

A RADHESHYAM AJITSARIA AND ANR.

v.

BENGAL CHATKAL MAZDOOR UNION AND ORS.

MAY 24, 2006

B [DR. AR. LAKSHMANAN AND R.V. RAVEENDRAN, JJ.]

Company Law:

C *Payment to unsecured creditors—In the course of winding up of a company/factory—Order for winding up of factory—Stayed subsequent to proposal by a group of creditors (Managing group) of the factory to run the factory by propounding a scheme—The managing group was also one of the pre-scheme creditors—Scheme approved by Supreme Court—Direction of Supreme Court to deposit a sum for disbursement of the same amongst unsecured creditors—Deposit of certain amount by subsequent management—The deposited amount lying with Registrar, High Court—The managing group and another group of creditors were denied payment by the Court—High Court allowed payment to another group and to the managing group to the extent of 25% and/or one fourth of their settled claim—In appeal filed by the Labour union of the factory, High Court directed readjudication of the claims—In appeal, held: the managing as well as another group of unsecured creditors are entitled for payment as pre-scheme unsecured creditors—Funds are meant for disbursement only to unsecured creditors—Workers do not have a right to oppose the payment to unsecured creditors—They do not have priority over creditors as the factory is not wound up and is still a going concern—Companies Act, 1956—Section 529 A—Employees State Insurance Act, 1948—Employees Provident Fund Act, 1952.*

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G *Companies Act, 1956—Section 529 A—Applicability of the provision—Winding up—Stayed pursuant to a scheme for running the company—Claim of preferential right of workers over unsecured creditors under the provision—Held: Protection under the provision is available only when the company has been wound up—It is not applicable when the company is a going concern as a result of stay of winding up.*

H *Words and Phrases:*

'In winding up'—Meaning of in the context of Sections 441 and 529A of Companies Act, 1956. A

Respondent-factory was ordered to be wound up. Thereafter a scheme was propounded to run the factory by 'N' group (the largest group of creditors of the factory). The scheme provided for payments to workers, electricity dues, statutory creditors and unsecured creditors. 'N' group was also included in the list of pre-scheme creditors. The winding up was stayed. The scheme was approved by High Court as well as by this Court. The scheme was finally passed by High Court with the support of secured creditors as well as the workers. Thereafter some unsecured creditors approached High Court complaining that they were not paid. In view of the complaint, Company Judge cancelled the scheme. In appeal against the cancellation of the scheme, rate of payment was reduced from 2% to 1% by the High Court. In Special Leave Petition this Court by its Order dated 31.3.1994 directed 'N' group to deposit a sum of Rs. 40 lacs by way of interim measure. The Court also set aside the order of High Court reducing the rate of payment from 2% to 1% and further directed the Committee to deposit Rs. 8 lacs per month. The amount of Rs. 40 lacs was transferred to High Court for distribution of the same amongst the creditors. 'N' group was replaced by another Committee of Management by Company Judge and directed them to deposit Rs. 64 lacs and further directed payments to substantial creditors except 'N' group. In appeal, Division Bench of High Court allowed the new Committee to continue with the process of the scheme, but set aside the direction for preferential payment to the named unsecured creditors. Company Judge directed all pre-scheme unsecured creditors to lodge their claims. F

Registrar prepared the Report whereby name of 'N' group was included while the name of 'A' group was excluded as persons entitled to receive payments. Registrar, despite 'A' group not being held as part of 'N' group, did not make any payments to them. Company Judge by order dated 9.9.1998 directed payment to all unsecured creditors except 'N' group on the ground that the group had made larger payments to members of its group in comparison to other unsecured creditors. Division Bench, in an appeal against order dated 9.9.1998 filed by 'J' by order dated 30.11.1998/1.12.1998 set aside the Registrar's report insofar as the same exceeded the amount mentioned in the list of G H

- A pre-scheme creditors. 'A' filed application for modification of order dated 9.9.98 and the same was decided by order dated 8.3.2001 giving directions to make payments to 'A' group holding that they were not part of 'N' group. 'N' group's application for modification of the order dated 9.9.1998 was disposed of by Single Judge holding that as all other unsecured creditors had been paid and even thereafter substantial funds were left in the hands of the Registrar, hence payment of 25% and/or one fourth of their settled claim after adjustment of payments already made could be made to 'N' Group. Appeals were preferred by the workers' union and respondent-factory under the new management of 'C'. High Court by impugned judgment directed readjudication of the claims. Hence the present appeals by 'A' group and two labour unions and special leave petitions by 'N' group.

Disposing of the appeals and Special Leave Petitions, the Court

- D HELD 1.1. That the Division Bench was not entitled to direct readjudication of the claims which were already adjudicated, contrary to its own orders dated 30.11.1998/1.12.1998. [952-G]
- E 1.2. 'A' and 'N' groups are entitled for payment as pre-scheme unsecured creditors in view of the specific directions given by this Court on 31.3.1994. [952-F]

- F 1.3. The impugned judgment and order warrants interference by this Court under Article 136 of the Constitution of India as the appellants have been wrongfully excluded from receiving the payments though all other creditors similar to the status of the appellants have received their payment long back thus there has been denial of justice. [949-B-C]

- G 1.4. The fund lying with the Registrar, original side, High Court was specially earmarked for the pre-scheme unsecured creditors as defined in the Scheme. [952-H]

- H 1.5. This Court affirmed that the amount of Rs. 8 lacs per month out of the revenues of the Company would be kept aside in the hands of the Registrar, Original side and pay to the unsecured creditors alone @ 2% per month. Admittedly, the said corpus has been treated by successive orders of this Court and the High Court as being the dues

of the unsecured creditors alone. None of these orders were ever appealed against or set aside. It is too late in the day to contend that the said fund would also be utilized for payment of workers dues and or other statutory dues for which the scheme made separate arrangements. [950-A-C]

1.6. Division Bench of the High Court has erroneously concluded that 'N' Group were not part of the pre-scheme creditors and/or that their names were not included in the list of pre-scheme creditors. The Division Bench also erred in holding that the claims of the 'N' Group had not been adjudicated which, was clearly contrary to the report of the Registrar, which was accepted by both the Single Judge as well as by the Division Bench. [944-C-E]

1.7. The facts of the case clearly go to show and administer that the workers do not have a right to oppose the payment to all unsecured creditors out of the funds lying with the Registrar, Original Side, High Court. [944-E-F]

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

[944-F-G]

1.9. The company being a running concern, the alleged dues of the workers cannot be claimed against any specific member of the management committee. The dues if any, are against the company and not against any individual members of the Committee of Management. There is no question therefore of holding up payment due to the unsecured creditors on the ground that workers dues are alleged to be outstanding. [945-B-C]

1.10. The facts that 'A' remained as a member of the Committee of management only for a brief period of 11 months, Appellant No.2 never participated in the management and affairs of the company, no one including the workers made any claim and/or grievance against the appellants at any point of time; that 'A' group are unsecured creditors of the Company who were entitled to receive payment in terms of the

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A scheme at the rate of 2% per month and the entire payment in terms of the said scheme without interest was to be disbursed to them within a span of four years and two months and accordingly the entire amount became due and payable in the year 1993 itself; and that at all material times, there was no dispute with regard to the fact that Group of

B Company consisted of seven companies/firms which are distinct and separate from the appellants has been duly noticed and recognized in various court orders including the order of the Division Bench of the High Court dated 30.11.1998/1.12.1998 and the order of the Single Judge dated 8.3.2001. [946-C-F]

C 1.11. There is no allegation upon 'A' Group of disbursing excess payments to themselves as has been alleged against 'N', therefore, they stand on a different footing from 'N' Group of companies/firms who have been made entitled to receive only 25% of their claim upon furnishing of bank guarantee. [946-G-H]

D 2.1. So far as the workers' claim is concerned, the scheme which was accepted by this Court on 30.11.1998 contained disbursement of the payment to all the creditors in the said scheme. The said scheme clearly mentioned the manner in which the creditors are entitled to receive the payment.

