<u>IN THE HIGH COURT OF JUDICATURE AT BOMBAY</u>
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION (L) NO. 434 OF 2016
IN
COMPANY PETITION NO. 1278 OF 2015
WITH
COMPANY PETITION NO. 400 OF 2014
WITH
OFFICIAL LIQUIDATOR'S REPORT NO. 448 OF 2016

Edelweiss Asset Reconstruction Company Limited ….. Applicant

<u>IN THE MATTER BETWEEN</u>

Edelweiss Asset Reconstruction Company Limited ….. Petitioner

VERSUS

M/s.Fourcee Infrastructure Equipments Pvt. Ltd. (In Liqn.) & Ors. .. Respondents

Mr.Ashish Kamat, a/w.Ms.Debashree Dey, i/b. Desai & Diwanji for the Applicant in CA(L)/434/2016.

Mr.Kevic Setalwad, Senior Advocate, i/b. Mr.Afreen Mukadam for the Respondent nos. 2 to 5/Ex-Directors in CA(L)/434/2016 and CP/400/2014.

Mr.Chetan Kapadia, a/w. Mr.Nimay Dave, a/w. Mr.Sachin Chandrama, i/b. Manilal Kher Ambalal for the Petitioner in CP/400/2014.

Mr.Y.V.Divekar, i/b.Divekar & Co. for the Director Mr.Manoj M.

Mr.Sharan Jagtiani for the Official Liquidator.

Ms.Yogini Chauhan, Deputy Official Liquidator present.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 14th MARCH, 2017
PRONOUNCED ON : 26th APRIL, 2017

P.C.

By consent of parties, the aforesaid two matters were heard together and are being disposed of by a common order. Some of the relevant facts for the purpose of deciding the matters as under :-

2. Company Application (L) No.434 of 2016 is filed by the applicant Edelweiss Asset Reconstruction Company Limited in Company Petition No.1278 of 2015 inter alia praying for an order and directions against the ex-directors to disclose on oath the assets and/or properties hypothecated in favour of the applicant and seeks permission to take possession of those assets upon such disclosure being made and for various other reliefs.

3. Company Petition No.400 of 2014 is filed by Citi Bank N.A. against the respondent company in liquidation *inter alia* praying for winding up of the said company on the ground that the said company is unable to pay its debts. The said petition is already admitted.

4. Official Liquidator's Report No.448 of 2016 is filed by the Official Liquidator inter alia praying for permission to take further steps in liquidation proceedings against the respondent company and to direct the ex-directors to co-operate with the Official Liquidator and to handover all the details and whereabouts of the containers and possession thereof, revenues earned by them during the last three years, possession of the immoveable properties etc. of the Official Liquidator.

5. Some of the relevant facts for the purpose of deciding the company application and the Official Liquidator's Report are as under :-

6. It is the case of the Citi Bank N.A. in Company Petition No.400 of 2014 that on 22nd August,2012, the petitioner offered to the respondent various credit facilities to the tune of Rs.200 million for meeting its working capital requirements on the terms and conditions contained in the sanction letter.

7. On 5th November,2012, the petitioner and the respondent entered into a loan agreement on the terms and conditions expressly set out therein.

8. On 11th October,2013, the respondent company executed a deed of hypothecation in favour of the petitioner in respect of the securities set out in the said agreement. It is the case of the petitioner that the respondent company executed Form-8 whereby various charges were registered with the Registrar of Companies in favour of the petitioner.

9. During the period between 1st November,2012 and 20th February,2013, the petitioner disbursed the loan amount to the respondent in the sum of Rs.200 million in two tranches by way of short term foreign currency loan i.e. first tranche for an amount of USD 2,242,990.65 disbursed on 1st November,2012 and second tranche of USD 1,491,563.34 disbursed on 20th February, 2013.

10. On 22nd October,2013, the petitioner called upon the respondent to make payment of the amount due and payable to the petitioner on or before 25th October, 2013.

11. On 17th January,2014 the petitioner issued a recall notice to the respondent in view of the respondent having committed event of default on 25th October,2013. The petitioner called upon the respondent to pay an aggregate amount of Indian currency equivalent to USD 1,266,423 within two days from the date of the receipt of the said recall notice.

12. On 6th March,2014, the petitioner issued a statutory notice upon the respondent calling upon the respondent to pay a sum of Rs.22,09,51,371/- as outstanding on 1st March,2014 with further interest thereon. The respondent through its advocates replied to the said statutory notice on 14th March,2014 and denied the demand made by the petitioner. The petitioner vide its letter dated 27th March,2014 denied the allegations made by the respondent and reiterated its claim. The respondent vide its advocates' letter dated 9th April, 2014 once again denied the allegations made by the petitioner in letter dated 27th March,2014.

13. It is the case of the petitioner that in its balance-sheet (provisional) as on 21st March,2014, the respondent has admitted its liability towards petitioner for a sum of Rs.20,31,19,777/- in respect of the credit facilities availed from the petitioner by it.

14. The petitioner therefore filed a Company Petition (400 o0f 2014) for seeking winding up of the respondent and applied for interim relief. The respondent has filed affidavit in reply in the said company petition and opposed the reliefs prayed by the petitioner in the company petition.

15. On 16th December,2014, the parties filed consent terms before this

court in the said petition which were taken on record. In the said consent terms the respondent admitted its liability to the petitioner in the sum of Rs.23,44,76,941/- as on 8th December,2014 with further interest thereon and agreed to make various payments to the petitioner in installments. It was provided in the said consent terms that in the event of the respondent committing default in payment of the installment, the settlement arrived at between the parties shall stand terminated and the company petition shall stand revived and admitted without recourse to the order passed by this court. It was also agreed that in that event the Official Liquidator attached to this court shall stand appointed as the Provisional Liquidator of the respondent with all powers under the Companies Act, 1956 including the power to take charge of all the assets, properties, stock in trade, books of account and bank account of the respondent. The petitioner was also permitted to advertise the admission of the petition in the newspapers as per the provisions of the Company Court Rules. This court disposed of the said company petition along with Company Application No.285 of 2014 in terms of the said consent terms.

