

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.11.2017

DELIVERED ON : 22.12.2017

Coram

The Honourable Mr. Justice RAJIV SHAKDHER
and
The Honourable Mr. Justice N. SATHISH KUMAR

Original Side Appeal No.348 of 2013

VGP Finances Limited,
At VGP Square, 6, Dharmaraja Koil Street,
Saidapet, Chennai - 600 015,
Represented by its Director,
Mr.V.G.P.Rajadas. .. Appellant

Vs.

1. The Official Liquidator,
High Court Madras,
as Liquidator of Neptune Inflatables
Limited, (In Liquidation).
2. Asset Reconstructions Company (India) Ltd.,
Branch Office at No.715-C, 7th Floor,
Spencer Plaza Phase-II,
No.769, Anna Salai, Chennai - 600 002,
Rep. by its Chief Manager-Legal. Respondents

(R2 substituted as per order dated 9.3.2017
in CMP.No.2500/17)

Prayer : Appeal filed under Order XXXVI Rule 11 of Original Side Rules read with Clause 15 of the Letters Patent, against the Order dated 20.09.2013 made in company application A.No.1324 of 2009 in C.P.No.201 of 1996 on the file of this Court.

For Appellant : Mr.Suresh
for M/s.Shivakumar & Suresh

For Respondent 1 : Mr.S.R.Sundar

For Respondent 2 : Mr.V.Jayachandran for
M/s.Jayachandran Associates

J U D G E M E N T

RAJIV SHAKDHER, J.

1. In this appeal, the only question that we are required to deal with is whether or not the learned Single Judge was right in dismissing the application filed by the appellant under Section 536(2) of the Companies Act, 1956 (hereafter referred to as "the 1956 Act") to validate the sale of the property in its favour by the company in liquidation. The property in issue is located at No.5/259, Old Mahabalipuram Road, Thoraipakkam, Chennai - 600 096 (hereafter referred to as "the subject property").

2. The matter was dealt with by the learned Single Judge, upon remand, by the Supreme Court, vide its order dated 24.04.2009, passed in C.A.2934 of 2009.

2.1. This order was passed by the Supreme Court based on an application filed by an entity known as Assets Reconstructions Company (India) Limited i.e. respondent No.2. Respondent No.2 stepped into the matter upon an assignment being executed in its favour by the Indian Bank.

2.2. Indian Bank, at the relevant point in time, was one of the creditors of the company in liquidation.

3. For the sake of discussion, we would be referring to the appellant i.e. VGP Finances Limited as "VGP", while the company in liquidation, which is Neptune Inflatables Limited would be referred to as "Neptune".

3.1. Similarly, respondent No.1 i.e. the Official Liquidator will be referred to as "OL"; while respondent No.2 Assets Reconstructions Company (India) Limited, would be referred to as "ARCIL".

3.2. Collectively, the appellant and the respondents would be referred to as parties.

4. With this preface in place, it would help adjudication of the issues raised before us if the broad contours of the case are set forth hereafter:

4.1. On 29.09.1995, a special resolution was passed at the twelfth Annual General Body Meeting of the company in liquidation i.e Neptune. By virtue of this resolution, the Board of Directors of Neptune were given the power to create charge or mortgage its assets. The overall limit on borrowing was fixed at Rs.4,00,00,000/-.

4.2. Pursuant to the aforementioned resolution, Neptune entered into a loan agreement dated 11.12.1995 with VGP. By virtue of this agreement, it was agreed that VGP would sanction loan in favour of Neptune to a maximum limit of Rs.70,00,000/-, based on the terms and conditions set out in the letter dated 24.11.1995.

4.3. Pertinently, letter dated 24.11.1995, is not placed on record. What is important, though, is that, VGP and Neptune agreed that the loan to the latter would be disbursed periodically by VGP, and while doing so, VGP will consider the repayment record of Neptune. Furthermore, by virtue of clause 3 of the said loan agreement, it was agreed that, if necessary, Neptune will create security as desired by VGP qua its present and future assets.

4.4. In addition to clause 3, there were three more clauses incorporated in the loan agreement. These were clauses 4, 5 and 6. These clauses also provided that Neptune will, without hesitation provide the necessary securities in terms of its assets to the satisfaction of VGP, in consideration of dues payable. Likewise, clause 5 provided that Neptune will discharge the entire loan by means of sale of its assets, if necessary. Lastly, clause 6 provided that Neptune will execute separate agreements at the time of receipt of the loan amount.

4.5. As agreed, VGP and Neptune, did enter into agreements as and when amounts were loaned to the latter. The four loan agreements which were executed between VGP and Neptune are thus dated: 01.01.1996, 30.01.1996, 07.02.1996 and 10.01.1997.

4.6. Under the first loan agreement dated 01.01.1996, a sum of Rs.10,00,000/- was advanced by VGP to Neptune. The loan carried an interest at the rate of 28% p.a., payable quarterly at the end of every quarter. Furthermore, the amount loaned was secured by issuances of personal guarantees of the Managing Director and Director of Neptune i.e Mr.Pradeep Ranganathan and S.N.Natarajan respectively. By virtue of these guarantees both the Managing Director and the Director pledged their share certificates for twice the value of the loan amount.

4.7. Via the second loan agreement dated 30.01.1996, VGP advanced a sum of Rs.25,00,000/- to Neptune. The terms and conditions of this agreement were no different from that of the first loan agreement.

4.8. In so far as the third loan agreement was concerned, which is dated 07.02.1996, once again, a sum of Rs.25,00,000/- was advanced by VGP to Neptune. The terms of this loan agreement were identical to the earlier two loan agreements.

4.9. In so far as the fourth agreement was concerned, which is dated 10.01.1997, VGP advanced a sum of Rs.5,20,901/- by way of a short term loan, to Neptune. The peculiarity of this loan agreement was that it set out the date when the principal amount would be lent, it quantified the interest payable and the sum total of the principal and interest that Neptune was required to repay. Furthermore, clause 2 of the agreement provided that the loan amount would carry an interest rate of 36% p.a. to be paid at the end of the loan period.

