IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 447 OF 2014
IN
JUDGES SUMMONS NO.487 OF 2012
IN
COMPANY PETITION NO.385 OF 2002

Grand View Estates Private Limited,)
a company incorporated under)
Companies Act, 1956, having its)
registered office at 70, Nagindas Master)
Road, Fort, Mumbai – 4000 023 and)
administrative office at SP Centre,)
41/44Minoo Desai Marg, Colaba,) ...Appellant
Mumbai – 400 005)(being org.
Respondent No.3)

V/s

1. Vishwanath Namdeo Patil,)
51 Tatanagar V.N. Purav Marg, Sion)
Mumbai – 22.)
)
2. Deepak Naralkar, 111/73,)
Svadeshi Mill Chawl, V.N. Purav Marg,)
Sion, Chunnabatti, Mumbai – 22)
)
3. Chandrabhudur Mall, 108/21,)
Svadeshi Mill Chawal, V.N. Purav Marg,)
Chunnabatti, Sion, Mumbai – 22)
)
4. Vishwanath Jadhav, Uday Chawl)
Committee, Asalfa Village, Jambhall)
Pada, Ghatkopar, Mumbai – 400 084)
)
5. Krishna Prophalkar, 4/18,)
Svadeshi Mill Chawal, V.N. Purav Marg,)
Chnabhatti, Sion, Mumbai – 22)

6. Official Liquidator, M/s Swadeshi Mills, Bank of India Building, 5th Floor, M.G. Road, Fort, Bombay – 22.	
7. Forbes & Company Limited earlier known as Forbes Gokak Limited), a company, incorporated under the Companies Act, 1956 having its registered office at Forbes Building, Charanjit Rai Marg Fort, Mumbai – 400001.	...Respondent Nos. 1 to 5 (being Org. Applicants) Respondent No.6(being orig. Respondent No.1) and Respondent No.7 (being Org. Respondent No.2)

ALONGWITH
APPEAL NO.668 OF 2014
IN
JUDGES SUMMONS NO.487 OF 2012
IN
COMPANY PETITION NO.385 OF 2002

Forbes & Company Limited (earlier known as Forbes Gokak Limited), a company, incorporated under the Companies Act, 1956, having its registered office at Forbes Building, Charanji Rai Marg, Fort, Mumbai – 400001	...Appellant(being org. Respondent No.2)

V/s

1. Vishwanath Namdeo Patil, 51 Tatanagar V.N.Purav Marg, Sion Mumbai – 22.	

2. Deepak Naralkar, 111/73,
Svadeshi Mill Chawl, V.N. Purav Marg,
Sion, Chunnabatti, Mumbai – 22

3. Chandrabhudur Mall, 108/21,
Svadeshi Mill Chawal, V.N. Purav Marg,
Chunnabatti, Sion, Mumbai – 22

4. Vishwanath Jadhav, Uday Chawl
Committee, Asalfa Village, Jambhall
Pada, Ghatkopar, Mumbai – 400 084

5. Krishna Prophalkar, 4/18,
Svadeshi Mill Chawal, V.N. Purav Marg,
Chnabhatti, Sion, Mumbai – 22

6. Official Liquidator,
M/s Swadeshi Mills, Bank of India
Building, 5th Floor, M.G. Road,
Fort, Bombay – 22.

7. Grand View Estate Private Limited,
a company incorporated under the
Companies Act, 1956, having its
registered office at 70, Nagindas Master
Road, Fort, Mumbai – 400 023 and
administrative office at SP Centre,
41/44, Minoo Desai Marg, Colaba,
Mumbai - 400 005.

..Respondent Nos.1 to 5(being Org. Applicants) Respondent No.6 (being org. Respondent No.1) and Respondent No.7 (being original Respondent No.3)

Mr. Virag Tulzapurkar, Senior Counsel alongwith Ms. Soumya Srikrishna, Mr. Vikash Jha i/b Cyril Amarchand Mangaldas for the Appellant in both the above appeals.

Ms. Jane Coax alongwith Mr. Rajmohan Amonkar i/b Mr Manmohan Amonkar for Respondent Nos. 1 to 5 in both the above Appeals.

Mr. J.P. Sen Sr. Counsel with Mr. S.A. Bhagwat for the Official Liquidator in both the above Appeals.