16. It is not in dispute that the respondent committed default in making repayment of the installments agreed under the said consent terms filed by the parties in the said Company Petition No.400 of 2014. The petitioner Citi Bank N.A. by its letter dated 20th January,2015 informed the Official Liquidator about such default committed by the respondent. The respondent through its advocate's letter dated 22nd January,2015 to the advocates of the petitioner alleged that the respondent had been all along ready and willing to make payment due to the petitioner as per the agreed consent terms and had no intention to commit any default. The respondent contended that the petitioner was aware that a Joint Lenders' Forum had been formed by various lenders including the petitioner and

all the payments including the financial obligations of the respondent were processed with the approval of the members of the Joint Lenders' Forum under the TRA agreement. The reference was made to the meeting of the said Joint Lenders' Forum held on 6th January,2015 recording that the said Forum had expressed their concern over the filing of the said consent terms and requested for a copy thereof. It was contended that due to various reasons mentioned in the said letter, the payment had not been processed as per the said consent terms. The respondent requested the petitioner to withdraw the notice addressed to the Official Liquidator.

17. On 30th January,2015, this court passed an order in Company Petition No.400 of 2014. This court recorded the statement of the Managing Director who was present in court that the Company had failed to pay an amount of Rs.50 lacs to the petitioner payable under the consent terms dated 16th December,2014 and the cheque issued by the respondent to the petitioner had been dishonoured upon presentation for want of sufficient funds. The said Managing Director undertook to pay an amount of Rs.50 lakhs to the petitioner on or before 13th February,2015 and further undertook not to approach this court for any extension of time to make payment of Rs.50 lakhs as undertaken. This court accepted that undertaking and granted extension of time to the respondent to make payment of Rs.50 lakhs upto 13th February,2015.

18. It was made clear in the said order that the Official Liquidator who was appointed as a Provisional Liquidator of the respondent and had taken symbolic possession of the assets and records of the respondent shall not take any further action in the matter. It was further provided in the said order that in the event of the respondent not paying amount of Rs.50 lakhs as undertaken, the

company petition shall forthwith stand admitted without reference to this court and shall be made returnable within six weeks from the date of the default and the company petition shall be advertised in two local newspapers i.e. Free Press Journal (in English) and Navshakti (in Marathi) and in the Maharashtra Government Gazette. It was made clear in the said order that the Official Liquidator shall proceed to take physical possession of the records/assets of the respondent.

19. The respondent through its advocates letter dated 13th February,2015 forwarded a demand draft dated 12th February,2015 for an amount of Rs.37 lacs drawn by the Axis Bank and demand draft dated 12th February,2015 for the amount of Rs.13 lakhs drawn by the ICICI Bank in favour of the petitioner.

20. The petitioner through its advocates' letter dated 3rd August,2015 to the Official Liquidator informed that a default had occurred under the consent terms and order dated 16th December,2014. The Official Liquidator was informed that he was appointed as a Provisional Liquidator of the respondent by this court and was requested to immediately fix an appointment for taking charge of the assets, properties, stock in trade, books of account and bank account of the respondent.

21. On 21st August,2015, this court passed an order in Company Petition No.400 of 2014. This court recorded that the respondent had committed default in making payment of the monthly installments and the Official Liquidator who had stood appointed as a Provisional Liquidator of the company and who had symbolic possession of the assets was directed not to take any further action in the matter. The respondent has made a payment of Rs.50 lakhs to the petitioner and defaulted

in payment of three installments of Rs.55,55,556/- due on or before 31st May 2015, 30th June 2015 and 31st July 2015. This court observed that whilst by a self-operative order, the petition has already stood admitted and whilst a Provisional Liquidator has already been appointed of the respondent company with direction not to proceed further until further orders of the court, before the admission of the petition is actually advertised in pursuance of the self-operative order, it may be worth while of all stakeholders, including the petitioner before this court, to approach the Joint Lenders' Forum and resolve the issue of disbursement of payment to the petitioner from out of the TRA Account in compliance with the consent terms. This court directed that the Joint Lenders' Forum to consider whether it was more advisable to keep up the attempts of revival of the company by releasing funds from the TRA account than to allow the petition to be advertised and winding up proceedings to be prosecuted further inter alia leaving the physical charge of the assets of the company with the Official Liquidator in his capacity as the Provisional Liquidator.

22. This court directed that the petitioning creditor was also expected to co-operate with the respondent to seek a resolution of the matter before the Joint Lenders' Forum. The matter was adjourned to 21st September,2015. It was made clear that no further time would be granted to any stakeholders on the next date.

23. On 12th October, 2015, this court gave one more chance to the respondent to see if the matter should be settled between the parties. It was however made clear that no further time would be granted on the next date. The petitioner in the Company Petition (L) No.957 of 2015 informed the court that the said petitioner also had large claim of Rs.50 crores against the respondent. This court directed the office to place the said Company Petition (L) No.957 of 2015

also along with Company Petition No.400 of 2014 on 26th October, 2015. This court directed the respondent to consider the claim of the petitioner in Company Petition (L) No.957 of 2015.

24. On 26th October,2015, the respondent through its counsel made a submission that there was a third party buyer, who had been identified and who had evinced interest in buying moveables belonging to the respondent. Learned counsel for the respondent made a statement that the monies received from the sale of the moveables shall be made over to the petitioner. Learned counsel for the petitioner in Company Petition (L) No.957 of 2015 submitted that his client was holding the security in respect of containers owned by the respondent. His client had already filed an original application before the Debt Recovery Tribunal in which he had applied for enforcement of its security. This court directed the respondent to indicate the particulars of the proposed transaction between the respondent and the third party buyer in the affidavit and also the location of the containers/moveables, which were proposed to be sold and the containers which were hypothecated to the petitioner in Company Petition (L) No.957 of 2015. The respondent was also directed to give inspection of those goods to both the petitioners as and when demanded. This court directed that the respondent shall not finalize any transaction with the third party buyer without communicating the particulars of the transaction and giving atleast one week's notice to the petitioner in Company Petition (L) No.957 of 2015. The matter was adjourned to 17th November, 2015.