5. Since, the aforementioned details with regard to the principal amount and the interest are reflected in the body of the loan agreement, for the sake of convenience, the same are extracted hereafter:

	"Principal	Interest	Total
a. 12.2.97	Rs.2,08,131	12,933	2,21,064
b. 12.3.97	Rs.3,12,770	28,072	3,40,842
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	Rs.5,20,901	41,005	5,61,906"
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6. The other important thing which comes to fore is that the first three loan agreements had a tenure of 365 days and that the period for repayment was to commence from the date of disbursal of the loaned amount.

6.1. Evidently, upon the execution of the 3rd loan agreement, two important things happened : First, Neptune bought the subject property on 16.02.1996, for a sum of Rs.7,72,000/- and, second, on 14.10.1996, a winding up petition, being C.P.No.24 of 1996, was filed against Neptune under Section 433 (e) and (f) of the 1956 Act.

6.2. Therefore, quite clearly prior to the execution of the 4th loan agreement, which was as alluded to above, executed on 10.01.1997, winding up proceedings had already commenced qua Neptune.

6.3. For the sake of completion of the narrative, it may be relevant to note that the aforementioned winding up petition was in the first instance allowed by the Company Judge on 13.03.1998; an order, to be only set aside in appeal by the Division Bench vide its judgement dated 09.06.1998, passed in O.S.A.No.85 of 1998. The ground on which winding up order passed by the learned Single Judge was set aside by the Division Bench was that the said order had been passed without publication of an advertisement, as required under the provisions of Rule 24 read with Rule 96 of the Companies (Court) Rules, 1959. Consequently, the matter was remanded to the learned Company Judge, whereupon, a paper publication was effected on 21.11.1998.

6.4. Thereafter, once again, the learned Single Judge passed an order of winding up on 10.03.1999. This time around, the Division Bench vide its judgement dated 14.07.1999, confirmed the order of the learned Single Judge. This order of the learned Single Judge has, admittedly, attained finality. Resultantly, Neptune, as indicated at the outset, went into liquidation.

6.5. The record shows that while, there was back and forth with regard to the fate of Neptune, i.e., as to whether or not it should be wound up, its promoter directors were arranging its affairs in a manner, which suited the interest of VGP.

6.6. The first step, in this direction, was taken on 20.07.1997, which was approximately nine (9) months after the winding up petition had been filed. On this day, a mortgage deed of even date, qua the subject property, was executed by Neptune's Managing Director and Director i.e. Mr. Pradeep Ranganathan and S.N. Natarajan respectively. This mortgage deed which is numbered as: 393 of 1997 was executed in favour of VGP.

6.7. The mortgage was created vis-a-vis the subject property and the consideration for execution of the mortgage deed was apparently a loan in the sum of Rs.5,00,000/-, received on 10.01.1997. What is to be borne in mind at this stage, is that, 10.01.1997, is the date when the 4th loan agreement was executed between VGP and Neptune. Under this agreement, Neptune was to receive from VGP, not Rs.5,00,000/- but a sum of Rs.5,20,901/- that too in two tranches. The first tranche of Rs.2,08,131/- was required to be disbursed to Neptune on 12.02.1997, while the second tranche in the sum of Rs.3,12,770/- was to be disbursed by VGP in favour of Neptune on 12.03.1997.

6.8. Therefore, the so called mortgage deed gave particulars which were inaccurate both with regard to the date as to when moneys were lent and the amount that was purportedly disbursed by VGP in favour of Neptune. It is an admitted position before us that, apart from the loan agreement dated 10.01.1997, there was no other transaction entered into between VGP and Neptune.

6.9. It may be relevant to point out at this juncture that in the aforementioned mortgaged deed, the market value of the subject property was pegged at Rs.4,80,000/-. When nearly eleven (11) months prior to the date of execution of the mortgaged deed i.e. on 16.02.1996, Neptune had bought the subject property for a sum of Rs.7,72,000/-.

7. Continuing with the narrative, there is a declaration, on record, which, though, undated, bears on the opening page the date: 27.01.1997. This declaration which is apparently executed on a ten rupees stamp paper, inter alia, sets out that an

equitable mortgage had been created to secure a loan of Rs.65,20,000/- extended by VGP in favour of Neptune on various dates.

7.1. The declaration further states that the immovable properties were mortgaged as first charge in favour of VGP to secure the said loan amount.

7.2. In this behalf, the declaration went on to make a reference to the four loan agreements adverted to above by us i.e. agreements dated 01.01.1996, 30.01.1996, 07.02.1996 and 10.01.1997. The point to be noted here is that this declaration which adverted to the fact that an equitable mortgage had been created contradicted the mortgage deed of 27.01.1997.

7.3. This apart, on record are also copies of Form-8 and Form-13, apparently, filed with the Registrar of Companies (ROC). Form-8, was evidently, filed by Neptune to create a charge on the subject property. Neptune in this form, against the query, pertaining to, date and description of the instrument creating charge, has stated as follows:

"31.01.1997: DEPOSIT OF TITLE DEEDS (NO AGREEMENT EXECUTED)."

7.4. In so far as Form-13 is concerned, which is an extract of the Register of Charges, Neptune gave the following information:-

PARTICULARS OF CHARGE UNDER SECTION 125

Date and description of the instrument creating the charge (1)	Amount secured by the charge / amount owing on security of the charge (2)	Short particulars of the property charged. If the property acquired is subject to charge, date of the acquisition of property should be given (3)	Gist of the terms and conditions and extent and operation of the charge (4)	Names and addresses and description of the person entitled to the charge (5)
31.01.1997 DEPOSIT OF TITLE DEEDS (NO AGREEMENT EXECUTED)	Rs.65,20,00 0/- (Rupees Sixty Five Lakhs and Twenty thousand only)	Property situated at Door No.135, Moottaikaran Chavadi Okkaim Thoraipakkam Village, Saidapet Taluk, Chengalpattu, MGR Dist.	Interest:@ 28% Period: 24 months	VGP Finances Ltd, No.6, Dharmaraja r Koil Street, Saidapet, Chennai - 600 015.

8. The creation of charge by Neptune in favour of VGP was followed by execution of two sale deeds by the latter in favour

of the former. These sale deeds were executed on 11.02.1999 and 16.02.1999. These are registered sale deeds. By virtue of these two sale deeds, two parcels of land were sold to VGP.

