

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.07.2017

DELIVERED ON : 28.07.2017

Coram

The Honourable Mr. Justice RAJIV SHAKDHER

and

The Honourable Mr. Justice ABDUL QUDDHOSE

O.S.A.No.396 of 2013
and
M.P.Nos.1 and 2 of 2013

Mr. Pradeep D. Kothari,
Chairman,
Kothari Orient Finance Ltd.,
No.114, Mahatma Gandhi Salai,
Nungambakkam, Chennai - 600 034.

... Appellant

Vs.

1. IDBI Bank Limited
Prestige Point,
No.33, Haddows Road,
Chennai - 600 006.

2. The Official Liquidator,
High Court, Madras
As a Liquidator of
M/s. Kothari Orient Finance Ltd.
(In liquidation)

3. S. Ramaiah

... Respondents

APPEAL under Order 36 Rule 1 and 2 read with Clause 15 of
the Letters Patent against the order dated 04.10.2013 made in
Company Application No.734 of 2011 in C.P.No.179 of 2001.

For Appellant : Mr.P.V.Balasubramaniam
for Mr.T.Mahendran

For Respondents : Mr.T.K.Seshadri, S.C.
for M/s.Shivakumar and Suresh - R1

Mr.S.R.Sundar
for Official Liquidator - R2

No appearance - R3

J U D G E M E N T

(Judgement of the Court was delivered by RAJIV SHAKDHER, J.)

1. This is an appeal preferred by Mr.Pradeep D.Kothari, former Chairman of Kothari Orient Finance Limited (in short 'KOFL') , against the judgement and decree dated 04.10.2013, passed by the learned Company Judge, in C.A.No.734 of 2011.

1.1. Pertinently, the application, i.e., C.A.No.734 of 2011 was moved in Company Petition (C.P.)No.179 of 2001.

2. The reason that we chose to highlight this aspect of the matter, right at the outset, as an argument was advanced on behalf of the appellant that the impugned judgement and decree, by which, the Official Liquidator (in short 'the OL'), who was acting as the Provisional Liquidator (in short, 'the PL') was discharged, was passed only in C.P.No.179 of 2001, whereas, on the record of the Company Judge, there is, even now, another petition pending, whereby, winding up of KOFL is sought. In other words, the argument advanced is that dismissal of C.P.No.179 of 2001 will not bring about an efficacious conclusion even from the point view of KOFL.

2.1. We may also note that, the learned Company Judge, while passing the impugned judgement and decree, has also gone on to dismiss C.P.No.179 of 2001, though the prayer in C.A.No.734 of 2011 was confined only to the discharge of OL.

3. As to whether, such a direction could have been passed or not by the learned Company Judge, is also a matter in issue, as submissions, in this behalf, have been advanced on behalf of the appellant.

4. Before we proceed further, and in order to adjudicate upon the instant appeal, the following, broad, facts are required to be noticed.

4.1. C.P.No.179 of 2001 came to be filed by one Mr.S.Ramaiah, who is arrayed as respondent No.3 in the instant appeal. He, along with his wife, had deposited monies with

KOFL. Since, there was a default not only qua the deposits made by respondent No.3 and his wife, but also vis-a-vis other depositors, several criminal complaints were filed by depositors, which numbered nearly 400, at one point in time.

4.2. In so far as respondent No.3 and his wife are concerned, they, as it appears, preferred aforementioned Company Petitions. As indicated above, respondent No.3's Company Petition is numbered as: C.P.No.179 of 2001. In so far as respondent No.3's wife, i.e., Mrs.R.Seethalakshmi, is concerned, her Company Petition is numbered as:C.P.No.180 of 2001. Both the Company Petitions, evidently, were filed under the provisions of Section 433 (e) and (f) and 434 of the Companies Act, 1956 (in short 'the 1956 Act').

4.3. The record shows that the aforementioned Company Petitions were presented on 02.07.2001 and numbered on 01.08.2001. The Company Petitions came up for admission before the learned Company Judge on 05.12.2001, at which point they were admitted and directions were issued for appointment of OL attached to this Court as the PL of KOFL.

4.4. Furthermore, an Administrator was also appointed, based on an application moved, in that behalf.

4.5. We may also note that, while admitting the Company Petitions, vide order dated 05.12.2001, the learned Company Judge did make observations, (some of which were based on KOFL's stand in the Company Petitions), broadly, on the following lines :

- i) That KOFL's liabilities were more than the available assets and receivables.
- ii) Substantial amounts were payable to depositors.
- iii) KOFL had also raised secured loans, which were outstanding.
- iv) That KOFL had no objection to the Company Petitions being admitted and publication being ordered.
- v) Furthermore, KOFL had no objection to the appointment of a PL and an Administrator to take charge and, manage its affairs.

4.6. We may also note that, the Court had considered an additional affidavit filed by the appellant, which adverted to two (2) Schemes, for repayment of amounts to depositors, albeit, over a period of 3/4 years. The Court observed that these Schemes were not acceptable to the stakeholders. The Court also went on to state that it was also not satisfied with the Schemes presented by KOFL, albeit, via the appellant. The reason, the Court made these observations was that, the amounts that the appellant sought to infuse, out of his personal funds to repay depositors, though, in instalments, was too small an amount, given the extent of monies owed.

4.7. The Court, however, went on to state that the appellant, based on an additional affidavit filed by him, shall

bring in the assured amounts and assets for repayment of debt for the benefit of depositors and other creditors. The Court, thus, restrained the appellant from alienating his immovable properties and other valuable assets, shares, deposits, investments and other movables without the leave of the Court, even while, noting the fact that KOFL had become insolvent and had lost its substratum. As alluded to above, the Court came to the conclusion that it was a fit case for admitting the Company Petitions.

5. As would be obvious, the aforementioned facts present only a broad preface as to how, the two, Company Petitions, i.e., C.P.Nos.179 and 180 of 2001, came to be filed.

5.1. The instant appeal, which has been filed by the erstwhile Chairman of KOFL, as indicated above, is, principally, contested by respondent No.1, i.e., United Western Bank, predecessor-in-interest of Investment Development Bank Limited (hereafter referred to as 'UWB/IDBI') and to some extent by the OL.

5.2. The contest amongst these three parties, i.e., the appellant, UWB/IDBI and OL, is pivoted around an immovable property, which at one point in time, was owned by KOFL. The property in issue, which ad-measures 2056.89 sq.ft., [inclusive of undivided share of land and office space bearing No.102 and 103, measuring 4263 sq.ft. is located on the First Floor of the building, known as, "Prestige Point", which is situate at No.33, Haddows Road, Nungambakkam, Chennai-600 006 (hereafter referred to, as 'the subject property')], was bought by KOFL on 19.04.1991.

5.3. Evidently, on 31.03.1999, the Board of Directors (in short, "BOD") of KOFL passed a resolution to sell the subject property. The reason it chose to take this step, was, perhaps, on account of the fact that KOFL, which had taken a working capital loan aggregating to Rs.55,00,000/- (Rupees Fifty five lakhs only) was unable to pay the loan. Pertinently, this loan had been advanced by UWB/IDBI. Since, defaults had been committed, KOFL proposed an one-time settlement plan for repayment of its dues. Towards this end, KOFL offered to sell the subject property, and accordingly, went on to execute an agreement for sale dated 17.02.2000. As per the said agreement for sale, the total consideration qua the subject property was pegged at Rs.1,05,00,000/- (Rupees One Crore and five lakhs only), out of which, a sum of Rs.41,00,000/- (Rupees forty one lakhs only) was paid as advance to KOFL. The balance consideration was required to be paid, only upon completion of the sale transaction.

5.4. It appears that, since, KOFL was unable to repay its dues to UWB/IDBI, the outstanding dues were adjusted against the balance consideration which was receivable by KOFL, against the sale of the subject property. As a result of this arrangement,

UWB/IDBI took possession of the subject property on 06.11.2000.