25. On 23rd November,2015, the petitioner through its advocates addressed a letter to the Official Liquidator alleging various defaults on the part of the respondent and conveyed that in view of the default committed by the

respondent, the company petition shall stand revived and consequently admitted and the Official Liquidator shall stand appointed as a Provisional Liquidator. The petitioner requested the Official Liquidator to take further steps in pursuance of the power under the Companies Act, 1956 including the power to take physical charge of the assets, properties, stock in trade, books of account etc. with intimation to the petitioner.

26. The petitioner forwarded a draft of the consent terms to the respondent regarding settlement of the dues and requested to fix a date for signing of the consent terms and exchanging the draft of upfront payment. The petitioner vide its e-mail dated 1st December,2015 to the respondent informed that some minor cosmetic changes were suggested by the counsel of the petitioner. The petitioner informed that the respondent may treat the same as final from the petitioner's end.

27. On 30th November,2015, the respondent filed an affidavit in Company Petition No.400 of 2014 and annexed a statement showing the details of the containers, whether pledged or unpledged and the current location. It is the case of the respondent that those details were sufficient and were in compliance with the order passed by this court. There is no affidavit in reply filed by the petitioner to the said affidavit dated 30th November,2015.

28. On 2nd December,2015, this court passed an order recording the statement made by the respondent that they had already filed an affidavit giving details of the container, the location of the container etc. The petitioner in Company Petition (L) No.957 of 2015 took time to file affidavit in reply to the said affidavit. The matter was adjourned to 14th December,2015.

29. On 23rd December,2015 this court recorded that the moveable assets were about 1985 shipping containers of which 207 were hypothecated to the petitioner in Company Petition No.400 of 2014 and 1778 were hypothecated to the petitioner in Company Petition No.1278 of 2015. This Court recorded the statement of the petitioner in Company Petition No.400 of 2014 that it was agreeable to the suggestion of the respondent that the containers hypothecated to the petitioner could be sold and the money be paid over to it so that its claim would get reduced. Learned counsel for the respondent informed the court that the consideration agreed for 207 containers was Rs.12 crores. This court recorded the statement of the petitioner that the entire transaction was expected to be completed within 9 weeks from the date of the said order on as is where is basis.

30. By the said order dated 23rd December,2015, this court permitted the respondent together with Citibank N.A. to sell 207 containers and directed that the entire sale consideration of Rs.12 crores shall be paid over by the buyer ATI Freight Pvt. Ltd. by way of Pay Order/Demand Draft/RTGS to the Prothonotary and Senior Master. This court directed the Prothonotary and Senior Master to invest the sale proceeds with any nationalized bank for a minimum period of six months. It was however made clear that the said order was passed without prejudice to the rights and contentions of ICICI. This court directed that if ICICI does not file an affidavit or was unable to establish that the 207 containers or any part thereof being sold by Citibank were in fact hypothecated to ICICI, then Citibank was at liberty to apply for modification of the said order to the extent of paying over the sale proceeds to it directly by Prothonotary and Senior Master of this court.

31. On 7th January,2016, the petitioner in Company Petition No.400 of 2014 through its advocates addressed a letter to the learned advocate for ICICI Bank Limited informing that the ATI Freight Pvt. Ltd. was informed about the order dated 23rd December, 2015 by this court, however they have till date not deposited the amount of Rs.2 crores with the Prothonotary and Senior Master, High Court and thus no agreement for 207 containers had been executed between the petitioner and the said ATI Freight Pvt. Ltd.

32. The petitioner through its advocates letter dated 3rd February,2016 to the Official Liquidator informed that the proposed sale of 207 containers to the third party did not materialize and thus transaction could not be completed. The respondent remained in continuous default since inception. It was contended by the petitioner that from the order dated 26th October,2015, it was clear that the consequences as recorded in the consent terms was to be forthwith followed on default committed by the respondent under the consent terms. The petitioner requested the Official Liquidator to fix an appointment to take physical possession of the assets, properties, stock in trade, books of account, bank account etc. of the respondent upon intimation to the petitioner.

33. The respondent through is advocate addressed a letter dated 2nd March,2016 to the Official Liquidator. It was contended in the said letter that by negotiating the sale of 207 containers and by finalizing the draft consent terms for realization of the dues of the respondent, the petitioner had given a go by to the consent terms dated 16th December,2014 and thus the question of the petitioner requesting the Official Liquidator to take physical possession of the assets, properties, stock in trade, books of account etc. of the respondent did not arise.

34. On 15th June,2016, this court passed an order recording that on 30th January,2015 since the cheque issued by the respondent was dishonoured, the self operative portion of the order dated 16th December,2014 came into effect. It was observed that despite the Provisional Liquidator having been stood appointed of the respondent as far back as on 30th January,2015, the same was never disclosed to this court, in the proceedings filed by General Atlantic Singapore Fund Pte. Ltd. and others in Company Appeal No.66 of 2014. It was also observed that the ex-directors of the respondent has not complied with the directions issued by the Official Liquidator in the meeting held on 18th April, 2016. This court observed that the learned senior counsel appearing on behalf of the ICICI Bank, learned counsel appearing for the appellants in Company Appeal No.66 of 2014 and learned counsel appearing for the Citibank are all ad idem that the ex-directors of the respondent were dodging this court and not complying with the orders passed by the Official Liquidator or by this court.

35. This court recorded the undertaking that the ex-directors of the company shall file the statement of affairs of the respondent company as required under the provisions of the Companies Act, 1956 and the Rules framed thereunder with the Official Liquidator within a period of two weeks from the date of the said order. This court accordingly directed the ex-directors to file affidavit disclosing various facts. This court observed that in view of the fact that the provisional Liquidator has already been appointed of the Respondent Company, there was no question of respondent company and/or its Directors dealing with any of the assets of the Respondent Company from the date when the Provisional Liquidator was appointed. This court accordingly refused to grant any ad-interim relief in terms of prayer clause 3 in Company Application (L) No.434 of 2016. This court further directed that the ex-Directors of the respondent company were directed not to

leave India without the leave of this Court until the next date. The matter was adjourned to 14th July, 2016.