CORAM: V.M. KANADE &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

Date on which the Judgment is reserved: 14/10/2015
Date on which the Judgment is pronounced: 22/12/2015

JUDGMENT: ***(Per V.M. Kanade, J.)***

1. Both these appeals can be disposed of by a common judgment since the same order passed by the learned Single Judge has been challenged in both these appeals.

2. An interesting question falls for consideration before this court viz.

> Whether, in an adjudication proceedings before the Official Liquidator, dues of the workers are to be calculated from the date of actual winding up of the Company by the Company Court or whether they should be calculated from the date of

appointment of the Provisional Liquidator with full powers to sell the assets or from the date on which there is cessation of work on account of various valid legal reasons?

3. The Company was wound up by the final order of winding up which was passed by this Court on 05/09/2005. Provisional Liquidator, however, was appointed with full powers including the power to sell the Company's assets on 13/02/2002. The workers filed claim before the Official Liquidator claiming their dues from the date of winding up.

4. The Company – Svadeshi Mills Ltd contended that the workmen were entitled to get their dues but not from the date of cessation i.e. from 01/08/2000 when they accepted their provident fund dues but from the date of appointment of Provisional Liquidator i.e. 13/02/2002. The Official Liquidator held that the workers were entitled to get their dues from 13/02/2002 when the Provisional Liquidator was appointed. Being aggrieved by the said order, the workers preferred a Petition before the Company Court.

5. The learned Single Judge relying on the provisions of section 445 sub-clause (iii) held that the workers were entitled to get their dues from the date of official winding up

of the Company. The Appellant – Grandview Estate Private Ltd is a secured creditor of the Company and it has challenged this order on the ground that if the order of the learned Single Judge is implemented, it would get less money towards its dues since substantial portion would have to be paid to the workers if their dues are calculated from 05/09/2005 and not from 13/02/2002. The other Appellant – Forbes & Company Ltd also has challenged the same order on similar grounds.

6. Brief facts which are relevant for the purpose of deciding the above appeals are as under:-

7. Svadeshi Mills Company Limited ("the Company") was engaged in the business of manufacturing textiles for a very long time. The financial condition of the Company deteriorated and became bad to worse on account of various reasons.

8. The Appellant – Grandview Estates Private Ltd is a major shareholder and also a secured and an unsecured creditor of the Company. The Appellant (hereinafter referred to as "Grandview Estates Private Limited") owns 22,83,210 equity shares of the Company constituting 29.29% of the total equity shareholding in the Company. Respondent No.7 - Forbes & Company is a promoter shareholder, a secured and

unsecured creditor of the company and is carrying on business of engineering goods, shipping and office automation. Respondent No.7, alongwith its wholly owned subsidiary Company, owns 17,64,430 equity shares of the Company constituting 22.70% of the total equity shareholding of the Company. Thus, Grandview Estates Private Limited and Forbes & Company Limited are holding, in aggregate, about 52% of the total equity shares of the Company and they are the only secured creditors of the Company and they are part of the Shapoorji Pallonji Group.

9. A winding up Petition was filed by the Ralli Brothers and Coney in 1997. Thereafter, various other winding up Petitions were also filed in the Bombay High Court and the Company made a reference to BIFR on 24/02/1998. On 24/04/1998, BIFR declared the Company as a sick Company. In October 2000, the Company stopped payment of wages to workers at Mill and Head Office. The BIFR on 05/02/2001 made a recommendation to the Bombay High Court for winding up of the Company. On 14/05/2001, AAIFR dismissed the appeal preferred against the Order of BIFR.

10. On 28/09/2001, Government of Maharashtra passed a Resolution and appointed High Power Committee ("HPC") to look into the workers dues and also dues of Bankers and Financial Institutions. The said Committee was empowered

by this Court to dispose of the assets of the Company. HPC, on 08/10/2001, fixed 30/09/2001 as a cut off date for all dues. On 13/02/2002, in winding up proceedings, Official Liquidator was appointed as Provisional Liquidator of the Company with all powers including the power to sell assets of the Company. On 21/06/2002, the Company Court passed an order permitting the HPC to dispose of the movable assets of the Company, and deposit proceeds with the Official Liquidator.

11. The Official Liquidator took possession of the factory and office premises in July 2002 and on 17/09/2003, sale of movable assets was confirmed by the Company Court. Thereafter, on 18/10/2003, the Official Liquidator issued an advertisement inviting claims from creditors including the claims of workers. The workers filed their claim through their Union on 30/12/2003. In 2004, HPC sold the movable assets and realized an amount of Rs 15.53 crores.