E The statutory dues, such as Provident Fund, E.S.I. and workers' dues on account of wages, salary are to be liquidated in the manner as provided therein and unsecured creditors were made entitled to receive payment @ 2% per month save and except initial payment @ 5%. The said scheme was supported by the workers. Unlike unsecured creditors, at no point of time workers had come up before the company

F Judge or before this Court alleging that payments have not been made to them pursuant to and in terms of the scheme. [947-A-D]

G 2.2. The workers having a priority over creditors can come into play only when the winding-up process is in motion and the Official Liquidator take steps to formalize winding-up. In the instant case, after the scheme had been sanctioned, the question of winding-up would arise only if the order of permanent stay granted was to be lifted on any party's complaining of failure of the scheme or inability on the part of the Company to make payments either in terms of the scheme or otherwise. [947-D-F]

2.3. The provisions as contained under Section 529A of the Companies Act, 1956 are not applicable in the facts and circumstances of the case as the order of winding-up has been stayed and the company is being run under the scheme as a going concern. Since the company still continues to function, Section 529-A of the Companies Act cannot be pressed into service by the workers. The protection of Section 529-A is available only when a company has been wound up. Official Liquidator has taken over the assets and disbursements are being made by the Official Liquidator in course of the winding up of the company. There is no question of the worker claiming a preferential right or payment while a company is running and carrying on business in the usual course and incurring daily expenses and liabilities. [948-B-C, 945-D-F]

2.4. Likewise, the reliance upon the provisions of the Employees' State Insurance Act, 1948 and Employees Provident Fund Act, 1952 are inapposite inasmuch as by virtue of orders of this Court as also noted by the Division Bench of the High Court that the amount to be paid at the rate of Rs. 8 lacs per month as directed by this Court was to be kept secured for payment to un-secured creditors only, the workers are therefore estopped from resorting to taking recourse to the provisions of Section 11(2) of the Provident Fund Act since the same was available to them even at the time this Court had directed the said sum to be earmarked for payments to un-secured creditors. For the purposes of Sections 441 and 529A of the Companies Act, the phrase "in winding up" cannot be referred to as "in the course of winding up". Such an interpretation would not only be contrary to the interest of the workers and the industry as a whole but would not be pragmatic and would be contrary to long settled practice in the Company jurisdiction.

[947-F-H, 951-A-C]

2.5. So long as the company continued as a going concern, the workers not only continued to get their wages and other benefits and also retained their rights to be reimbursed out of the assets of the Company in the event that the assets have to be sold in winding up.

[950-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4101-4103 of 2004.

From the Judgment and Order dated 3.3.2004 of the High Court of Calcutta in A.P.O.T. Nos. 162, 271-272/2001.

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SLP (C) Nos. 6257-6258 of 2004.

Civil Appeal No. 5906 and 5907 of 2004.

B Jaideep Gupta, S.K. Bagaria, R.F. Nariman, Sr. Advs., Rana Mukherjee, Siddharth Gautam, Manju Agarwal, Goodwill Indeevar, Gaurav Kejriwal, P.C. Sharma, M.K. Michael, Varinder Kumar Sharma, Saurav Kirpal, Chanchal Kumar Ganguli and Naresh Kumar, Advs. with them for the appearing parties.

C The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J. :

D *CIVIL APPEAL NOS. 4101-4103 OF 2004*

These appeals were filed against the final judgments and orders dated 3.3.2004 of the High Court at Calcutta passed in APOT No. 271/2001, APOT No. 162/2001 and APOT No. 272/2001. By the said final judgments and orders, the Division Bench of the Calcutta High Court held that the appellants **E** have to be considered as members of the Nemani Group are not entitled to receive payments on the ground that the said group being the profounders of scheme and on the ground that the dues shown by themselves had not been adjudicated either by the Court or by the Registrar.

F *SLP NOS. 6257-6258 OF 2004*

These special leave petitions were filed by M/s Niraj Trading Company, a registered partnership firm represented by one of its partner - Shri Krishna Kumar Nemani and six others (known as Nemani Group). These two special leave petitions were filed by members of the Nemani Group against the **G** Bengal Chatkal Mazdoor Union, the Official Liquidator, the Registrar High Court and Baranagore Jute Factory and the other Mazdoor and Employees Union. These petitions were filed against the final judgment and order passed by the Division Bench of the High Court at Calcutta in APOT Nos. 227 of 2001 and 228 of 2001 dated 03.03.2004 whereby the Division Bench has **H** allowed the appeal of contesting respondent No.1 (Bengal Chatkal Mazdoor

Union) and set aside the order passed by the learned Single Judge dated 08.03.2001 which order had allowed the petitioners M/s Niraj Trading Company and others of Nemani Group to receive one-fourth of the adjudicated claim from the Registrar, Original Side of the High Court at Calcutta upon furnishing a Bank Guarantee to the satisfaction of the said Registrar of the equivalent amount. The said order was set aside by the Division Bench on the ground that the claim of the petitioners had not been adjudicated and also by ignoring the earlier orders dated 30.11.1998 and 01.12.1998 passed by the Division Bench of the High Court which had held that the claims of the unsecured creditors including the petitioners had been adjudicated.

CIVIL APPEAL NOS. 5906 AND 5907 OF 2004

These appeals were filed by Bengal Chatkal Mazdoor Union and Baranagore Jute Factory PLC Shramik Sabha respectively against Radheshyam Ajitsaria, Ashok Ajitsaria, Official Liquidator and Registrar, High Court and the Baranagore Jute Factory. The above appeals were filed against the final judgments and orders of the High Court at Calcutta passed in APOT No. 271 of 2001, APOT No. 162 of 2001 and APOT No. 272 of 2001 dated 03.03.2004. The grievance of the appellants in these two appeals are that the Division Bench while allowing the appeals did not consider the case of the Unions and did not direct disbursement of the money to the workers who were members of the Unions.

BACKGROUND FACTS:

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

A of Management to re-open the mills, but however maintained the assets of the Company under the Official Liquidator. One of the creditors filed an appeal against the order dated 15.09.1988. An interim order was passed by the Division Bench of the High Court appointing Joint Special Officers under whose supervision the Committee of Management was to be constituted on an *ad-hoc* basis with other directions.

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Mr. Raj Kumar Nemani being aggrieved by the order dated 27.09.1988 passed by the Division Bench filed a special leave petition before this Court on 07.10.1988 and this Court, by an order dated 30.11.1988 directed that the scheme proposed by Raj Kumar Nemani supported by the workers and

C unsecured creditors be accepted with a direction for implementation of detailed Scheme. The learned Company Judge was directed to work out the Scheme.

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

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“R.K. Nemani & Anr. v. Shiva & Co. & Others.

