought for in this petition requires elaborate consideration after hearing the arguments of the respective learned counsel, in view of the fact that one time settlement arrived at with the Bank of Baroda, State Bank of Travancore and Punjab National Bank expires today i.e., on 30.4.2009 and yet another one time settlement entered with Central Bank of India also expires on 20.5.2009, pending further order in this application and keeping the last date for honouring the one time settlement we permit the payment of the said amount.

2. The respondents shall file counter, post the matter on 16.6.2009.

Ultimately, while allowing the Appeal, the Division Bench dismissed M.P. No. 2 of 2009, specifically holding that they are not entertaining this Application. Despite the said order, the applicant and the Company entered into the Supplementary MOU on 14.7.2009 and they have taken a stand now that the transfer of the 2 unencumbered assets described in Schedules "C" and "D" of the first MOU is complete. It means that in the opinion of the Company, they did not require the permission of this Court in respect of those 2 assets.

(d) Fortunately, the Apex Court issued a mandate, while issuing notice in the SLP that the Company shall not alienate its assets, except with the permission of this Court. But for this mandate, the applicant and the Company would have proceeded to complete the transaction, as they have done in respect of 2 assets covered by the first MOU dated 16.3.2009. Therefore, I am clearly of the view from the above sequence of events that the applicant and the Company have not acted in a bona fide and honest manner, so as to enable this Court to grant approval for the transfer.

(e) If we really look at the sequence of events narrated above, it will be clear that the approval of this Court is sought in respect of 3 secured assets, 2 covered by the first MOU dated 16.3.2009 and one covered by the Supplementary MOU dated 14.7.2009. In respect of the unsecured assets covered by the first MOU, what is sought is only a post facto validation. Even this, the Company has now been forced, in view of the order of the Supreme Court. Therefore the whole transaction cannot be termed as bona fide. That there is no honesty and bona fide on the part of the Company is also borne out by the manner in which 2 estates namely, Adderley Estate and Glendale Estate have been disposed of. I shall elaborate this in the next part of this order while dealing with the other 2 Applications.

(f) Apart from the lack of bona fides, it is also apparent that the intention behind the whole exercise is to keep at least two secured creditors viz., the State Bank of India and ICICI Bank at bay. As can be derived from the observations of Buckley L.J., which I have extracted earlier, the Court cannot validate or approve a transaction, even if one or more of the creditors would stand to gain, if it would be at the cost of the other creditors. The claim of the Company that the transaction is intended to discharge their liabilities to some of the secured creditors, under the one time settlements reached with them, may sound a pleasing ring tone. But the State Bank of India and the ICICI Bank are sought to be kept out, by the Company on the ground that the dues to them have not crystallised and that the assignment made by them in favour of Kotak Mahindra Bank is in dispute. In other words, as rightly contended by Mr. P.L. Narayanan, learned counsel for Kotak Mahindra Bank, the relief sought in this Application u/s 536(2) is actually a relief of redemption of mortgage sought against one of the secured creditors viz., State Bank of India, when their Application to enforce the mortgage is pending for the past 5 years, before the DRT under a special law, with the State Bank of India as on date, standing outside the winding up proceedings.

(g) In an attempt to white wash the true picture, the Company states that there is a very valuable property at Ennore, which would take care of the interest of the State Bank of India and ICICI Bank. But Kotak Mahindra Bank, which claims to be an assignee of both these Banks, has its own reservations about the value of this security. The State Bank of India and ICICI Bank are not even parties to the present application. The claim of Kotak Mahindra Bank to be an assignee of these two Banks is contested vehemently by the Company. Once the Company has chosen not to recognise Kotak Mahindra Bank's very existence, the Company should have at least put the State Bank of India and ICICI Bank on notice of these two Memorandum of Understanding. Even this the Company has not chosen to do.

