(2007) 10 CAL CK 0052

Calcutta High Court

Case No: Company Petition No. 217 of 2001

In Re: Prudential Capital Markets Ltd. (In Liquidation)		APPELLANT
	Vs	
		RESPONDENT

Date of Decision: Oct. 8, 2007

Acts Referred:

- Companies Act, 1956 - Section 391, 441(2), 446(2), 531, 531(1)
- Limitation Act, 1963 - Article 59
- Presidency Towns Insolvency Act, 1909 - Section 56
- Provincial Insolvency Act, 1920 - Section 54
- Registration Act, 1908 - Section 17(1)
- Reserve Bank of India Act, 1934 - Section 45I, 45IA(4), 45IA(7), 45MB(2), 45MC
- Transfer of Property Act, 1882 - Section 107

Citation: (2008) 1 CompLJ 314 : 112 CWN 408 : (2008) 84 SCL 239

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: P.C. Sen, M.C. Ghosh and M. Sen, for the Appellant;Pratap Chatterjee, Surojit Nath Mitra, Arup Bhattacharyya and Aryak Dutt, for the Respondent

Judgement

Sanjib Banerjee, J.
The official liquidator seeks eviction of a lessee at a property of the company in liquidation in Hyderabad. A letter for directions to such effect has been filed. The lessee has filed affidavits and has attempted to resist the order sought.

2. Prudential Capital Markets Ltd. (now in liquidation) was permitted by its memorandum to carry on investment business. In 1997 it applied under the Reserve Bank of India Act, 1934, for issuance of a certificate of registration as a non-banking financial company as defined by Section 45-I(f) of the 1934 Act. On 29 September 1997, the Reserve Bank prohibited the company from accepting any deposit from

any person whether by way of renewal or otherwise and the company was further directed not to sell, transfer, create any charge or mortgage or deal with its property or assets in any manner without the prior written permission of the Reserve Bank except for the purpose of repayment of the deposits held by the company on maturity. Such direction was issued in the context of the Reserve Bank having received complaints from depositors that the company was unable to repay the deposits accepted from the public. The Reserve Bank took the view that to allow the company to accept fresh deposits or to permit it to renew the existing deposits would be detrimental to the interests of the existing and prospective depositors. The Reserve Bank order requiring the company not to sell or otherwise deal with its properties, was in terms of Section 45-MB(2) of the 1934 Act and it was for a period of six months from the date of the order.

3. By another order of 14 May 1998, the Reserve Bank directed the company not to sell, transfer, create any charge or mortgage or deal with its property and assets in any manner except to repay deposits on maturity without the prior written permission of the Reserve Bank for a further period of six months. On 30 October 1998, the Reserve Bank rejected the company''s application for grant of certificate of registration as a non-banking financial company. The Reserve Bank cited several reasons for such refusal. It noticed that a large number of complaints had been received from the company''s depositors that the company was unable to repay the deposits following which the Reserve Bank had issued a prohibitory order which was subsequently renewed. The Reserve Bank found that the application for registration did not contain anything to show that the company was in a position to repay deposits upon maturity. The Reserve Bank was of the opinion that the company had failed to fulfil the conditions set down under Sub-section (4) of Section 45IAof the 1934 Act.

4. Company Petition No. 217 of 2001 was filed by a creditor on 7 April 2001, for winding up the company. The company was directed to be wound up on such petition on 5 December 2001. The customary notification following the order of winding up was issued on 25 January 2002. On an application being CA No. 99 of 2002 for recalling or stay of the order of winding up, an order was made on 25 February 2002, directing the official liquidator not to take any further steps and requiring the company to deposit a sum of Rs. 40,000 with the official liquidator on account of the claim of the petitioning-creditor in CP No. 217 of 2001. Notices were also required to be issued to the secured creditors of the company. It is necessary that such order of 25 February 2002 be seen in its entirety:

Upon deposit of Rs. 40,000 with the official liquidator on amount (account) of the claim of the petitioning creditor, the company shall be at liberty to serve the secured creditors and the matter shall appear in the list as ''specially fixed matter'' one week hence. It is made clear that if the abovementioned sum is deposited by and on behalf of the company within the course of 1 this week, only then the company shall

be at liberty to serve notice or else this 1 order shall stand recalled. In the meantime, the official liquidator shall not take any further steps in the matter. This order shall be valid till adjourned date.

5. It is of some significance that neither the winding up petition nor the order directing the company to be wound up was stayed. Only the official liquidator was required not to take any further steps in the matter. In any event the order was to operate till the adjourned date. The official liquidator has submitted that the sum of Rs. 40,000 was deposited with him but he is not aware as to whether notice was served on the secured creditors and as to how CA No. 99 of 2002 was prosecuted thereafter. There were certain events that overtook the further progress of CA No. 99 of 2002 which, according to the official liquidator, renders useless any enquiry as to the ultimate fate of the application.

6. On 15 May 2002, the Reserve Bank filed a winding up petition u/s 45MC of the 1934 Act, being CP No. 342 of 2002. The company affirmed an affidavit in such proceedings, a copy whereof has been appended by the official liquidator to a supplementary affidavit filed on his behalf in the present proceedings. An anomalous situation arose that is difficult to be reconciled in the context of the events. But before such anomaly is detailed, it is necessary to appreciate the stand taken in the company''s affidavit filed in the Reserve Bank''s winding up petition.

7. The company set out in its affidavit its principal objects of carrying on business of an investment trust company, to act as financial and management consultants, to act as an issue house, registrars and share transfer agents, to receive money on deposits at interest or otherwise for fixed periods and to manage investment pools, mutual funds, syndicates in shares and the like. The company averred that it commenced business as a non-banking financial company after having carried on business as merchant bankers upon obtaining due certificate therefore from the Securities and Exchange Board of India (SEBI). According to the company, it became one of the foremost lead managers to public issues in the country. The affidavit went on to record that upon the rejection of its application by the Reserve Bank for issuance of a certificate of registration as a non-banking financial company, it explored various other business opportunities even after it preferred an appeal from the order of refusal. At the time that the affidavit was filed, the appeal u/s 45IA(7) of the 1934 Act was still pending and the company admitted having given an undertaking to the Reserve Bank:

The company on its own gave undertaking to the (Reserve Bank) that it would not accept any deposit with effect from 1 July 1997, and that it would not alienate any of its assets without the approval of the (Reserve Bank) except for the purpose of repayment of deposit obligations. These undertakings were given to the (Reserve Bank) in July, 1997, itself while the prohibitory order was issued on 29 September 1997. This action was taken by the company to contain its liability and concentrate its efforts in repaying the deposits ... The undertaking of the company not to

alienate any of its assets without the approval of the (Reserve Bank) except for the purpose of repayment of deposit obligations continues till date. In terms of its undertaking as given to the (Reserve Bank) the company has in fact not done so....

8. The company thereafter proffered excuses as to why matured deposits remained unpaid and suggested that debtors of the company had failed to make timely payments following which the orders passed by the Company Law Board for paying the depositors could not be complied with.

9. On 11 July 2003, the company was directed to be wound up on the Reserve Bank''s petition and the official liquidator was directed to take charge of the assets of the company forthwith. Thus arose the anomalous situation. There was already an order of winding up that remained in force, notwithstanding the order of 25 February 2002, but a second order of winding up came to be passed as it does not appear that the company brought it to the notice of the court at the time the Reserve Bank''s petition for winding up was taken up for final hearing that the company had already been wound up. It also appears that the official liquidator read the order of 25 February 2002, to be a continuing injunction on him from taking any further steps. Either the official liquidator did not appreciate the import of the last sentence of the order dated 25 February 2002, by which such order was to remain valid till the adjourned date which was set a week from the order; or the official liquidator interpreted such part of the order to imply that the injunction on him from taking further steps was to continue till the matter was disposed of or it was taken up for hearing.