ORDER

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Special leave granted. Heard, learned counsel for the parties.

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Having regard to the scope of this appeal and having considered the report of the Special Officer, dated 13th November 1988 made pursuant to the order of this Court, we are of the opinion that the scheme supported by the workers and unsecured creditors of Raj Kumar Nemani, be accepted and a detailed scheme on that basis be formulated. It is desirable that the scheme be implemented as soon as possible and the workers and the creditors should be paid in accordance with the scheme, approved today. Further, the appeal is disposed of with a direction to work out the scheme by the learned Company Judge, Calcutta High Court, who is seized of the matter.

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It is contended by some of the secured creditors that by the operation of the scheme, the assets of the secured creditors should not be allowed to be affected. This contention of the secured creditors may be agitated before the Company Judge, if they are so entitled. All intervention applications are dismissed without prejudice to their rights, if any, to applicants move the Company Judge,

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Calcutta High Court.

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

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

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Sd/-
(Sabyasachi Mukharji)

Sd/-
(S. Ranganathan)

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New Delhi,
30th November, 1988."

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

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

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On an appeal preferred by the Committee of Management against the order dated 16.12.1991, the Division Bench of the High Court made an interim order dated 18.12.1981, reiterated on 24.3.1992 directing payment of 1% of the respective claims to all creditors on or before 7.1.1992. The Bench also stayed the order passed by the learned Company Judge dated 16.12.1991 ordering cancellation of the Scheme. A special leave petition was filed against the order dated 24.03.1992 by one of the creditors. This Court directed the appeal pending before the Division Bench of the High Court to be disposed of expeditiously, while also directing payment to the unsecured

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A creditors to be made @ 2% per month from 01.03.1993. The said order dated 22.03.1993 in S.L.P.(C) No. 6505 of 1992 reads as follows:-

"Acumen Truding Corporation & Anr. v. Committee of Management of Baranagore Jute Factory & Ors.

B Dated : 22nd March, 1993

Coram: Hon'ble The Chief Justice
Hon'ble Mr. Justice A.S. Anand

C ORDER

1. We have heard counsel for all the parties.

2. By an order dated 16th December 1991, the learned Company

D Judge of the Calcutta High Court cancelled the scheme earlier
sanctioned on the ground that the terms of the scheme particularly
in the matter of the schedule of payments to the creditors had not
been complied with. That order was carried up in appeal before the
Division Bench of the High Court, which by its order dated 24th
March 1992 now under appeal, stayed the order of the learned

E single Judge. The Division Bench directed that instead of payment
of 2% p.m. to the unsecured creditors contaminated by the scheme,
there should be payment of 1% p.m. That was the effect of the order
dated 24th March 1992 of the Division Bench, when it referred to
and incorporated its earlier order dated 18th December 1991.

F 3. It is not disputed that payments to the unsecured creditors have
not proceeded strictly in terms of the scheme. There is substantial
short-fall. The parties who have taken over the company under the
scheme and who are liable to effect payments to the creditors in
terms of the scheme cannot take shelter behind the fact that auditors

G of the company have not scrutinised the books of account of the
company. That is a matter over which the unsecured creditors have
no control. Till the auditor examine the books of account and report
that the claim of the extent of the claim of the unsecured creditors
was not supportable, there could be no suspension of the scheme

H of payments.

4. On a consideration of the matter it appears appropriate that the appeal before the Division Bench of the High Court requires to be disposed of expeditiously. We request the High Court to dispose of the appeal within three months.

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5. In the meanwhile payment to the unsecured creditors should proceed at the rate of 2% p.m. from 1st March 1993 and not at 1%. The difference for the past on that calculation shall be made good within three months from today. If there is failure to do so, it will be appropriate for the Division Bench to put that circumstance also into scale in deciding whether the order of the learned single Judge setting aside the scheme should be interfered with in appeal or not..."

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

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

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Sd/-
(Virender K. Sharma)
Court Master

Sd/-
(S.R. Thite)
Court Master"

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

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A *“Acumen Trading Corporation & Anr. v. Committee of Management of Baranagore Jute Factory & Ors.*

ORDER

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

D In the meanwhile, the Committee of Management has deposited in the Registry of this Court, a sum of Rs.40 lacs under directions of this Court. The said sums are in term-deposits with the bank.

E On a consideration of the matter, we set aside the order of the Division Bench reducing the amount from 2 per cent per month to 1 per cent per month. The Committee of Management shall from the month of April 1994 onwards, deposit every month sum of Rs. 8 lacs. Deposits will be made in the High Court.

F The matter will now go back to the learned company Judge, Calcutta High Court who will issue necessary directions as to the appropriation and distribution of Rs. 40 lacs now in deposit, amongst the creditors and also as to the distribution of the sum of Rs. 8 lacs to be deposited every month by the Committee of Management. It is made clear that if the Committee of Management commits default in the matter of these deposits and fall in arrears for any two months, it will be appropriate for the Company Court to replace the Committee of Management by an appropriate alternative mechanism. The amount of Rs.40 lacs in deposit in this Registry shall be transferred to the account of the Registrar (Original Side), High Court of Calcutta, together with accrued

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interest immediately after the present deposits mature. A

A grievance was aired by the petitioners that the Committee of Management is appropriating to itself the funds of the Company towards its alleged claims as unsecured creditor. Sri Santosh Hegde says this is impermissible. It is open to the petitioners to move the Company Judge in this regard. The contention of the Committee of Management on this point is also left open. B

The interlocutory applications are disposed of accordingly. C

Sd/-
CJI

Sd/-
(S. Ratnavel Pandian) D

New Delhi,
March 11, 1994.”

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

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

The learned Company Judge by order dated 23.12.1996 also directed all unsecured creditors to lodge their claims with the Registrar of the High Court. The learned Company Judge, on the note of the Registrar, directed, *inter alia*, the Registrar of the High Court to confine to the claims of those unsecured creditors as on 28.10.1987 i.e. the date of winding-up order and H

- A the amounts quantified against their names in the list of unsecured creditors appended to the Company Application No.63 of 1987 affirmed on 27.4.1997. Pre-scheme unsecured creditors including the appellants lodged their respective claims with the Registrar on 27.02.1997. The Registrar submitted the second report excluding the names of the appellants (Radheshyam Ajitsaria) while including the name of the Nemani group. The Company Judge, on an application filed by the appellants (Ajitsaria's group) directed the Registrar to hear to the submissions of the appellants with regard to their exclusion. The appellants made their submissions and filed written notes in support of their contentions before the Registrar and thereafter the Registrar, on 23.04.1997, submitted a report including names of the appellants (Ajitsaria's group) as persons entitled to receive payments in terms of the Scheme. The Company Judge, by a detailed judgment dated 9.9.1998 directed the Registrar to make payments of all creditors as per the revised statement enclosed to the Supplementary (Second) Report, except to the Nemani group. The Division Bench, in an appeal against the order dated 09.09.1998 filed by Jardine Handerson Ltd., made an order on 30.11.1998/1.12.1998 set aside the Registrar's report insofar as the same exceeded the amount mentioned in the list annexed to Company Appln. No.63 of 1987. The Registrar, despite the appellants not being held as part of the Nemani group, however, did not make any payments to the appellants. The appellants filed an application by way of Notice of Motion, *inter alia*, praying for modification of the order dated 09.09.1998 and for a further direction not to treat the appellants as part of the Nemani group with a further prayer for immediate payment in terms of the sanctioned Scheme. On 08.03.2001, the learned Company Judge directed payments to be made to the appellants, *inter alia*, holding that the appellants were not the part of the Nemani group and that their claims were already adjudicated upon and settled by the Registrar, Original Side.