5.5. Not too far in point of time, as indicated above, C.P.Nos.179 and 180 of 2001, were presented on 02.07.2001. The record shows that the said Company Petitions were numbered on 01.08.2001.

5.6. As alluded to above, the aforementioned Company Petitions were admitted by the learned Company Judge on 05.12.2001, when, inter alia, directions were issued for advertising the petitions and the OL attached to this Court was appointed as the PL.

5.7. In the interregnum, in line with the then prevailing provisions of the Income Tax Act, 1961, the agreement for sale was presented before the concerned income tax authority. According to UWB/IDBI, the concerned income tax authority gave its No Objection Certificate (NOC) for sale of the subject property on 18.04.2000.

5.8. We may, however, note that in the application filed by UWB/IDBI, qua which the impugned judgement and order has been passed by the learned Company Judge, i.e., Comp.A.No.734 of 2011, UWB/IDBI avers that the income tax authority had attached the subject premises, whereupon, a sum of Rs.2,02,322/- was paid by UWB/IDBI, out of the balance sale consideration payable to KOFL. It is further averred that the attachment vis-a-vis, the subject property, was lifted only thereafter.

5.9. Be that as it may, UWB/IDBI, on 24.07.2002, requested the Administrator appointed by this Court to execute the sale in its favour vis-a-vis the subject property. Since, there was no response, UWB/IDBI filed Comp.A.No.1208 of 2002, with the learned Single Judge, wherein, the prayer made was, for issuance of a direction to the Administrator, to execute a sale deed in its favour under the provisions of Section 536 of the 1956 Act. This application was filed, in and about, September 2002.

6. Comp.A.No.1208 of 2002 was, however, dismissed by the learned Company Judge, via the judgement and order dated 21.04.2003, on the principal ground that the subject transaction amounted to a fraudulent preference.

6.1. UWB/IDBI, being aggrieved, preferred an appeal with the Division Bench, which was numbered O.S.A.No.284 of 2003. This appeal was filed in and about August 2003. O.S.A.No.284 of 2003, met the same fate, that is, it was dismissed by the Division Bench, vide judgement and order dated 17.08.2009.

6.2. Being aggrieved, UWB/IDBI, preferred a Special Leave Petition (SLP) bearing No.33825 of 2009, against the judgement and order dated 17.08.2009, passed by the Division Bench.

7. We are informed that the said SLP is pending. In the SLP, the Supreme Court, vide order dated 10.01.2017, has directed

this Court to dispose of the captioned appeal (i.e., O.S.A.No.396 of 2013) expeditiously, and preferably, within a period of three (3) months.

7.1. We may only note that the matter, for the first time, was, placed before the Predecessor-Bench by the Registry on 13.04.2017. Since, no substantive hearing could be held for one reason or the other, the matter was placed before the presently constituted Bench only on 04.07.2017. As a matter of fact, the directions contained in the order of the Supreme Court dated 10.01.2017, were brought to the notice of this Bench only on that day.

7.2. Accordingly, counsels for the parties were persuaded to advance arguments in the matter, so that a decision could be rendered in the matter, in terms of the directions issued by the Supreme Court.

8. We may also note that, in the interregnum, the appellant herein had filed Company Applications (i.e., Comp.A.) Nos.2482 to 2485 of 2007, with the prayer seeking permission of the Company Judge to pay amounts to depositors/unsecured creditors.

8.1. These applications were disposed of vide order dated 09.10.2007, when, the appellant was directed to deposit a sum of Rs.4,69,60,738/-, with the Administrator towards full and final settlement of the dues owed by KOFL.

8.2. C.P.No.179 of 2001, was listed before the Company Court on 14.02.2008. On the said date, the Company Judge, based on a memo dated 05.02.2008, filed by the Administrator, passed a common order in Comp.A.Nos.2482 to 2485 of 2007. In the said order, the Company Judge observed that, since, the Administrator had reported to him that the appellant had paid the entire amount, as directed by the Court on 09.10.2007, he was inclined to lift the attachment order and direct the Administrator to return the sale deed dated 17.09.1993, and other relevant papers pertaining to the property situate at No.9, Mohan Kumaramangalam Road, Poiner Sudarsan Plaza, Nungambakkam, Chennai-600 034. To be noted, these were title documents, which, the appellant had deposited with the Administrator.

8.3. Consequent thereto, the Administrator filed a report dated 08.06.2009. The report filed showed that the learned Administrator had made recoveries from the debtors of KOFL to the extent of Rs.1,03,44,559/-. In addition thereto, the Administrator had transferred a sum of Rs.7,64,363/- to the OL. The total recoveries, which the Administrator had made was Rs.1,11,08,922/-. Furthermore, the report also recorded that the appellant had made, via cheques issued on various dates between January 2003 and December 2007, remittances to the Administrator amounting to Rs.7,41,60,738/-.

8.4. A perusal of the interim and final report filed by the Administrator, the contents of which, were noticed by the Court in its order dated 23.06.2009, made in Comp.A.Nos.2482 to 2485

of 2002, would show that KOFL in all had on its books 10,968 depositors, out of which, 6,464 depositors were paid by the learned Administrator at the rate of 20%. A further amount, equivalent to 30% of the dues, was brought in by the appellant from his private resources. In other words, this part of the claim made by the depositors was settled by the appellant privately. In so far as the remaining 4,504 depositors were concerned, whose claim are valued at Rs.5,87,00,922/-, the Administrator, in the first instance, paid 20% of the claim, amounting in all, to Rs.1,17,40,184/- while the balance sum amounting to Rs.4,69,60,738/-, was paid by the appellant pursuant to the order dated 09.10.2007, passed in Comp.A.Nos.2482 to 2485 of 2007. The Court, also noted, that cheques amounting to Rs.1,00,25,265/-, were returned in respect of 1,782 depositors.

9. Accordingly, the following directions were issued by the Court vide its order dated 23.06.2009 :

- (i). A sum of Rs.1,03,44,550/-, lying with the Indian Overseas Bank (in short, 'IOB'), Esplanade Branch, be transferred to the OL. The OL would credit the aforementioned sum along with the sum of Rs.7,64,636/-, to the account of KOFL.
- (ii).The OL would pay the fee of the Administrator and the Auditors.
- (iii).The sum of Rs.1,95,73,682.44 available with IOB would be returned to the appellant.
- (iv).The appellant to make payments to unpaid depositors, in case, they were to make a claim in future. This direction was based on the appellant's affidavit dated 23.06.2009.
- (v).The appellant to make payments to 6,464 depositors, in case any further claims were made, since these claims had been settled by him directly.
- (vi).Likewise, in respect of 1,782 depositors, (whose cheques had been returned and stood invalidated), the appellant was made liable to settle the same, in case, any claims were raised, in that behalf. As noticed above, the value of these cheques was a sum equivalent to Rs.1,00,25,265/-.
- (vii).In respect of the unpaid depositors, the appellant was made liable to the extent of Rs.1,47,01,553/-.
- (viii).In respect of the unsettled claims, the appellant was called upon to furnish security in the form of Fixed Deposit Receipt (FDR) worth Rs.25,00,000/- (Rupees twenty five lakhs) and, to hand over the same to the OL. The initial period, for which, deposits were to be kept alive was pegged at one year. The appellant was given liberty to approach the Court, upon the expiry of the tenure fixed vis-a-vis Fixed Deposit, for issuance of appropriate orders.
- (ix).The OL was directed to depute one of his officials to take inventory of the entire material belonging to KOFL, albeit, in the presence of the nominee of the Administrator

and to take possession of the same thereafter. The time frame given, for the said purpose, was four (4) weeks from the date of receipt of the order and upon filing of the report, in that behalf.

(x).The Administrator was discharged of his obligation to manage the affairs of KOFL, which, essentially, pertained to redemption of dues of depositors. The Administrator was, however, directed to prosecute the appeal, and in that behalf, take assistance, if necessary from the OL.