63. Admittedly, the State Bank of India filed O.A. No. 48 of 2004 before the DRT in the year 2004. The alleged assignment by State Bank of India in favour of Kotak Mahindra Bank is dated 23.3.2006. The application C.A. No. 1000 of 2009 was filed in July 2009. Thereafter, the Company Kothari Industrial Corporation has filed a Suit in

C.S. No. 938 of 2009 against the State Bank of India and Kotak Mahindra Bank, seeking various relief's. Pending the Suit, the Company had also moved an Application in O.A. No. 1077 of 2009, seeking an interim injunction restraining the State Bank and Kotak Mahindra Bank from dealing with or acting on the properties of the Company. On 21.10.2009, an ex parte order of interim injunction has been granted by a learned Judge, on the original side of this Court, restraining the State Bank and Kotak Mahindra Bank from taking any further proceedings on the basis of the Deed of Assignment dated 23.3.2006. Therefore, the scheme of the Company is obviously to outwit the State Bank of India, which is a secured creditor and which has a charge over the properties, for the sale of which, permission is now sought. The offer of the Company now to keep the consideration of Rs. 3 crores to be received from K. Periasamy Gounder in a no-lien account in the State Bank of India, is only a ruse to give an impression as though the Company is not trying to outwit the State Bank of India. Contesting the claim of State Bank of India before the DRT in O.A. No. 48 of 2004 on the one hand, contesting their claim of assignment before this Court in a Suit instituted in 2009 on the other hand and also offering to make a deposit of Rs. 3 crores out of the present deal in a no-lien account on the third hand, the Company is now trying only to force its will upon the State Bank of India to come to terms. This Court is not obliged to be a party to the same.

64. Therefore, in essence, I find no bona fides on the part of the applicant as well as the Company, in seeking validation for the transfer of 2 allegedly unencumbered properties and approval for the transfer of 3 remaining properties. I also find that the intention is to outwit at least 2 creditors, if not more. Therefore, C.A. No. 1000 of 2009 is liable to be dismissed.

C.A. Nos. 1740 and 1741 of 2009:

65. These two Applications, as pointed out in the first part of this order, are by Kotak Mahindra Bank, seeking (i) an injunction restraining the Company from alienating or disposing of the shares of Glenworth Estate Ltd. and Adderley Estate Ltd., to any third party or in any manner encumbering its movable or immovable assets, pending disposal of the Company Petition, and (ii) a direction to the Company not to place any agenda relating to approval of the transfer of any of its assets before the AGM.

66. In so far as the prayer of the applicant in C.A. No. 1741 of 2009 is concerned, the Company has taken a stand that the statutory notices for the AGM have already been issued and that there is no such agenda, relating to transfer of any of the fixed assets of the Company. Therefore, recording the said statement, C.A. No. 1741 of 2009 is closed.

67. The prayer in C.A. No. 1740 of 2009 is to restrain the Company from transferring the shares held in two subsidiary companies by name Glenworth Estate Ltd. and Adderley Estate Ltd. Though the Company has taken a stand that this Application

has become infructuous since it had already completed the transfer of the 2 estates in favour of 2 subsidiary companies and also transferred the shares in those subsidiary companies to third parties, way back in 2005 itself, I cannot turn a blind eye to the manner in which the same is claimed to have been accomplished.

68. By a Transfer Deed dated 22.10.2005, executed on plain papers, a copy of which is filed by the Company itself, Kothari Industrial Corporation Ltd., transferred, conveyed and sold, the Glendale Estate comprising of about 1,147.98 acres of land in Coonoor Taluk, Nilgris District, together with the buildings constructed thereon including hospital, canteen, workshop, officers" quarters, etc., as well as the machinery installed therein, to and in favour of Glenworth Estate Ltd., for a total sale consideration of Rs. 22 crores.