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

- H On 14.05.2001, the appellants - Ajitsaria's group received payments from the Registrar of the High Court upon furnishing the requisite Bank

Guarantee. Learned single Judge of the High Court passed an order on 19.12.2002, *inter alia*, holding that the possession of the Company by the alleged Board of Directors was wrongful, while directing the Official Liquidator to take possession of the Company (in liquidation). Several appeals were preferred from the order. The Division Bench, while staying the operation of the order dated 19.12.2002, directed the Joint Special Officers to take possession.

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

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

We heard Mr. Jaideep Gupta, learned senior counsel appearing for the petitioners in S.L.P.(C) Nos. 6257-6258 of 2004, Mr. Rana Mukherjee, learned counsel appearing for the appellants in Civil Appeal Nos. 4101-4103 of 2004, Mr. Varinder Kumar Sharma, learned counsel, Mr. S.K. Begaria, learned senior counsel, Mr. R.F. Nariman, learned senior counsel and Mr. Naresh Kumar, learned counsel appearing for the respondents.

Mr. Jaideep Gupta, learned senior counsel appearing for petitioner No.1, M/s Niraj Trading Company and Raj Kumar Namani, petitioner No.4, submitted that the High Court has erred in holding that the dues shown against the members of Nemanji Group were shown by themselves and that

A dues of the Nemani Group have not been adjudicated by the High Court or by the Registrar. He would submit that the High Court has failed to appreciate that the disbursement by Registrar took place after submission of the third report dated 10.4.1997 and the payment to pre-scheme unsecured creditors were available with the Registrar, Original side. According to Mr. Jaideep Gupta, the Division Bench should not make any discrimination amongst the same category of pre-scheme unsecured creditors mentioned in the list annexed to the scheme of management who have lodged their claims with the Registrar, Original side.

B Mr. Jaideep Gupta, learned senior counsel, submitted that the Judges of the Division Bench have erroneously concluded that the petitioners were not part of the pre-scheme creditors and that their names were not included in the list of pre-scheme creditors filed along with C.A.No. 63 of 1987 and that the Bench has also erred in holding that the claims of the petitioner had not been adjudicated which was clearly contrary to the report of the Registrar, original side, which was accepted by both the Judges as well as the Division Bench. It was further submitted that at the present stage the workers do not have a right to oppose the payment to the Nemani Group out of the funds lying with the Registrar, original side. In the light of the above, Mr. Jaideep Gupta submitted that there is nothing on record justifying withholding of payments to the petitioner-group, who undoubtedly were pre-scheme creditors and whose claims had been finally adjudicated upon by the Registrar, original side, which adjudication has been upheld both by the learned single Judge as well as by the Division Bench. Further based on such adjudication all other unsecured creditors have been paid, while only 25% of the total amount due and payable to the petitioner-group has been directed

C to be paid by the learned single Judge by the order dated 8.3.2001. The funds available at the hands of the Registrar is far in excess not only of the 25% ordered to be paid but in excess of the entire claim of the petitioner-group. It was also submitted by Mr. Jaideep Gupta that a sum of Rs. 42 crores which was received by way of acquisition compensation is now with the company. This apart, the assets are also lying with the company. In these circumstances, it is submitted that it is only just and proper that the order passed by the learned single Judge be upheld and payments be made to the Nemani Group. It is also pertinent to notice that all other unsecured creditors including Jardine Henderson (the original management at the time when the winding up order was passed) and the Jain Jalan Group (being in management after 1994) have been fully paid their dues as unsecured creditors out of the funds

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in the hands of the Registrar, original side. A

Mr. Jaideep Gupta took us through the pleadings, annexures and orders passed thereon on various occasions by different Courts.

Mr. Rana Mukherjee, learned counsel, appearing for the appellants in Civil Appeal Nos. 4101-4103 of 2004 submitted that appellant No.1 remained as a member of the Committee of management only for a period of 11 months having resigned on 2.5.1990 and that appellant No.2 never participated in the management and affairs of the company (in liquidation) and no one including the workers made any claim and/or grievance against the appellants at any point of time. B

The said fact has been duly noticed and recognized in various Court orders including the order of the Division Bench dated 30.11.1998 and 1.12.1998 and the order of the Registrar dt. 8.3.2001. According to Mr. Rana Mukherjee, the appellants' firm Radheyshyam & Co. and Indian Agency never formed part of Nemani Group and the same would be evident from the letters written by the workers' Union and submitted before the Company Court. The appellants are the unsecured creditors of the Company who were entitled to receive payment in terms of the Scheme @ 2% p.m. at the entire payment in terms of the said Scheme without interest was to be disbursed to them within a span of four years and two months and accordingly the entire amount became due and payable in the year 1993 itself. There is also no allegation upon the appellants to disburse excess payments to themselves as has been alleged against Raj Kumar Nemani, therefore, the appellants stand on a different footing from the Nemani Group of Companies/firms who have been made entitled to receive only 25% of their claim upon furnishing of bank guarantee. It was also submitted that the appellants have received their dues as certified by the Registrar of the Calcutta High Court under orders of the said Court upon furnishing a bank guarantee which has been kept alive. According to Mr. Rana Mukherjee, the main judgment and order warrants interference by this Court as the appellants have been wrongly excluded from receiving the payments though all other creditors similar to the status of the appellants have received their payments long back. Thus accordingly to him, there has been denial of justice. C

Mr. S.K. Bagaria, learned senior counsel appearing for the Baranagore Jute Factory PLC Shramik Sabha, submitted that the Scheme was sanctioned D

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A and approved by the High Court and by this Court primarily taking into consideration the workers' interests and that the workers and their Unions supported the Scheme and the Scheme provided for payment of pre-scheme outstanding dues and current dues of the workers. According to him, Nemani Committee defaulted in making payment of wages, provident fund, ESI, gratuity etc. not only towards the outstanding pre-scheme arrears but also the current dues during its period of management. In addition to the defaults committed by Nemani Committee in payment of the said outstanding pre-scheme dues, the said Committee also defaulted in paying the workers; current dues during its period of management. It was further submitted that all other pre-scheme unsecured creditors who lodged their claims with the

B Registrar of the High Court, have already received their payments and as against the aforesaid, the workers have hardly received a small fraction of their outstanding dues for the pre-scheme period and over and above that, their huge dues got mounted for the current periods during which Nemani Committee was in management. The Scheme being primarily for the benefits

C of the workers and unsecured creditors and all other unsecured creditors excepting the appellants having already been paid, it is in the interest of justice and in terms of the Scheme that the amounts accumulated under the Scheme be directed to be utilized for paying the workers' dues and statutory liabilities on account of Provident Fund, ESI, wages, bonus, gratuity, STL etc. He invited out attention to Section 11(2) of the Employees' Provident

D Funds and Miscellaneous Provisions Act, 1952 which provides that the amounts due from an employer shall be deemed to be the first charge on the assets of the establishment and shall be paid in priority to all other debts. It was submitted that the workers and their Unions supported the scheme in expectation and hope that their outstanding dues as well as current dues