12. This amount was disbursed by the Official Liquidator for reimbursement of the cost of security agencies, other related expenses, part payment of the dues of the workers and employees and statutory dues and dues of secured creditors. Employees of the Mill were paid from the proceeds from the sale of movable assets 75% only of the claim for unpaid earned wages upto September, 2001. Employees of Head

Office were paid 75% plus gratuity calculated upto September, 2001 i.e. the date on which the Mill and the Head Office were closed by the Company. Finally, winding up order was passed in Company Petition No.1068 of 1997 and other Company Petitions on 05/09/2005. On 25/08/2006, the learned Company Court Judge revoked the order of appointment of HPC and consequently immovable property was not sold by the HPC. On 24/01/2011, Memorandum of Understanding was signed by the Company and the Union in respect of the Head Office Employees.

13. As pointed out earlier, 52% of the equity shares of the Company are held by Grandview Estates Private Limited and Forbes & Company Limited. On 01/12/2006, full debt of IDBI was assigned to Grandview Estates Private Limited. Thereafter, on 31/08/2007 full debt of Bank of Baroda was assigned to Grand View Estates Private Limited. Similarly, 70 out of 146 unsecured creditors' debts were assigned to Grandview Estates Private Limited.

14. Appellant – Grandview Estates Private Limited also filed a Petition in this Court for setting aside the order of winding up and deposited about Rs 86 crores for that purpose in this Court. However, the High Court did not accept the said proposal and the amount was refunded to Grandview Estates Private Limited who then have filed an SLP in the Supreme

Court, which is pending.

15. The Official Liquidator thereafter started adjudication process inter alia of fixing of dues of the workmen. The Official Liquidator held that the workers were entitled to get their dues from the date of appointment of the Provisional Liquidator of the Company. The workers – Respondent Nos. 1 to 5 challenged the said order by filing Judges' Summons No.487 of 2012. The learned Single Judge set aside the order of the Official Liquidator and directed that dues of the workmen should be paid from the date of order of winding up i.e. 05/09/2005 and not from 13/02/2002 which is the date on which the order appointing the Provisional Liquidator was passed.

16. Appellant – Grandview Estates Private Limited and Forbes & Company Limited have challenged this order by filing this appeal.

17. It is a well settled position in law that in the Letters Patent Appeal filed under Clause 15 of the Letters Patent, the Court can interfere with the order passed by the learned Single Judge only if it is found that the impugned order is patently illegal or perverse. The Apex Court in *Wander Ltd and Another vs. Antox India P. Ltd.*[1] has observed in para 14

1 1990(Supp) SCC 727

as under:-

> "14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd vs. Pothan Joseph (1960) 3 SCR 713 : AIR 1960 SC 1156 : (SCR 721).
>
> > "...... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130) '....the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of

> well settled principles in an individual case."

> The appellate judgment does not seem to defer to this principle."

18. Keeping in view the aforesaid principle, we now proceed to examine the rival submissions.

19. Both, the learned Senior Counsel appearing on behalf of the Appellants and the learned Counsel appearing on behalf of the workmen have submitted detailed written submissions which stand incorporated in this Judgment and, therefore, we do not propose to separately quote each and every submission made by the learned Senior Counsel appearing on behalf of the Appellants, the learned Counsel appearing on behalf of the workmen and the Official Liquidator.

<u>Issues for consideration:</u>

20. What is the cut off date from which the workers are entitled to get their wages including other entitlements -

> (a) Whether as per Section 445(3) from the date of actual winding up order of the Company Court Judge? Or

(b) Whether from the date on which the Provisional Liquidator is appointed by the Company Court Judge with full powers to sell the property of the Company? Or

(c) Any other date prior to the date of actual winding up of the Company by the Company Court Judge when there is cessation of work and the workers stop rendering services to the Company, or

(d) Whether the cut off date is to be ascertained from Section 530(1) sub-clause (d) and/or as per the facts of each case as per the discretion of the Official Liquidator?

21. It will be necessary to see the relevant provisions first.

22. Before the Amendment Act of 1985 by which some provisions of the Companies Act relating to winding up were amended and priority was given to the workers dues alongwith dues of the secured creditors, the position was that in the scheme of distribution of assets, workers did not

get any priority in distribution. Only secured creditors were first entitled to receive their claim and after this amount was paid, all others were then paid ratably according to the amount which was available for distribution.