10. It appears that the Company Petition, in this background, came up before the Court, for hearing, on 21.06.2010, when, upon the submission advanced by the petitioning creditor's counsel, that he had returned the papers, notice was issued by the Court to the party, i.e., respondent No.3, in the present appeal.

11. In the meanwhile, consistent, with the direction contained in the order dated 23.06.2009, the appellant moved Comp.A.No.1716 of 2010, whereby, he sought returns of FDR worth Rs.25,00,000/-, furnished on his behalf by HDFC Limited, Chennai. The consequent direction, which, the appellant sought in the said application, was for appropriation of the said amount along with the accrued interest.

11.1. The said application, which was moved in C.P.No.179 of 2001, was disposed of, by the learned Company Judge, vide order dated 02.12.2010, with the direction that the OL would return the FDR to the appellant, so as to enable him to receive the amounts due and payable on the FD, with the caveat that if, in future, any claims were made by the depositors, the same shall be honoured by him. The appellant was asked to file an affidavit of undertaking with the OL in that behalf.

11.2. Principally, this direction came to be passed, as no claims had been received by the OL for a period of one year, since, the date the FDR was furnished, i.e., on 07.07.2009.

12. It is in this background that in and about March 2011, (03.03.2011), Comp.A.No.734 of 2011, was filed by UWB/IDBI, in C.P.No.179 of 2001.

13. As noticed at the outset, Comp.A.No.734 of 2011, was disposed of, by the learned Company Judge, via the impugned judgement dated 04.10.2013.

14. The record shows that one of the secured creditors, i.e., Stressed Assets Management Branch, State Bank of India, Egmore, Chennai, (in short, 'SBI'), having become aware of the impugned judgement and order, approached the Debts Recovery Tribunal-II, Chennai, (in short, 'DRT'), for securing its interest.

14.1. SBI, apparently, was constrained to move the DRT, as the Recovery Officer had refused to grant reliefs, prayed for in the applications filed by it. The substantial reliefs, prayed for, in the applications filed before the DRT were as follows :

- i. To grant an order of injunction and ad-interim injunction restraining the second respondent from refunding the aforesaid amount of Rs.,130,29,441.00 together with accrued interest or any other amount lying with the second respondent to the first respondent.
- ii. To grant an order of attachment of the aforesaid amount of Rs.1,30,29,441.00 together with accrued interest lying with the second respondent and belonging to the first respondent.
- iii. To direct the second respondent to pay the aforesaid amount of Rs.1,30,29,441.00 together with accrued interest to the Petitioner Bank towards the recovery of the Certificate amount.

14.2. The aforementioned reliefs were sought for by SBI, in view of the consequential directions contained in the impugned judgement dated 04.10.2013, whereby, the OL, upon his discharge, was directed to transfer the sum of Rs.1,27,00,000/- lying with him by way of investment and Rs.3,29,441/- available with him in the form of Bank Deposits, to the appellant herein.

14.3. The DRT, taking into account, the directions contained in the impugned judgement and order dated 04.10.2013, vide its order dated 13.12.2013, granted only one of the three (3) reliefs, which is, the order of attachment prayed for by SBI.

14.4. Accordingly, the sum available with the OL, in the form of investment and bank deposits amounting to Rs.1,30,29,441/- was directed to be attached along with accrued interest, upon transfer of the said sum being effected by the OL in favour of the appellant herein.

14.5. The fact that SBI is aware of the present proceedings is borne out from the communication dated 07.07.2017, addressed by it to the OL, whereby, it has requested the OL to bring to the notice of this Court, the aforementioned order of the DRT.

15. The record further shows that in response to Comp.A.No.734 of 2011, the OL filed two reports. The first report appears to be an interim report, which is dated 23.09.2011. The second report is a final report, which is dated 04.01.2013. A perusal of the two reports would show that the OL, broadly, took the following stand :

- (i). That the Comp.A.No.734 of 2011 was not maintainable, as at the time of admission of the Company Petition, this Court had categorically held that KOFL had lost its substratum and was unable to pay its debts.
- (ii). That the entire purpose of filing Comp.A.No.734 of 2011

was to enable KOFL to obtain interest in the subject property, which it seeks to root in the agreement for sale dated 17.02.2000. Since, the subject transaction was set aside by this Court, by holding it to be a fraudulent preference in favour of UWB/IDBI, the attempt, now made is to neutralize its impact.

(iii).The instant application, i.e., Comp.A.No.734 of 2011, has been moved by the UWB/IDBI to obtain indirectly, what it could not obtain directly. The stand taken was that any order passed in Comp.A.No.734 of 2011, would impact the pending SLP filed by UWB/IDBI against the order dated 17.08.2009.

(iv).The subject property is the only asset available with KOFL, since the OL, had sold its movable assets, pursuant to order dated 12.10.2009, passed in Comp.A.No.1367 of 2009.

(iv)(a) The movable assets were sold via M/s.Murray and Co., for a sum of Rs.1,00,000/- (Rs.75,000/- + Rs.25,000/-) (Rupees one lacs only).

(v).That KOFL had entered into a loan agreement dated 13.08.1998, with the consortium of eight (8) banks, which included UWB/IDBI, for grant of working capital loan. Since, there was a default on the part of KOFL, recovery proceedings were initiated by the concerned banks before the DRT. It is stated that banks, in order to recover their dues, have filed the following Original Applications before the DRT, being : O.As.No.139 of 2001; 978 of 2000 and 14 of 2002.

(v)(a). We may only note that in so far as O.A.No.14 of 2002 is concerned, which, evidently, has been filed by SBI stands disposed of, by DRT vide order dated 30.05.2005, with the issuance of a Recovery Certificate. SBI, accordingly, has been issued, it appears, a Recovery Certificate for a sum of Rs.1,40,81,030.75.

(v)(b)We have, though, not been told, what was the fate of the other two original applications.

16. At this stage, it would be relevant to note that in the final report, a tabular chart has been set out by the OL with regard to the working capital limit sanctioned by each bank. For the sake of convenience, the details as given therein are set out hereafter :

Sl. No.	Name of the Bank	Limit (Rs. In lakhs)
1.	State Bank of India	75.00
2.	Bank of India	125.00

3.	Catholic Syrian Bank Ltd.	35.00
4.	Bank of Madura Ltd.	25.00
5.	Bank of Baroda Ltd.	75.00
6.	United Western Bank Ltd.	50.00
7.	Karur Vysya Bank Ltd.	100.00
8.	The Federal Bank Ltd.	50.00

 17. Apart from the OL, the appellant, as it appears, also, filed a counter affidavit to Comp.A.No.734 of 2011, wherein, he, broadly, made the following averments :

- (i).That the application was not maintainable, and therefore, was liable to be dismissed.
- (ii).KOFL was engaged in the business of Non-Banking Finance and towards this end, it accepted deposits from the public, which were advanced in the form of loans to various parties.
- (iii).At one point in time, the dues owed to KOFL by its debtors amounted to Rs.17.63 Crores, and because, the recovery of dues was slow, KOFL could not pay its depositors.
- (iv).The consequences of this circumstance was that, dissatisfied depositors filed various forms of actions against KOFL, which included criminal complaints, consumer cases, as well as, the aforementioned Company Petitions.
- (v).C.P.Nos.179 and 180 of 2001, which were filed by respondent No.3 and his wife were admitted on 05.12.2001, for the reason that KOFL was unable to pay its debts; was commercially insolvent; and lastly, had lost its substratum. Accordingly, the OL attached to this Court was appointed as the PL; in addition thereto, an Administrator was also appointed.
- (vi).The Administrator and the OL had taken charge of all movable assets of KOFL and that the only immovable property, which was, otherwise, in the physical possession of UWB/IDBI, was the subject property.
- (vii).The appellant with his efforts was able to settle the dues of 10,968 depositors. Towards this end, the appellant had brought in personal funds; a fact which is demonstrable from a bare perusal of orders dated 09.10.2007, 23.06.2009 and 02.12.2010.
- (viii).That movable assets of KOFL had been sold for Rs.25,000/- and Rs.75,000/- in compliance of order dated 12.10.2009, passed in Comp.A.No.1367 of 2009.
- (ix).KOFL has 13 creditors, which includes UWB/IDBI. That KOFL had entered into an agreement for sale dated 17.02.2000. However, UWB/IDBI's application, for issuance of a direction to the OL to execute a sale deed in respect of the subject property, was dismissed by the learned Company

Judge vide order dated 21.04.2003, which was confirmed by the Division Bench, via its judgement and order dated 17.08.2009, and that, the SLP, against the same is pending adjudication.