36. Mr.Setalwad, learned senior counsel invited my attention to various orders passed by this court and also various correspondence exchanged between the parties referred to aforesaid. He also invited my attention to some of the averments made in the sur-rejoinder filed by the ex-director Mr.Vinay Singh dated 28th February,2017 and would submit that in the said affidavit it is contended that by virtue of the order passed by this court in Company Petition No.400 of 2014, the appointment of the Official Liquidator as provisional liquidator has been stayed and thus the question of the Official Liquidator taking any further steps in the liquidation proceeding of the company did not arise.

37. Learned senior counsel for the ex-directors also placed reliance on the letter dated 13th February,2017 addressed by Mr.Manoj Mohanka through his advocate to the petitioner's advocate recording that a sum of Rs.1,50,00,000/- has been handed over to the petitioner in trust and was to be held and retained by the petitioner's advocate until necessary orders were passed by this court.

38. It is submitted by the learned senior counsel for the ex-director that by an order dated 21st August,2015 passed by this court, the Official Liquidator was categorically directed not to take any further steps in the matter. This court had noticed the three defaults committed by the respondent in the said order. The Joint Lenders' Forum was directed to consider the revival of the respondent. The respondent was permitted to approach the Joint Lenders' Forum for disbursement of various amounts to the petitioner out of TRA account. It is submitted that in view of the said order dated 21st August,2015, the petitioner could not have

addressed any letter to the Official Liquidator to take physical possession of the property. He submits that pursuant to the order passed by this court, the respondent company had already filed various details of 207 containers including its location to the petitioner.

39. It is submitted that the petitioner in Company Petition No.400 of 2014 and Company Petition (L) No.957 of 2015 did not take further steps to sell those containers and have committed default. He submits that the petitioner in Company Petition No.400 of 2014 had as a matter of fact finalized the draft consent terms. It is submitted by the learned senior counsel that since the matter was pending before the Joint Lenders' Forum, the Official Liquidator could not have taken forcible possession of the assets of the respondent without obtaining further orders from this court. He submits that if those containers would have been sold in compliance with the order passed by this court, the claim amount of the petitioner would have been substantially reduced. He submits that the physical possession of the properties taken by the Official Liquidator on 27th April, 2016 is totally illegal. He submits that since the order passed by this court appointing the Official Liquidator was stayed by the subsequent orders, in fact there was no order of appointment of Official Liquidator in force and thus the respondent company could be represented by the directors by engaging their own advocates and cannot be represented by the Official Liquidator.

40. Learned senior counsel invited my attention to some of the correspondence exchanged between the petitioner and the respondent on one hand and between the petitioner, respondent and the Official Liquidator. He submits that the Joint Lenders' Forum is already in place. He placed reliance on the affidavit dated 14th March,2017 in support of this plea. He submits that since the proposal of

revival of the respondent company is under consideration before the Joint Lenders' Forum, this court cannot proceed with the company petition and other interlocutory proceedings till appropriate orders are passed by Joint Lenders' Forum. In support of this submission, learned senior counsel placed reliance on the judgment delivered by this court on 14th February, 2017 in ***Company Petition No.570 of 2016*** in case of ***IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited*** and more particularly in paragraphs 81, 99 to 101. He submits that his clients are not aware of the steps taken if any, by the Joint Lenders' Forum towards rectification or re-structuring. It is finally submitted that the Official Liquidator shall be directed to handover possession back to the directors of the respondent company during the pendency of the recovery steps being taken by the Joint Lenders' Forum and the Company Application (L) No.434 of 2016 filed by the applicants and the Official Liquidator's Report for various reliefs shall be dismissed by this court.

41. Mr.Kapadia, learned counsel appearing for the petitioner in Company Petition No.400 of 2014 invited my attention to the consent terms dated 16th December,2014 filed by the parties in Company Petition No.400 of 2014. He submits that under the said consent terms, the respondent had agreed to pay more than Rs.24 crores to the petitioner in various installments. The respondent had agreed to make upfront payment of Rs.50 lacs at the time of execution of the said consent terms and the balance amount in accordance with the schedule of payment provided in paragraph (5) of the consent terms. He submits that under clause (9) of the consent terms, it was clearly provided that the settlement arrived at between the parties shall stand terminated in the event of the respondent committing default and in that event the company petition shall stand revived and shall stand admitted without further reference to court and the Official Liquidator attached to this court

shall stand appointed as a provisional liquidator of the respondent. He submits that in view of the respondent admittedly having committed default of installments, the company petition stood revived and the Official Liquidator stood appointed as a provisional liquidator.

42. Learned counsel for the petitioner invited my attention to the minutes of the meeting dated 18th April, 2016 held by the Deputy Official Liquidator which was attended by the parties. In the minutes of the said meeting, it was recorded by the learned Deputy Official Liquidator that the symbolic possession of the registered office was already taken by the Official Liquidator on 28th January,2015. The ex-directors were directed to handover physical possession of the registered office premises of the respondent situated at Andheri (West), Mumbai 400053 on 27th April, 2016. He placed reliance on the order dated 30th January,2015 passed by S.J.Kathawalla, J. recording the statement of the managing director of the respondent admitting that the respondent company had failed to pay an amount of Rs.50 lakhs to the petitioner under the consent terms on 16th December,2014. The cheque issued by the respondent company to the petitioner had been dishonoured upon presentation for want of sufficient funds.