8.1. Via sale deed dated 11.02.1999, item No.2 and 3, adverted to as Schedule 'A' property, ad measuring 4359 Sq.ft., located at Old No.148/New No.135, Mootaikaran Chavadi, Okkiam Thoraipakkam Village, Tambaram Taluk, Kancheepuram District, were sold for Rs.2,37,180/-. Item No.2 and 3 of Schedule 'A' property have been morefully described in Schedule 'B' of the very same sale deed. It is important to note that Schedule 'A' comprises of item No.1, 2 and 3, out of which, only that part of the property, which is described in item No.2 and 3 were sold. Therefore, in effect, what was sold under sale deed dated 11.02.1999, was Schedule 'B' property. The area covered under item No.2 of Schedule 'A' extended to one (1) ground and 324 Sq.Ft., which is equivalent to approximately, 2724 Sq.Ft., while, item No.2 of Schedule 'A' covered an area equivalent to 1635 Sq.Ft. Therefore, the total area sold under sale deed dated 11.02.1999, was 4359 Sq. Ft., which is, as indicated above, described in Schedule 'B'.

8.2. In the recitals, the reason for sale are indicated. The reason given is that, since Neptune was unable to pay the sum of Rs.5,00,000/-, Schedule 'B' properties were being sold to VGP. Furthermore, in the recitals, a reference to the aforementioned mortgage deed was given and it was clearly stated that Neptune had mortgaged, schedule-A property which comprises of schedule-B property in favour of VGP.

8.3. It may be noted that in one section of the document, the date of the mortgage deed was given as 29.01.1997, while in the other, the correct date was given, which is, 27.01.1997.

8.4. In so far as the second sale deed was concerned, i.e. sale deed dated 16.02.1999, the recitals are identical to sale deed dated 11.02.1999. The only difference between the two sale deeds is that VGP was sold under sale deed dated 16.02.1999, a parcel of land described as schedule 'B' property, which ad-measured six (6) grounds and 1404 sq.ft, situate at Old No.148/New No.135, Mootaikaran Chavadi, Okkiam Thoraipakkam Village, Tambaram Taluk, Kancheepuram District, located in Survey No.265/2 and covered by patta No.180; which is referred to as item No.1 in Schedule 'A' appended to sale deed dated 11.02.1999.

8.5. This parcel of land, was however sold by Neptune, in favour of VGP for a sum of Rs.3,16,080/-, albeit, for the very same reason, as indicated in the earlier sale deed, which was, that Neptune was unable to repay the mortgaged loan of Rs.5,00,000/- along with accrued interest.

8.6. As indicated above, VGP had never given a loan in the sum of Rs.5,00,000/- to Neptune. The only amount that VGP had lent to Neptune in the vicinity of the aforementioned figure was the amount in the sum of Rs.5,20,901/-, that too, via the 4th loan agreement.

8.7. We may only indicate at this juncture that an argument was sought to be put forth on behalf of VGP, which was, that in the recital, there was a reference not only to the mortgage loan of Rs.5,00,000/-, but also to accrued interest, and therefore, amount mentioned in the sale deed would more or less tally with the figure given in the 4th loan agreement i.e. Rs.5,20,901/-.

8.8. Whether this explanation by itself will have any impact will be known in the course of our discussion hereafter.

9. Suffice it to say, that since the learned Single Judge had passed a winding up order on 10.03.1999, the OL took possession of the assets of Neptune on 01.06.1999, which was prior to the date when the Division Bench confirmed the order of winding up passed by the learned Single Judge.

9.1. Given these circumstances, VGP felt emboldened, and thus, moved an application for issuance of direction to the OL to deliver the possession of the properties which it had bought vide sale deed dated 11.02.1999 and 16.02.1999. This application was filed on 14.09.1999 and, it was numbered as: C.A.No.1275 of 1999.

9.2. Unfortunately, for VGP, the learned Single Judge dismissed its application vide order dated 29.11.2004.

9.3. In an appeal preferred against the said order, the Division Bench vide order dated 07.03.2005, allowed the appeal and remanded the matter to the learned Single Judge. The basis on which the Division Bench allowed the appeal was that, according to it, the learned Single Judge had declared the sale transactions entered into between VGP and Neptune as void, simply because these were transactions which were executed after the winding up order had been passed, without examining as to whether or not the sale could be validated.

9.4. The Division Bench, thus, while referring to the provisions of Section 536(2) of the 1956 Act, remanded the matter, as indicated above, to the learned Single Judge. The Division Bench also noted the fact that though the application on which orders have been passed by the learned Single Judge related to delivery of possession, what required examination by the learned Single Judge was whether or not the transactions ought to have been validated.

9.5. Upon remand, the learned Single Judge allowed C.A.No.1275 of 1999 and, went on to direct that the possession of subject property be handed over to VGP. This order was passed on 09.08.2005. This time around, it was the predecessor-in-interest of ARCIL which preferred an appeal with the Division Bench. This appeal was filed on 17.08.2005 and, was numbered as: O.S.A.No.201 of 2005.

9.6. The Division Bench, however, went on to sustain the order of the learned Single Judge, whereby, C.A.No.1275 of 1999 was allowed. The order in this behalf was passed by the Division Bench on 09.09.2008.

9.7. It is in this background, that the matter, as indicated by us at the very outset, was carried in appeal to the Supreme Court. This appeal, as well, was preferred by the predecessor-in-interest of ARCIL. The Supreme Court as alluded to above by us, set aside the order of the Division Bench and remanded the matter to the learned Company Judge.

9.8. While passing the order, Supreme Court observed that the application on which orders were passed (i.e. C.A.No.1275 of 1999) was not an application seeking validation of the sale transactions. The Supreme Court, thus, noticing the fact that VGP had in fact filed an application for validation on 13.09.2004, which remained unnumbered, as orders were passed in other application, directed that it be numbered and adjudicated upon by the learned Single Judge. The Supreme Court, specifically, observed that while adjudicating upon the application, the claims of secured and unsecured creditors would be kept in mind as also the assets held by Neptune.

9.9. The learned Company Judge was directed by the Supreme Court to decide the validation application de novo without being influenced by observations made in the judgement impugned before it. Having regard to the fact the subject property was in possession of VGP, the Supreme Court directed parties to maintain status quo till the validation application was decided. VGP was restrained from alienating or creating any third party interest in the subject property. This order, as noted by us, was passed on 24.04.2009.