- (x).That Comp.A.No.734 of 2011 has been filed with malafide intention, only to grab the subject property.
- (xi).That Comp.A.No.734 of 2011 has been filed without the knowledge of other creditors, who have a pari passu right on the subject property, in terms of Section 529A of the 1956 Act.
- (xii).Finally, since, there is no scope for restructuring and/or reviving KOFL, it is, in its interest, that the OL continues to act as its PL. The appellant, being its promoter, has no role to play in collection of dues from the borrowers of KOFL and payment of monies to the outstanding creditors in the absence of a revival scheme or resumption of business of KOFL in view of the directions issued by this Court vide order dated 05.12.2001.

18. It is, in this background, that the learned Company Judge was called upon the pass orders in Comp.A.No.734 of 2011.

19. What, thus, emerges, upon the perusal of the record, which includes the impugned order, is as follows :

- (i).That KOFL owed a sum of Rs.66,55,055/-, to UWB/IDBI as on 31.03.1999.
- (ii).A resolution was passed by the BOD of KOFL on 31.03.1999, authorising one of its Directors to negotiate the sale of the subject property with UWB/IDBI. Accordingly, the letter dated 02.02.2000, was issued by KOFL to UWB/IDBI expressing its willingness to sell the subject property to UWB/IDBI.
- (iii).Consequent thereto, an agreement for sale dated 17.02.2000, was executed between KOFL and UWB. The total consideration fixed was Rs.1,05,00,000/-, against which, KOFL received a sum of Rs.41,00,000/-.
- (iv).As per ¹clause 1 of the agreement for sale, the balance sum of Rs.64,00,000/- was to be paid by UWB/IDBI to KOFL at the time of completion of the transaction.
- (v).As per ²clause 6 of the agreement for sale, KOFL was inter alia required to produce, the necessary documents, title deeds and resolutions to prove its clear and marketable

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- 1 That the PURCHASER has paid a sum of Rs.41 lakhs (Rupees forty one lakhs only) vide pay order No.177674, dated 17th February 2000 drawn on The United Western Bank Ltd., Broadway Branch, to the VENDOR as and by way of advance towards sale consideration on signing of this Agreement and the balance of the purchase money amounting to Rs.64 lakhs (Rupees Sixty four lakhs only) shall be paid at the time of completion of the transaction.
- 2 6. The vendor has further agreed to produce necessary documents, title deeds, resolutions are required by the Companies Act 1956 to prove its clear, marketable title and its powers to execute Sale Deed in respect of Schedule property morefully described hereunder to the PURCHASER to enable them to get necessary legal opinion to prepare the Sale Deed.

- title in the subject property apart from document evidencing power to execute the sale deed.
- (vi).As per ³clause 8 of the agreement for sale dated 17.02.2000, KOFL had agreed to deliver original title deeds and vacant possession qua the subject property on the date of registration of sale deed.
 - (vii).Clearly, execution of sale deed did not take place. However, a letter dated 30.10.2000, was issued by KOFL asking for adjustment of the balance consideration of Rs.64,00,000/- against dues owed by it to UWB/IDBI.
 - (viii).In furtherance of the letter dated 30.10.2000, via letter dated 06.11.2000, both the possession as well as the title documents pertaining to the said property were handed over by KOFL to UWB/IDBI.
 - (ix).This transaction was subject matter of Comp.A.No.1208 of 2002, whereby, UWB/IDBI sought issuance of a direction to the Administrator for execution of sale deed. The Company Judge vide order dated 21.04.2003, dismissed the application by labeling it as a fraudulent preference.
 - (x).Appeal preferred by UWB/IDBI, which is numbered as O.S.A.No.284 of 2003, was also dismissed by the Division Bench of this Court, vide order dated 17.08.2009.
 - (xi).Against the said order dated 17.08.2009, UWB/IDBI has preferred a SLP, which is pending adjudication.

20. The Division Bench has formed a view that the subject transaction is a case of fraudulent preference, and while doing so, has returned the following findings of fact and law :

- (i).That the only immovable asset, which KOFL had, was the subject property.
- (ii).The aspect of sale of the subject property had not received the approval of its shareholders in accordance with the provisions of Section 293 of the 1956 Act. In other words, the Division Bench came to the conclusion that the said provision was applicable, as the subject property formed the whole or, substantially the whole of the undertaking of KOFL and therefore, its sale could only have been conducted with the approval of the shareholders at the general meeting.
- (iii).The provisions of Section 531 of the 1956 Act, pertaining to, fraudulent preference were applicable, as the transfer of right and/or interest in the subject property had not taken place. This finding was returned in the context of the argument advanced on behalf of UWB/IDBI that the subject transaction took place on 17.02.2000, which was more than six (6) months prior to the date of presentation of the winding up petition, i.e. 02.07.2001 and hence would not amount to fraudulent preference.

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- 3 8. The VENDOR has agreed to deliver all original title deeds and vacant possession of the schedule mentioned property on the date of registration of Sale Deed to the PURCHASER.

- (iv).The Court also observed that, if, as on 31.03.1999, KOFL owed a sum of Rs.66,55,055/- to UWB/IDBI, it could have in the normal course sought for adjustment of the said sum towards balance sale consideration of Rs.64,00,000/- on the very date, when the agreement for sale was executed, i.e., 17.02.2000, rather than wait for eight (8) months, as proposed by the letter dated 30.10.2000.
- (v).Taking into account, this circumstance and the fact that possession and title deeds had to be given only on execution of the sale deed, the Court came to the conclusion that the letter dated 06.11.2000 had been created only to distance the subject transaction from the taint of fraudulent preference. The aforesaid finding of the Division Bench, while, still at large, in view of the pendency of the SLP, does impel us to ascertain as to whether an order passed in the present proceedings would in any manner impact, by a side-wind the order of a coordinate Division Bench.

21. The learned Company Judge in the impugned judgement and order has, pithily, captured the motivation of the two main contesting parties in the present proceedings. In so far as the appellant is concerned, the learned Single Judge has, graphically, adverted to the fact that the only reason the appellant infused his personal funds in defraying the dues of the depositors, was to save himself from criminal prosecution.

21.1. Having said so, the learned Company Judge recognised the fact that dues of more than 10,000 depositors stood settled, out of which, in the first instance, 30% of dues payable to 6,464 depositors were liquidated, by the appellant from his personal funds, while, 20% of the dues were paid by the learned Administrator, and similarly, another 30% of the dues paid to the 4,504 depositors were brought in by the appellant, while the balance 20% of the dues were paid by the Administrator. The learned Company Judge also noted that a sum of Rs.1,95,73,682.44 was refunded to the appellant, albeit, out of the personal funds brought in by him.

21.2. In this context, the learned Company Judge observed that "the line of demarcation between the promoter's personal funds and the company's funds is very thin and the third respondent would not have had this benefit if the prosecution had continued under the Tamil Nadu Protection of Interest of Depositors Act, 1997". In sum, the learned Company Judge's assessment vis-a-vis the appellant is that the only reason he opposed Comp.A.No.734 of 2011, was that he did not want the creditors to take recourse to his personal assets.

