

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

**COMPANY APPLICATION NO.341 OF 2016
WITH
OFFICIAL LIQUIDATOR'S REPORT NO.84 OF 2017
WITH
COMPANY APPLICATION (L) NO.85 OF 2018
IN
COMPANY PETITION NO.505 OF 2006**

Forbes and Company

....Applicant

IN THE MATTER BETWEEN :

Bord for Industrial and Financial
Reconstruction (B.I.F.R.)

....Petitioner

Vs.

Coromandel Garments Ltd. & Ors.

....Respondents

Shri Girish Godbole a/w. Shri Sajjed Shamim I/b. Shamim and Co. for applicant in CA/341/2016.

Ms. Sunanda Kumbhat for applicant in CAL/85/2018.

Shri J.P. Sen, senior advocate a/w. Shri Shushrit Desai for Official Liquidator.

Shri Mahendhar Aithe, Company Prosecutor for Official Liquidator present.

**CORAM : K.R.SHRIRAM, J.
RESERVED ON : 20th JUNE 2018
PRONOUNCED ON : 13th JULY 2018**

P.C.:

1 This application is filed seeking leave of this Court under Section 446 of the Companies Act 1956 to execute the Consent Decree dated 9th July 2009 obtained in suit no.164 of 2009 by applicant against Coromandel Garments Limited (in liquidation). Coromandel Garments Limited (in liquidation) is hereinafter referred to as the Company. Official Liquidator has, on behalf of the Company, filed a reply opposing grant of

such leave. Official Liquidator has also filed Official Liquidator's Report No.84 of 2017 seeking various directions from this Court including, *inter alia*, that the Consent Decree dated 9th July 2009 be set aside and that applicant be directed to bring back, along with interest, amounts received by it from out of the sale proceeds of one of the Company's properties. The company application has also been opposed by a few unsecured creditors of the Company (in liquidation) who have, in this behalf, filed company application (lodging) No.85 of 2018 (hereinafter 'Intervenors'). The counsel appearing for Intervenors basically supplemented the submissions of the counsel for Official Liquidator.

2 By its order dated 2nd June 1998, the Board for Industrial and Financial Reconstruction (BIFR) declared the Company (in liquidation) a sick unit under the provisions of The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) and appointed Bank of Baroda as the Operating Agency for framing a scheme for revival of the Company. The said order contained several directions regarding such a scheme including, *inter alia*, that "Any shortfall in cash-flow projection shall be met by the promoters by bringing in interest-free-funds and not by diversion of working capital." The Company/Promoters were also directed under Section 22A of SICA not to dispose off any fixed or current assets of the Company without the consent of the BIFR.

3 As part of the revival process, the Promoters were required to make a contribution of Rs.400 lakhs to pay off the workers of the Company under a voluntary retirement scheme floated by it. The Company sought the approval of the BIFR to the creation of a second charge on its mortgaged assets in favour of the Promoter Group Company/Companies bringing in the said contribution. By an order dated 16th September 1999, BIFR sanctioned the proposed creation of the second charge and recorded the consent of Bank of Baroda, the first charge holder, in this behalf.

4 Pursuant to the said order, applicant (then Forbes Gokak Limited) appears to have entered into a Loan Agreement dated 21st September 2000 with the Company. The purpose of the loan, the terms on which it was granted and the relationship between applicant and the Company were reflected in the Loan Agreement, the salient portions of which are reproduced hereinbelow:

“...Whereas the Borrower is a wholly owned subsidiary of The Swadeshi Mills Co. Ltd. having its registered office at Swadeshi Mills Compound, Sion, Mumbai – 400 022 and whereas The Swadeshi Mills Co. Ltd. is a Sick Company registered with the Board for Industrial and Financial Reconstruction (BIFR) and whereas the Borrower is also a sick company registered with BIFR.

And whereas the Lender holds a significant portion of the share capital of the Swadeshi Mills Co. Ltd. and whereas the Borrower has finalized a scheme of VRS for its employees and for the purpose, has entered into a settlement with the Unions of its employees and whereas the Borrower has made an application to BIFR for availing of loan from the Lender and BIFR had approved availing of such Loan and providing security and the security for such loan, is agreed to by and between the Lender and the Borrower as detailed in Table ‘A’ hereto.

It is agreed to by and between the Lender and the Borrower as under:

...

3. The amount of the loan provided under the terms of the agreement together with the interest and all other costs recoverable by the Lender from the Borrower, shall be secured by a charge which is hereby provided by the Borrower to the Lender as set out in table "A" hereto.

4. The loan together with interest shall be repayable by the Borrower to the Lender as per such schedule as may be approved by BIFR. Pending issuance order by BIFR, the same shall be payable immediately on call by the Lender.