43. At the request of the managing director of the respondent company, this court granted extension of time on his undertaking to pay an amount of Rs.50 lacs. He submits that merely because the upfront payment of Rs.50 lacs was paid by the respondent in view of the undertaking given by the managing director and extension of time granted by this court, the said conditional order dated 16th December,2014 would still apply in view of the respondent having committed default in payment of installments recorded in clause (5) of the said consent terms. The said consent terms would operate regarding other installments also. He

submits that the stay granted by this court by the said order dated 30th January,2015 against the Official Liquidator not to take any further action in the matter was only during the period till the upfront payment of Rs.50 lacs was paid by the respondent. He submits that the said order dated 30th January,2015 has to be read with the order dated 16th December,2014. It is submitted that the said order dated 16th December,2014 was not substituted by the order dated 30th January,2015 in toto. There was no waiver on the part of the petitioner not to implement or execute the self operative order dated 16th December,2014.

44. It is submitted by the learned counsel for the petitioner that the Official Liquidator represented the entire body of the creditors. He submits that by the said order dated 30th January,2015 the order of appointment of Official Liquidator or the effect of the consent terms was not diluted. The respondent company had hypothecated large number of containers in favour of the Citi Bank N.A. Merely because the petitioner agreed for sale of those containers, the effect of consent terms was not given up by the petitioner. The Official Liquidator was in picture all throughout and was participating before this court when various orders were passed from time to time. It is submitted that those containers which were hypothecated in favour of the petitioner could not be sold, because locations of those containers were not provided by the respondent company to the petitioner and for other reasons attributable on the part of the respondent.

45. Learned counsel for the petitioner tendered various minutes of the meeting held by the Joint Lenders' Forum. He submits that six of the banks have already filed proceedings against the respondent for winding up and/or other recovery proceedings. It is submitted that no meetings are held by the Joint Lenders' Forum after 10th August, 2015. The respondent did not participate in the

JLF meeting.

46. Learned counsel for the petitioner placed reliance on the order passed by this court on 21st April, 2016 in Company Appeal No.66 of 2014 recording the statement made by the petitioner herein that in view of the self-operative order passed by this court on 16th December,2014 and the respondent having committed default, the Official Liquidator has stood appointed as a provisional liquidator. It is also recorded that the meeting with the Provisional Liquidator has already taken place on 18th April,2016. This court directed the Official Liquidator to file a report in this court as to what steps had been taken by him after his appointment as a Provisional Liquidator of the respondent company. He submits that the statement made by the petitioner before this court on 21st April, 2016 that the Official Liquidator has already stood appointed as a Provisional Liquidator of the respondent company was not controverted by the respondent though had appeared before this court on 21st April, 2016 when that statement was made by the petitioner and was recorded by this court.

47. Learned counsel for the petitioner invited my attention to a praecipe dated 23rd July,2015 filed by the petitioner placing on record that the respondent company had failed to pay the amount as set out in the consent terms and thus the petition stood revived and the Official Liquidator stood appointed as a Provisional Liquidator of the respondent company. The petitioner requested the Prothonotary and Senior Master to place the matter on board before the learned Company Judge on 24th July, 2015 for directions. A copy of the said praecipe was also served upon the learned advocate representing the respondent. He also placed reliance on the praecipe dated 3rd August, 2015 filed before the Prothonotary and Senior Master recording that the respondent company had committed default and the company

petition accordingly stood revived and admitted and Official Liquidator stood appointed as Provisional Liquidator of the respondent company.

48. Insofar as order dated 21st August,2015 passed by Shri S.C.Gupte, J. in this petition is concerned, it is submitted that this court recorded the statement made by the respondent company that there was an amount lying in a TRA account of the respondent company. This court directed that the Joint Lenders' Forum may consider whether it was more advisable to keep up the attempts of revival of the Company by releasing funds from the TRA account than to allow the petition to be advertised and winding up proceedings to be prosecuted further inter alia leaving the physical charge of the assets of the Company with the Official Liquidator in his capacity as the Provisional Liquidator. This court as a last resort permitted the respondent company to approach the Joint Lenders' Forum with a request to seek disbursal from the TRA Account towards the compliance of the Consent Terms within a period of four weeks from the date of the said order. The petition was advertised and the Official Liquidator was called upon to take physical possession of the assets of the respondent in accordance with the self-operative order passed by this court on 16th December,2014, and the matter was adjourned to 21st September,2015. It was made clear that no further time would be granted to any stakeholders on the next date.

49. It is submitted by the learned counsel for the petitioner that though the said order was passed by this court on 21st August,2015, the respondent did not approach the Joint Lenders' Forum for release of any amount from the said TRA account of the respondent company. He submits that admittedly no meetings are held by the Joint Lenders' Forum after 10th August,2015. The minutes of the meeting held between 30th April,2014 and 10th August,2015 are produced by the

learned counsel. Mr. Setalwad, learned senior counsel for the ex-director does not dispute the correctness of those minutes produced by the learned counsel for the petitioner and that no amount has been released by the Joint Lenders' Forum out of the said TRA account to the petitioner or to any other creditor. He submits that admittedly, the Joint Lenders' Forum did not take any decision or any steps for revival of the respondent company. It is submitted that the ex-directors of the respondent are pleading total ignorance of the meetings held by the Joint Lenders' Forum and not shown any participation in the meeting after 10th August,2015.

50. Learned counsel appearing for the petitioner invited my attention to the term-sheet dated 7th September,2016 between Mr.Manoj Mohanka and Citi Bank N.A. Who claimed to be one of the investor. He submits that the said Mr.Manoj Mohanka had deposited a sum of Rs.1.5 crores. However, the said term-sheet was not implemented. No further payment was made by the said Mr.Manoj Mohanka. Mr.Manoj Mohanka had demanded refund of the said amount. By an order dated 14th March,2017, this court recorded the statement made by this learned counsel for Mr.Manoj Mohanka that his client would not pursue any action under the term sheet dated 3rd September,2016 entered into with Citi Bank NA and prayed for refund of Rs.1.50 crores in full and final settlement of his claim. Learned counsel for the petitioner made a statement that the said amount of Rs.1.50 crores shall be returned to Mr.Manoj Mohanka within two weeks from the date of the said order.