21.3. In so far as UWB/IDBI is concerned, the learned Company Judge recognised the fact that Comp.A.No.734 of 2011, had been filed only to remove one of the impediments in its way in securing the title to the subject property. The present

application, according to the learned Company Judge, was in effect an attempt to take a shortcut to success.

22. Having adverted to the motivation of the contesting parties, the learned Company Judge held that a conjoint reading of the provisions of Rules 95, 96, 99 and 24 of the Companies (Court) Rules, 1959, (hereafter referred to as "the 1959 Rules") would show that the Company Court had no discretion to dispense with the advertisement of the Company Petition. This view was supported by the learned Company Judge by referring to sub-rule (2) of Rule 100, which prohibits hearing of an application filed to seek leave to withdraw a winding up petition, before the date fixed in the advertisement for hearing of the said petition is reached.

22.1. In answer to the poser as what would happen, if, the petitioner were to fail in advertising the Company Petition, the learned Company Judge, relied upon on the provisions of Rule 101 of the 1959 Rules. Based on the Company Judge's appreciation of the rule, he observed as follows :

"49. Therefore, it appears that the Court has powers to substitute as petitioner, any creditor or contributory, in the place of the original petitioning creditor. But two conditions are to be satisfied for the invocation of Rule 101. They are (i) the person who gets substituted, should have a right to present a petition and (ii) such person is desirous of prosecuting the petition.

50. Today, no other creditor or contributory has come to this Court expressing a desire to prosecute the original petition for winding up. Interestingly, the third respondent has not made any offer to prosecute the original petition. Even in the course of hearing of the present application, the third respondent who was the Chairman of the company, could have made an offer to prosecute the petition, by getting substituted in the place of the original petitioning creditor....."

23. The question, therefore, which arises for our consideration, is, as to whether in the absence of an advertisement of the factum of institution of the Company Petition, the OL, ought to have been discharged and consequently, the Company Petition, i.e., C.P.No.179 of 2001, ought to have been dismissed ?

24. Mr.P.V.Balasubramaniam, who appears for the appellant, finds fault with the impugned judgement and order, broadly, on the following reasons :

(i). First, that the appellant was both the creditor and

contributory of KOFL, and therefore, could have been substituted as a petitioner under Rule 101 of the 1959 Rules, in the place of the petitioning creditor, notwithstanding his failure to advertise the Company Petition. Adequate opportunity in this behalf was not given.

- (ii). Second, the learned Company Judge was called upon to rule as to whether or not the prayer made in Comp.A.No.734 of 2011 ought to be granted. The prayer made in the application, according to the learned counsel, was confined to seek OL's discharge as PL. There was no prayer made to seek dismissal of C.P.No.179 of 2001.
- (iii). Third, on the record of the learned Company Judge, the CP filed by respondent No.3's wife, i.e., C.P.No.180 of 2001, was also pending adjudication. Therefore, notwithstanding the impugned judgement, the OL, who was appointed to act as a PL, vide order dated 05.12.2001, would continue to do so in C.P.No.180 of 2001, as the said order was passed, both in C.P.Nos.179 and 180 of 2001. In order to buttress this submission, our attention was drawn to the Decree dated 04.10.2013, which adverts to the fact that only C.P.No.179 of 2001 stands dismissed.
- (iv). Fourth, the learned Company Judge, ought to have given an opportunity, not only to the appellant, but also other creditors and contributories, to step into the shoes of the petitioning creditor in terms of Rule 101 of the 1959 Rules, by having the Company Petition posted on another date.
- (v).Fifth, the impugned judgement was flawed, as it failed to take into account that the order of admittance, that is, order dated 05.12.2001, alluded to the fact that C.P.Nos.179 and 180 of 2001 were being admitted, inter alia, for the reason that KOFL had become insolvent and had lost its substratum. The impugned judgement and order had impacted these findings without dealing with them.
- (vi).Sixth, the undisputed position is that KOFL always owned only one immovable property, which is the subject property and that, there were secured creditors in position, which included banks and financial institutions, apart from the UWB/IDBI, who would stand to lose, if the impugned judgement was allowed to stand.

25. On the other hand, Mr.T.K.Seshadri, learned Senior Counsel, who appeared for UWB/IDBI, argued, broadly, in line with the reasoning set out in the impugned judgement and order. The learned Senior Counsel submitted that Rule 24 of the 1959 Rules made it mandatory to advertise the Company Petition,

failing which, the Court had no option, but to dismiss the Company Petition. It was contended that, while, Rule 101 empowered the Company Court to substitute other persons/entities in place of the petitioning creditor to carry forward the directions issued by the Company Court vide order dated 05.12.2001, including the direction issued to advertise the petition, the appellant, had not offered to step into the shoes of the petitioning creditor.

25.1. In support of this submission, our attention was drawn to paragraph 50 of the impugned judgement and order, wherein, the learned Company Judge has observed that the appellant did not offer to prosecute the Company Petition, and that, even during the course of hearing, no such offer was made by the appellant.

25.2. In support of this proposition, reliance was placed on the judgement of the Division Bench of this Court in the matter of Kothari Industrial Corporation Ltd. V. Kotak Mahindra Bank Limited, CDJ 2009 MHC 2543, and the judgement of the Division bench of the Delhi High Court in : Lt.Col.R.K.Saxena V. Imperial Forestry Corporation Limited, CDJ 2001 DHC 639.

25.3. Furthermore, Mr.Seshadri, submitted that since, the learned Company Judge had considered all aspects of the matter, and thereafter, employed his discretion in the matter, this Court, sitting in appeal, ought not to interfere with the impugned judgement and order. In support of this submission, learned Senior Counsel relied upon the following judgements :

- (i).The Printers (Mysore) Private Ltd. V. Pothan Joseph, AIR 1960 SC 1156 ;
- (ii).Wander Ltd. and Another V. Antox India P. Ltd., 1990 (Supp) SCC 727 ;

Discussion on provisions of the 1956 Act and 1959 Rules:

26. Given this background, before we proceed further, it may be relevant to notice some of the provisions of the 1956 Act.

26.1. The circumstances, in which, a company can be wound up by Court are provided for under Section 433 of the 1956 Act. At the relevant point in time, the said section contained six (6) clauses. These clauses enumerated the circumstances, in which, a company could be wound up. The subject Company Petition, i.e., C.P.No.179 of 2001, was filed under the provisions of Clause (e) and (f) of Section 433.

26.2. Clause (e) speaks of a circumstance, whereby, a company is unable to pay its debts. Clause (f), on the other hand, empowers the Court to wind up a company, if it is, in its opinion, just and equitable to do so. Since, we are not concerned with other circumstances, we do not think it necessary to advert to, those circumstances that are referred to in the remaining clauses. Suffice it to say that clause (e) of Section 433 is required to be read with Section 434 of the 1956 Act, as it articulates as to when a company is deemed to be unable to pay its debts.

26.3. Clauses (a) of Sub-section (1) of Section 434, sets up a statutory presumption qua inability to pay debts qua a company if, after it is served with a demand notice by a creditor in the manner prescribed, it neglects to pay the said sum, or, to secure, or, to compound for it, to the reasonable satisfaction of the creditor within a period of three (3) weeks from the date of service of the demand. Pertinently, the provision requires the demand to be served at the registered office of the company, via registered post or otherwise.

26.4. Clause (b) of Sub-section (1) of Section 434, speaks of a situation, where, the company returns unsatisfied in whole, or in part, a decree or order issued in favour of its creditor, during the course of the execution or other process issued on a decree or order of the Court.

26.5. Clause (c) of Sub-section (1) of Section 434 entitles the Court to trigger the provisions of clause (e) of Section 433, if, it is proved to its satisfaction that the company is unable to pay its debts. The Court in coming to such a conclusion is entitled to take into account, both contingent and prospective liabilities of the company.