10. It is in this background, that the learned Single Judge in third round, by virtue of the impugned judgement dated 20.09.2003, disposed of the validation application, being C.A.No.1324 of 2009.

10.1. As observed by us at the outset, C.A.No.1324 of 2009 was dismissed by the learned Single Judge.

Submissions of Counsels

11. The decision of the learned Single Judge has been assailed before us by VGP and in a manner of speech, the charge in this behalf has been led by Mr.T.V.Seshadri, learned senior counsel instructed by Mr.M.V.Suresh, Advocate. In so far as the OL is concerned, he was represented by Mr.S.R.Sundar, Advocate while submissions on behalf of ARCIL were advanced by Mr.Vijayachandran.

12. The submissions advanced on behalf of VGP can be broadly, paraphrased as follows:

(i) The learned Single Judge failed to appreciate that the loan agreement dated 11.12.1995, (which the learned counsel referred to as the Master Loan Agreement), clearly stipulated that Neptune was required to provide security in the form of its assets, both present and future, in respect of monies which would be advanced to it. Therefore, it was inbuilt in the arrangement arrived at between VGP and Neptune that as and when loan amounts were disbursed and on demand by VGP, security in the form of immovable property would be offered by Neptune.

(ii) The learned Single Judge also failed to take note of the fact that the first three loan agreements were executed prior to the date of institution of the winding up petition. Since, the subject property was bought by Neptune only on 16.02.1996, Neptune could mortgage the same only thereafter and, thus, after the 4th loan agreement dated 10.01.1997 was executed between VGP and Neptune, a mortgaged deed was executed on 27.01.1997.

(iii) The learned Single Judge failed to appreciate that a major part of the loan facility extended to Neptune, in 1996 was for continuation of its day-to-day operations, and that, the security in the subject property was created in lieu of the vast consideration received by Neptune. Therefore, the conclusion reached by the learned Single Judge that the creation of mortgage did not benefit Neptune is flawed.

(iv) Furthermore, the learned Single Judge failed to appreciate that since securities had been validly created in favour of VGP, it was entitled to buy the subject property, which was done by executing the registered sale deeds in that behalf. Resultantly, VGP sacrificed a good amount of the loan amount which was outstanding; a fact, which the learned Single Judge failed to discern and notice.

(v) The learned Single Judge ought to have also taken note of the fact that the sale deeds were executed nearly 13 years prior to the date when the validation application was disposed of by him, at which point in time, there was no real estate boom.

(vi) The statements made by Neptune under Rule 3(1) of the Tamil Nadu Stamp (Prevention of Undervaluation of Instruments) Rules, 1968 (in short "Stamp Rules"), was only for the purpose of calculating stamp duty qua the subject sale deeds and therefore, the statement made by Neptune would not bind VGP. In any case, the value mentioned in the said statement was only a guideline value, which cannot be taken as the market value of the subject property.

(vii) The learned Single Judge ought to have taken note of the fact that the loan agreement deed dated 27.01.1997, was executed for a small amount of Rs.5,00,000/-, which was part of a larger amount loaned by VGP to Neptune and that with regard to the rest, security was created by VGP by deposit of title deeds.

(viii) This fact was put in public realm by registration of charge, with the ROC. Form-8 and Form-13 is reflective of this fact. Furthermore, in the declaration filed by the Managing Director of Neptune, there is a reference to all four loan agreements qua which equitable mortgage was created in favour of VGP.

(ix) VGP acquired possession of the subject properties pursuant to the execution of two registered sale deeds dated 11.02.1999 and 16.02.1999, given the fact that Neptune was unable to repay its debt. Therefore, for the learned Single Judge to hold that the execution of the aforementioned sale deeds happened under suspicious circumstances, was a finding, which was erroneous, both in law and on facts.

(x) The learned Single Judge ought to have tested VGP's bona fides before coming to the conclusion as to whether or not the sale deeds executed in its favour were in consideration of discharge of the loan amount availed of by Neptune. Since, the learned Single Judge failed to test VGP's bonafides, he, reached an erroneous conclusion.

(xi) The learned Single Judge ought to have appreciated that VGP was a bonafide transferee of the subject property, which it had acquired for valuable consideration without knowledge of institution of the winding up petition, at least, on the date when the transfer of interest of title took place in the subject property.

(xii) Since, the entire loan facility was extended in favour of Neptune for conducting its day-to-day business, the sale of the subject property, could not be construed as not being in its interest.

(xiii) The learned Single Judge ought to have taken into account the fact that as on 31.03.1996, the value of land and building without claiming any depreciation was shown by Neptune in its balance sheet as an amount equivalent to Rs.72,60,900/-. This value continued to remain constant till 10.03.1999, when balance sheet was drawn up for that year. The fact that under the four loan agreements, VGP had an outstanding of a larger amount was lost sight of by the learned Single Judge. The principal amount alone, disbursed under four loan agreements was a sum of Rs.65,20,901/-. Therefore, clearly the sale transaction was valid as the amount due to VGP was much more than the value of the subject property.

(xiv) The learned Single Judge ought to have taken into account the fact that the sale deeds were executed on 11.02.1999 and 06.02.1999 i.e. on dates prior to the winding up order i.e. 10.03.1999.

(xv) Furthermore, upon entering into the sale transaction, VGP had adjusted the outstanding loan amount, which enured to the interest of Neptune. VGP on the other hand had no other security except the subject property, to recover its loan amount. The transaction was therefore completely bonafide and above board.

(xvi) The sale deeds were executed between VGP and Neptune in the ordinary course of business. Therefore, the sale of the subject properties was valid in the eyes of law.

(xvii) The fact that Form-8, was filed by Neptune and a charge was registered on the subject property; an act which lent transparency to the transaction.

(xviii) The learned Single Judge could not have been swayed by the fact that the stamp paper on which the mortgage deed was executed did not bear the name of the purchaser of the stamp paper. As per the Rules framed under the Tamil Nadu Supply and Distribution of Stamps Rules, a document does not become invalid only on account of the fact that the stamp vendor omits to write the name of the purchaser on the stamp paper.