10. However, the official liquidator took a cue from the direction contained in the order of 11 July 2003, requiring him to forthwith takeover the assets of the company in liquidation and construed such later order to undo the embargo, if at all it continued, of the order of 25 February 2002. According to the official liquidator, he attempted to take possession of the company''s assets at 26 and 27, Amurtha Mall, Samojiguda, Hyderabad-500 016, in December, 2003, but was resisted by an employee of Globex Travels and Exchange Ltd., the respondent herein. The respondent claimed to the official liquidator that it was a lessee under the company at the said premises and had been carrying on business thereat for a substantial period. During the visit of the official liquidator''s representative to Hyderabad, the respondent''s officers could produce no document in support of the respondent''s claim but informed the official liquidator that the relevant documents were available at the respondent''s principal office in Mumbai. By 9 January 2004, the respondent''s Mumbai advocates informed the official liquidator that by an indenture of lease of 24 November 1998, the shop-rooms had been let J out by the company prior to its liquidation to the respondent. The respondent i claimed that in pursuance of a renewal clause contained in 24 November 1998 agreement, a subsequent document was executed between the company and the respondent on 23 November 2001, by which the shop-rooms had been let out to the respondent for a period of 50 years.

The respondent informed the official liquidator that it was not aware, prior to the visit of the official liquidator''s representative in December, 2003, of the company having gone into liquidation and that the last payment tendered by the respondent to the company on account of rent was on or about 23 October 2003, when a cheque for Rs. 11,141 was forwarded to the company towards lease rent from 1 April 2003 to 30 September 2003, but the envelope bearing such cheque was returned undelivered. The respondent enquired of the official liquidator as to the manner in which such cheque and future lease rent may be paid in respect of the said premises. In the beginning of February, 2004, the respondent''s Mumbai advocates again sought information from the official liquidator as to the manner in which the lease rent could be tendered by the respondent. It appears that the official liquidator did not respond to the queries in such regard following which the respondent''s Mumbai advocates forwarded a demand draft favouring the official liquidator for a sum of Rs. 63,941 under cover of a letter of 8 September 2004. A further demand draft for Rs. 49,594 was received by the official liquidator from the respondent''s advocates in October, 2004, towards lease rent/occupation charges after deducting maintenance charges of Rs. 7,200 and a sum of Rs. 14,347 on account of property tax claimed to have been paid by the respondent to the municipal corporation of Hyderabad.

11. By a letter of 1 February, 2005, the official liquidator returned the demand draft for Rs. 49,594 to the respondent''s advocates and sought particulars as to the registration of the two documents on which the respondent relied. On 11 February 2005, the official liquidator called upon the respondent''s advocates to impress on their clients to make over possession of the shop-rooms to the official liquidator claiming that the lease of 23 November 2001 was void. The official liquidator asserted that such agreement had been made after the date of presentation of the winding up petition by the creditor and during the period that winding up had commenced. The date of commencement of winding up proceedings was stated to be 7 April 2001. The official liquidator emphasised that ''under Section 531 of the Companies Act, 1956, any transfer of property moveable and immovable made by a company in favour of a purchaser or encumbrance within a period of one year before the presentation of petition for winding up shall be void''. The letter for directions was filed shortly thereafter on 13 May 2005, seeking a direction on the respondent to make over vacant possession of the shop-rooms and leave to serve notice of hearing on such prayer on the respondent. Leave was given to serve the respondent which has filed an affidavit relying on divers ''documents including papers from which it appears that it undoubtedly came to occupy the premises in or prior to January, 1999. The respondent claims that it is a well-known name, carrying on business as travel agents and money changers and that it entered into the agreement of November, 1998, with the company at arm''s length for the purpose of opening a branch office at Hyderabad which was a burgeoning hub at that time. The respondent has detailed the circumstances in which the agreement of 24

November 1998 came to be concluded and seeks to justify the monthly rent of Rs. 5,000 and the interest-free deposit of Rs. 50,000 that form the material terms of such agreement. The respondent seeks to establish that the monthly rent and the deposit were in accordance with the rates prevailing in Hyderabad at the relevant time and were commensurate with the accommodation that the respondent obtained. According to the respondent, it was put into possession of the premises simultaneously with the execution of the lease of 24 November 1998, took steps for refurbishing the office and, by 7 January 1999, it obtained permission from Reserve Bank of India to carry on its business from such premises. The respondent also obtained a certificate of registration from the Government of Andhra Pradesh and both the Reserve Bank licence and the State Government registration continue to be in force. The respondent relies on a payment by draft made on 8 March 1999, for the sum of Rs. 71,167 to the company prior to its liquidation on account of the interest-free security deposit of Rs. 50,000 and lease rents between 24 November 1998, and 31 March 1999. The respondent complains that the lessor failed to pay the maintenance and other charges in respect of the shop-rooms and did not tender the municipal rates and taxes therefore that it was obliged to under the agreement. The respondent claims to have made payments on account of maintenance to the relevant association from February, 1999, and has relied on receipts issued by such association. Such payments were made, according to the respondent, with the knowledge of the company that it was made on its behalf and adjusted lease rents were thereafter tendered to the company. The respondent has made a similar claim, on account of the rates and taxes, paid to the municipal corporation and has relied on receipts issued by the corporation.

12. By October, 2001, the respondent claims, its business in Hyderabad had developed substantially and that it was desirous of setting up long-term business in the city and sought to exercise its option under the lease of 24 November 1998, by proposing to continue in occupation of the said premises for a period of 50 years. The respondent relies on the subsequent document of 23 November 2001, which it claims in its affidavits to have been registered and asserts that the material terms reflected therein were the only transactions with the company prior to its liquidation and were reasonable and justified given the nature of the shop-rooms, the location and the market price. The respondent urges that the official liquidator''s plea be rejected and the suspicion that is sought to be raised as to the bona fides of the transaction is completely unfounded.

13. The lease of 24 November 1998 was for a period of three years with effect from the date thereof, renewable ''at the option of the lessee and lessor on terms and conditions mutually agreed to''. The lessee was required to pay monthly rent of Rs. 5,000 and keep an interest-free deposit of Rs. 50,000 with the lessor. The lessor was required to pay all taxes including property taxes and other charges due and payable in respect of the premises. The second agreement provides for a tenure of 50 years commencing from 24 November 2001, renewable at the option of the

lessee for a further period of 50 years. The rent was to remain the same at the rate of Rs. 5,000 per month and the quantum of interest-free deposit of Rs. 50,000 as under the previous arrangement remained unchanged. Clauses 6, 8, 13 and 17 of the second agreement throw some light on the nature of the transfer:

6. The lessee may sub-lease, under-let, sub-let or transfer or assign the lease of the said premises or any part thereof to any other person of its choice without having to obtain the consent or permission of the lessor, and the lessor shall not object to the same.

8. The lessor will not terminate, the lease, save and except (if) the lessee fails to pay the lease rent for continuous period of more than twelve months. The lessor shall have given notice in writing for the payment of the same.

13. The lessor shall bear and pay the property taxes and other maintenance expenses in respect of the said premises, if however the lessor commits default in payment of the same, the lessee may at its option pay the same, and in such event shall be entitled to adjust and recover the same from the accruing lease rent becoming payable in respect of the said premises.