26.6. Section 439 of the 1956 Act makes provisions for persons or entities, who can seek winding up of a company. In this regard, at the relevant point in time, six (6) categories stood adverted to, in sub clauses (a) to (f) of Sub-section (1) of Section 439. Amongst other categories, creditors, which include contingent and prospective creditors and contributories, fall in clause (b) and (c) respectively, of Sub-section (1) of Section 439.

26.7. It has to be borne in mind that the winding up of a company when ordered, as per provisions of Sub-section (2) of Section 441 of the 1956 Act, is deemed to commence from the time of presentation of such a petition, unless it is a case of voluntary winding up. In that case, the winding up of the company is deemed to commence from the time, when, a resolution is passed by the company, in that behalf.

27. It may be important to note that Section 447, clearly, provides that, an order for winding up of a company shall operate in favour of all creditors and contributories, as if it was made on a joint petition of a creditor and of a contributory.

27.1. However, before a Court reaches such a stage, that is, of passing a winding up order, there are intermediary stages, which includes, a stage, at times, for appointment of the OL, as the PL. The power to do so is vested in the Court under Section 450 of the 1956 Act.

27.2. Under Sub-section (1) of Section 450, the Court is empowered, at any time, after the presentation of a winding up petition, but before making an order of winding up, to appoint the OL attached to the concerned Court, as the PL. However,

before appointing a PL, the Court is required to give notice and reasonable opportunity to the company, to make a representation, unless for special reasons, which are to be recorded in writing, the Court deems it fit to dispense with such notice.

27.3. The Court is also empowered to decide on the contours of the powers, it wishes to confer on the PL. In case, the Court places no fetters, the PL would be invested with the same power as that of the liquidator of a company. The provision with regard to this aspect of the matter has been made in Sub-section (3) of Section 450 of the 1956 Act.

27.4. Sub-section (4) of Section 450 makes it clear that, once, the winding up order is passed, the OL will cease to hold office as the PL and shall don the role of the liquidator of the company. This provision in line with the provision made in Section 449 of the 1956 Act.

28. Therefore, what comes through is that, both the creditor as well as the contributory can file a petition. In so far as the contributory is concerned, unlike a creditor, he is not required to issue a statutory notice, as stipulated in Section 434(1) (a) of the 1956 Act.

29. The procedure for instituting a winding up action is however, provided in the 1959 Rules.

29.1. As noticed by the learned Company Judge, a winding up action, in tune with Rule 95 can only be filed in Form Nos.45, 46 and/or 47, depending on the circumstances in play. Upon a petition being filed and placed before the Company Judge in Chambers, for admission, the Company Judge has three options. First, the Company Judge could simply issue notice in the winding up petition. Second, the Company Judge could straight away, admit the company petition. Third, the Company Judge may admit the petition and defer issuance direction for publication of advertisement. For this purpose, the Company Judge would be empowered to issue to Company. If, the Company Judge, chooses to exercise the second option, he must fix a returnable date, on which, the Company Petition would come up for hearing. Along with this direction, the Company Judge is also required to issue a direction for an advertisement to be published and persons, if any, upon whom copies of the petition have to be served.

29.2. We must add here that even where, a Company Judge exercises, the first option, which is of issuing a notice prior

195. Petition for winding-up

A petition for winding-up a company shall be in Form No. 45, 46 or 47, as the case may be, with such variations as the circumstances may require, and shall be presented in duplicate. The Registrar shall note on the petition the date of its presentation.

to admission, in some Courts there is practice of fixing a returnable date in such a scenario as well.

29.3. It may be relevant to note that these options find a reflection in ¹Rule 96 of the 1959 Rules. While, the second option gets clearly reflected in Rule 96, the first and third options, which enable issuance of notice both before and after admission are provided for in an indirect manner in Rule 96. Rule 96 states that the Company Judge may, if he thinks fit, give notice to the Company before giving directions as regards the advertisement of the petition. In other words, if, there is an admission of the Company Petition, then, a direction for advertisement has to be, necessarily, given, wherein, the date of hearing of the Company Petition would have to be indicated with a caveat that issuance can be delayed till after return of notice issued to the Company.

29.4. Moving further, ²Rule 99 provides that subject to any directions that the Court may give, the Company Petition shall be advertised within the time and in the manner provided in ³Rule 24. The advertisement is required to be taken out in the form prescribed in Form 48.

29.5. Sub-Rule (1) of Rule 24 provides that, unless the

1 96. Admission of petition and directions as to advertisement
Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition.

2 99. Advertisement of petition
Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by rule 24 of these rules. The advertisement shall be in Form No. 48.

3 24. Advertisement of petition

(1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge. (2) Except in the case of a petition to wind-up a company, the Judge may if he thinks fit, dispense with any advertisement required by these Rules.

Judge orders otherwise, or the Rules provide differently, any petition, which is required to be advertised, shall be advertised not less than fourteen (14) days before the date fixed for hearing. The manner of the advertisement is also provided in Sub-rule (1) of Rule 24. The said provision requires the advertisement to be taken out in one issue of the Official Gazette of the State or the concerned Union Territory, and one issue each in a daily newspaper published in English language and in regional language of the State or the concerned Union Territory. Interestingly, Sub-rule (2) of Rule 24 mandates that except in the case of winding up, a Judge may, if he thinks fit, dispense with the requirement of publishing an advertisement.

29.6. Having regard to the nature of the winding up proceedings, which are undoubtedly proceedings in rem, Sub-rule (1) of ¹Rule 100 provides that a winding up petition shall not be withdrawn after presentation without the leave of the court. To strengthen this position, Sub-rule (2) of Rule 100 provides that, if, an application is filed to withdraw a winding up petition, which has already been advertised in accordance with the provisions of Rule 99, the said application shall not be heard, at any time prior to the date fixed in the advertisement for hearing of the winding up petition.

29.7. It is interesting to note that the rules do not provide, explicitly, the consequences of failure to advertise the petition, as mandated under Rule 99 read with the provisions of Rule 24 of the 1959 Rules. It is also be worthwhile to note that a conjoint reading of Rule 99 along with Rule 24(2) would demonstrate that advertisement of the winding up petition cannot be dispensed with, by the Company Judge, and therefore, in that sense, makes advertisement compulsory given the nature of the proceedings.

29.8. Pertinently, though, neither Rule 99 nor Rule 24 stipulate the advertisement can only be published by the person or entity, which instituted the Company Petition.

29.9. The learned Company Judge does pose a question as to what would happen, if, the petitioner, who filed the Company Petition, failed to advertise the same, within the time prescribed by the Court.

30. The learned Company Judge answers this question by

1 100.Application for leave to withdraw petition

(1) A petition for winding-up shall not be withdrawn after presentation without the leave of the Court. (2) An application for leave to withdraw a petition for winding-up which has been advertised in accordance with the provisions of rule 99 shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition.

adverting to ²Rule 101 of the 1959 Rules, which provides for substitution of a creditor or contributory for the original petitioner in various circumstances, including where the original petitioner fails to advertise the petition within the time prescribed by the rules, or, by order of the Court, or within the extended time granted by the Court.

30.1. Sub-rule (4) of Rule 101, does seem to indicate that, where, the original petitioner does not apply for an order in terms of the prayer cast in the petition, or, where in the opinion of the Court, there is "sufficient cause" for an order being made for substitution, the Court may, upon such terms as it may think just, substitute as the petitioner, any creditor or contributory, who, in its opinion, would have a right to present a petition, and who is desirous of prosecuting the same.

30.2. Based on this provision, the learned Company Judge goes on to hold that the Court can carry out substitution in place of the original petitioner, only if, the two conditions adverted to above, subsist. We can safely assume herein that the Company Judge had no difficulty in otherwise holding that there was a sufficient cause for substitution, the only impediment faced was the presence of suitable and willing person / entity.

30.3. Only to reiterate the two qualifications provided in Rule 101(4) for substitution are (i) first, that the person should have the right to present a petition; and (ii) second, he should be a person desirous of prosecuting the petition.