(xix) The learned Single Judge has returned a finding of fact that the impugned sale transactions, lacks honesty, without any material evidence. The error made in this behalf becomes even more evident as the learned Single Judge has not returned a finding of fact that VGP had knowledge of institution of the winding up petition.

(xx) The learned Single Judge failed to appreciate that VGP had not sought validation of the mortgage created in its favour, but, it had sought, on the other hand, validation of the sale transaction. Validation of mortgage was not sought since it had

merged with the sale transaction as provided for in the Master Loan Agreement. That the adequacy of the consideration, qua the impugned sale transactions had to be tested by evaluating the same at the time when alienation of the subject properties took place.

12.1 In sum, the submission advanced on behalf of VGP was that the learned Single Judge had misdirected himself in both law and facts.

12.2. In support of his submissions, the learned counsel relied on the following judgements:

(i) Official Assignee of Madras Vs. Valliappa Chetti and Others (AIR 1992 Mad 144)

(ii) N.Subramania Iyer Vs. Official Receiver, Quilon and Another (AIR 1956 SC 1)

(iii) Sankar Ram and Co Vs. Kasi Naicker and Others (2003 AIR SCW 3732)

(iv) M.K.Ranganathan and Another Vs. Government of Madras and Others (AIR 1955 SC 604)

(v) Navjivan Mills Ltd In Re. (1986 Vol 59 CC 201)

(vi) K.N.Narayana Iyer Vs. Commissioner of Income Tax (1993 Vol 78 CC 156)

(vii) N.Babu Janardhanam and another Vs. Official Liquidator, Golden Cine Studios P Ltd. (1993 Vol 78 CC 490)

(viii) Pankaj Mehra and another Vs. State of Maharashtra and Others (2000 2 SCC 756)

(ix) Dr.Kathirvel Vs. Official Liquidator and another (2013 Vol 177 CC 187)

(x) K.Periasamy Gounder Vs. Kothari Industrial Corporation Ltd (2010 (1) CTC 62)

(xi) M.Lakshmi Narayana Choudhary Vs. Official Liquidator (CDJ 2013 MHC 2671)

(xii) Thiruvengadam Pillai Vs. Navaneethammal and another (2008) 4 SCC 530

13. On the other hand Mr.Vijayachandran who appeared for ARCIL and Mr.S.R.Sundar, who advanced submissions on behalf of the OL, largely, relied upon the impugned judgement and the record in support of their arguments.

14. Mr.Vijayachandran, in particular, made the following submissions:

14.1. The learned counsel drew our attention to the report dated 16.11.2010, filed by OL to demonstrate that as on the date of the report, ARCIL had a exposure in Neptune to the extent of Rs.2,18,23,829.43/-.

14.2. The learned counsel also attempted to bring to fore the fact that the sale transactions were deliberately

undervalued. For this purpose, the learned counsel drew our attention to the market value of the subject property set out in the second sale deed i.e. sale deed dated 16.02.1999. Emphasis was laid by the counsel on the fact that the said document clearly indicated that the market value of the property which was the subject matter of the said sale deed, was a sum of Rs.6,79,572/-. The point that the learned counsel sought to highlight was that despite this figure having been mentioned in the document in issue, adjustment was made of a loan amount equivalent to only a sum of Rs.3,16,080/-. It was further submitted that the figures with regard to the value of the subject property could not be relied upon since in the mortgage deed dated 27.01.1997 (document No.393/1997) the market value was set out as Rs.4,80,000/-.

14.3. This apart, our attention was drawn to the fact that even as on 31.03.1995, ARCIL's predecessor-in-interest was shown as secured creditor and that on the said date outstanding sum payable by Neptune was Rs.55,82,538/-. This figure, according to the counsel, as on 10.03.1999, rose to Rs.57,70,640/-.

14.4. Furthermore, it was submitted that in so far as the purported exposure of VGP was concerned, it had been reflected only in the balance sheet for the year ending 10.03.1999. It was emphasised that the amount outstanding in favour of VGP was shown as Rs.54,71,000/-, with security in the form of mortgage created on the machinery and not on the subject property.

14.5. The learned counsel, thus highlights the fact that prior to the financial year 1998-1999, there was no reference to the amount, purportedly, loaned by VGP to Neptune. Furthermore, even as on 10.03.1999, the security created to protect VGP's financial exposure did not relate to the subject property.

14.6 In sum, what was sought to be portrayed, by the learned counsel was that the impugned transactions were suspect and that they were entered into only to defeat the interest of other creditors.

15. Likewise, Mr.S.R.Sundar, resisted the appeal. Learned counsel placed much reliance on the OL's report dated 19.11.2013 and buttressed the same with the following submissions:

15.1. First, even though the subject property was purchased by Neptune in 1996 for a sum of Rs.7,72,000/-, it was sold via the impugned sale deeds for a cumulative value of Rs.5,43,260/-, and that too, after a gap of three (3) years, when the price of the subject property ought to have risen, rather than fallen.

15.2. This apart, Mr.S.R.Sundar also relied upon the OLs earlier report dated 16.11.2010; based on which it was contended that the OL had voluntarily received claims, as on the date of

the said report, from various statutory authorities as well as other creditors which included the predecessor-in-interest of ARCIL, which in all added upto Rs.3,36,16,855.38.

15.3. The learned counsel submitted that the OL had not as yet formally called for claims. The reason furnished for this delay was that the subject property was the only valuable asset available which if liquidated would give a realistic chance of distribution of some amount of dividend to both secured and unsecured creditors of Neptune i.e. the company-in-liquidation.

15.4. In this behalf, Mr.S.R.Sundar submitted that this Court while considering as to whether or not to accord validation to the impugned transactions, would have to consider the interests of both secured and unsecured creditors.

15.5. Our attention, in this regard, was also drawn to the directions of the Supreme Court contained in its order dated 24.04.2009, via which the matter was remanded to the learned Single Judge.

15.6. What was also sought to be highlighted was the stark difference in the rate per sq.ft., at which, subject property was sold to VGP via the impugned sale deeds. The learned counsel, sought to demonstrate this, taking into account the loan amount which was adjusted and area sold to VGP in the process. In so far as the first sale deed was concerned, i.e. 11.02.1999, according to Mr.Sundar, the rate per sq.ft. worked out to Rs.54.41, whereas, in respect of the second sale deed dated 16.02.1999, the price per sq.ft., using the same measure, worked out to Rs.20 per sq.ft.