17. The grant of this lease has been approved by the board of directors of the lessor in its meeting held on 25 October 2001, and Shri Narasimhan Jaya-chandran, its deputy manager, has been authorised to execute these presents on behalf of the lessor.

14. The second agreement also records that the lessor had handed over to the lessee the possession of the said premises on 24 November 2001, to hold the same as lessee thereof (Clause 2). The official liquidator insinuates that the second agreement cannot be a complete recording of what passed between the transferee and the company in liquidation or those in control thereof and suggests that a valuable property of the company was sought to be fraudulently removed from the pool of assets that the creditors of the company, including a large number of public depositors, could look to for sale and discharge of a part of their dues. The official liquidator relies on a'' letter dated 9 May 2006, issued by the official liquidator attached to the High Court of Andhra Pradesh under cover whereof a tentative assessment of the fair market rent of comparable premises has been for-warded. On local enquiry, it has been ascertained that the fair market rent in the area in May, 2006, was Rs. 50,000 per month per shop/shutter. The respondent here enjoys two shop-rooms at the lower ground floor basement of the Amurtha Mall.

15. The respondent belittles the assessment of fair market rent relied upon by the official liquidator by placing a report obtained from a retired employee of the Income Tax Department. The retired valuer of the Income Tax Department has opined that fair market value of authorised offices or commercial premises at the area was Rs. 1,200 per sq. ft. in November, 1998; Rs. 1,800 per sq. ft. in November, 2001; and, Rs. 3,000 per sq. ft. in August, 2006. In his opinion, fair monthly rental

value of the premises worked out to Rs. 3,675 in November, 1998, Rs. 5,512.50 in November, 2001 and Rs. 7,656.25 in August, 2006. The valuer has also noticed a monthly expenditure of Rs. 1,796 in August, 2006, on account of property tax and maintenance expenses. The respondent attempts to remove the lurking suspicion that the official liquidator has tried to create and suggests that a more reliable report than the one placed by the official liquidator was called for, for the official liquidator to sustain an underlying charge of fraud as to the transaction.

16. Detailed arguments have been made as to the applicable provisions. The official liquidator referred to Section 531 of the Companies Act in his notice to the respondent. At the hearing, the official liquidator has referred to Section 531A and Section 536(2) of the Act in asserting that the Company Court has authority to decide the question that has been raised and that the respondent is liable to be evicted from the premises. The official liquidator has referred to Section 446(2) and Section 537(1) of the Act as to the jurisdiction of the Company Court in relation to the estate or effects of a company and matters pertaining thereto after the commencement of its winding up. The relevant provisions may be set out for convenience:

446. Suits stayed on winding up order--(1)...

(2) The court shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of--

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made u/s 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960).

531. Fraudulent preference--(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before-the commencement.of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in I his insolvency a fraudulent preference, shall in the event of the company being I wound up, be deemed a fraudulent preference of its creditors and be invalid ! accordingly:

Provided that, in relation to things made, taken or done before the commencement of this Act, this sub-section shall have effect with the substitution, for the reference to six months, of a reference to three months.

(2) For the purposes of Sub-section (1), the presentation of a petition for winding up in the case of a winding up by the court, and the passing of a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond to the act of insolvency in the case of an individual.

531 A. Avoidance of voluntary transfer.--Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by the court or the passing of a resolution for voluntary winding up of the company, shall be void against the liquidator.

536. Avoidance of transfers, etc., after commencement of winding up.--(1)...

(2) In the case of a winding up by the court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

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

(a) any attachment, 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; or

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

17. u/s 441(2) of the Act, the winding up of a company by the court is deemed to commence at the time of presentation of the petition for winding up. The creditor''s petition was filed on 7 April 2001, on which the company was directed to be wound up. The embargo on the official liquidator against taking further steps by the order of 25 February 2002 was irrelevant in the matter of winding up as the order did not stay the winding up. Even if it be assumed that the order of winding up was stayed on 25 February 2002, it was not a permanent stay with the effect of completely obliterating the order of winding up. Even if a stay is read into the order of 25 February 2002, at the highest, it kept the order of winding up in abeyance or suspended animation but did not altogether wipe it off. Whether or not the management of the company again resumed control thereof upon the order of 25 February 2002 in law, it makes no difference except that in the absence of a specific stay of the winding up order or the express leave to the management to resume

control of the company, the company ought to have remained in limbo with its management not entitled to run it nor the liquidator entitled to take steps by reason of the order. In any event, the restraint on the official liquidator was removed by the second order of winding up of 11 July 2003, passed on the Reserve Bank''s petition filed on 15 May 2002. The respondent is justified in its assertion that if Section 531 were to apply, the period would date back to 7 October 2000 (six months prior to commencement of the winding up proceedings on the creditor''s petition which was filed on 7 April 2001). If the period u/s 531A were to be reckoned, the period that would be covered would be from 8 April, 2000, since the liquidator''s year u/s 531A begins a year before presentation of the winding up petition. If Section 536(2) were to apply, any disposition of the property of the company in liquidation made after the commencement of the winding up would be void, unless otherwise ordered by court. The respondent relies on such dates as its entry into the said premises pursuant to the agreement of 24 November 1998, cannot be questioned under Sections 531, 531A and 536(2) of the Act. The respondent has also been able to establish on the strength of the licence that it obtained from the Reserve Bank to carry on business from the said premises, that it entered into occupation of the said premises in or prior to January, 1999. The respondent submits on the authority of the Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, , that its status and the nature of its possession of the premises would be protected under the relevant Rent Act if a subsequent deed of lease turned out to be void. It is submitted that a tenancy was created in favour of the respondent by the document of 24 November 1998, which is protected u/s 10 of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960. The respondent asserts that the grounds for eviction under such Act are strict and a lessee under a deed for a three year tenure, with or without an option to renew at the end thereof, is protected as a tenant on much the same lines as a tenant under the West Bengal Premises Tenancy Act, 1956. The respondent seeks to demonstrate that whether or not the 2001 lease was valid, a monthly tenancy was created with effect from 24 November 1998, and the respondent is entitled to cling on such tenancy with all the attendant protections under the said Andhra Pradesh Act of 1960 and is immune to a challenge of the kind now brought by the official liquidator. In response to the respondent questioning the Company Court''s authority to delve into such matters, the official liquidator has placed a number of judgments recognising the Company Court''s jurisdiction. Such authorities speak of the wide powers of the Company Court and it would be useful to notice them before the matter at hand is assessed. In the judgment of a Division Bench of this court reported at Vidyadhar Upadhyay Vs. Sree Sree Madan Gopal Jew and Others, , the nature of authority u/s 446(2) of the Act fell for consideration. An unreported Division Bench judgment of this court rendered in Indramoni v. Shriram Jute Mills (P) Ltd. Appeal No. 154 of 1976 dated 6 December 1976 was noticed and the following passage therefrom was quoted in the Vidyadhar Upadhyay Vs. Sree Sree Madan Gopal Jew and Others, matter:

In our opinion, the language of Sub-section (2) is clear, it was the intention of learned judge that all questions which come within the scope of Sub-section (2) of the said section should be dealt with by the Company Court in order to avoid unnecessary delay and multiplicity of proceedings. In an application being made to that effect, leave is given to the liquidator or appropriate party to institute or continue such proceedings in any other court or Tribunal. In this case, there was an application u/s 446(2) . It comes under Clause (b) which relates to any claim made by or against the company and in any event it is certainly covered by Clause (d) which includes any question whatsoever whether of law or fact which may relate .to or arise in the course of the winding up of the company. In the present case, admittedly, the winding up proceedings have not come to an end. The company was not yet dissolved. It was still in the course of winding up. Further, in our opinion, it was certainly a question relating to or arising in the course of such winding up. In the course of the winding up, the official liquidator was directed to sell the mill premises to the purchaser who was the applicant before the learned Company Judge. This provided for handing over possession of the immovable properties to the purchaser. The order specifically directed the police authorities referred to therein to render police help in evicting the trespassers. A list of tenants and licensees was prepared. The others in occupation were the trespassers. The liquidator prepared a list showing whether the tenants are licensees or trespassers. This was challenged by the appellants on the ground that the liquidator did not give them any opportunity. On that basis, they were given further liberty to file supplementary affidavits which they did. Now the question was whether these appellants were trespassers or not within the meaning of the order passed on 8 August 1972. In our opinion, it was certainly a claim or question coming within Clause (b) and certainly within Clause (d) of Sub-section (2) of Section 446 of the said Act. Accordingly, in our opinion, the learned judge was entitled to entertain this application owing to such a question in such a proceeding. Accordingly, we reject this contention of Dutta.