69. By a similar Transfer Deed dated 30.11.2005, executed on plain papers, a copy of which is filed by the Company itself, Kothari Industrial Corporation Ltd.. transferred, conveyed and sold, the Adderley Estate comprising of about 536.16 acres of land in Coonoor Taluk, Nilgris District, together with the buildings constructed thereon including the dispensary, creche, workshop, officers" and staff quarters, etc., to and in favour of Adderley Estate Ltd., for a total sale consideration of Rs. 8.5 crores.

70. Two interesting features are noticed in the above two Transfer Deeds. One is that the mode of payment of the consideration of Rs. 22 crores and Rs. 8.5 crores is not disclosed in the documents. The second is that both the Deeds contain a declaration in Clause 12 that the transferee is a wholly owned subsidiary of the transferor. Both the Deeds also contain a declaration that the instrument is exempt from payment of stamp duty, in view of the fact that the transferee is a wholly owned subsidiary of the transferor.

71. But it was admitted by Mr. T.K. Seshadri, learned Senior Counsel for the Company, in the course of hearing of these Applications, that these two subsidiary companies ceased to be so, with effect from 24.10.2009 and 30.11.2009 respectively. According to him, Glenworth Estate Ltd., ceased to be a subsidiary of Kothari Industrial Corporation, with effect from 24.10.2005, within 2 days of transfer of Glendale Estate in their favour, on 22.10.2005. Similarly, Adderley Estate Ltd., ceased to be a subsidiary with effect from 30.11.2005, the very same date on which the transfer of Adderley Estate was made in its favour.

72. Let me take it that the Transfer Deeds were executed in favour of the two subsidiary Companies on 22.10.2005 and 30.11.2005 respectively. Let me also take it that by transferring the shares that Kothari Industrial Corporation had in these two subsidiary Companies to third parties, on 24.10.2005 and 30.11.2005 respectively, the subsidiary Companies ceased to be so.

73. But what is surprising is that even as per covenant No. 5 contained in the Transfer Deeds, ICICI Bank has a first charge over these 2 estates. ICICI Bank had filed O.A. No. 23 of 2005, way back on 13.1.2005, before the DRT-I, Chennai. Kotak

Mahindra Bank sought substitution in the place of ICICI Bank, by filing an Application in I.A. No. 559 of 2005 on 30.6.2005. Thereafter, Kotak Mahindra Bank also moved an Application for injunction on 15.12.2005 and obtained an order of status quo. Subsequently, the Company filed I.A. No. 67 of 2006, seeking permission to complete the transfer of Adderley Estate. This Application was filed in February 2006.

74. Therefore, one would normally expect the borrower, who comes up with an Application in February 2006 seeking permission to transfer an estate, to make a full and true disclosure, at least before the Tribunal, of all material facts, including the transfers effected in October and November 2005. But unfortunately, the Company did not make such a true and full disclosure, in the affidavit filed in support of I.A. No. 67 of 2006. In paragraph-9 of the affidavit filed in support of I.A. No. 67 of 2006, the Company made the following averments:

P. It is submitted that the petitioner for effective management and to avoid various legal entanglements and resources drained from these Estates, the petitioner-Company decided to transfer certain assets to only its wholly owned subsidiary Company, in particular the petitioner have decided to transfer the Adderley Estate to M/s. Adderley Estate Ltd., which is been specifically incorporated for this purpose. And, this Adderley Estate Ltd., is a wholly owned subsidiary Company of the petitioner-Company. This property is transferred in total along with all assets, liabilities and mortgages pending with it.

75. Apart from stating on oath in paragraph-9 of the affidavit that Adderley Estate Ltd. is a wholly owned subsidiary, the Company also repeated the same assertion in paragraphs 10, 13 and in the prayer portion of the affidavit. The prayer of the Company in I.A. No. 67 of 2006, filed in February 2006, reads as follows:

For the reasons stated it is therefore prayed, that this Hon"ble Tribunal may be pleased to permit the petitioner to complete the transfer of the Adderley Estate to and in favour of its wholly owned subsidiary Company i.e., M/s. Adderley Estate Ltd., and pass such further or other orders as this Hon"ble Tribunal may deem fit and proper and thus render justice.