30.4. In this context, as rightly pointed out by Mr.Seshadri, the Court has made observations that no creditor or contributory came forward expressing his/her desire to prosecute

2 101.Substitution of creditor or contributory for original petitioner

Where a petitioner,-

- (1) is not entitled to present a petition, or
- (2) fails to advertise his petition within the time prescribed by these rules or by order of Court or such extended time as the Court may allow, or
- (3) consents to withdraw the petition, or to allow it to be dismissed, or the hearing to be adjourned, or fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof, or any day to which the hearing has been adjourned, or
- (4) if appearing, does not apply for an order in terms of the prayer of his petition, or where in the opinion of the Court there is other sufficient cause for an order being made under this rule, the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who, in the opinion of the Court, would have a right to present a petition, and who is desirous of prosecuting the petition.

the original petition for winding up, and that the Court has also gone on to observe that the appellant had not offered to prosecute the original petition. As a matter of fact, we may note that the Court further observed that even during the course of the hearing, the appellant made no such offer, even though, he could have made such an offer.

31. Therefore, to our minds, two aspects would arise for consideration given the fact and circumstances obtaining in the instant case. First, if, winding up is not advertised, by the original petitioner as directed, can the Court direct the PL to advertise the petition, having regard to the fact that the proceedings are inter alia for the benefit of creditors at large and not one single creditor ?

31.1. The answer to this poser, to our minds, has to be in affirmative as there is no bar in the Rules which prohibits a PL from advertising the Company Petition in such like circumstances, though, ordinarily, in practice, Company Petitions are advertised by the petitioner who institutes the action. As alluded to above, the Rules do not bar the Company Court from directing the PL to advertise the petition. The reason, why we hold this view is plainly this, that, while, advertisement of the petition is compulsory as winding up proceedings are proceedings in rem and therefore should receive the widest of publicity enabling all stakeholders to have notice of the proceedings, there is no such stipulation in the Rules that once, the winding up petition is admitted by a Court, it can in no circumstances move forward, unless an advertisement is taken out by the original petitioner or a suitable substituent who fulfills the qualifications provided in Rule 101(4).

31.2. The fact that Rule 101 provides for substitution of the original petitioner in various circumstances, including where, the original petitioner fails to advertise the Company Petition, that, circumstance in itself, in our opinion, cannot lead to a situation whereby, winding up proceedings are stultified only because none of the creditors or contributories show a desire to advertise the Company Petition, and therefore by logical extension such a petition would, necessarily, have to be dismissed. One can take judicial notice of situations which very often arise during the course of a winding up action which commend continuation of winding up proceeding. Take for example where the original petitioner senses that the company is unable to pay its debts, as, its net worth is substantially eroded. In very often in such a situation the petitioner, loses interest in prosecuting his action as he does wish to put good money after bad, by bearing, inter alia the burden, of taking out an advertisement. Petitioner's interest in prosecuting a winding up action is more often than not dependent on what he can gain in the bargain. If the bargain is a loss making proposition it is likely that the petitioner would not waste his time, energy

and money in prosecuting a lost cause. But does not that mean that the Court would become helpless where it is amply clear to it that the Company is not solvent only for the reason that it is unable to find a willing suitor. Suitors while being willing to continue with the winding up process may not wish to take the financial burden of taking out an advertisement.

31.3. In this particular case, the petition was filed under Clauses (e) and (f) of Section 433. Clause (f) of Section 433 enables a Court to order winding up of the company, once, it forms an opinion that it is just and equitable to do so. The order of the admission, dated 05.12.2001, clearly, points in the direction that the Court had reached, at that point in time, at least, to a prima facie conclusion that the liabilities of KOFL were substantially more than its assets, and that, KOFL had lost its substratum.

31.4. The record shows that KOFL, has at least, eight (8) secured creditors, who have outstanding dues, and that, there are, in effect, apart from the subject property, no other assets available to satisfy those dues. KOFL is thus, an entity, which is in deep financial crisis. The Court, therefore, in our view, ought to have directed the advertisement of the petition by empowering the PL to take steps in that behalf and allowed adjustment of cost incurred by him as the first charge against proceeds received on sale of assets of KOFL.

31.5. The fact that such circumstance, obtained in the instant case, is borne out by the observations made in paragraph 38 of the impugned judgement and order, wherein, the Company Judge observes that he is unable to acquiesce to the request advanced on behalf of UWB/IDBI that the OL should be discharged, as the depositors had received their dues. The learned Company Judge has opined, in our view, quite correctly, that there were other creditors, who had approached the DRT for defrayment of their dues, and therefore, on that ground, the discharge of the OL could not be ordered.

31.6. Therefore, in our opinion, the fact that the appellant herein did not offer to step into the shoes of the original petitioner, would not make a significant difference with regard to whether or not the Company Petition should have proceeded further, albeit, after issuance of necessary directions for publication of the advertisement.

31.7. The other aspect which would necessarily fall for consideration is, as to what is to be done with a company where the original promoter directors have neither the financial wherewithal nor the inclination to manage the affairs of the company in such like situations.

31.8. In effect, the poser is, should such companies be allowed to remain in operation, albeit, on paper, though it is otherwise just and equitable to wind up the company only for the reason that an advertisement post the admission of the company petition was not published by the original petitioner. In our

opinion, such a situation cannot be allowed to subsist. The Court should have the necessary, leeway to order winding up of such a company, based on its wisdom, after issuing necessary directions for publication of advertisement to the PL. The Company Court, to our minds, would have the necessary powers in this behalf, under ¹Rule 9 of the 1959 Rules. Rule 9, speaks of the inherent powers of the Court to issue directions which may be necessary to achieve ends of justice or to prevent abuse of the process of Court [see National Conduits (P) Ltd., Vs. S.S.Arora, (AIR 1968 SC 279)]. Therefore, in our opinion, in the absence of, a specific provision in the Rules mandating that the advertisement would have to be published only by the original petitioner, the Court can direct, where the situation so demands, the PL to publish the advertisement.

32. This apart, there is another difficulty in the way of UWB/IDBI, which is that, the impugned judgement and order not only allowed the prayer made in Comp.A.No.734 of 2011, but also dismissed C.P.No.179 of 2001, though, that was not the prayer made in the application.

32.1. Mr.Seshadri, submits that since, compliance had not been made of the directions issued by the Company Judge, vide order dated 05.12.2001, requiring the original petitioner to advertise the petition, the learned Company Judge was well within his rights to dismiss the Company Petition, i.e., C.P.No.179 of 2001 as well.

32.2. We are unable to accept this submission. If the purpose of Rule 101 of the 1959 Rules, is to enable a creditor or a contributory to step into the shoes of the original petitioner, an adequate opportunity for the said purpose had to be given. Without giving adequate opportunity to creditors and contributories, the Court, in our view, could not have come to a decisive conclusion that the other creditors or contributories (apart from the appellant), would not be interested in stepping into the shoes of the original petitioner.

32.3. In fact, a perusal of the order dated 13.12.2013, passed by the DRT indicates that SBI has submitted a claim in Form 66, for a sum of Rs.1,78,46,650.44, which is the sum due and payable according to it, as on 30.09.2006, along with future interest. This claim, evidently, was filed by SBI with the OL's office on 24.08.2006. This aspect which is embedded in the order of DRT, fortifies our view that SBI, amongst other creditors, ought to have been called upon to convey one way or the other, as to whether or not, it would want to step into the

1 9. Inherent powers of Court

Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

shoes of the original petitioner. The fact that, SBI was concerned by the consequential directions issued by the learned Company Judge, which, inter alia, involved refund of monies available with the OL to KOFL, after adjusting expenses incurred by the OL, is demonstrable from the steps that it took, for securing the said amount by approaching the DRT.