18. A judgment rendered by a Single Judge of this court reported in Smt. Pushpa Devi Jhunjhunwalla v. Official Liquidator (1993) 1 Cal LJ 447, is next placed in support of the contention that while determining all questions that arise in the course of winding up u/s 446(2) of the Act, the Company Court can evict trespassers from the property of the company in liquidation. It has been recognised in such case that the procedure that may be followed by the Company Court is summary in nature but the law that has to be applied prior to ordering eviction of a trespasser is the same law that would have to be applied in any civil court ordinarily trying a suit against a trespasser. There cannot be any dispute as to such position in law. If the Company Court does not face any inconvenience in adjudicating upon such a matter that is covered by Section 446(2) by a summary procedure, the Company Court need not require a regularly constituted suit to be filed in respect of such matter before a civil court. Indeed, Section 446(2) does not restrict the procedure to be adopted by the

Company Court and there is no principle by which a summary procedure has to be followed. The procedure to be adopted will depend on the gravity of the issues raised and one that the Company Court may determine to be the more appropriate in the circumstances.

19. The official liquidator has relied on a Gujarat High Court judgment reported at Official Liquidator of Piramal Financial Services Ltd. Vs. Reserve Bank of India, , to establish that a second order of winding up may be passed in respect of the same company during the subsistence of an earlier order for winding up. The following passage from page 67 of the report has been relied upon:

It may be noted that there is no provision under the Act to the effect that no order of winding up can be passed when an earlier order is already passed. In the decision of this court in the case of Y.S. Spinners Ltd. v. Official Liquidator, Ambica Mills Ltd. (1999) 1 Comp LJ 442 (Guj), the order of winding up passed by this court in Company Petition No. 121 of 1995 on 17 January 1997, was referred to which stated that it is an order in Company Petition No. 66 of 1988 (and other petitions including Company Petition No. 121 of 1995) which was filed on 12 April 1988, which was the earliest petition. That means the court had already passed similar orders in the other petitions in spite of the fact that it had already passed an order in the later petition. The only difference in the present case is that instead of the above order, the court had passed specific separate orders of winding up. However, this does not make any difference since in the said decision, the court should be taken to have passed separate orders in other petitions but the language used is somewhat different which has no significance to the question whether winding up orders can be passed for the same company which is ordered to be wound up in another petition. In both the cases the legal effect is the same, namely, that winding up is deemed to have commenced from the dates of the respective petitions in each case. The said decision also supports the legal position that orders for winding up a company can be passed in more than one petition. As far as the question involved in the present case is concerned the fact that the winding up orders are passed on different dates in the instant case has no relevance.

20. Ordinarily, a second order of winding up is unnecessary when there is another order of such effect subsisting in relation to a company. But it is not necessary to address such question in the present case as the issue, answered either way, would effectively be only an issue as to the date that can be reckoned, whether for the purpose of Section 531 or 531A or 536(2) of the Act. Whether it is the date of presentation of the first petition on 7 April 2001, or the date of presentation of Reserve Bank''s petition on 15 May 2002, neither date will carry the period to the date of the first impugned transaction of 24 November 1998, if the respondent can rely on the Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, principle to deflect attention from the second agreement. What needs to be assessed is whether the respondent''s best arguable case that a tenancy was created in its favour on 24

November 1998 is good enough for it to resist the eviction sought by the official liquidator.

21. The official liquidator has also relied on a judgment reported at Kanchan Kumar Dhar, Official Liquidator (As Liquidator of Star of Cochin Chit Schemes P. Ltd.) Vs. Dr. L.M. Visarai and others, , as to the general authority of the Company Court in such matters and the relevance of the conduct of the official liquidator. In the Kanchan Kumar Dhar, Official Liquidator (As Liquidator of Star of Cochin Chit Schemes P. Ltd.) Vs. Dr. L.M. Visarai and others, , the petition was filed on 7 July 1978, upon which an order of winding up was made on 19 January 1979. The impugned agreement was entered into between the transferee and the company, prior to its liquidation, on 18 July 1978, after the commencement of the winding up proceedings. A defence was raised in that case that the official liquidator''s application for annulling the agreement was barred by the laws of limitation and by estoppel on account of his having accepted rent from the transferee. The Bombay High Court considered Article 59 of the Schedule to the Limitation Act and held that Section 536(2) of the Act expressly made such a transaction as impugned in those proceedings to be void and there was no question of any declaration of the nature envisaged by Article 59 being sought by the official liquidator within a period of three years from the time that the facts entitling the official liquidator to have the relevant instrument cancelled or set aside or for cessation of the contract, came to his notice. The official liquidator had obtained a copy of the agreement in that case in March, 1979, and it was the admitted position that he had received some rents though some of the rent receipts bore the endorsement ''without prejudice'' and others did not. Despite the official liquidator''s application in that case being made beyond the period of three years from the date of receipt of a copy of the agreement and despite the official liquidator having received rent, some of them without any reservation, the court passed an order of eviction.

22. The principles that apply u/s 536(2) of the Act make it irrelevant as to whether the transferee of a company''s property is aware of the presentation of the winding up petition against the company. A disposition must not be validated merely because the transferee bona fide entered into the transaction. Section 536(2) provides a mechanism for a company or a transferee of its properties (or assignees of actionable claims) to apply to the Company Court sitting over the winding up petition to accord sanction to a transaction even before an order of winding up is made. Upon such sanction, the transfer is protected at the post winding up order stage. The order of sanction becomes irrelevant if the order for winding up is ultimately declined.

23. The respondent first makes out a defence to the official liquidator''s notice wherein Section 531 of the Act was mentioned in urging the respondent to vacate the suit premises. The respondent rightly submits that the import of Section 531 cannot be gauged without reference to the applicable principles in insolvency

proceedings, be it u/s 54 of the Provincial Insolvency Act or Section 56 of the Presidency Towns Insolvency Act. The respondent refers to the legal fiction in Section 531 and submits that there would be fraudulent preference if one creditor is singled out in preference to other creditors. The respondent relies on a Division Bench decision of the Kerala High Court reported in Jayanthi Bai v. Popular Bank Ltd. (1966) 2 Comp LJ 36 (Ker) for the proposition that a transaction can be hit by Section 531 of the Act once it is seen that what was sought to be achieved by the transaction was the preferring of one creditor over others with a dominant intent so to do. It is in such context that the respondent relies on the other proposition found in the Kerala case that the onus is on the liquidator to establish such dominant intent. In that case entries made in the company''s books adjusting payments due to a bank were ultimately required to be reversed.