51. Mr. Setalwad, learned senior counsel for the ex-directors in rejoinder submits that by an order dated 21st August,2015, Shri S.C.Gupte, J. had directed the Official Liquidator not to take any further steps against the respondent company. He submits that in the said order, this court had noticed three more

defaults committed by the respondent company and had directed the Joint Lenders' Forum to consider the possibility of revival. The respondent company was also permitted to approach the Joint Lenders' Forum for disbursement. It is submitted that in view of the said order dated 21st August,2015, the Citi Bank N.A. could not have addressed any letter to the Official Liquidator for his physical possession of the properties and records of the respondent company. He submits that the respondent company was not part of the Joint Lenders' Forum but was permitted to approach the said Forum by this court. He once again invited my attention to the correspondence exchanged between the Citi Bank N.A. and the respondent company exchanging the draft consent terms duly approved except minor changes.

52. It is submitted by the learned senior counsel that pursuant to the order dated 2nd December,2015, the respondent company had already furnished the location of the various containers. He submits that the respondent company had taken steps to sell those containers. Those containers could not be sold in view of the fact that the Citi Bank N.A. did not comply with the directions. He submits that the Official Liquidator thus could not have taken physical possession of the assets and records of the respondent company.

53. It is submitted by the learned senior counsel for the ex-directors that the Joint Lenders' Forum is still in place and not disbanded. He once again placed reliance on the judgment of this court in case of ***Company Petition No.570 of 2016*** in case of ***IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited*** (supra) and would submit that since the Joint Lenders' Forum is in place and is still considering for revival, the Official Liquidator is directed to return the possession of the assets of the respondent and the records.

54. Mr.Jagtiani, learned counsel appearing for the Official Liquidator invited my attention to the various averments made in the Official Liquidator's Report and annexures thereto and submits that the Official Liquidator was all through out participating in the aforesaid proceedings from time to time. It is submitted that in view of the default committed by the respondent no.1, in view of the self – operative order passed by this Court, the Official Liquidator had already stood appointed. The Official Liquidator had initially taken symbolic possession of the properties. The respondent nos.1 to 5 have not disputed that the Official Liquidator had taken symbolic possession of the office premises of the respondent no.1. The question of the respondent no.1 company therefore being represented by the Ex-Directors did not arise. He submits that the meeting held by the Official Liquidator pursuant to a letter addressed by the petitioner for taking physical possession of the property in view of the default committed by the respondent no.1, was also attended by the representatives of the respondent nos.1 to 5, who were directed to hand over physical possession of the property by the Official Liquidator.

55. Learned counsel for the Official Liquidator also invited my attention to some of the minutes of the meeting of the Joint Lenders Forum and would submit that though the respondent no.1 was allowed to participate in those meetings, the respondent no.1 did not take any steps of any nature whatsoever before the Joint Lenders Forum and did not get any amounts released from TRA account in favour of the creditors. He submits that the Official Liquidator is thus justified in taking physical possession of the office premises of the respondent no.1.

56. It is lastly submitted by the learned counsel that in view of the default

committed by the respondent no.1 of the consent terms and in view of the various orders passed by this Court referred to aforesaid, the Official Liquidator already stood appointed. In these circumstances, this Court shall not direct the Official Liquidator to hand over possession of the office premises to the respondent nos.1 to 5.

57. In rejoinder, it is submitted by the learned senior counsel for the respondent nos.2 to 5 that in view of the order passed by Shri Justice S.C. Gupte on 21st August, 2015, Citibank N.A. could not have addressed any letter to the Official Liquidator for physical possession of the property. He submits that the respondent no.1 company was not part of the Joint Lenders Forum though was permitted to approach the said Joint Lenders Forum. It is submitted that all the consent terms were finalized except small minor changes suggested by the petitioner. It is the case of the respondent nos.2 to 5 that they had already informed about the location of all the containers to the petitioner for the purpose of sale of those containers but the petitioner did not take any steps deliberately to sell those containers. It is submitted that since the Citibank N.A. was admittedly a member of the Joint Lenders Forum, it cannot pursue this winding up petition filed by it. He submits that formation of Joint Lenders Forum is mandatory and till the Joint Lenders Forum itself decides to file any recovery proceedings by members of the Joint Lenders Forum, no proceedings can be filed by any of the members of the said Joint Lenders Forum or be pursued for winding up of the company in respect of which the process of rectification and restructuring are in place.

<u>REASONS AND CONCLUSIONS :</u>

58. A perusal of the record indicates that it is not in dispute that the

petitioner in Company Petition No.400 of 2014 disbursed the loan amount to the respondent in the sum of Rs.200 millions. The petitioner had issued a recall notice on 17th January, 2014 and had issued a statutory notice on 6th March, 2014 calling upon the respondents to pay a sum of Rs.22,09,51,371/- as outstanding as on 1st March, 2014. The said statutory notice was replied by the respondents through its advocates denying the demand made by the petitioner. There was further correspondence exchanged between the parties. The record further indicates that it is not in dispute that the parties had filed the consent terms before this Court in the said company petition on 16th December, 2014. The respondent had admitted its liability payable to the petitioner to the tune of Rs.23,44,76,941/- as on 8th December, 2014 with further interest thereon and had agreed to pay the said amount in several installments. It is not in dispute that the respondent committed default in making payment of those installments.

59. This Court on the application of the respondent granted extension of time to pay a sum of Rs.50,00,000/- to the petitioner by an order dated 30th January, 2015 by accepting an undertaking rendered by the respondent. It was made clear in the said order that the Official Liquidator, who was appointed as the Provisional Liquidator of the respondent had already taken symbolic possession of the assets and the records of the respondent and shall not take any further action in the matter. It is clear that the remaining installments were to be paid by the respondent to the petitioner in accordance with the said consent terms and in the event of the respondent committing any default, the consequences as provided in the said order dated 16th December, 2014 would have been triggered. It was clearly provided in the said order dated 16th December, 2014 for admission of the said company petition without further reference to the Court and for advertising the petition in the event of default. It was also made clear that the Official Liquidator

was to proceed to take physical possession of the records and assets of the respondent.