15.7. The learned counsel submitted that there was no reasonable explanation tendered by VGP as to how the price of a property which was co-located differed so vastly.

15.8. Mr.S.R.Sundar stressed the fact that the impugned sale transaction was dishonestly executed only to defeat the interest of other creditors.

15.9. Furthermore, learned counsel submitted that the manner in which the transaction was configured resulted in loss of revenue to the State in the form of stamp duty.

16. In support of his submissions, the learned counsel relied on the following judgements:

- (i).Sunita Vasudeo Warke Vs. Official Liquidator and others (2013) 2 Mah LJ 777
- (ii).BNP Paribas, France Vs. UB (Holdings) Ltd., Bangalore and Others (ILR 2014 KAR 779)
- (iii).ICICI Ltd. Vs. Ahmedabad Manufacturing & Calico Printing

- Co. Ltd. and another (2004) 9 SCC 747
(iv).NGEF Ltd. Vs. Chandra Developers (P) Ltd. and Another (2005) 8 SCC 219
(v).Smt.Jayanthi Bai and others Vs. Popular Bank Ltd., (AIR 1966 Ker 296)
(vi).K.Periasamy Gounder Vs. Kothari Industrial Corporation Ltd., and another (2010 (1) CTC 62)
(vii).In re Gray's Inn Construction Co. Ltd. (1980) 1 WLR 711
(viii).Express Electrical Distributors Ltd Vs. Beavis and others (2016) 1 WLR 4783

Reasons

17. We have heard the learned counsel for the parties and perused the records.

18. Before we proceed further, what is required to be noticed, based on the judgements cited both before us and the learned Single Judge, as to the principles of law which govern the validation of the transaction involving disposition of property by a company after commencement of its winding up.

18.1. The measure which a Court generally applies while examining transactions involving disposition of property by a company qua which winding up has commenced are, broadly, as follows:

(i) First and foremost what is to be borne in mind is that though Section 536 (2) of the 1956 Act states that any transaction involving disposition of property, which includes actionable claims, after the commencement of winding up, is void, the Court has the discretion to validate such transactions, if they are undertaken for the benefit of and in the interest of the company which is in winding up. In other words, the transactions undertaken to keep the company operable while the winding up process is on, can be validated if they are entered into in the ordinary course of business.

(ii) The power to validate the transactions undertaken by a company after winding up process has commenced (i.e. winding up petition is filed) is to enable the company to obtain funds to carry out its business, so that its business is not "paralysed".

(iii) This principle has to be read with a caveat that assets cannot be disposed of by the company at its mere whim and fancy causing violation of the fundamental principle, which is, that equality amongst creditors is required to be maintained. [See: Tulsidas Jasraj Parekh Vs. Industrial Bank of Western India (AIR 1931 Bombay 2)]

(iv) The distinction between what is construed as ordinary course of business before the winding up petition is presented

and that which can be categorised as ordinary course thereafter is, broadly, as follows:

(iv)(a) The ordinary course of business before a winding up petition is filed recognises the fact that a company in order to generate funds needs at times to furnish security in the form of assets owned by it so that the company has the leeway to raise debts according to its commercial wisdom.

(iv)(b) However, after the winding up petition is presented, the circumstances take a different colour. The unsecured creditors, will, necessarily, have a pari passu charge over its assets. It is, thus, not ordinary course of business, if, one creditor is paid in full or in entirety to the detriment of the interests of other creditors.

(v) The fact that the transactions have been entered into by the creditor in ignorance of institution of a winding up petition would be rare. Therefore, the knowledge of presentation of a petition is a factor which is required to be considered in determining as to whether or not the transaction is bonafide, even though, that by itself may not be conclusive. [See: *Tulsidas Jasraj Parekh Vs. Industrial Bank of Western India* (AIR 1931 Bombay 2)]

(vi) The transactions which are honest and bonafide, and are carried out in the ordinary course of business, can be validated by the Court. In examining the bonafides of a transaction, what should be kept in mind is that the transaction is fair, just and reasonable and in the interest of the company and its creditors.

(vii) The policy of law is that Court should not validate any transaction which will result in one or more pre-liquidation creditors being paid in full at the expenses of other creditors, albeit, in the absence of special circumstances. In determining whether the disposition of property should be validated or not, the principle of good faith and ordinary course of business should be applied. [See *Re: Gray's Inn Construction Co. Ltd.*, [1980 (1) All ER 814 (CA)]].

(viii) In considering whether the transaction is bonafide or not all surrounding circumstances should be considered. In this behalf, what is required to be examined is : is the disposition of property carried out to keep the company operational. If the answer is in the affirmative, then, generally a Court would validate such a transaction, unless it is shown to be a sham transaction.

(ix) While, the Court may validate a genuinely bonafide transaction carried out in the ordinary course of day-to-day business it will not allow disposition of property to take place which excludes other creditors from sharing the proceeds which

would otherwise flow from sale of its assets. [See Syed Haidar Sahib Vs. M.Jayaram Pillai 1956 (26) Comp Cases 164 (Mad)].

(ix)(a) In other words, the fundamental principle of equality among creditors cannot be violated [See Tulsidas Jasraj Parekh Vs. The Industrial Bank of Western India AIR 1931 Bom 2)]

19. Having culled out the broad principles which govern the examination of a transaction brought before Court for validation, we need to apply the same to the facts obtaining in the present case and ascertain as to whether or not the impugned transactions should be validated.

20. The facts which have emerged, from the material on record, clearly show that while the loan agreement dated 11.12.1995 (which is termed as a Master Loan Agreement by VGP) envisaged creation of security for moneys to be advanced in future to Neptune, no security was, in fact, created under the three loan agreements dated 01.01.1996, 31.01.1996 and 07.02.1996, which were executed in quick succession thereafter.

20.1. What is to be borne in mind is that clause 3 to 6 of the Master Loan Agreement which adverted to the creation of security in the assets of Neptune, both present and future, did not specifically refer to immovable assets.