24. The respondent refers to a Gujarat Division Bench decision reported in Bank of Maharashtra Vs. Official Liquidator, Navjivan Trading Finance Pvt. Ltd., , to emphasise that for a transaction to be hit by Section 531 of the Act, such transaction has per force to be entered into by the company, within the period covered by the section, with a creditor of the company. Upon construing Section 54 of the Provincial Insolvency Act in that case, the Gujarat High Court was of the view that discharge of a debt by a company within the prescribed period may, by itself, not be deemed to be fraudulent unless the element of intent on the part of the company at the time of discharging the debt is established. The respondent in this case is right in asserting that fraudulent preference implies that the impugned transaction is with a creditor of the company. The reference to the insolvency rules adds weight to such contention just as the immediate succeeding section, Section 531A of the Act, indicates that transactions with persons other than creditors may be annulled and considered void against the liquidator under the later provision. There is considerable merit in the respondent''s assertion that if Section 531 were to be applied in relation to a transaction with a person other than a creditor, Section 531A may be otiose.

25. The judgment reported in Madan Mohan Pathak and Another Vs. Union of India (UOI) and Others, is placed, by the respondent to emphasise on the jural relationship involved in a debt and the import of the concept of fraudulent preference as recognised by the privy purse case:

It would, therefore, seem that, according to the decision of the majority in Rustom Cavasjee Cooper Vs. Union of India (UOI), , debts and other rights in personam capable of transfer or transmission are property which can form the subject-matter of compulsory acquisition. And this would seem to be unquestionable on principle, since even jurispru-dentially debts and other rights of action are property and there is no reason why they should be excluded from the protection of the constitutional guarantee. Hidayatullah, C.J., had occasion to consider the true nature of debt in H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others

Vs. Union of India and Another, , where the question was whether the privy purse payable to the ruler was property of which he could be said to be deprived by the order of the President withdrawing his recognition as ruler. The learned Chief Justice, making a very penetrating analysis of the jural relationship involved in a debt, pointed out that:

A debt or a liability to pay money passes through four stages. First there is a debt not yet due. The debt has not yet become a part of the obligor''s ''things'' because no net liability has yet arisen. The second stage is when the liability may have arisen but is not either ascertained or admitted. Here again the amount due has not become a part of the obligor''s things. The third stage is reached when the liability is both ascertained and admitted. Then it is property proper of the debtor in the creditor''s hands. The law begins to recognise such property in insolvency, in dealing with it in fraud and creditors, fraudulent preference of one creditor against another, subrogation, equitable estoppel, stoppage in transitu, etc. A credit-debt is then a debt fully provable and which is fixed and absolutely owing. The last stage is when the debt becomes a judgment-debt by reason of a decree of a court''.

26. The respondent suggests that even if Section 531 were to be applicable, it was incumbent on the official liquidator to make out a case of fraud or bad faith or lack of proper consideration and the letter for directions taken out by the official liquidator is singularly lacking in such aspect. Since the insolvency rules apply in the matter of adjudication of a transaction u/s 531, the respondent relies on the judgment reported at N. Subramania Iyer Vs. The Official Receiver, Quilon, , where it was held that the onus is upon the official receiver to prove that a conveyance that he seeks to set aside is not made in good faith or for valuable consideration. On a parity of reasoning, the respondent urges that it should be the same onus that the official liquidator in this case should be required to discharge.

27. For the same effect, the respondent has relied on a Division Bench judgment of the Madras High Court reported in N. Babu Janardhanam and another Vs. Official Liquidator, Golden Cine Studios P. Ltd. and a judgment delivered by the Company Judge of the Bombay High Court reported at Monark Enterprises v. Kishan Tulpule, President Mill Mazdoor Sabha (1992) 1 Comp LJ 288 (Bom). In the Madras case, it was held that u/s 531A of the Act the initial burden is on the person who denies the transaction to establish that a transaction was not made in the ordinary course of business of the company or that it lacked good faith and only thereupon, when the onus is discharged, would the burden shift to the transferee. The Division Bench found that the Single Judge had committed an error of law in requiring the transferee to prove that the transaction had been entered into in good faith. In the Bombay case, Sections 531, 531A, 536(2) and 537(1) were all considered. It was held, on the facts, that the impugned transaction was not vitiated by Section 531 of the Act as the transaction was entered into without intent to prefer one creditor over another. The court found that it was not possible to hold, on the facts of that case,

that the transferor and the transferee shared the common intention to defraud other creditors or the workmen and found no bad faith or lack of consideration which would make the transaction vulnerable. As a proposition of law it was found that Section 537(1) of the Act applied only to transactions which were in pursuance of adjustment, distress or execution levied by court or by any other competent authority and a voluntary transaction may not be assailed under such provision. For Section 536(2) to apply, it was held that the ''disposition of property'' had to be effected within the period covered by such provision and in case the disposing power had been exercised prior to the commencement of winding up, the disposition could not be challenged.

28. In response, the official liquidator has relied on the judgment reported at Rajratna Naranbhai Mills Co. Ltd. (in liquidation) v. New Quality Bobbin Works (1972) 2 Comp LJ 333 (Guj), where a Single Judge of the Gujarat High Court held that u/s 537(1) read with Section 446(2) the Company Court had authority to take up all questions relating to a company in liquidation without the liquidator having to institute an action before a civil court. The official liquidator also submits that a reading of Section 536(2) of the Act would imply that the person setting up a transaction had to establish that it was bona fide as, by operation of law, such transaction would be void if it is entered into within the period covered by the sub-section.

29. The final argument of the respondent as to various provisions of the Companies Act which the official liquidator has applied in the alternative for obtaining the order sought, is that the word ''disposition'' used in Section 536(2) of the Act is not to be equated with the word ''transfer''. It is submitted that the word ''transfer'' appears in Sections 531, 531A and 536(1) of the Act which are related provisions or provisions of like import, but the word ''disposition'' has been deliberately used in Section 536(2) to make it distinct from transfer. Disposition, according to the respondent, is an absolute transfer in the nature of a conveyance and is not to be construed otherwise. The respondent relies on Bouvier''s Law Dictionary, (8th edition, 3rd Rev.), volume 1, for the meaning of the word ''disposition'': ''To alienate or direct the ownership of property, as, disposition by will.''

30. It is first necessary to assess the applicability of Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, , principle invoked by the respondent in the context of the second agreement of 23 November 2001. The respondent is aware that such second agreement falls foul of Section 531A even if the Reserve Bank''s presentation of the petition is reckoned as the date of commencement of winding up. But it is, in fact, the date of presentation of the creditor''s petition which marked the commencement of winding up in this case. It was incumbent on the company and the respondent to seek leave of court u/s 536(2) of the Act in respect of the agreement of 23 November 2001, as the creditor''s winding up petition was pending at that time and as, subsequently, Section 536(2) came into play upon such

creditor''s petition for the winding up being allowed.

31. The mainstay of the respondent''s defence is Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, . The first agreement of 1998 is beyond the period covered by any of the provisions cited to avoid such agreement--be it Section 531 or Section 531A or Section 536(2) of the Act. If the creditor''s petition is taken to be the one on which the order of winding up was made, only the second agreement of 2001 can be doubted on the strength of Section 536(2) of the Act; if the Reserve Bank''s petition is taken to be the one on which the winding up order was made, the second agreement can be assailed only u/s 531A of the Act. If the Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, principle is found applicable then the second agreement would be void and leave the respondent to defend its possession of the premises on the basis of its continuing rights under the first agreement.