E would be paid by Nemani Committee as specifically provided in the Scheme. Similar was the position when the Jain-Jalan Committee was in management. However, when they came to know about filing of applications by Sri Raj Kumar Nemani and by Sri Radheyshyam Ajitsaria and their group concerns before the learned single Judge of the High Court for payment of their dues out of the funds accumulated under the Scheme, the Unions moved two

F separate applications bearing C.A.No.9 of 1999 and C.A.No.10 of 1999 before the learned single Judge praying, *inter alia*, for not directing any such payment without first paying to the workers. Arguing further, the learned senior counsel, submitted that all unsecured creditors excepting the appellants have already been paid. In the aforesaid circumstances and in terms of the

G Scheme, the amounts lying with the Registrar of the High Court are required

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to be utilized for paying the workers' dues. According to him, the Division Bench of the High Court correctly held that the release of any amounts to the Members of the Nemani Group at this stage is not appropriate. However, the Division Bench of the High Court erred in not directing for payment of the workers' dues out of the amounts accumulated under the Scheme and lying with the Registrar as has been contended by Shramik Sabha in the appeal filed by it (C.A.No.5907/2004).

It was further submitted that as stated in C.A.No. 5907 of 2004 filed by Shramik Sabha, the Division Bench should have directed for utilizing the balance amount lying with the Registrar, Original side, High Court of Calcutta for payment of workers' dues and statutory liabilities on account of the Provident Fund, ESI, wages, Gratuity, bonus etc. It was further submitted that a period of 18 years has passed since approval of the Scheme by this Court on 30.11.1988 and it will be fully in terms of the Scheme as well as Section 11(2) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, if the funds lying with the Registrar are utilized for payment of the workers' dues including those on account of outstanding Provident Fund dues mentioned above.

Mr. R.F. Nariman, learned senior counsel appearing for the Bengal Chatkal Mazdoor Union, submitted that as per the scheme, the workers were to be paid in a time bound schedule. The arrears of back wages were to be cleared within five months of the restarting of the mill. Several other dues, namely, gratuity, ESI, Provident Fund, Welfare Fund etc. were also to be cleared in the manner prescribed under the Scheme. However, these payments were not made by the Nemani Group and instead a large sum of money was paid to themselves.

It is alleged that the failure to pay the amounts is squarely on account of the Nemani Group and at the time when these arrears were mounting, they were paying themselves a greater sum of money than was due under the Scheme. The appellants cannot be allowed to take advantage of their own wrong. Mr. R.F. Nariman further submitted that the Scheme has to be read as a whole and in case payment is not made under one part of the Scheme, i.e. to the workers, the same Scheme cannot be relied upon to make a payment to the unsecured creditors. In this context, he relied on the judgment of this Court in the case of *Workers v. Rohtas Industries*, [1987] 2 SCC 588 where this Court held that the claims of the workers have a priority even above those of secured creditors. Mr. R.F. Nariman drew our attention to

A Section 529 A of the Companies Act, 1956 for the proposition that the priority is to be given to the dues of the workers. Though the winding up order has been stayed, the provisions of Section 529 A of the Companies Act, 1956 will apply in letter if not in spirit. According to him, the provision is applicable in a winding up of an insolvent company and as per Section 441 of the Companies Act, 1956, winding up is deemed to commence upon the presentation of the petition for winding up. Further, in case the money is disbursed without regard to Section 529A of the Companies Act, 1956, and ultimately the stay of the winding up is lifted, there would be an effective annulment of the legislative mandate provided in Section 529A of the Companies Act, 1956.

C He also invited our attention to Section 11(1) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and Section 94 of the Employees' State Insurance Act, 1948 which also provide for a first priority to these dues in respect of a company in winding up.

D Section 11(2) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 is reproduced hereunder:

E “11(2) Without prejudice to the provisions of sub-section(1), if any amount is due from an employer whether in respect of the employees' contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts.”

F While interpreting the provisions of Section 11(2) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and while noting that the Provident Fund Act is a piece of welfare legislation have accorded priority to these dues over other dues. In this context, he cited the following rulings:

G 1. *Recovery Officer & Assistant Provident Fund Commissioner v. Kerala Financial Corporation*, 2002(95) FLR 1024 paras 7,10,13,14 (High Court of Kerala)

H 2. *National Stock Exchange of India Ltd. Rep. By its authorized*

signatory A. Sebastian v. The Assistant Provident Fund Commissioner Employees' Provident Fund Organisation and the Managing Director, Premier Securities Ltd. (W.P. Nos. 24857 and 25609 of 2001, para 32) High Court of Madras.

3. *Manager, Vijaya Bank, Padubidri, Dakshina Kannada v. Regional Provident Fund Commissioner, Sub-Regional Office, Balmatta, Mangalore and Ors.* [1999] 5 Kar.L.J.459, para 7 (Karnataka High Court)

At the very least, by virtue of Section 11(2), the claims of the Provident Fund authorities are akin to secured claims and, therefore, have a priority over the unsecured claims and that the amount of money lying with the Registrar is far less than the arrears of the Provident Fund department and, therefore, in consonance with the legislative mandate embodied in Section 11(2) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, the money should first be paid to the provident fund authorities before they are disbursed to unsecured creditors. Concluding his arguments, Mr. R.F. Nariman submitted that in the present case, substantial justice has been done to the workers and no interference by this Court is called for. When dealing with an appeal under Article 136 of the Constitution of India, this Court comes to the conclusion that there is no failure of justice, it is not bound to decide and interfere even when a question of jurisdiction of the original Court of Tribunal is raised and even if the impugned judgment is wrong. The following rulings have been cited for the above proposition:

1. *Balvantrai Chimanlal Trivedi v. M.N. Nagrashna*, AIR 1960 SC 407
2. *Bulaki v. Lal Dhar*, [1997] 9 SCC 274, para 3
3. *Union of India v. Kulamoni Mohanty*, [1999] 1 SCC 185 paras 4,6
4. *Taherakhatoon v. Salambin Mohammad*, [1999] 2 SCC 635 para 20
5. *Chandra Singh v. State of Rajasthan*, [2003] 6 SCC 545 paras 39 & 45

A 6. *State of Punjab v. Savinderjit Kaur*, [2004] 4 SCC 58 paras 16 & 17

Mr. Naresh Kumar, learned counsel appearing for Baranagore Jute Factory PLC (R-4 in SLP(C) Nos. 6257-6258 of 2004, furnished details in regard to the payment of arrears of wages of the workers of the Mill, payment to the statutory creditors, arrears of gratuity etc. According to him, Nemani-Ajitsaria Group committed several offences; that they did not make payment on receipt of arrear dues and statutory dues as per the Scheme and that default in making current payment of wages and other statutory dues and they siphoned huge sums of money while they were running the Jute Mills. He submitted, at the request of a section of the workers, Directors of the Company, to control the Jute Mills and immediately thereafter filed an application before the High Court stating the background under which the Management took control of the Jute Mills and also prayed for liberty from the High Court to take steps for revival of the Company. The High Court appointed a Special Officer with certain directions. He also furnished other details subsequent to the appointment of the special Officer. He invited our attention to the report filed by the Special Officer as per the directions of the Division Bench, details about the status of the Company and the details regarding the company's writ disputing the arrear, PF liability and their reply to the allegations made by the Nemani Group. According to him, the funds are meant for disbursement. It was never the intention of the High Court to allow Nemani Group to run the mill for their own personal gain without complying and/or paying the workers and other creditors. The defaults and/or evasion made by them is their personal liability as has categorically been clarified by the judgment dated 19.11.1994 passed by the High Court. He further submitted that the arrears of wages of the Workers of the Mill have since been reduced by the Committee of Management by payment of Rs.22 lacs on account of arrears of wages for two weeks and Rs.17 lacs on account of 50% of the arrears of bonus for the year 1985-86 and that the arrears of wages now stands at Rs.54 lacs and at Rs.17 lacs on account of the balance of the arrears of bonus aggregating to Rs.71 lacs which would be paid by the Committee of Management.