76. I searched in vain, in the entire affidavit filed in February 2006, before the DRT in I.A. No. 67 of 2006, to see if the Company made a disclosure of the fact that the subsidiary companies ceased to be so, even in October and November 2005. I found none. The Company is thus guilty of both suppressio veri and suggestio falsi. The transfer of the shares that Kothari Industrial Corporation had in both the subsidiary Companies, to and in favour of third parties, if really had taken place in October and November 2005, the Company was duty bound to disclose the same in the affidavit filed in February 2006, before the Tribunal. This is the suppression that the Company is guilty of. By repeatedly making assertions in paragraphs 9, 10 and 13 as well as in the prayer portion of the affidavit, the Company also made a false

suggestion to the effect that the transfer is sought to be made in favour of subsidiary Companies, when the transferee Companies had ceased to be subsidiaries, at least 3/4 months prior to the filing of the Application.

77. It appears that the Transfer Deed dated 22.10.2005 in respect of Glendale Estate was presented for registration on 18.11.2005 to the Sub Registrar of Coonoor, claiming exemption from payment of stamp duty on the ground that the transfer was in favour a subsidiary Company. But even on 24.10.2005, the transferee ceased to be a subsidiary Company. However, the document was kept pending by the Office of the Sub-Registrar as pending document No. P. No. 33/2005. The formalities relating to registration were completed only on 11.5.2009, after 4 years and the document was assigned regular document No. 861 of 2009. Similarly, the Transfer Deed relating to Adderley Estate is said to have been presented for registration on 15.3.2006, claiming exemption from payment of stamp duty on the ground that the transfer was in favour of a subsidiary Company, though it ceased to be so on 30.11.2005 itself. This document was assigned pending document No. P. No. 5 of 2006.

78. Interestingly, the Application filed by the Company in I.A. No. 67 of 2.006 was only in respect of Adderley Estate. There is no whisper in the application about the transfer of Glendale Estate. After having filed I.A. No. 67 of 2006 in February 2006, without disclosing the fact that the transferee Companies had already ceased to be subsidiary Companies, Kothari Industrial Corporation did not even wait for an adjudication in that Application. The Company has proceeded to complete the registration in May 2009 at least in respect of Glendale Estate, despite suffering an order of status quo in their Application I.A. No. 67 of 2006, on 30.3.2007 itself.

79. Thus, there has been a total suppression as well as a violation of the order of status quo. It must be remembered that I.A. No. 67 of 2006 was filed in February 2006, on the ground that the formalities relating to registration has to be completed. In this application, the Tribunal ordered status quo on 30.3.2007. In other words, the permission sought for, was not granted. However, the formalities have been completed. The presentation of the very document relating to Adderley Estate for registration, had taken place on 15.3.2006, after filing the Application in February 2006.

80. If what is stated above relates to what the Company has done in relation to two of its secured creditors, now let me see what the Company has done, in relation to its shareholders. The statutory notice for the 36th Annual General Meeting of the Company, for the year 2005-2006, was issued on 28.9.2007 along with the notice for the 37th AGM for the year 2006-2007. The meetings were scheduled to be held on 26.4.2008. In the Report of the Directors, it was stated, under the caption "FIXED ASSETS-TEA DIVISION" as follows:

FIXED ASSETS-TEA DIVISION:

In accordance with the resolution passed by the members of the Company at the 35th Annual General Meeting held on 27th September 2005, the Company's tea estates known as Glendale and Adderley were transferred as a going concern together with all assets, rights, benefits and other movables and immovable properties along with the liabilities and obligations related to the said estates to the Company's wholly owned subsidiaries, namely M/s. Glenworth Estate Limited and Adderley Estate Limited respectively. The two subsidiary companies ceased to be subsidiaries on transfer of the Company's investment thereon to a best buyer and the profit on sale of such investment amounting to Rs. 726.80 lacs is included in the Profit & Loss Account. However, the legal transfer of the title to the plantation lands and buildings has not been effected in view of the objections raised by the financial institutions who hold pari passu charge over the immovable property.