23. Prior to this amendment, workers, employees and officers had a priority only to the extent of section 530(1)(b) and they were entitled to get only four months' salary out of a year. The said provision prescribed that the period of four months was to be calculated 12 months before the “relevant date”. The “relevant date” has been defined under section 530(8)(c) to mean the date on which the Provisional Liquidator was appointed by the Company Court Judge. After insertion of Section 529-A, Section 530 was amended and after clause 8(b), clause (bb) was added and it was clarified that the Section was not applicable to workmen. Consequently, the workmen were brought out of the purview of Section 530. In our view, therefore, on the combined reading of Sections 529, 529A and 530, on the basis of section 530(1)(d), it could not be said that the cut off date for payment of workers' dues is the date of appointment of the Provisional Liquidator. However, we will separately examine whether independently of Section 530, that date would still be considered as a cut off date on the ground that because of cessation of work, workers are not entitled to get workers' dues after the Provisional Liquidator was appointed

with full powers to sell the property.

24. Sections 529, 529-A, 530(1)(b) , 530(8)(bb) and (c) of the Companies Act read as under:-

> "529. Application of insolvency rules in winding up of insolvent companies.-(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-
>
> (a) debts provable;
> (b) the valuation of annuities and future and contingent liabilities; and
> (c) the respective rights of secured and unsecured creditors; as are respect of the estates of persons adjudged insolvent:
>
> [Provided that the security of very secured creditor shall be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,-
>
> (a) the liquidator shall be entitled to represent the workmen and enforce such charge;
>
> (b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank *pari passu* with the workmen's dues for the purposes of section 529A]

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the Company as they respectively are entitled to make by virtue of this section:

[Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to [pay his portion of the expenses] incurred by the liquidator 9including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor.]

[*Explanation* -For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security.]

[(3) For the purposes of this section, section 529A and section 530,-

(a) “workmen”, in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) “workmen's dues”, in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely :-

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Wormen's Compensation Act, 1923 (8 of 1923) rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of-

(i) the amount of workmen's dues; and
(ii) the amounts of the debts due to the secured creditors."

"**529A. Overriding preferential payment.-** Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company -

(a) workmen's dues : and
(b) debts due to secured creditors to the extent such debts rank under clause

(c) of the proviso to sub-section (1) of section 529 *pari passu* with such dues,

shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.]”

“**530. Preferential payments**.- (1) In a winding up [subject to the provisions of section 529A, there shall be paid] in priority to all other debts-

(a)...........

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date subject to the limit specified in sub-section 2;”

“530(8) For the purposes of this section-

(a)........

(b)........

(bb) the expression “employees' does not include a workman;” and]

(c) the expression “relevant date' means-

(i) in the case of a company ordered to be wound up compulsorily, the date of the

> appointment (or first appointment) of a provisional liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound up voluntarily before that date; and
>
> (ii) in any case where sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company."

25. It will also be relevant to have a look at section 445 which reads as under:-

> "445. Copy of winding up order to be filed with Registrar (1) On the making of a winding up order, it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the Registrar a certified copy of the order, within [thirty days] from the date of the making of the order.
>
> If default is made in complying with the foregoing provision, the petitioner, or as the case may require, the company, and

every officer of the company who is in default, shall be punishable with fine which may extend to [one thousand rupees] for each day during which the default continues.

[(1A) In computing the period of [thirty days] from the date of the making of a winding up order under sub-section (1) the time requisite for obtaining a certified copy of the order shall be excluded.]

(2) On the filing of a certified copy of the winding up order, the Registrar shall make a minute thereof in his books relating to the company, and shall notify in the Official Gazette that such an order has been made.

<u>(3) Such order shall be deemed to be notice of discharge to the officers and employees of the company, except when the business of the company is continued.</u>"

26. The learned Single Judge on the basis of Section 445 sub-section (3) held that the date of actual winding up order passed by the company Court Judge was the cut off date from which workers were entitled to get their legal dues.

27. On the other hand, it has been urged on behalf of the workmen that since section 445(3) was the only provision under the Companies Act which provided for the legal cessation or retrenchment of workers from their work, that date alone has to be deemed to be the date on which the employer-employee relationship came to an end in the absence of the Company or Official Liquidator obtaining permission for closure under Section 25-O(6).

28. Ms Jane Coax, the learned Counsel appearing on behalf of the workers also relied on Ruled 154 of the Companies (Court Rules), 1959 which lays down that value of all debts and claims against the Company would be estimated according to the value thereof on the date of the order of winding up of the Company.