20.2. A perusal of the balance sheets of Neptune for the period spanning between 1994-1995 and 1998-1999, would show that in 1994-1995 (as on 01.04.1994) it had a gross block of assets worth Rs.1,42,76,625/-. This figure included plant and machinery worth Rs.39,29,441/-. Besides this, after taking into account depreciation, even on 31.03.1994, it had gross block assets worth Rs.1,25,61,956/-. As on 31.03.1995, the gross block of assets of Neptune was pegged at Rs.1,69,62,611/-. Likewise, as on 30.06.1996, the gross block value of assets rose to Rs.4,93,95,461/-.

20.3. It appears Neptune made additions in the form of land and building, to the extent of Rs.72,62,900/-. This addition was, evidently, made during the financial year 01.04.1995 and 31.03.1996. This fact, as it appears, accounted for the enhancement of the general block of assets to the tune of Rs.4,93,95,461/- as on 30.06.1996.

20.4. The fact of the matter, is that, by the time, the first three loan agreements were executed i.e. on 01.01.1996, 31.01.1996, 07.02.1996, VGP had loaned a total sum of Rs.50,00,000/- to Neptune. Therefore, if, the intention was bona fide, as claimed by Neptune, it would have in the ordinary course, called upon Neptune to secure its interest by creating a charge on the assets, which were, available at that point in time.

20.5. For some curious reason no such step was taken. The subject property were bought on 16.02.1996 via a registered sale deed (document No.818/1996) for a stated value of Rs.7,72,000/-. VGP attempted to defend its actions and portray them as being bonafide by contending that since the subject property was bought only on 16.02.1996, security could be created only thereafter.

20.6. As is sought to be demonstrated above, it is not as if other assets were not available with Neptune qua which security could have been created to protect the interest of VGP if its intention was bona fide. It is only after the winding up petition was filed, that the 4th loan agreement dated 10.01.1997 was executed between VGP and Neptune, followed by execution of mortgage deed on 27.01.1997. This was accompanied by deposit of title deeds and creation of charge on 31.01.1997.

20.7. Neptune claims that all three events, that is, the execution of the 4th loan agreement dated 10.01.1997, the mortgage deed dated 27.01.1997 and the deposit of title deeds on 31.01.1997, happened without it having knowledge of the fact that a winding up petition had been filed against Neptune on 14.10.1996.

20.8. Even if we were to accept this submission advanced on behalf of VGP, what befuddles us is that why would VGP enter into the impugned sale transactions vide sale deed dated 11.02.1999 and 16.02.1999 after a paper publication with regard to admission of winding up petition was made on 21.11.1998, without seeking the permission of the Company Court.

20.9. What makes the matter even more curiouser, is that, VGP, which is, admittedly, a finance company, would lend monies to Neptune and not examine its balance sheets. As indicated in our narration above, in the balance sheets of Neptune for the period 1995-1996 to 1997-1998, there is no mention of the loan advanced by VGP. The only balance sheet, in which, VGP's loan is reflected is the one prepared as on 10.03.1999.

21. Furthermore, as noticed by us herein above, the balance sheet of Neptune which is prepared as on 10.03.1999, shows that Neptune was indebted to VGP to the extent of Rs.54,71,000/- and that the debt was secured by creation of mortgage on machinery. There is no correspondence on record which would show that VGP had ever contested the fact that the financial statements of Neptune did not disclose the debt owed by it to VGP or that even as on 10.03.1999, the nature of security was wrongly reflected in the financial statements of Neptune. The reason we advert to this aspect of the matter is that when this query was put to the learned counsel for VGP, he responded by saying that VGP was not

responsible for the manner in which Neptune prepared its financial statements.

21.1. While this stand is correct, albeit, partially. It would stretch credulity if one were to accept that a hard nosed creditor, such as VGP, which is in the business of finance would not raise a red flag with its debtor qua such grave anomalies in its financial statements.

22. This brings us to the other aspect which is as to whether or not one could rely upon on the documents which have been placed before the Court to secure validation of the impugned sale transactions. As rightly argued by the learned counsel for ARCIL, in so far as the second sale deed is concerned, i.e., sale deed dated 16.02.1999, the market value of the property referred to therein has been shown as Rs.6,79,572/-. There is no good reason furnished by VGP as to why when the market value of the property is shown in document as Rs.6,79,572/-, it would have only an amount of Rs.3,16,080/- adjusted towards outstanding loan.

22.1. Compare this with the fact that the subject property (which included the property which were sold via the impugned sale deeds were purchased on 16.02.1996) was purchased, admittedly, by Neptune for a stated sum of Rs.7,72,000/-. Despite which, for reason best known to VGP the combined cumulative consideration that is reflected in the two sale deeds is a sum of Rs.5,43,260/- (first sale deed: Rs.2,37,180/- and second sale deed: Rs.3,06,080/-).

22.2. The two (2) transactions i.e., the transaction by which Neptune had purchased the subject property and the dates on which they were sold are set apart by little over two (2) years and four (4) months. Preponderance of probability would have us believe that even by the most conservative estimate the stated value of the subject property ought to have risen, even if, marginally, rather than fallen.

23. Furthermore, according to us, VGP and Neptune have used the device of sale of immovable property only to ensure that the personal guarantees of the Managing Director and Director of Neptune i.e. Mr.Pradeep Ranganathan and S.N.Natarajan respectively are not enforced. As per clause 5 of the first three loan agreements, the amount lent by VGP to Neptune was to be secured by the aforementioned persons by furnishing personal guarantees by pledging their share certificates for twice the value of the loan taken.

23.1. We had specifically queried the learned counsel for VGP as to whether personal guarantees were furnished, to which we received an answer in the affirmative. We had also asked the

learned counsel whether shares were pledged. To this query, though, the learned counsel was not able to give definitive answer. As a matter of fact, the learned counsel was not able to place on record either the personal guarantees of the Managing Director and the Director of Neptune or, any document which would show that a pledge was created in the subject shares.

23.2. In order to get to the root of matter we had also asked for the balance sheets of VGP for the period spanning between 1995-1996 to 2000-2001. We were told by the learned counsel for VGP that he was not able to place the same on record as more than eight (8) years had passed and therefore, the financial statements for the aforementioned period had been destroyed in the ordinary course of events.

23.3. According to us, qua the non-production of the balance sheet for the periods referred to above VGP may have had some basis in law, however, there was, in our view, no basis for failure to place on record the personal guarantees of the Managing Director and Director of Neptune.