60. A perusal of the correspondence exchanged between the parties further indicates that in view of the default committed by the respondent admittedly the petitioner by a letter dated 3rd August, 2015 to the Official Liquidator informed about the default committed by the respondent and requested the Official Liquidator to fix an appointment for taking charge of the assets, properties, stock in trade, books and accounts and the bank accounts of the respondent.

61. A perusal of the order dated 21st August, 2015 passed by this Court in the said company petition clearly indicates that this Court recorded that the respondent had committed default in making payment of monthly installments and the Official Liquidator, who had stood appointed as the Provisional Liquidator of the respondent, had already taken symbolic possession of the assets. This Court however, directed the Official Liquidator not to take any further action in the matter. This Court directed that all the stake holders, including the petitioner before this Court to approach the Joint Lenders Forum, resolve the issue of disbursement of payment to the petitioner from the TRA account in compliance with the terms. This Court also directed that the Joint Lenders Forum shall consider whether it would be more justifiable to keep up attempts of revival of the company by releasing the funds from TRA account then to allow the petition to be advertised and winding up proceedings to be prosecuted further in the matter leaving physical charge of the assets of the company with the Official Liquidator in his capacity as Provisional Liquidator.

62. By the said order, this Court permitted the respondent also to approach the Joint Lenders Forum with a request to seek disbursement from the TRA account towards compliance of the consent terms within a period of four weeks from the date of the said order. This Court directed that the petitioning creditor also shall co-operate with the respondent to seek resolution of the matter before the Joint Lenders Forum. It is not in dispute that in the said order, it was made clear that no further time would be granted to any stake holder on the next date. The matter was accordingly adjourned to 21st September, 2015. On 12th October, 2015, this Court granted one more chance to the respondent to see if the matter could be settled between the parties and made it clear that no further time would be granted on the next date.

63. Insofar as the sale of the containers is concerned, it is not in dispute that the petitioner in Company Petition (Lodging) No.957 of 2015 has already filed an application before the Debt Recovery Tribunal *inter-alia* praying for enforcement of its security i.e. containers which were owned by the respondent. This Court accordingly directed the respondent to give inspection of those goods to both the petitioners as and when demanded and directed the respondent not to finalize any transaction with the third party without communicating the particulars of the transaction and without giving at least one weeks' notice to the petitioner in Company Petition (Lodging) No.957 of 2015.

64. A perusal of the record indicates that the said sale of the containers could not take place due to various reasons. It is the case of the petitioner that the said third party did not deposit the amount for purchase of the said containers, whereas it was the case of the respondent that both the petitioners did not take appropriate steps to sell those containers. A perusal of the record further indicates

that the respondent did not furnish the details of the exact location of those containers and did not comply with its part of obligation insofar as the sale of those containers is concerned.

65. A perusal of the various minutes of the meeting of the Joint Lenders Forum placed on record by one of the party, clearly indicates that the last meeting of the Joint Lenders Forum was held on 10th August, 2015. The minutes of the meeting dated 10th August, 2015 indicates that in the meeting of the Joint Lenders Forum held on 30th June, 2015, the respondent had informed the lenders that the Memorandum of Understanding for enforcement was expected to be signed soon. The promoter however, subsequently informed that deal with strategic investors could not materialize due to various reasons and hence the Joint Lenders Forum was convened to decide the way forward. It was recorded that neither deal with the strategic investor could be materialized nor was the company able to revive and scale its business operations to the required level and the rectification as a CAP has failed.

66. It was recorded that despite the strong business model, restructuring as a CAP was ruled out as was discussed in the past. Now, in a scenario where the company had not conducted financial audit for 2-3 years and/or not agreeable to follow the critical restructuring parameters / requirements, such as providing a personal guarantee etc., in absence of the two options as CAPs, the lenders were left with no option but to adopt the third option suggested by the Reserve Bank of India under the guidelines dated 30th January, 2014. In the said minutes of the meeting, it was also recorded that the High Court hearings against the respondent are still in process. The HDFC bank had issued a notice under the SARFAESI Act for recovery of the dues. L. & T has already filed the arbitration proceedings.

Hearings of those arbitration proceedings were in progress. Standard Chartered Bank and First Rand Bank have filed winding up proceedings against the respondent.

67. It is not in dispute that no further meetings were held by the Joint Lenders Forum after 10th August,2015. It is clear that till 10th August, 2015 the process of rectification itself was not fruitful and failed. The Joint Lenders Forum has already decided to adopt the third option i.e. to file the recovery proceedings.

68. During the course of hearing of these proceedings, the respondent produced a copy of term sheet between Manoj Mohanka dated 7th September, 2016 and the respondent by which the said Manoj Mohanka had agreed to make payment of a sum of Rs.50,00,000/- to the respondent on or before 7th November, 2016 and had paid a sum of Rs.1,50,00,000/- by demand draft directly to the Citibank N.A. It is not in dispute that the said Manoj Mohanka however, through his counsel made a statement before this Court on 14th March, 2017 that he will not pursue any action under the term sheet dated 3rd September, 2016 entered by him with Citibank N.A. and sought refund of Rs.1,50,00,000/- which was paid by him to the Citibank N.A. under the said term sheet in full and final settlement of his claim. The petitioner made a statement that the said amount of Rs.1,50,00,000/- would be returned to the said Manoj Mohanka within two weeks from the date of the said order.

69. It is thus clear that the said investor introduced by the respondent, who had entered into a term sheet on 7th September, 2016 with the petitioner also asked for refund of the amount paid by him in the sum of Rs.1,50,00,000/- has received the said amount back. There is no other proposal placed on record by the

respondent to show that any proposal for restructuring or revival of the respondent is now in place before the Joint Lenders Forum or any other investor is willing to help the respondent for its revival.

70. Insofar as the judgment of this Court in case of ***IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited*** (supra) relied by Mr.Setalwad, learned senior counsel appearing for the respondent nos.2 to 5 is concerned, in my view, since the Joint Lenders Forum has already decided to adopt recovery proceedings against the respondent company and has already held that restructuring of the respondent is not possible and in view of the fact that the said Manoj Mohanka, who had entered into term sheet with Citibank N.A. has also backed out and has got his amount returned from the Citibank N.A., the said judgment of this Court would not forward the case of the respondent in any manner whatsoever.