As regards payment to the statutory creditors, it was submitted that the Committee of Management will pay the aforesaid arrears of statutory dues which have accrued during the previous management. Likewise, the arrears of gratuity payable to the workers/employees who have already retired or

superannuated or resigned or ceased to be in service of the company have accumulated during the period of previous management to the tune of Rs. 36 lacs approximately. It was submitted that the Committee of the Management will arrange for payment of such amount of gratuity to such workers. It is to the credit of the present management that they have apparently succeeded in turning the Company and resurrecting the Jute Mills. While the workers have jointly supported the achievement of the present Management, the statutory creditors have also come out in support of the present management.

In the above background, the questions of law that require determination in the instant Civil appeals and the S.L.P. are as under:

- (a) Whether the Division Bench of the High Court was entitled to allow the appeal without first deciding the maintainability of the appeals as directed in terms of the order dated 29.3.2001?
- (b) Whether the Division Bench of the High Court was entitled to withhold the payment of the pre-scheme unsecured creditors in view of the specific direction given by this Court on 31.3.1994?
- (c) Whether the Division Bench was entitled to direct re-adjudication of the claims, which were already adjudicated contrary to the order passed by the Division Bench of the High Court on 30.11.1998 and 1.12.1998?
- (d) Whether the workers can have any stake and have right to receive any payment from the fund lying with the Registrar original side of the High Court of Calcutta which was specially earmarked for the pre-scheme unsecured creditors as defined in the Scheme?
- (e) Whether the finding and decision of the learned Company Judge can be ignored and/or overlooked on the ground that no enquiry was held by the Registrar?

We have carefully considered the elaborate and lengthy submissions made by the respective counsel appearing on either side with reference to the pleadings, annexures filed and the orders passed by the Company Court,

A the High Court and of this Court.

As already noticed, Baranagore Jute Factory - petitioners in S.L.P.C Nos. 6257-6258 of 2004, was ordered to be wound up on October 28, 1987. The petitioners' group comprises of (i) Niraj Trading Company; (ii) Banwarilal Anup Kumar HUF, (iii) M/s Raj Kumar Krishna Kumar, HUF; (iv) Raj Kumar Nemani; (v) Nemani Trading Company ; (vi) Krishna Kumar Nemani and (vii) Raj Kumar Jain constituted the largest group of creditors of the Jute Factory and were accordingly included in the list of pre-scheme creditors prepared and filed in C.A.No.63 of 1987 at S.Nos. 1 to 7 by the erstwhile management i.e. *M/s Jardine Henderson Ltd.* After the winding up order was passed, a Scheme was propounded to run the Jute Mill and for this purpose, a Committee of Management was proposed to be constituted of M/s Niraj Trading Company commonly referred to as the Nemani Group. The said scheme propounded by the Nemani Group provided for payments to workers, electricity dues, statutory creditors and unsecured creditors. This compartmentalised payment mechanism was adopted to ensure that everybody was paid in accordance with and under the Scheme. The said scheme was approved both by the High Court as well as by this Court on November 30, 1988. The said scheme was finally approved and passed by the High Court with the support of the secured creditors as well as the workers. Thereafter some unsecured creditors approached the High Court for payment under the scheme and especially since pursuant to order of the High Court, the payment under the scheme stood reduced from 2% as envisaged under the scheme to 1%. The matter was carried up in appeal to this Court and this Court directed the Nemani Group to deposit a sum of Rs.40 lacs as and by way of an interim measure. By an order dated 11.3.1994, this Court set aside the order of the High Court reducing the amount from 2% to 1% and further directed the Committee to deposit Rs.8 lakhs per month. The amount of Rs.40 lakhs deposited by the Nemani Group was directed to be transferred to the High Court. It is pertinent to mention that at this stage no grievance was made by the workers and as such the question of consideration of their claim does not and cannot arise. Moreover, the order in no uncertain term provides that the payments made pursuant to such order i.e. order dated 11.3.1994 were to be disbursed amongst creditors.

We have already noticed that the Nemani Group was replaced by the Jain Jalan Committee of Management. The learned single Judge, by order dated 13.12.1994, directed that the Nemani Group be replaced and the Jain-

Jalan Group may take over the Committee of Management subject to payment of Rs.64 lacs and further directed payments to substantial creditors except the Nemani Group. This order was carried up in appeal before the Division Bench and the Division Bench by an order dated 25.1.1995 set aside the order for preferential payments to certain creditors and left the issue relating to payments to the Nemani Group open. The learned single Judge, by an order dated 26.8.1996, in view of the substantial funds having accumulated in the hands of the Registrar, Original side directed the parties to file their claims as directed by this Court and further directed the Registrar to adjudicate the claims in accordance with law. The learned single Judge by its order dated 23.12.1996 clarified that only pre-scheme unsecured creditors appended to the company's application being C.A.No.63 of 1987 affirmed on 27.4.1987 were to be considered for payment. The Registrar, Original side was further given the liberty to requisition the services of a Chartered Accountant to adjudicate upon the claims of the unsecured creditors. Thereafter, reports were prepared by the Registrar. The third and final report dated 23.4.1997 of the Registrar was accepted by the High Court. In the said report, it was categorically recorded that full and final adjudication of the net claim of pre-scheme unsecured creditors will appear as per the schedule set out hereinbelow. The names of the members of the Nemani Group were included at S.Nos. 60 to 66 and an amount of Rs. 2,29,34,500/- was adjudicated to be outstanding as far as the Nemani Group is concerned.

The learned single Judge by order dated 9.9.1998 accepting the final adjudication made by the Registrar directed payments to be made to all the other unsecured creditors except the Nemani Group on the ground that the Nemani Group had made larger payments to members of its group in comparison to other unsecured creditors. This order was subsequently affirmed by the Division Bench in an appeal filed by Jardine Henderson. The Division Bench while disposing of the said appeals upheld the adjudication made by the Registrar, subject to adjustments. Nemani Group filed C.A.No.627 of 1998 for modification of the order dated 9.9.1998. On 8.3.2001, the learned single Judge disposed of C.A.No.627 of 1998 filed by Nemani Group for modification of the order dated 9.9.1998. The learned single Judge, after noticing that all other unsecured creditors had been paid off and even thereafter substantial funds were left in the hands of the Registrar, directed payment of 25% and/or one fourth of their settled claim after adjustment of payments already made. Appeals were preferred by the workers' Union and

A respondent No.4 (Jute Factory) under the new Management of Chetan Choudhary. The Division Bench while admitting the appeal by an order dated 29.3.2001 directed that the Nemani Group be allowed to withdraw the monies subject to furnishing a Bank Guarantee of the like amount. Further doubts as to the *locus standi* of Chetan Choudhary to represent the Company were also raised and the same were kept open. The workers contended that there was no change in circumstances or additional material on record justifying the direction for payment to the Nemani Group and further that they had filed C.A.Nos. 9 and 10 of 1999 giving details of their dues. In so far as the change in circumstances is concerned, by the time the order dated 8.3.2001 was passed, all other unsecured creditors had been paid off and still substantial sums were available for disbursement. As regards the pending applications are concerned, this court has noticed, during the course of hearing, that the said applications were really in the nature of intervention applications. In spite of the above, the Division Bench of the High Court has erroneously concluded that the petitioners-Nemani Group were not part of the pre-scheme creditors and/or that their names were not included in the list of pre-scheme creditors filed along with C.A.No. 63 of 1987. The Division Bench also erred in holding that the claims of the petitioners-Nemani Group had not been adjudicated which, in our opinion, was clearly contrary to the report of the Registrar, which was accepted by both the learned single Judge as well as by the Division Bench.