29. The principal contention of Mr. Virag Tulzapurkar, the learned Senior Counsel appearing on behalf of the Appellants is that the deeming fiction which is sought to to be introduced in Section 445(3) cannot be treated as a last date from which the workers dues are to be calculated and if there are any other relevant dates which are prior to passing of the order of winding up which disclose the stoppage of rendering of services by the workers and cessation of work due to that, such a dates also would have to be taken into

consideration by the Official Liquidator. Secondly, it is submitted that the Official Liquidator has rightly held that the date of appointment of the Provisional Liquidator with all powers viz 13/02/2002 is the cut off date. He submitted that there could be several situations in which lawfully the services of the workmen would come to an end before the date of winding up as stated in written submissions of the Appellants in para 5.4 viz (a) to (k). He submitted that therefore the learned Single Judge has erred in holding that the date of winding up was the only date on which there was legal cessation of relationship of employer-employee. He relied on the judgment of *Carne & Anr. vs. Debono*[2] in support of this submission and also relied on para 25 at page 30 of the judgment of the learned Single Judge dated 23/03/2009 in MSM Satellite (Singapore) Pte. Ltd. vs. Board of Control for Cricket in India (Arbitration Petition (L) No.284 of 2009).

30. On the other hand, Ms. Jane Coax appearing for the workmen submitted that the view taken by the learned Single Judge is correct and elaborately taken us through the Rule 154 and other Rules framed under 1959 Rules and also other relevant provisions of the Act.

31. In our view, to some extent, there is a substance in the

2 (1988) 1 WLR 1107 at page 1112

submission made by the learned Senior Counsel appearing on behalf of the Appellants that the date under section 445(3) cannot be the last date from which there would be cessation of employer-employee relationship. In *Carne and Another vs. Debono*[3] in the facts of that case, it was observed by the Court of Appeal as under:-

> " I can now turn to the main point which the purchaser himself urged. It is clear on the master's finding that time was of the essence for the completion of the contract on 5 February. That being so, it is surprising to find no completion statement and no attempt to agree the sum due on completion until 10 minutes past 10 on that morning, apart from a telephone communication the previous day. What is more, in the respects that I have mentioned, the completion statement was wholly defective. What had proceeded in an extremely dilatory matter had suddenly become the most urgent procedure that I

3 (1988) 1 W.L.R. 1107

personally have come across; viz. No completion statement being provided until the very morning of the crucial day. The purchaser asks what was he to do : his solicitors were in funds but what had been asked from them was the payment of a sum which, on the face of the completion statement, was the wrong sum: The purchaser submitted , in effect, that the vendors were in breach of contract in that they failed to send in good time a completion statement specifying the right amount due. He also relied on special condition 12(h) which deems any notice given by other parties under the agreement to have been served on the expiration of 48 hours after it had been posted. Applying that to the faxed completion statement, he said it had to be deemed not to have been received until two days after the crucial date of 5 February.

I have no doubt that he is wrong on that latter ground. Clause 12(h) is a

> deeming provision which does not exclude the possibility of proving an earlier receipt. It is not a statement that for all purposes the document shall only be treated as having been received at a particular time."

Similarly, the learned Single Judge of this Court also in *MSM Satellite (Singapore) Pte. Ltd vs. Bord of Control for Cricket* [Arbitration Petition (Ld) No.284 of 2009) after relying on the aforesaid judgment held in para 25 as under:-

> "25............The provision relating to deemed delivery on the next working day is also not applicable because here also deeming provision does not come into play in view of the actual receipt of notice by the petitioner. The respondent has also relied upon the decision in Carne & Anr. vs. Debono, reported in (1988) 1 WLR 1107 wherein the Court of Appeal while considering a similar clause to the effect "12(h): *Any notice given by either party to the other under the provisions of this agreement shall be*

> *in writing and shall be deemed to have been served at the expiration of 48 hours after it has been posted*....”
> has held that the deeming provision does not exclude the possibility of proving the earlier receipt. It is not a statement that for all purposes, the document shall only be treated as having received at a particular time.”

32. There cannot be any dispute regarding the said proposition. The deeming fiction clause which is introduced in any provision may not necessarily mean that, that date alone would be date on which the provision would come in operation and factually if it can be shown that it would be set in motion on some other date then that date also would operate as a cut off date.