71. Insofar as the submission of the learned senior counsel for the respondent nos.2 to 5 that by virtue of the order passed by this Court on 21st August, 2015, the Official Liquidator could not have taken any steps and the appointment of the Official Liquidator thus was stayed is concerned, in my view, there is no merit in this submission of the learned senior counsel. A perusal of the record clearly indicates that in view of the default committed by the respondent, the Official Liquidator stood appointed of the assets and books of accounts etc. of the respondent company and had already taken symbolic possession thereof pursuant to the conditional order passed by this Court. This fact has been recorded by this Court from time to time in several orders, including the orders dated 30th January, 2015, 21st August, 2015 and 15th June, 2016, which orders are not impugned by the respondent. I am thus not inclined to accept the submission of the learned senior counsel for the respondent nos.2 to 5 that the order of appointment

of the Official Liquidator was not to be implemented or cannot be implemented.

72. A perusal of the order dated 21st August, 2015 clearly indicates that this Court had granted last opportunity to the respondent to approach the Joint Lenders Forum with a request to seek payment from TRA account towards compliance of the consent terms within a period of four weeks from the date of the said order. It was made clear by the said order that no further time would be granted to any stake holder on the next date. A perusal of the minutes of the meeting of the Joint Lenders Forum clearly indicates that the respondent did not approach the Joint Lenders Forum for release of any amount from the said TRA account of the respondent company in favour of any of the creditors. No further meeting of Joint Lenders Forum has been held after 10th August, 2015. It is thus clear that the respondent did not avail off the last opportunity granted by this Court as far back as on 21st August, 2015.

73. In the circumstances stated aforesaid, In my view, the Official Liquidator was justified in taking physical possession of the office premises of the respondent in compliance with the orders passed by this Court in view of the respondent having committed default in making payment of various installments agreed to be paid under the consent terms filed by the parties. The default clause provided in the said consent terms had triggered in view of the respondent having committed default in making payment of the installments provided in the consent terms. Be that as it may, in the facts and circumstances of this case, the petitioner in both the company petitions have even otherwise made out a case for taking physical possession of the assets of the respondent by the Official Liquidator. This Court has already directed the Ex-Director to file a statement of affairs of the respondent which order has not been impugned by the respondent nos.2 to 5. The

Company Petition No.400 of 2014 is already admitted by this Court.

74. Insofar as Company Application (Lodging) No.434 of 2016 is concerned, the applicant is registered as securitized and assets restructuring company and is impleaded in place of ICICI Bank Limited, which had filed the winding up petition bearing Company Petition No.1278 of 2015 against the respondent in views of the failure on the part of the respondent to pay a sum of Rs.31,78,14,647.78 with further interest thereon. Inspite of an opportunity granted by this Court to sell the containers which were hypothecated in favour of the petitioner in Company Petition No.1278 of 2015 and Company Petition No.400 of 2014, the said containers were not sold due to reasons solely attributable to the respondent. The liability of the applicant in Company Application (Lodging) No.434 of 2016 is also admitted by the respondent. The respondent is heavily indebted and could not be revived inspite of having ample opportunities before the Joint Lenders Forum. In my view, the applicant has thus made out a case for various directions which are sought for in the company application against the respondent and its Directors.

75. Insofar as the report submitted by the learned Official Liquidator is concerned, the learned Official Liquidator seeks permission to take further steps in liquidation proceedings for directions against the Ex-Directors to co-operate with the learned Official Liquidator and to hand over all the details and whereabouts of the containers as on the date and to hand over possession thereof, the revenue earned by them during last three years, title deeds of the immovable properties of the respondent company to the Official Liquidator.

76. In my view since the Official Liquidator has already stood appointed

as the Provisional Liquidator of the assets, properties, stock in trade, books of account and the bank accounts of the respondent in terms of the order dated 16th December, 2016 and subsequent orders, the Official Liquidator has made out a case for further directions sought in the report. The respondent nos. 2 to 5 have not co-operated with the Official Liquidator in implementing any orders passed by this Court.

77. I therefore, pass the following order :-

a). The Official Liquidator has already stood appointed as the Liquidator of the respondent M/s.Fourcee Infrastructure Equipment Private Limited in terms of the order dated 16th December, 2016 read with subsequent orders. The Official Liquidator shall take physical possession of other assets, properties, stock in trade, books of accounts and bank accounts of the respondent in respect of which possession if not taken by the Official Liquidator expeditiously.

b). The respondent nos.2 to 5 are directed to co-operate with the Official Liquidator and shall hand over all the details / whereabouts of the containers as on the date and shall hand over possession thereof to the Official Liquidator within two weeks from the date of this order, including title deeds of the immovable properties to the Official Liquidator simultaneously.

c). The respondent nos.2 to 5 are directed to disclose on oath before this Court about the details of all the assets and properties hypothecated in favour of the applicant within four weeks from the date of this order.

d). The respondent nos.2 to 5 are directed to remain present for each hearing before the Official Liquidator without fail.

e). The respondent nos.2 to 5, their agents and servants are restrained by an order and injunction of this Court from in any manner directly or indirectly alienating, creating third party rights and/or otherwise encumbering the assets / properties hypothecated in favour of the applicant.

f). The Official Liquidator's Report No.438 of 2016 and the Company Application (Lodging) No.434 of 2016 are disposed of in aforesaid terms. Hearing of the Company Petition No.400 of 2014 is expedited.

g). Place the other pending company petitions against the respondent on board for admission on 3rd May, 2017.

h). There shall be no order as to costs.

(R.D. DHANUKA, J.)

Learned senior counsel appearing for respondent nos. 2 to 5 in Company Application (L) No.434 of 2016 seeks stay of the operation of the order passed by this court which is vehemently opposed by Mr.Kapadia, learned counsel for the petitioner in Company Petition No.400 of 2014. The prayer for stay is rejected.

(R.D. DHANUKA, J.)