32. The facts and the questions that arose in Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, , are found at paragraphs 4 and 5 of the report:

4. The undisputed facts are that Kanti Bhusan Bose, respondent No. 3, took on lease the demised premises under a registered lease deed dated 11 September 1948, the period reserved under the lease being 5 years at a monthly rent of Rs. 2,000 with an option for renewal to be exercised by a notice two months before the expiry of the lease. It is equally undisputed that during this period of 5 years the appellant-company was accepted as tenant of the demised premises and the company paid the rent reserved under the lease being Rs. 2,000 per month. The period reserved under the lease expired on 31 August 1953. But before the expiry of the period an application was made by the appellant for fixation of standard rent of the demised premises under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. In October, 1953, respondents Nos. 1 and 2 as lessors commenced an ejectment action against the appellant and the third respondent on the ground that the period reserved under the lease has expired and the lessee has failed to exercise the option for renewal. During the pendency of the aforementioned actions the parties entered into a compromise and consent terms were filed in the suit instituted by respondents Nos. 1 and 2 lessors inviting the court to pass a decree in terms thereof, and a consent decree was passed which has been referred to in the evidence as ''solenama''. It, inter alia, provides for a lease for a further period of 5 years commencing from 1 March 1955, on a monthly rent of Rs. 1,000 per month made up of a rent of Rs. 500 for the premises and a rent of Rs. 500 for furniture and fixtures and the lessee would have no further option of renewal of the lease on the expiry of the period reserved under the lease. This consent decree incorporating the terms of a fresh lease to be effective as a valid lease required registration in view of the provisions contained in Section 107 of the Transfer of Property Act read with Section 17(1)(d) of the Registration Act, 1908, because the period reserved under the lease was exceeding one year. It is an admitted position that the instrument containing the terms of lease, i.e., either the consent terms or

the consent decree was not registered as required by law. However, it is equally an admitted position that the company continued in possession and paid rent which was accepted by the lessors from the company from month to month. It appears that on 29 February 1960, i.e., the last day on which would expire the lease for a period of 5 years, the lessors, respondents Nos. 1 and 2, entered into the demised premises and locked a portion thereof.

5. The questions that emerge for consideration in this appeal are:

1. What would be the status and nature of possession of a per-son who was admittedly a tenant of the premises covered by the local Rent Restriction Act till the date of commencement of a fresh lease which turns out to be void for want of registration, during and at the expiry of the period purporting to be reserved by such a void lease?

2. Would such a person be a tenant who could only be removed by proper legal proceeding or a licensee without any interest in the premises and could be forcibly evicted by the landlords of the premises entering the premises and locking the same?

3. Could such a person defend his possession by a suit seeking a declaration and mandatory injunction?

32.1 The questions are answered at paragraphs 10 and 11 of the report which the respondent in this case puts forth as its unimpeachable ground to protect its possession of the Hyderabad shop-rooms:

10. If, as it clearly transpires from the facts of this case, the appellant was a tenant on the date on which the second lease, which is found to be void, was to commence what would be the nature of pos-session of the appellant during the period of five years, the period sought to be reserved under the second lease and on the expiration of such period? If the appellant was put into possession for the first time under a void lease the appellant could have protected its possession u/s 53A. But it must be made distinctly clear that the appellant was in possession on the date on which the second lease now found void was to commence. Would this attempt inchoate or stillborn of entering into a fresh contractual tenancy make any difference in the position of the appellant and the nature of his possession? If the second lease is void or inchoate or ineffective or still-born it is not at all effective. If it is not effective it does not impinge upon the nature of the appellant''s possession which was that of a tenant. In other words, the appellant continued to remain in possession of the demised premises as tenant because there was no impact of the lease which is found to be void. It must be made distinctly clear that the appellant was not put in possession under the lease which turns out to be void. In such a situation even during the period of 5 years for which the second lease was to be created the appellant continued to be in possession as tenant and this is evidenced by the further fact that rent was accepted from the appellant by respondents Nos. 1

and 2. There is nothing to show that the rent was accepted from month to month by respondents Nos. 1 and 2 under the second lease and not what was determined by the court in rent fixation case No. 114/53 wherein the parties had filed a consent praecipe by which the parties invited the rent controller to fix the standard rent of the premises at Rs. 500 per month and Rs. 500 for use of the machinery, furniture and fixtures, in all Rs. 1,000 per month. In this connection, attention was drawn to receipt exhibit 10 issued by respondents Nos. 1 and 2 on 1 January 1960, in which it is stated that the amount is accepted as per terms of consent decree (solenama), but it could not be overlooked that this amount was determined by consent of parties in the case initiated by the appellant before the rent controller for fixation of standard rent. If thus the appellant was already in possession as a tenant of the premises, an unsuccessful attempt to create a fresh lease would not change the nature of his possession as from a tenant to one in part performance under a void lease. The appellant continues to be in possession as tenant and no cloud is created over its title to remain in possession as tenant merely because the appellant and respondents Nos. 1 and 2 attempted to enter into a fresh lease which did not become effective.

11. Even if it is assumed that the appellant was put in possession for the first time under a lease which turns out to be void, the appellant came into possession of the premises with the consent of the landlords and paid rent from month to month. As the lease was to be for a period of five years, for want of registration no operative lease came into existence. In almost identical circumstances in Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another, an inference of tenancy was made and the duration of the tenancy in such circumstances was held to be from month to month.

33. If the Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, principle were to be applicable and respondent''s right under the first agreement is unassailable and its possession continued, then if it is covered by the said Andhra Pradesh Act it would be a tenant entitled to protection under that Act. But if the first agreement is dislodged then the respondent will not be entitled to the protection accorded to an admitted tenant under that Act.

34. More than the provisions of the Companies Act, over the construction whereof there has been considerable debate in the course of hearing, it is the order passed by the Reserve Bank and the company''s unequivocal assertion in the affidavit filed to oppose Reserve Bank''s prayer for winding up that is crucial to the issue herein. It is the company''s assertion in the affidavit affirmed on 30 January 2003, which is appended to the official liquidator''s supplementary affidavit in these proceedings, that from July, 1997, there remained in force, an undertaking given by the company to the Reserve Bank that it would not alienate any of its properties without the sanction of the Reserve Bank for any purpose other than paying the matured deposits. Though the Reserve Bank order of May, 1998, ran its course a few days

prior to 24 November 1998, the date of the first agreement, the company''s undertaking to the Reserve Bank continued and such undertaking was given in order that the Reserve Bank grant the company the certificate of registration as a non-banking financial institution. It was the company''s stand in that affidavit that such undertaking continued till the date of filing of the affidavit sometime in the year 2002 when its appeal from the Reserve Bank''s rejection of its request for a certificate was still pending. If such undertaking continued which may have induced the Reserve Bank in not continuing the order or passing a fresh order restraining the company from dealing with its assets u/s 45MB(2) of the 1934 Act, the company had no authority to deal with the Hyderabad property.

35. The power u/s 45MB(2) has to be seen in the context of the public purpose that it seeks to achieve in securing the interest of public depositors:

45MB. Power of bank to prohibit acceptance of deposit and alienation of assets.--...(2) Notwithstanding anything to the contrary contained in any agreement or instrument or any law for the time being in force, the bank, on being satisfied that it is necessary so to do in the public interest or in the interest of the depositors, may direct, the non-banking financial company against which an order prohibiting from accepting deposit has been issued, not to sell, transfer, create charge or mortgage or deal in any manner with its property and assets without prior written permission of the bank for such period not exceeding six months from the date of the order.