33. In our view, therefore, if the other dates are not applicable in the facts and circumstances of the case then, in that case, the date of winding up would be the date on which the relationship of employer-employee would come to an end and from that date workmen would be entitled to get their legal dues. Therefore, there cannot be any strait-jacket formula which can be arrived at by holding that the date under section 445(3) would be the only cut off date from

which workers dues are to be calculated and in a given case, it is possible to hold that earlier date could be the cut off date for calculating the workers' dues. To that extent, we disagree with the view taken by the learned Single Judge that date under section 445(3) would be the only date from which workers dues can be calculated.

34. It will be therefore necessary to take into consideration whether in the facts of the present case, the learned Single Judge was right in coming to the conclusion that the date of order of winding up was the date on which the workmen became entitled to claim their dues.

35. Mr. Virag Tulzapurkar, the learned Senior Counsel appearing on behalf of the Appellants has pointed out various dates from which it could be said that there was cessation of services rendered. He submitted that the workers are entitled to their legal dues. He pointed that under section 529(3)(b)(i) legal dues are defined as under:-

> "529(3)(b)(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman

under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947)”

He submitted that therefore what the workers were entitled to were the dues for the services which were legally rendered by them. He then pointed out various dates from which they had stopped rendering services. Firstly, he pointed out that from 01/08/2000 the Mill and the Head Quarters had stopped functioning. Thereafter, in 2001 HPC was appointed which was authorized to sell some movable assets. Part of the movable assets was sold and therefore after having sold the movable assets, and HPC having received Rs 15.53 crores, there was no question of workers rendering their services particularly when the plant and machinery in the Mill was being sold. He also submitted that the HPC has held that date 30/09/2001 was to be treated as cut off date for calculating dues of workmen. He relied on para 20 of the Judgment of Gujarat High Court in *Textile Labour Association vs. Official Liquidator*[4] (“Jubilee Mills case”) Secondly, he submitted that the workers had collected their provident fund dues in 2001 He submitted that having collected their provident fund dues, workers could not claim to be in service. Thirdly, he submitted that, in any case, the Company court Judge appointed a Provisional Liquidator with all powers to sell movable and

4 1999-II-LLJ-859 (Gujarat)

immovable assets. He submitted that from that date, in any case, there was a complete cessation of work and, therefore, the Official Liquidator had rightly held the said date to be the cut off date.

36. The learned Senior Counsel for the Appellants in response to the submissions made by the learned Counsel for workmen submitted that section 25-O(6) would have no application to the present case. He relied on the judgment of the Division Bench of this Court in *Bombay Metropolitan Transport Corporation Ltd. vs. Employees of Bombay Metropolitan Transport Corporation Ltd. CIDCO & Ors* **reported in (1991) 71 Company Cases 473 (Bombay) at pages 478 to 480** and more particularly on paras 17 to 19 of the said judgment and submitted that the Division Bench of this Court has observed that winding up proceedings under section 25-O operate in different fields.

37. Mr. Sen, the learned Senior Counsel appearing on behalf of the Official Liquidator adopted the arguments made by the learned Senior Counsel appearing on behalf of the Appellants. In addition, he relied on the Judgment of the Apex Court in *Bank of Maharashtra vs. Pandurang Keshav Gorwardkar and Others*[5] and also on the judgment of the learned Single Judge of this Court in Engineering Workers,

5 (2013) 7 SCC 754

High Court, Bombay Association vs. The Official Liquidator[6] at paras 38 and 39 on page 635.

38. In our view, as we have pointed out hereinabove, while calculating the cut off date the facts in each case have to be taken into consideration. The Amendment Act of 1985 which amended various provisions of winding up proceedings is a beneficial piece of legislation which was brought about to give equal priority to the workers who had contributed to accumulation of capital and revenue of the Company. The Parliament amended the Act and held that the workers dues had a *pari passu* charge over the secured creditors' dues. The import of the said amendment was to give equal status to workers as that of secured creditors. In a winding up proceedings, there could be two possible results viz (1) that after selling the assets of the Company and distributing the assets for paying off liabilities, the Company may still have surplus amount or in the alternative the liabilities would outweigh the amount realized by the sale of assets in which case even though both, workers and secured creditors had priority would have to accordingly rateably get their share out of assets and whatever remains would be distributed ratably amongst the other creditors. Therefore, in our view, the Official Liquidator would have to then consider whether there would be any surplus of assets

6 2006(6) ALL MR 617

over liabilities to see whether paripasu benefit could be given to the workers and take it to its logical conclusion. The Official Liquidator in such a case therefore would have to consider the last order of actual winding up of the Company as the order from the date of which the workers dues would have to be calculated. In our view, such purposive interpretation or "purposes & objectives" approach could harmonize the intention of the legislature in giving paripasu benefit to workers alongwith the secured creditors.