TEA:

Pursuant to the resolution of the shareholders, the Glendale and Adderley Estates were disposed of through the subsidiary route, the proceeds of which was utilized to meet the debenture redemption liability and other statutory dues.

81. Interestingly, the underlined portion in the above extract, which formed part of the statutory notice for the 36th AGM, was deleted only in the AGM, held on 26.4.2008, by way of amendment. To put it in other words, the message conveyed to the shareholders, in the notice for the 36th AGM, sent on 28.9.2007, was that the legal transfer of the title had not been effected in view of the objections raised by financial institutions holding a pari passu charge on the estates. But in the meeting held on 26.4.2008, an amendment is introduced deleting the above portion.

82. If we take a look again at the sequence of events, it is seen from paragraph 7 of the counter affidavit filed by the Company that the transfer of the estates to the wholly owned subsidiaries was effected pursuant to a resolution of the AGM allegedly held on 27-9-2005. But in paragraph 11 of the affidavit filed in I.A. No. 67 of 2006 before the DRT, it was claimed by the Company that the approval of the shareholders was obtained through postal ballots on 8.10.2005. But in the statutory notice issued on 28.9.2007 to all the shareholders, for the 36th AGM convened on 26.4.2008, it was stated that the transfer had not been effected. Subsequently, the statement was deleted by way of amendment in the meeting on 26.4.2008. Thus contradictory statements have been made on the issue and the Company has not come out clean. Different statements have been made in different forums, but none of the statements contained the whole truth. I.A. No. 67 of 2006 was filed by the Company before the DRT in February 2006. If the transfer had already been effected in October and November 2005 and the subsidiary Companies had also ceased to be so in October and November 2005, the Company should have made a disclosure about the same in their Application filed in February 2006 to the DRT. On the contrary, their Application gave an impression as though the transferees continued to be subsidiaries. Therefore a shadow of doubt is cast upon the conduct of the

Company.

83. However since it is claimed that Adderley Estate and Glendale Estate were transferred on 22.10.2005 and 30.11.2005 and that the transferees ceased to be subsidiary Companies with effect from 24.10.2005 and 30.11.2005, I am unable to grant the relief of injunction, as prayed for by Kotak Mahindra Bank in C.A. No. 1740 of 2009. However, I am of the considered view that the Company should be directed to come out clean with full particulars of the whole transaction.

84. Therefore, C.A. No. 1740 of 2009 is disposed of directing Kothari Industrial Corporation Ltd. to furnish, within two weeks from the date of receipt of the copy of this order, the following particulars such as (i) date of presentation of both the Transfer Deeds for registration before the concerned Sub-Registrar (ii) the date on which the registration was completed and the registered Transfer Deeds were handed over (iii) the dates on which the Company effected transfer of its shares in the two subsidiary companies (iv) the number of equity shares actually transferred and the names and addresses of persons to whom the shares were transferred, and (v) the reasons as to why the transfer of shares were suppressed before the Debts Recovery Tribunal, in the Application filed in February 2006 in I.A. No. 67 of 2006. The Company is also directed to file into Court, within two weeks from the date of receipt of a copy of this order, certified copies of the Transfer Deeds dated 22.10.2009 and 30.11.2009 issued by the Office of the concerned Sub-Registrar containing all the endorsements relating to registration. In fine, C.A. No. 1000 of 2009 is dismissed. C.A. No. 1740 of 2009 is disposed of with the directions contained in the preceding paragraph. C.A. No. 1741 of 2009 is closed, recording the statement made by the Company that there was no agenda for the AGM. However, the disposal of these Applications in the manner indicated herein, will not preclude the Bank from initiating any action before the Tribunal, for the violation of the any of the interim orders passed by the Tribunal.