36. The authority u/s 45MB(2) of the 1934 Act has been given to the Reserve Bank, inter alia, to preserve the assets of a company which has accepted deposits from public, in the interest of such depositors. An order under such provision may be preparatory to a petition for winding up being presented by the Reserve Bank against the concerned company. The company may, during the period covered by the order, satisfy the Reserve Bank that it is able to pay its depositors and the embargo ought to be lifted. It is also open to a company suffering such order to have the order lifted or not continued upon offering some cheques that may satisfy the Reserve Bank as being adequate safeguard in the interest of the depositors. There is no express bar to a fresh order being made u/s 45MB(2) of the 1934 Act after the expiry of the period covered by an earlier order. During the period that the Reserve Bank order remained in force, the company in this case undertook before it not to alienate any of its assets and to hold that such undertaking was meaningless or could be flouted by the company would both undermine the authority of the Reserve Bank and be contrary to the interest of depositors that the provision seeks to preserve.

37. If such undertaking remained in force, as the company asserted, it could not have dealt with the property and whether or not such fact was kept concealed from the respondent-transferee is immaterial. Again, the time that the arrangement under the 24 November 1998 agreement ripened for renewal, the undertaking not

to deal with any of its assets given by the company, on its own showing, remained in force and the renewal could not have been acceded to nor a fresh lease executed. The company could not have transferred the premises to the respondent in derogation of the undertaking that it gave to the Reserve Bank and the fact that it entered into the agreement of 24 November 1998, despite such undertaking, demonstrates utmost bad faith and fraudulent conduct on its part.

38. The terms of the second agreement are shocking. Even if the valuation of the property obtained by the official liquidator is not taken into account, it is unbelievable that market rate of rent at the shopping complex remained unchanged between 1998 and 2001. Even if the notorious fact of Hyderabad''s growth as a metropolis is discounted, the second agreement was a virtual sale of the shop-rooms for a pittance. The rent for the 50-year period beginning November, 2001, was to remain unchanged with the lessor being obliged to pay maintenance and other charges which would obviously rise over the years. The authority sought to be granted to the lessee to sub-let the premises, the option given to the lessee to seek renewal for a further period of 50 years and the absence of any clause for enhancement of rent are all in-built instances of absolute bad faith and lack of consideration. In the Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, , the creation of the tenancy or the original lease was free from doubt, which is not the case here when the first agreement was entered into in derogation of the express undertaking given by the company to the Reserve Bank. Again in the Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, , the transferee was entitled to protection as a tenant under the rent laws as on the date of the relevant agreement being found void for want of registration. u/s 446(2) of the Act, the Company Court has the jurisdiction to go into the questions as to the transactions raised by the official liquidator. The scandalous transactions that the respondent seeks to defend are indefensible on facts and in law.

39. For the court to hold a case of fraudulent preference u/s 531 of the Act, the dominant motive as to such transaction has to be assessed. There is good reason for this. The period covered by Section 531 of the Act begins six months before the commencement of the winding up. Commencement of winding up in cases where the winding up is by the court is on the date of presentation of the petition for winding up. For a transaction which is entered into prior to a winding up petition being presented, before it is found to be one hit by Section 531, it needs to be demonstrated that the transaction not only reflected a preference shown to a particular creditor, but it was entered into with the object of giving such creditor favoured treatment. There has to be an element of dishonesty on the part of the company or the controlling minds of the company before a transaction can be annulled u/s 531 of the Act. It is the overriding intention of the transaction that is relevant and such transaction must have been voluntarily entered into by the company without there being any compulsion on the company so to do. The onus is on the official liquidator to establish that the company as debtor deliberately singled

out the creditor for the transfer ahead of other creditors who, upon the company ultimately be wound up, may not have enough for the entire dues to be discharged. But Section 531 does not come into play in this case as the respondent was no creditor of the company as on the date of the second agreement.

40. Section 531A of the Act provides that any transfer of property or goods made by a company within one year before the presentation of a winding up petition against it will be void unless such transaction was in the ordinary course of business. In principle, the same tests as to intent as in Section 531 apply to a transaction challenged u/s 531A of the Act and the onus is on the official liquidator seeking to avoid the transaction to establish that the transfer was not made in the ordinary course of the company''s business or that it was not made in good faith or for valuable consideration. As to whether the transaction is made in good faith or for valuable consideration will depend on the facts of a given case. If there is no consideration or the consideration is woefully inadequate, there may arise a presumption of want of good faith. Again, even if there is adequate consideration, the official liquidator may attempt to establish that a valuable asset of the company was sought to be shielded against the claims of the company''s creditors. The official liquidator''s challenge would not pass muster if he cannot establish lack of bona fides on the part of the transferee.

41. In either case, whether u/s 531 or u/s 531A of the Act, for the rigours thereunder to apply and the transfer to be declared void, it must be evident that the company or the controlling mind thereof was aware of the imminent winding up of the company, took out a valuable asset of the company from the general pool to be ultimately available to creditors and dealt with such asset by the impugned transaction. The test that has to be applied in either case has to be one that would hold good for the earliest date of the period covered by either section.

42. Section 536(2) of the Act provides for preservation of all assets of a company, upon commencement of winding up proceedings, for ultimate distribution thereof among the creditors following winding up. Section 536(2) contemplates leave being obtained subsequent to presentation of a petition for winding up but prior to the winding up order being passed, before a disposition of the kind covered is made. Even if there is disposition of property without prior leave, the court will not automatically annul the transaction but will probe into the purpose therefor. The mere presentation of a winding up petition cannot fetter the company to continue its functioning including bona fide disposition of its properties. There is wide discretion conferred on the Company Judge by the expression ''unless the court otherwise orders''.

43. The court has to weigh whether a company is to be altogether paralysed upon a presentation of a petition for having it wound up or whether a company can continue business in the usual course and enter into transactions that ultimately have to satisfy the test of bona fides.

44. The expression ''unless the court otherwise orders'' applies both before and after the disposition of any property or effects of the company covered by the period. The test is the same. If the court were to consider ex post facto the prudence and necessity of a disposition, it has to place itself in the position that it would have been in if prior leave was sought for the transaction.

45. It does not appear that the periods covered by Section 531 and Section 536(2) of the Act overlap, just as it cannot be said that the periods covered by Section 531A and Section 536(2) of the Act overlap. The period covered by Section 531 ends at the commencement of the winding up proceedings. Similarly, the period covered by Section 531A also ends at the commencement of the winding up proceedings. Disposition of its properties and effects made by a company after the commencement of winding up is covered by Section 536(2) of the Act and it is for such reason that the word ''transfer'' is used in Sections 531 and 531A of the Act and the word ''disposition'', an expression of wider import, is used in Section 536(2) of the Act.

46. After the hearing was concluded, a judgment reported in ICICI Ltd. v. Ahmedabad Manufacturing and Calico Printing Co. Ltd. , was noticed which may throw some light as to the meaning of the word ''disposition''. Notice was there-after given to the parties and further submission permitted on 3 October 2007.