5. The loan shall carry interest at the Bank Rate. However, this will be subject to the provisions of Sick Industrial Companies (Special Provisions) Act, 1985, order of BIFR and such instructions as may be issued by the operating agency viz. Bank of Baroda and BIFR.

6. The Borrower owns 1/3rd undivided shares of the property at Pachgani. The Borrower agrees that it shall not create any charge on the said property without prior approval of the Lender."

...."

5 The asset in respect of which a second charge was created in favour of applicant Company was land at Plot No.21, Industrial Estate, Ambattur, Tamil Nadu together with the structures standing thereon (Ambattur property). The Company also appears to have executed a Supplemental Memorandum of Deposit of Title Deeds, *inter alia*, recording the creation of the second charge in respect of the Ambattur property in favour of applicant. Further, the said second charge also appears to have been recorded in the register of charges maintained by the Registrar of Companies in this behalf.

6 Applicant appears to have advanced a sum of Rs.3.25 Crores to the Company under the said Loan Agreement. The remaining amount of Rs.75 lakhs, appears not to have been disbursed. Meanwhile, attempts to revive the Company failed. By its order dated 9th April 2002, BIFR confirmed that it would be in the public interest to wind up the Company. This order was communicated to this Court on 7th May 2002. On 31st October 2002, the Appellate Authority for Industrial & Financial Reconstruction ('AAIFR') dismissed an appeal filed by the Company challenging the order dated 9th April 2002 of the BIFR recommending that it be wound up. However, the BIFR recommendation was set aside by an order dated 23rd February 2006 passed by the Hon'ble Madras High Court in Writ Petition Nos.34837 and 34838 of 2003 filed by the Company. The matter was remanded back for re-consideration to the BIFR. By the said order, the Hon'ble Madras High Court sanctioned the sale of the Ambattur property for a sum of Rs.27.86 Crores to one Sugai and Damani Lottery Agency Private Limited. The sale proceeds were deposited with Bank of Baroda in a no lien account.

7 On 29th June 2006, this Court passed an order directing that the communication dated 7th May 2002 of the BIFR recommending that the Company be wound up be treated as a petition. By the said order, the petition was admitted and Official Liquidator, High Court, Bombay was appointed as Provisional Liquidator of the Company. The order of the

Hon'ble Madras High Court setting aside the recommendation does not appear to have been brought to the notice of this Court.

8 On 22nd January 2007, BIFR passed a fresh order recommending that the Company be wound up. The said order was communicated to this Court on 5th July 2007. On 25th September 2007, Appeal No.58 of 2007 filed by the Bank of Baroda against the order dated 22nd January 2007 of BIFR was dismissed by AAIFR. Appeal No.85 of 2007 filed by the Company was withdrawn. These orders were not further tested. As such, the recommendation for winding up the Company became final.

9 By their letter dated 30th April 2008, applicant's advocates called upon the Company to repay the said sum of Rs.3,25,00,000/- "*together with interest as agreed in terms of the Loan Agreement dated 29th September 2000...*". By its reply dated 28th May 2008, the Company described the demand as being 'unreasonable and not sustainable in law.' In doing so, the Company, *inter alia*, also noted that the Loan Agreement did not provide for any rate of interest, that the BIFR had not permitted any interest to be charged and that applicant was on that account disentitled to claim any interest under the said Agreement. The letter referred to the order dated 29th June 2006 appointing Provisional Liquidator and claimed that the Company was proposing to file a company application to recall the said order. However, in the meanwhile, on account of the appointment of

Provisional Liquidator, the Company pleaded its inability to make any preferential payment to any creditors including applicant.

10 On 28th August 2008, the Company filed company application (L) No.951 of 2008 before this Court praying that the order dated 29th June 2006 be recalled. By an order dated 16th October 2008, this Court recalled the order dated 29th June 2006. In doing so, it noted:

“It now transpires that recommendation of BIFR was questioned by way of writ petition before Madras High Court, which in turn has set aside the opinion of the BIFR that the Company is incapable of being revived... It necessarily follows that the basis on which this Court proceeded to pass order dated 29th June, 2006 was non-existent...In the circumstances, the appropriate course is to recall the Order dt. 29th June, 2006....”

While the company application made a reference to the subsequent recommendation of the BIFR dated 22nd January 2007 for winding up the Company, the same does not appear to have been brought to the notice of the Learned Company Judge at the time of the hearing of the company application. As for the appeal filed by the Company against the recommendation of the BIFR and subsequently withdrawn, no reference was made to it either in the company application or in the course of the hearing.