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

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

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

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

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

(e) Further, since the company still continues to function, Section 529-A of the Companies Act cannot be pressed into service by the workers. The protection of section 529-A is available only when a company has been wound up, Official Liquidator has taken over the assets and disbursements are being made by the Official Liquidator in course of the winding up of the company. There is no question of the worker claiming a preferential right or payment while a company is running and carrying on business in the usual course and incurring daily expenses and liabilities. C

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In the light of the above, Mr. Jaideep Gupta, learned senior counsel, submitted that there is nothing on record justifying withholding of payments to the Nemanji Group, who undoubtedly were pre-scheme creditors and whose claims had been finally adjudicated upon by the Registrar which adjudication has been upheld both by the learned single Judge as well as by the Division Bench. It is also not in dispute that the funds available at the hands of the Registrar is far in excess not only of the 25% ordered to be paid but in excess of the entire claim of the petitioner-Nemanji Group. F

In view of the above, we are of the opinion that the claim of the Nemanji Group and Niraj Trading Company has to be upheld and accepted and the payment should be ordered to. G

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A In the result, S.L.P(c) Nos. 6257-6258 of 2004 are allowed and the impugned judgment and order dated 3.3.2004 in APOT Nos. 227 & 228 of 2001 common with APOT No. 271 of 2001 passed by the Division Bench is set aside.

B *The claim made by Radheyshyam Ajitsaria and Anr. In C.A.Nos. 4101-4103 of 2004.*

We have already discussed in detail in paragraphs supra about the facts and circumstances of the above appeals and the various proceedings taken out by the parties and the orders passed thereto.

C In view of the discussion made above, the following conclusion can be arrived at:

D i) Appellant No.1 remained as a member of the Committee of management only for a brief period of 11 months having resigned on 2.5.1990. Appellant No.2 never participated in the management and affairs of the company, no one including the workers made any claim and/or grievance against the appellants at any point of time.

E ii) The appellants are unsecured creditors of the Company who were entitled to receive payment in terms of the scheme at the rate of 2% per month and the entire payment in terms of the said scheme without interest was to be disbursed to them within a span of four years and two months and accordingly the entire amount became due and payable in the year 1993 itself.

F iii) At all material times, there was no dispute with regard to the fact that Nemani Group of Company consisted of seven companies/ firms which are distinct and separate from the appellants.

The said fact has been duly noticed and recognized in various Court orders including the order of the Division Bench of the High court dated 30.11.1998/ 1.12.1998 and the order of the learned single Judge dated 8.3.2001.

G iv) There is no allegation upon the appellants of disbursing excess payments to themselves as has been alleged against Raj Kumar Nemani, therefore, the appellants' stand on a different footing from the Nemani Group of companies/firms who have been made entitled to receive only 25% of their claim upon furnishing of bank guarantee.

v) That the appellants have received their dues as certified by the Registrar of the High Court under orders of the High court upon furnishing a bank guarantee which has been kept alive.

So far as the workers' claim is concerned, the scheme which was accepted by this Court on 30.11.1998 contained disbursement of the payment to all the creditors in the said scheme. The said scheme clearly mentioned the manner in which the creditors are entitled to receive the payment. The statutory dues, such as Provident Fund, E.S.I. and workers' dues on account of wages salary are to be liquidated in the manner as provided therein and unsecured creditors were made entitled to receive payment @ 2% per month save and except initial payment @ 5%. The said scheme was supported by the workers. Unlike unsecured creditors, at no point of time workers had come up before the company Judge or before this Court alleging that payments have not been made to them pursuant to and in terms of the scheme, though the workers all along appeared in the proceedings.

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

Likewise, the reliance upon the provisions of the ESI and the EPF Act are inapposite inasmuch as by virtue of orders of this Court as also noted by the Division Bench of the High Court that the amount to be paid at the rate of Rs. 8 lacs per month as directed by this Court was to be kept secured for payment to un-secured creditors only, the workers are therefore estopped from resorting to taking recourse to the provisions of Section 11(2) of the EPF Act since the same was available to them even at the time this Court had directed the said sum to be earmarked for payments to un-secured creditors.

A In view of the fact, that the manner in which the unsecured creditors are entitled to receive the payment has been specified and more particularly, when all the pre-scheme un-secured creditors who have lodged their claims with the Registrar, High Court, Calcutta have received payment, there cannot be a justification in withholding the payment of the appellants and petitioners B who were also entitled to receive payment as other pre-scheme un-secured creditors.

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

One Committee of Management is being replaced by another Committee of Management on the same terms and conditions with an object to implement the same scheme. Thus the dues of the creditors including the D workers and other statutory dues are to be paid by the Committee of Management. Even, at present the company is being run by a committee of Management and are now supported by the workers as would appear from the order dated 18.11.2004.

E This apart from the report of the Joint Special Officers dated 20th August, as submitted by respondent No.4 before this Court it would further appear that the present committee of Management in implementation of the said scheme, is making payments of arrears as well as current dues of the workers.

F So far as the provision as contained under section 11 sub-clause 2 of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 are concerned, the same, in our opinion, would not debar the appellants to receive their payments as the appellants have been made entitled to receive the payments in terms of the scheme and charge if any, would crystallize G over the assets of the company and not upon the money of the appellants.

H It is interesting to notice that the workers on the one hand are opposing the claim of the appellants on the ground that they have not received the payment. On the other hand, the workers have not made any claim from the money which has been received by the respondent No.4 as compensation

approximately to the tune of Rs.41 crores for acquisition of the land by the National High-Way Authority of India for 17 acres valued at Rs. 41 crores reported in *Competent Authority v. Barangore Jute Factory & Ors.*, [2005] 13 SCC 477. Thus it is crystal clear that the Workers' Union have been set-up by the present committee of management so as to obstruct the payment to these appellants.

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In our considered opinion, the impugned judgment and order warrants interference by this Court under Article 136 of the Constitution of India as the appellants have been wrongfully excluded from receiving the payments though all other creditors similar to the status of the appellants have received their payment long back thus there has been denial of justice.

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Insofar as the argument of Shri K.P. Bagaria, learned senior counsel appearing on behalf of other Workers' Union with regard to the liability of making payments towards Provident fund dues and the judgment reported in 1995 Volume I CLJ page 89, it is not in dispute that the appellants were not parties to the proceedings in which the said judgment was delivered, and it was Mr. Raj Kumar Nemani who had been held to be liable by the High Court to pay provident fund dues. The liability to pay Provident Fund dues remains with the company which is still run a going concern.