24. This apart what has clearly emerged upon perusal of the mortgage deed, Form-8, Form-13 and the sale deeds, is that, VGP and Neptune have both colluded and collaborated in depriving the State of valuable revenue. As per the declaration made by the Managing Director of Neptune, charge was created on the subject property in the sum of Rs.65,20,000/-. The sum total of the loan granted above by VGP to Neptune under the four (4) loan agreements, does in fact come to a figure of Rs.65,20,901/-.

24.1. In the books of Neptune, the book value of land and building during the relevant period is shown as Rs.72,60,900/-. Therefore, it is inexplicable as to how the market value of the subject property, even in the registered document hovers around a sum of rupees 6 to 7 lakhs.

24.2. To be noted, the subject property is a vacant site, as per the statement made under Rule 3(1) of the Stamp Rules. Thus, the value in the books of accounts of Neptune which is shown to be in excess of Rs.72,00,000/- is, perhaps, closer to the market value than that which is reflected in the document such as the mortgage deed and the two impugned sale deeds. The real price of the subject property is to some extent shown in Form-8, whereby, a charge on the subject property is created, albeit, to the extent of Rs.65,20,000/-.

25. Furthermore, as correctly argued by the learned counsel for ARCIL and OL, there is a vast difference in price in respect of two parcels of land which together comprise the subject property. The rate per sq.ft. vis-a-vis the first sale dated 11.02.1999 works out to Rs.54.41/-, while the rate per

sq.ft. vis-a-vis the second sale deed dated 16.02.1999, works out to Rs.20 per sq.ft.

25.1. Mr.M.V.Suresh, sought to explain the difference in price by laying emphasis on the fact the two sale deeds dealt with the front and rear portion of the subject property. According to us, even if this explanation, which is given across the bar, is accepted, there cannot be such a vast difference in the rate of the two portions of the subject property which were sold to VGP within a gap of only four days; more particularly, if the purchaser was the same entity.

26. Therefore, according to us, the preponderance of probability is that VGP was always aware of the fact that the state of health of Neptune has precarious and in order to save the promoter-directors of Neptune from difficulty and, perhaps, to further their interest agreed to enter into the impugned sale transactions.

27. The impugned sale transactions were clearly motivated by the fact that the exposure, if any, of VGP could be secured by giving it the first bite in the assets of Neptune. VGP was a pre-liquidation creditor and therefore, by this device, cannot be allowed to steal a march over other creditors.

28. The exposure of ARCIL as on 16.11.2010 (which is the date when OL submitted his report) is a sum of Rs.2,18,23,829/-, and if dues of other statutory and unsecured creditors are included, the debt of Neptune balloons to Rs.3,36,16,855.38/-.

28.1. As indicated by Mr.Sunder, the OL is yet to call for claims. There is, therefore, every likelihood that there may be other unsecured creditors whose claims qua Neptune may be outstanding.

28.2. The impugned sale transaction were not, as held by the learned Single Judge, either carried out to benefit Neptune or, were transactions, which helped Neptune to conduct its day-to-day operations.

29. Therefore, for all these reasons, we are disinclined to interfere with the impugned order. Accordingly, the appeal is dismissed. Consequently, costs will follow the result.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

gg/kk

To

1. The Sub Assistant Registrar (Original Side),
High Court, Madras.

Copy to:

- 1.The Official Liquidator, High Court, Madras.

- 2.The Record Keeper,
Original Side, High Court, Madras

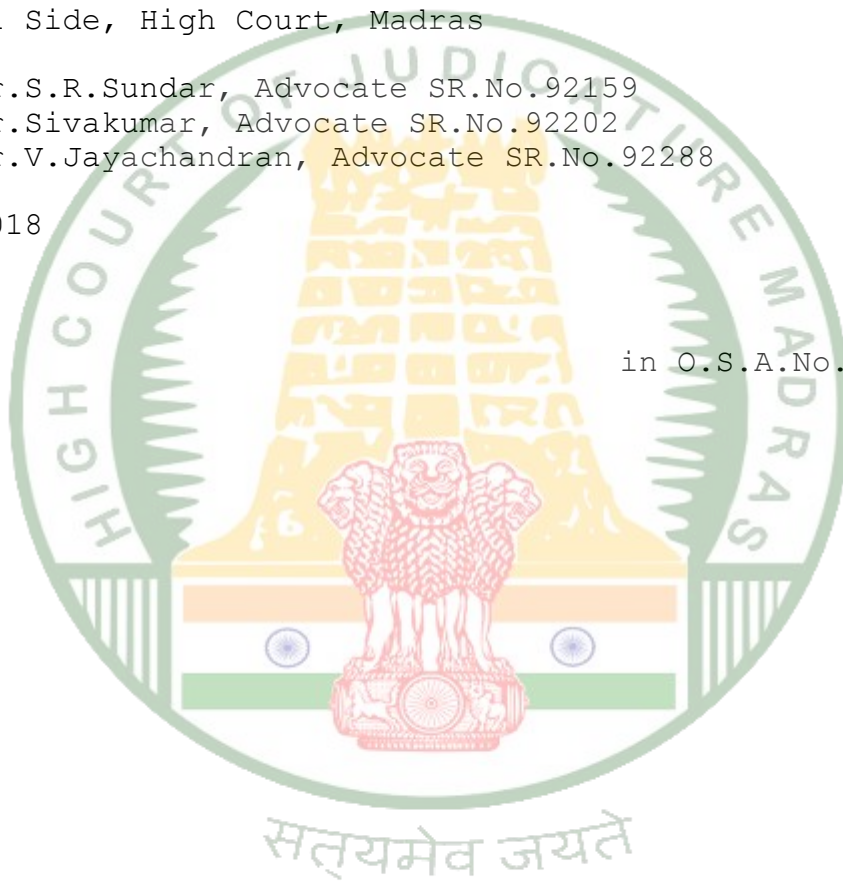
+2cc to Mr.S.R.Sundar, Advocate SR.No.92159

+1cc to Mr.Sivakumar, Advocate SR.No.92202

+1cc to Mr.V.Jayachandran, Advocate SR.No.92288

sm:18.1.2018

Judgement
in O.S.A.No.348 of 2013



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