11 Shortly thereafter, on 30th December 2008, applicant filed Suit No.164 of 2009 before this Court, *inter alia*, for a declaration that the Company owed applicant a sum of Rs.13,92,45,091/- along with further interest thereon, for a declaration that the said amount was secured by a

second charge on the Ambattur property and for a declaration that the Ambattur property and its sale proceeds stand duly charged to secure applicant's alleged dues. The said figure of Rs.13,92,45,091/- was arrived at, as evident from the particulars of claim annexed to the plaint, by computing interest at a rate of 18% p.a. compounded quarterly. On 31st December 2008, applicant filed Notice of Motion No.372 of 2009 in the said suit seeking, *inter alia*, a decree on admission to the extent of Rs.3.25 Crores as well as appointment of Court Receiver, High Court, Bombay as Receiver in respect of the Satara property described in Exhibit 'B' to the plaint. This was a property in respect of which no charge had been created in favour of applicant under the Loan Agreement.

12 By its reply dated 4th March 2009, the Company sought to resist the grant of the said reliefs. In doing so, the Company repeatedly asserted that applicant's claim for interest was not sustainable, in view of no rate of interest having been agreed upon in the Loan Agreement and no rate having been stipulated by the BIFR.

13 By an order dated 12th February 2009, this Court declined to appoint Court Receiver in respect of the Satara property, but merely restrained the Company from creating any third party rights in respect thereof. On 9th June 2009, when Suit No.164 of 2009 appeared on board, a submission was made on behalf of the parties that they proposed to file

consent terms and that the dispute had been amicably resolved. The suit was accordingly stood over to 7th July 2009 for filing consent terms.

14 On 9th July 2009, applicant and the Company tendered consent terms and a decree was passed in respect thereof. Under the said consent terms, the Company submitted to a decree on admission in the sum of Rs.12,49,27,897/- together with interest thereon @ 15.76% p.a. with quarterly rests from 8th June 2009 till payment and/or realization. It was stipulated that if the Company paid applicant a sum of Rs.10,00,00,000/- within 3 months from the date of the consent terms, the decree would stand fully satisfied and that in the event of default to do so within the period stipulated, the entire decretal amount would become due and payable forthwith. The consent terms also declared that the decretal amount would be secured by the Ambattur property in respect of which a second charge had been created in favour of applicant under the Loan Agreement. Under the consent terms, the 1/3rd undivided interest of the Company in the Satara Property stood “attached forthwith in execution of the decree”. The said purported consent terms was signed on behalf of the Company by one Shri R. Venkateshwaran. He did so on the strength of a Power of Attorney dated 9th August 2002. The said Power of Attorney authorized the said Shri Venkateshwaran to do various acts on behalf of the Company as stipulated in the Power of Attorney. The Power of Attorney, however,

provided that the exercise of the said powers shall be “subject to the prior sanction of the Board and subject to such restrictions, conditions and limits as may be imposed by the Board or were permitted by a committee of the Board”. While the said Power of Attorney conferred on Shri Venkateshwaran, subject to the limitations referred to hereinabove, the power to commence, prosecute, enforce, defend, answer or oppose various legal proceedings and to represent and appear for the Company before the Government of India and statutory authorities, it did not confer upon him specifically the power to compound or compromise any action or proceeding to which the Company may be a party.

15 By an order dated 27th August 2009, on an application moved by Kotak Mahindra Bank Limited (claiming rights as a purported assignee of Bank of Baroda), this Court admitted winding up proceedings against the Company and once again appointed Official Liquidator, High Court, Bombay as its Provisional Liquidator. In doing so, the Learned Company Judge referred in the following terms to the failure of the Company to bring to the notice of the earlier Company Judge the recommendation dated 22nd January 2007 of the BIFR :

“xi) On 16th October 2008 an application being application (lodging) No. 951 of 2008 was filed before this Court by the respondent seeking setting aside of the order passed by this Court on 29th June, 2006 on the ground, that at the time when the said order was passed, the appeal of the respondent was pending before the AAIFR, which application was allowed. However, it appears that it was not pointed out to the Court

that BIFR had again recommended on 22nd July 2007 that the respondent should be wound up and that the appeal preferred therefrom by the company was also withdrawn by the company on 25th September 2007. If this would have been pointed out to this Court, this Court would surely have again passed a fresh order admitting the petition and appointing the provisional liquidator of the respondent.

2. Applicants have, therefore, submitted that appropriate orders be passed against the respondent.

3. The learned Advocate for the respondent states that all the required / necessary facts were set out in the affidavit in support of the application pursuant to which the order dated 29th June, 2006 was set aside by an order dated 16th October 2019. In my view, the duty of an Advocate does not end with setting out of facts in Affidavits. The Advocates appearing before the Court are duty bound to draw the attention of the Court to facts which are relevant for the purpose of deciding an issue by the Court which may have been set out in the affidavit/s of their clients.”