D

Insofar as the outstanding amounts are concerned, these very unions had sworn affidavits filed in July, 1993 before the High Court stating that the Nemani group after taking over management has paid substantial part of their dues.

E

Insofar as the scheme is concerned, the said scheme was initially for a period of 8 years and the amounts mentioned therein were to be liquidated over the years and not immediately upon the scheme coming into force. The payments which were to be made immediately upon implementation of the scheme, were accordingly made. The petitioner group was replaced midway into the scheme and did not complete the entire tenure of the scheme. The new Committee of Management (Jain-Jalan) which replaced the petitioner group, took over the management on the same terms and conditions as contained in the scheme, thereby assuming and/or taking over the entire responsibility of payment of all outstanding amounts including workers dues and other employee benefits including Provident Fund.

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A It is pertinent to note that the fund which is the subject-matter of the present proceedings was created only for the purpose of payment of unsecured creditors under the scheme framed by the High Court and accepted and affirmed by this Court by two orders dated 17.12.1993 and 11.03.1994. This Court affirmed that the amount of Rs. 8 lacs per month out of the revenues of the Company would be kept aside in the hands of the Registrar, Original side and pay to the unsecured creditors alone @ 2% per month. Admittedly, the said corpus has been treated by successive orders of this Court and the High Court as being the dues of the unsecured creditors alone. None of these orders were ever appealed against or set aside. It is too late in the day to contend that the said fund would also be utilized for payment of workers dues and or other statutory dues for which the scheme made separate arrangements. Both Jardine Henderson and Jain-Jalan Committee who were in management of this Company at various points of time have been allowed to recover their entire dues as unsecured creditors out of this fund without reference to the workers dues and or other statutory dues. At no stage, whatsoever, have any part of the said fund been utilized by the High Court for payment of any of the workers dues or other dues. The said fund, in our opinion, therefore, cannot have a different character merely when it comes to the dues of the present petitioners.

E It is important to note that by orders of Court, the company (in liquidation) was not in fact wound up but was allowed to continue as a going concern. This was undoubtedly in the interest of the workers. So long as the company continued as a going concern, the workers not only continued to get their wages and other benefits and also retained their rights to be reimbursed out of the assets of the Company in the event that the assets have to be sold in winding up. In fact, the fixed assets of the Company are enormously valuable. It has land in excess of 50 acres in prime locations out of which 17 acres was acquired by the National High-way Authority upon payment of compensation of Rs. 41 crores recently to the present Company. The dues of workers are, therefore, in no jeopardy whatsoever. When the Company continues as a going concern, it is the dues of the unsecured creditors which are most vulnerable and it is for that purpose this Court by its various orders ensured that a separate fund should be created for the unsecured creditors. In our opinion, it is fair and proper that the funds so created should only be utilized for the purpose of the unsecured creditors and not workers dues and other dues.

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

Many judgments were cited by counsel for the workers' union. None of the judgments cited on behalf of the workers' union under Section 11(2) are applicable to the facts of the present case. These are cases where a dispute arose as to who had first charge on the assets of the employer which is not at all the issue arising in the present context. It was argued that the present petitioners (Niraj Trading Company Group) are responsible for heavy outstanding which was specifically denied by learned counsel for the petitioners as most mis-leading and contrary to the provisions of the scheme itself. Our attention was also drawn to the findings recorded by learned single Judge that despite such tall claims, the workers had not been able to provide proof of the specific details claimed by them. It was stated by learned single Judge that except for certain bald statements the objectors did not provide details in support of their allegation. In our view, dues under the many heads were not to be paid personally by the Members of the Committee of the Management. They would be paid out of the funds generated in the course of carrying on business of the said Company. If anything remained unpaid, the liability would pass on under the provisions of the scheme itself to the Committee of Management which replace them. In the first instance, the Committee of Management was taken over by the Jain-Jalan Group and it is now alleged that now it is taken over by Chetan Choudhary. Outstanding liabilities under the scheme, therefore, remain the liability of the Company and the subsequent Committees were also required to discharge their liabilities under the Scheme. In our view, it is a deliberate attempt here to cast the entire liability under the Scheme on to the Members of the Committee constituted under the present petitioners in special leave petition

A Nos. 6257-58 so that the subsequent Committees can avoid their responsibilities and obligations under the scheme. To take one example, if there is any outstanding amount by way of Provident Fund, the same is just as such charged on the compensation money realized by the present Management. The present Management in collusion with the Union leaders are, therefore, necessitated in projecting that the outstanding Provident Fund dues, if any, should come out of the fund lying in the hands of the Registrar, Original side, rather than out of the compensation money which has been realized by the present Management at the time of acquisition of the fixed assets of the Company. It is to be noted that only 25% of the dues of the petitioner, as unsecured creditors, have been directed to be released under

B the orders of the High Court. These dues relate back to 1987. The present petitioners who were suppliers of jute to this mill have been unable to realize their dues of 1987 till today whereas all other unsecured creditors have been able to do so. It is, therefore, just and proper that at least at the present stage, the dues should not be held back any further.

C

D In any event, it is crystal clear that finding of the Division Bench of the High Court, that the claim of the appellants have not been duly adjudicated is erroneous as claim of the appellants have duly been adjudicated by the Registrar, High Court, Original Side, with the help of the Chartered Accountant as would be evident from Certificate dated 15th March, 2004 issued by the Registrar. Thus, the said order dated 3.3.2004 passed by the Division Bench as against these appellants is liable to be set aside.

E

For the foregoing reasons, we hold

F 1. That the appellants in C.A.Nos. 4101-4103 of 2004 and the petitioners in S.L.P.(C) Nos. 6257 and 6258 of 2004 are entitled for payment as pre-scheme unsecured creditors in view of the specific directions given by this Court on 31.3.1994.

G 2. That the Division Bench was not entitled to direct readjudication of the claims which were already adjudicated, contrary to its own orders dated 30.11.1998/1.12.1998.

H 3. The fund lying with the Registrar, original side, High Court of Calcutta was specially earmarked for the pre-scheme unsecured creditors as defined in the Scheme.

4. Registrar of the High Court is directed to effect payment A
immediately to both the creditors.

In the result, C.A.Nos. 4101-4103 of 2004 and S.L.P.(C) Nos. 6257-6258 of 2004 are allowed and the orders passed by the Division Bench of the High Court which are impugned in these appeals and petitions are set aside and the C.A.Nos. 5906 and 5907 of 2004 filed by Barangore Jute Factory and Bengal Chatkal Mazdoor Union (CITU) shall stand dismissed. However, there shall be no order as to costs.

It is stated that both the appellants in C.A.Nos. 4101-4103/2004 and petitioners in S.L.P.(C) Nos. 6257-6258 of 2004 have already furnished the bank guarantee and have received the payment upon furnishing the requisite bank guarantee. The Registrar of the High Court is directed to release the bank guarantee to the respective parties forthwith.

The Company is directed to pay the other dues such as PF, ESI, Welfare Fund, arrears of wages, gratuity, bonus etc. to the workers depending upon the availability of the funds with it.

The appeals and special leave petitions are disposed of accordingly. No costs.

K.K.T.

Appeals and special leave petitions disposed of.