32.4. Admittedly, besides SBI, there are other creditors on the books of KOFL, some of whom are banks. In our view, the other creditors should also have been called upon to indicate as to whether they would want to step into the shoes of the original petitioner. As a matter of fact, the OL, adverts to this aspect of the matter both in his final report and counter affidavit. The final report of the OL is clearly indicative of the fact that KOFL owes moneys to eight (8) banks and financial institutions, which includes UWB/IDBI. Therefore, in our view, this exercise was required to be completed before dismissing the Company Petition.

33. Apart from the above, as has been rightly argued by Mr. Balasubramaniam, the impugned judgement only deals with C.P.No.179 of 2001. The decree passed in terms of the impugned judgement also indicates that what has been dismissed is C.P.No.179 of 2001. Admittedly, C.P.No.180 of 2001, continues to remain on record of the Company Court, qua which, no orders have been passed. Mr. Seshadri, learned Senior Counsel, attempted to get away from this tricky problem, which was staring him in the face, by alluding to the fact that the learned Company Judge, had adverted to this aspect, in paragraph 2 of the impugned judgement and order. A perusal of paragraph 2 of the impugned judgement would show that there is only a reference to the fact that respondent No.3's wife, i.e., Mrs. R. Seethalakshmi, had also filed a Company Petition i.e. C.P.No.180 of 2001.

33.1. According to us, this would not help the cause of the UWB/IDBI, as the impugned judgement and decree does not contain any direction qua to C.P.No.180 of 2001. Since, the order dated 05.12.2001, was common to C.P.Nos.179 and 180 of 2001, the directions contained therein with regard to admission and other matters will continue to operate, even if, we were to sustain the impugned judgement and order vis-a-vis C.P.No.179 of 2001.

34. Before we conclude, we must also indicate that the result reached in the instant appeal would have an impact on SLP No.33825 of 2009, which arises out of O.S.A.No.284 of 2003, which was, as noticed above, dismissed by a Division Bench of this Court vide order dated 17.08.2009. In the said judgement, a coordinate Division Bench has returned a finding to the effect that the appellant, in entering into the subject transaction, had fraudulently preferred UWB/IDBI over other creditors. The fact that the appellant's motivation in keeping the winding up

petition in play emanates from his desire to keep the creditors at bay, cannot, in our view, result in a situation, whereby the rights of other creditors and contributories, apart from that of UWB/IDBI, get impacted. It is another matter that looking at the liabilities of KOFL, contributories may get nothing at the end of the day. But that by itself cannot be the reason for depriving them or other creditors, the opportunity of stepping into the shoes of the original petitioner.

34.1. The matter can be looked at, from another angle as well. The appellant, admittedly, even according to the learned Single Judge, enabled the settlement of dues, of more than ten thousand depositors. To achieve this end, concededly, the appellant brought in his personal funds. Clearly, by providing funds, the appellant has become a creditor of KOFL. That apart, the appellant is also a contributory of KOFL. The fact that the appellant enabled a settlement with the depositors by delving into his personal funds would not deprive him of the protection of limited liability. The KOFL liability towards the creditors cannot enable the creditors to latch on to the appellant's personal assets unless they are able to establish malfeasance, defalcation and fraud by the appellant. Though, in the Administrator's report, there is a reference to the factum of appointment of M/s.Rangan and Krishnan as auditors of KOFL, nothing has been placed before us to suggest that the appellant had defalcated KOFL's funds. Therefore, the appellant's motivation in infusing his personal funds cannot, to our minds, be the basis for coming to the conclusion that keeping the winding up petition in play works to his benefit. Whatever may have been the reasons for the appellant to infuse funds, the fact of the matter is that, claims of a vast majority of depositors were settled with help of funds brought in by him and therefore, if criminal proceedings initiated against the appellant were closed on account of settlement of dues of depositors is any issue on which, we cannot comment as that aspect of the matter is not within the scope of the present proceedings. What is clear though the motivation of the appellant to keep the company petition ongoing cannot impinge upon construction of the Rules adverted to above by us.

34.2. Having said so we make it abundantly clear that nothing that we said above will come in the way of prosecution of the appellant in civil and criminal proceedings, if, otherwise they are tenable in law.

35. Before we conclude, we would also like to deal with the judgements cited by Mr.Seshadri.

35.1. The first, in the line, is the judgment rendered in the matter of : Kothari Industrial Corporation Ltd. V. Kotak Mahindra Bank Ltd., CDJ 2009 MHC 2543. This was a case, where, the Division Bench of this Court, interfered with the order of

the Company Judge, whereby, winding up of the concerned company had been directed without advertising the Company Petition. The Division Bench held that the order of winding up was contrary to the statutory requirements, as stipulated in the 1959 Rules, which obligated advertisement of the winding up petition. In this regard, reference, inter alia, was made to Rule 24(2) of the 1959 Rules. This judgement, in so far it states that advertisement is mandatory, does not take a view which is very different from the one we have taken above.

35.2. As regards the judgement rendered in the matter of : Lt.Col.R.K.Saxena V. Imperial Forestry Corporation Limited, CDJ 2001 DHC 639, is concerned, the Delhi High Court, in that case, was called upon to decide as to whether publication of the advertisement in the Official Gazette was mandatory. The Court came to the conclusion that publication in the Official Gazette was mandatory, as it would give wider publicity to the factum of admission of the Company Petition. According to us, the issue involved in the present case is somewhat different. Therefore, save and except to the extent that the Court holds publication of the advertisement of a winding up petition was necessary, the rest would not apply to the facts of the instant case.

35.3. The judgement of the Supreme Court rendered in Bakemans Industries Pvt. Ltd. V. new Cawnpore Flour Mills and Others, (2008) 15 SCC 1, would, to our minds, have no application. The said judgement, in effect, dealt with the interplay of powers conferred on the Company Judge under the Companies Act and powers invested in the State Financial Corporation under the provisions of the State Financial Corporations Act, 1951. The Supreme Court, in that case, came to the conclusion that a Company Judge could exercise his powers of auction only in accordance with the provisions of the Companies Act. No such issue arises for consideration in the present case. Therefore, the judgment is, clearly, distinguishable.

35.4. The other two judgements, which were placed before us were : The Printers (Mysore) Private Ltd. V. Pothan Joseph, AIR 1960 SC 1156 and Wander Ltd. V. Antox India P. Ltd., 1990 (Supp) SCC 727. Both judgements advert to the approach, which is to be followed by the Appellate Court, while hearing appeals against judgements of the Court of first instance. In sum, the Court reiterated the well settled principle, which is that, the Appellate Court will not supplant its view with that of the view taken by the Court of first instance, in exercise of its discretion, if the view taken was a plausible view, on the materials placed before the Court. Clearly, one cannot quibble with this principle.

35.5. The question, in the present case, though, arose on the construction of the 1959 Rules, which provide for the

procedure to be adopted for prosecuting a winding up petition. More specifically, the issue, which arose for consideration before the Court of first instance, as indicated above, was, as to what should be done, when, upon admission of the Company Petition, the requirement of having the Company Petition advertised is not carried out by the original petitioner.

35.6. This issue, to our minds, which does not have a direct and clear precedent, required examination by us. This is not a case of re-appraisal of the material, which was placed for consideration of the Court of the first instance.

36. Therefore, for the foregoing reasons, we are of the view that the impugned judgement and decree cannot be sustained. It is ordered, accordingly. The appeal is allowed. C.P.No.179 of 2001, is put back on board. The OL, who is, presently, acting as PL, will continue to prosecute the winding up proceedings under the supervision and as per the orders of the learned Company Judge. Resultantly, the consequential directions issued via the impugned judgement and decree shall also stand set aside. Consequently, the pending applications shall also stand disposed of.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Official Liquidator,
High Court, Madras.

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

+1cc to Mr.ShivaKumar & Suresh, Advocate SR.No.53642

+1cc to MR.S.R.Sundar, Advocate SR.No.53779

Pre-Delivery Judgement
in O.S.A.No.396 of 2013
and M.P.Nos.1 and 2 of 2013

GJ(CO)
GN(10/08/2017)