47. In such case, the appellant before the Supreme Court had advanced loans to the company prior to the filing of a winding up petition by an unsecured creditor. Further, loans were sanctioned after the winding up petition was filed and the appellant and the company applied u/s 536(2) of the Act seeking leave of the Company Court for allowing the disposition of the company''s property ''which may have to take place'' as a consequence of the loans advanced. The Company Judge refused leave in respect of the transactions prior to the commencement of the winding up proceedings but allowed the application in part in respect of dispositions by the company for loans which were made subsequent to the commencement of winding up. The resultant appeal from the order of partial rejection was dismissed on the ground that the bank was seeking to convert itself from an unsecured creditor to a secured creditor in respect of the past transactions. The Division Bench also set aside the decision of the Company Judge insofar as it pertained to the loans obtained by the company subsequent to the commencement of winding up, though no appeal had been preferred therefrom. The Supreme Court agreed with the Division Bench as to the impropriety of the disposition relating to loans granted prior to the commencement of winding up, but set aside the order insofar as it interfered with the leave granted by the Company Judge for disposition relating to loans granted after the commencement of winding up. Paragraphs 4 and 5 of the judgment are relevant:

4. The appellant''s prayer u/s 536(2) was to allow the company to execute documents creating a first charge over the company''s properties in favour of the appellants. The company''s properties as of today are not properties belonging to the company. Apart from it being a practical impossibility to allow the appellant''s prayer at this stage, we are of the view that the Division Bench did not err in rejecting the application of the appellant at least insofar as it pertained to the loan transactions prior to 10 July 1986. There is no explanation forthcoming from the appellant as to how these advances were made for over a period of 10 years without obtaining any security. The appellant ultimately sought to create securities in respect of these transactions only in 1990. The Division Bench was also correct that the grant of leave u/s 536(2) would not be appropriate after this delay. Leave u/s 536(2) may be granted for the benefit of the company in liquidation or the creditors of the company in general. It cannot be said that the securing of old debts due to one creditor of the respondent by creating of a mortgage ex post facto would in any way either enure towards the preservation of the company''s assets or its business or enure to the benefit of its other creditors.

5. However, we are of the view that the High Court erred in setting aside the learned Single Judge''s order even in respect of the post-10 July 1986 loans on the simple ground that this was beyond the scope of the appellant''s appeal. The appellant could not be in a worst position by having preferred the appeal from the order of the learned Single Judge. The appeal is accordingly partially allowed to the extent stated without any order as to costs.

48. It would be evident from such judgment that the transaction of creating security in favour of the appellant before the Supreme Court was considered to fall within the meaning of ''disposition'' as referred to in Section 536(2) of the Act. But the respondent suggests that as to whether or not such a transaction was a disposition within the meaning of Section 536(2) of the Act did not fall for the Supreme Court''s consideration in that case and it would be unwise to treat the judgment as a precedent on such issue. The respondent cites the judgment reported at Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, , and places paragraph 155 thereof in support of its contention that it is only what has been decided that can be the authority of a binding precedent not what is logically deduced therefrom. The respondent has also relied on the judgment reported at Arnit Das Vs. State of Bihar, , paragraph 20 thereof as to the rule of sub silentio.

49. The respondent may be right in its assertion that there was no challenge as to the transaction in the ICICI Ltd. v. Ahmedabad Manufacturing and Calico Printing Co. Ltd. , being one beyond what disposition u/s 536(2) of the Act would include. Equally, it would be unwise to conclude that the Supreme Court allowed a disposition which could be no disposition at all within the meaning of Section 536(2) of the Act. But one need not rely on theICICI Ltd. v. Ahmedabad Manufacturing and

Calico Printing Co. Ltd. , for the purport of the word ''disposition'' appearing in Section 536(2) of the Act. It is, and has to be, wider than the transfer that is covered by Section 531 and Section 531A of the Act. It is impossible to accept that a lesser alienation of a company''s property prior to commencement of winding up would be void, but only a complete alienation after commencement of winding up may be susceptible to challenge. Logically, it should be quite the contrary. If transfers of company assets brought about by scheming minds in anticipation of imminent winding up proceedings being launched can be undone under Sections 531 and 531A of the Act, there ought to be stricter control over transactions involving a company after winding up proceedings against it has commenced. There is surely a different meaning that the Legislature intended to convey by using the word ''disposition'' in Section 536(2) of the Act while the word ''transfer'' has been used in Sections 531 and 531A of the Act. As Section 536(2) operates during the time when winding up proceedings are pending, the legislative intent of using a different expression becomes clearer. ''Disposition'' u/s 536(2) would cover a wider range of transactions than ''transfer'' u/s 531 or Section 531A of the Act would cover.

50. In any event, even if disposition were to be given a more constricted meaning than transfer, as the respondent here suggests, it cannot take the second agreement out of the pale of Section 536(2). First, it is the creditor''s petition presented on 7 April 2001, on which the order of winding up was passed, though the official liquidator''s hands were fettered by court by the order of 25 February 2002. Secondly, the nature of the transaction covered by the second agreement is as close to absolute transfer as it gets--what, with the transferee having a right to sub-let the property without the transferor''s consent, have the property for a period of 50 years renewable for further 50 years at the transferee''s option, and not to speak of the consideration. It is conceivable that with increasing maintenance charges but with fixed rent as provided under the second agreement, the lessor would end up paying more on account of maintenance charges and taxes than it would receive by way of rent even during the first tenure of 50 years.

51. The terms of the second agreement are such that the official liquidator needs to say no more than to place the terms to establish that the transaction was in bad faith and without adequate consideration. The official liquidator has discharged the onus that Section 536(2) contemplates, upon presenting the terms of the second agreement and the valuation that has been forwarded by the official liquidator attached to the Andhra Pradesh High Court. The terms of the second agreement are so appalling that any suggestion made by the respondent as to its bona fides and as to the valuable consideration must be rejected. Even if it is presumed that the respondent had no knowledge of the commencement of winding up that by itself is not enough to justify its part in a transaction that is a veritable gift.

52. The matter may be tested from another angle. If the company through its erstwhile management had sought prior leave after commencement of winding up,

to execute the agreement for transferring its Hyderabad property, no Company Judge would have accorded sanction without asking for the proposed terms and seeking the creditors'', or at least the petitioning-creditor''s, views on the proposed terms. If the company then carried these terms to court, no Company Judge would have found them worthy enough for the views of any creditor being sought thereon.

53. There is another aspect of the matter, though the parties have not referred to such issue. The respondent has relied on the said Andhra Pradesh Rent Control Act and the protection that is guaranteed to a tenant u/s 10 without referring to Section 32 thereof. u/s 32(c) of such Act any building the rent of which, as on the date of commencement of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control (Amendment) Act, 2005, exceeds Rs. 3,500 per month in areas covered by the municipal corporations in the state, the provisions of the Act would not apply. Such provision is of some significance as the rent payable under the first lease of 28 November 1998 is in excess of Rs. 3,500. Even if j the respondent was entitled to protection u/s 10 of the Andhra Pradesh Act in 2001, it docs not enjoy any protection under such Act as the said Andhra Pradesh Act received the assent of the Governor on 27 April 2005, and was published in the Andhra Pradesh Gazette the following day.

54. The lease of 23 November 2001 is void. The respondent is not entitled to any protection to remain in possession of the Hyderabad shop-rooms as its initial induction thereat under the 24 November 1998 deed was illegal and it is, in any event, not entitled to any protection under the Andhra Pradesh Rent Control Act. It is recorded that the respondent has insisted that it continues to be in possession of the shop-rooms. The respondent is directed to deliver vacant possession of the shop-rooms to the official liquidator or his duly authorised representative within seven weeks from date. The respondent will not part with the possession in respect of the shop-rooms or either of them or create any interest in respect thereof in favour of any person other than the official liquidator till it hands over possession of the same to the official liquidator. The official liquidator will be at liberty to apply to recover occupation charges from the respondent for the duration of its illegal occupation of the premises in question. The respondent will pay costs assessed at 6,000 GMs to the official liquidator.

Urgent photostat certified copies of this judgment, if applied for, be issued to the parties upon compliance with requisite formalities.