39. In the present case the facts which are undisputed are as under:-

The Appellants before this Court are not only the secured creditors but also the majority shareholders. The Appellant No.1 held from earlier 22.70% of the shares and is part of the Shahpoorji Pallonji Group, which is in turn part of the Tata Group which owned the Mill in liquidation. The Appellant No.2 is also a part of the Shahpoorji Palonji Group and engaged in real estate development construction and infrastructure business. It acquired 29.29% of the shares in 2010 after the Order of winding up, thus giving the Appellants together 52% of the equity shares of the Company. Similarly, after the order of winding up, in 2006 and 2007 the debts of the only two secured creditors, IDBI and Bank of Baroda, were assigned to the Appellant No.2, as also the debts of 70 out of the 146 unsecured creditors. Given the extent of the immovable assets yet to be sold, which include 48 acres of prime land in the heart of Mumbai City, after the sale of these assets there will be a surplus even after payment is made from the proceeds to the workmen and creditors. In this situation as per section 475 of the Companies Act, 1956, any surplus shall be distributed amongst the contributors. Once the winding up order is passed the shareholders as also the ex-directors become contributories (S.427 & S. 428 of the Companies Act, 1956). Thus any surplus in this matter will be distributed to the Appellants in their capacity as shareholders. If the date of calculation of dues is taken as the date of winding up, in matters where there is surplus like the present, the workmen will get a larger amount than they would if the cut-off date is taken as the appointment of the Provisional Liquidator.

The dues of the secured creditor in the present matter grew at a phenomenal rate even after the de facto closure of the factory/ BIFR recommendation etc due to the fact that their decree from the DRT has grant in 2003 an amount, as of 13/01/2003, of Rs 27,46,04,358.24 (Rs 22,14,17,645/- + Rs 5,31,86,713.24) with future interest @ 16% p.a with quarterly rests. Given this staggering rate of interest, by 2011 this amount had grown to Rs 193,85,74,592/-. (report of Official Liquidator dated 12/07/2011, paras 46(ii) & 57(E).

40. Since the immovable property of Svadeshi Mills admittedly has not been sold and it has a land of almost about 50 acres in the heart of the City which is a prime residential and commercial area, the Official Liquidator would receive substantial amount (approximately Rs 1000 crores) to say the least by sale of these assets. The Grandview Estates Private Limited which is a majority shareholder of the Company and whose SLP is pending in the Apex Court, if it is permitted to develop this property it would make substantial profit by developing the said land since it is a developer and builder and earn profit and also get its dues as per the decree passed by DRT wherein they are entitled to get the decretal amount with compound interest. Taking into consideration these facts, in our view, the legislative intention therefore would be taken to its logical conclusion. Therefore, it will have to be held that the date of the last order of the winding up of the Company would be the date from which the workers dues would be calculated and not the earlier date on which much emphasis is laid by the learned Senior Counsel appearing on behalf of the Appellants. In the facts and circumstances of this case therefore issue No. (a) framed in para 20 above is held to be in the affirmative. Issue Nos. (b) to (d) in the facts of the present case will have to be answered in the negative. The question framed in para 2, viz. :

> "Whether, in an adjudication proceedings before the Official Liquidator, dues of the workers are to be calculated from the date of actual winding up of the Company by the Company Court or whether they should be calculated from the date of appointment of the Provisional Liquidator with full powers to sell the assets or from the date on which there is cessation of work on account of various valid legal reasons?"

therefore, will have to be held as under:

> "Depends on the facts and circumstances of each case."

41. In view of this it will not be necessary to go into the question as to whether permission has to be obtained by the Company or the Official Liquidator under Section 25-O(6) in order to stop the claim of the workers. We are, therefore, of the view that it is not necessary to interfere with the judgment and order passed by the learned Single Judge, though the reasons given by us are slightly different from the reasons given by the learned Single Judge.

42. Appeals are accordingly dismissed.

(DR SHALINI-PHANSALKAR JOSHI, J.) **(V.M. KANADE, J.)**