IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION (L) NO. 793 OF 2016
IN
OFFICIAL LIQUIDATORS REPORT NO. 139 OF 2016
IN
COMPANY PETITION NO. 423 OF 2010

Deepak Kanegaonkar …Applicant/Orig.Res.No.3
vs.
The Official Liquidator, High Court,
Bombay as Liquidators of Phoenix
Alchemy Pvt.Ltd. & Ors. ….Respondents

Mr.Mathews Nedumpara I/b. R.R. Naik for Applicant.
Mr.Rohit Gupta with Nikhil Rajani I/b. V. Deshpande & Co. for Respondent No.5.
Mr.Bhupesh Samant for Thane Bharat Sahakari Bank Ltd./Secured Creditor.
Ms.Yogini Chauhan, Dy.Offficial Liquidator with Mr.Mahendhar Aithe, Company Prosecutor for Official Liquidator.

CORAM : S.C. GUPTE, J.

18 JANUARY 2017

P.C. :

This company application is made in an Official Liquidator's Report which arises out of a winding up petition. The application seeks recall or review of an order passed by this court on 2 December 2016 on the OLR. By this order, directions were issued by this court towards sale of an immovable asset of the company (in liquidation).

2 The application for recall is on two grounds. Firstly, it is submitted that this Court is *coram non judice* as winding up proceedings are not maintenable before this court, since the Petitioner has already initiated action under Section 13 of the Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") as well as under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDB Act"). Secondly, it is submitted that the principle of estoppel will apply in the present case as the Petitioner has chosen to proceed with other proceedings outside winding up and hence, winding up proceedings cannot lie. Apart from the fact that these very issues have been raised previously by the Applicant herein or other ex-directors of the company (in liquidation) and answered by our courts, there is absolutely no merit in these contentions, as I have discussed above.

2 A company application was separately taken out, being Company Application (Lodging) No.26/2014, in the present winding up petition which was disposed of by a learned Single Judge of this court on 25 April 2014. The Applicant had applied for recall of the winding up order on the self-same submission, that is to say, that the petitioning creditor having instituted proceedings before the Debt Recovery Tribunal under the RDDB Act as also under the SARFAESI Act and thus, made an election of forum, the present winding up petition does not lie. What was alleged before the learned Single Judge in that application was the very "doctrine of estoppel", which is invoked in the present application. The court comprehensively rejected the Applicant's submissions holding that proceedings under Sections 433 and 434 of the Companies Act, 1956 operate in a completely different sphere from the proceedings under debt recovery statutes such as RDDB Act and SARFAESI Act; Whereas the proceedings under the latter statutes are for recovery of debts, proceedings under the Companies Act are not for recovery of debt *per se but* to have the company wound up on account of its inability to pay debts.

4 When the possession of this very property was sought by the Official Liquidator in pursuance of the winding up order, ex-directors of the company (in liquidation) and a purported lessee thereof objected to the same. The learned Company Judge hearing the Liquidator's Report found the lessee and the company (in liquidation) to be related parties. Brushing aside all their submissions, the learned Judge directed the lessee and the ex-directors to hand over vacant and peaceful possession of the property to the Liquidator. The matter was then carried in appeal before a Division Bench of this court. That appeal, namely, Appeal (Lodging) No.688/2014, was disposed of by the Division Bench by its order dated 31 March 2015. The attack on the impugned order before the Division Bench was based on the very issue of maintainability of the winding up petition. The very decision, which is relied on in the present company application, namely, the decision of the Supreme Court in **A.R. Antulay vs. R.S. Nayak**[1], was cited before the Division Bench and it was submitted that the order under which the company had been wound up was *void ab initio* and therefore, could be challenged in any proceedings including the proceedings before the Division Bench. The submission that the secured creditors having pursued their remedy under the SARFAESI Act, the winding up petition was not maintainable, was advanced before the Division Bench. The Division Bench, referring to the order of the learned Single Judge referred to above, and also the order of the learned Single Judge hearing the Official Liquidator's report thereafter, from which the Appellant director had come in appeal before the Division Bench, held that the objection to the maintainability of the winding up petition was already overruled and that those orders had attained finality. The Division Bench order was then carried before the Supreme Court by the Applicant ex-director in a Special Leave Petition. The SLP was dismissed by the Supreme Court.

1 **(1988) 2 SCC 602**

5 After the dismissal of the SLP, another attempt was made for recall of the order passed by the Division Bench on 31 March 2015 by way of review. The Division Bench declined to entertain the review petition finding *inter alia* no ground for such review.

6 Once again, by the present application, a fresh attempt is made to rake up the same issue of maintainability of the winding up proceedings. There is a limit upto which litigants can press their rights and invoke the remedial jurisdiction of courts. After their approaches are consistently repelled by courts, if they continue to press home the self-same arguments, it is nothing but a gross abuse of the process of law.

7 Mr.Nedumpara, learned Counsel for the Applicant herein, however, made extensive submissions on the ground that none of the courts has so far considered the doctrine of election in the context of election of forum. He submits that the doctrine of election has several facets such as election of rights as also election of remedies and election of procedure. Learned Counsel submits that it is these latter two elections which have been considered so far by our courts and not the election of forum. Learned Counsel submits that a party may be free to choose his remedies so long as the remedies are not mutually inconsistent but that he is not entitled to go to different forums. It is submitted that once a forum is chosen by an aggrieved party, all actions should be brought and all remedies sought before that forum. It is submitted that having chosen a particular forum, the party is not entitled, and should not be allowed, to approach other forums. Learned Counsel, in this behalf, refers to some judgments of our courts, which, according to him, have missed this point. Be that as it may, what is

clear to my mind is that any choice of forum, in turn, depends on the choice of remedies. If a creditor has different remedies, which are not mutually exclusive or mutually inconsistent, he may well resort to those remedies. The choice of remedy will then decide the forum that the creditor needs to approach for availing of the remedy. The choice of forum, thus, cannot be considered *de hors* the choice of remedies.

8 As this court has said in the very case of the Applicant on a number of occasions, the proceedings before the Company Court, which creditors are entitled to take for winding up of companies on the ground of their inability to pay debts, are different from ordinary remedies for recovery of debts, which the creditors may take before civil courts or special forums created for recovery in their cases, as the case may be. The jurisdiction to wind up the company cannot be exercised by any court but the Company Court. There is no forum available to the creditor, save and except the Company Court, to resort to winding up.

9 There is, thus, no merit in the present company application, which, as I have noted above, amounts to nothing but abuse of the process of law. The application is, in the premises, dismissed with costs quantified at Rs.50,000/-. The Applicant shall pay these costs to the Official Liquidator within four weeks from today. The amount paid by the Applicant by way of costs shall be appropriated by the Official Liquidator towards his expenses on the general liquidation account.

(S.C. Gupte, J.)