This Court directed that the recommendation of the BIFR dated 22nd January 2007 be treated as a petition for winding up and that the same stand admitted, returnable on 10th November 2009. This order was followed by a further order dated 24th June 2011 whereby the Company was wound up. At the hearing of winding up, the advocate appearing for the Company brought to the notice of the Court the purported liability of the Company towards applicant to the tune of Rs.12.49 Crores and further interest thereon. Sometime in 2016, Kotak Mahindra Bank, applicant and Bank of Baroda arrived at an understanding for distribution of the sale proceeds received from the Ambattur property. In view of Official Liquidator's opposition to the said consent terms or in any event, his unwillingness to accept it, by an order dated 26th February 2016, the Learned Presiding Officer of the Debts Recovery Tribunal (DRT) directed Official Liquidator to

seek directions from this Court regarding the proposed compromise.

16 Aggrieved by the said order, Kotak Mahindra Bank Limited filed Appeal No.80 of 2016 before the Debts Recovery Appellate Tribunal, Delhi Bench (DRAT, Mumbai being unavailable). By an order dated 23rd March 2016, the said appeal was allowed and the matter was remitted for reconsideration to the DRT, Mumbai. However, the said consent terms were not tendered to, or taken on record by the DRT. Kotak Mahindra Bank Limited chose the alternative course of filing company application (L) No.258 of 2016 before this Court seeking directions in the matter. By an order dated 21st April 2016, this Court directed that a sum of Rs.1,33,64,389/- out of the sum of Rs.51 Crores (approximately) lying with Kotak Mahindra Bank Limited be paid over to Official Liquidator to secure the claim of the workmen of the Company (in liquidation), with the balance to be distributed in the ratio of 80% to Kotak Mahindra Bank and 20% to applicant herein. However, the order noted that this would be an interim arrangement and “subject to final outcome of the issue on status of the creditors of the Company in Liquidation including Kotak Mahindra Bank Limited.” The order also noted that it was being passed “at the instance of applicant and Respondent No.3 and without prejudice to the rights and contentions of Official Liquidator”, ‘Applicant’ and ‘Respondent No. 3’ being Kotak Mahindra Bank and applicant herein, respectively. At this stage, it is

stated, the papers and proceedings in Suit No.164 of 2009 filed by applicant against the Company in which consent terms had been taken were not available with Official Liquidator. Official Liquidator had, accordingly, not raised before either the DRT or this Court any issue regarding the legality of the consent terms nor was such an issue considered or decided by either forum.

17 Pursuant to the order dated 21st April 2016, applicant received a sum of Rs.10,17,03,493/- towards its 20% share in the distribution of sale proceeds. Meanwhile, applicant had filed the present company application no.341 of 2016 seeking the leave of this Court under section 446 of the Companies Act 1956 to proceed in execution to recover the balance decretal amount alleged to be due to it. The company application proceeds on the basis that applicant has a charge over the Satara property and as a secured lender is entitled to priority over all other creditors. On an application being made on behalf of Official Liquidator, this Court was pleased, by an order dated 4th January 2017, to direct applicant to furnish Official Liquidator with a copy of the papers and proceedings in Suit No.164 of 2009 in which the Consent Decree came to be passed. It is on examining these papers and proceedings, Shri Sen submitted that Official Liquidator formed the view that the Consent Decree constituted a fraudulent preference and was thus invalid. Official Liquidator accordingly filed Official Liquidator's Report

No.84 of 2017 seeking directions in this behalf from this Court as well as opposing the grant of leave under Section 446 of the Companies Act, 1956 to execute the Consent Decree.

18 Shri Godbole for applicant submitted as under :

(a) Official Liquidator cannot seek to impugn the Consent Decree by way of a report filed before this Court or by a reply filed in the application seeking leave under Section 446;

(b) Even if the Consent Decree could be challenged by way of an Official Liquidator's Report, the directions sought by Official Liquidator from this Court are clearly barred by time.

(c) The defence/plea of fraudulent preference raised by Official Liquidator on the assumption that the Decree was allegedly obtained by fraud and was therefore nullity is barred by limitation. This is because Official Liquidator had knowledge of the Decree at least on 26th August 2010 and in any case on 24th June 2011. Official Liquidator could have and ought to have filed suit under Section 31 of the Specific Relief Act 1963 for rescission of the Decree within 3 years from the date of the knowledge. Such suit could have been governed either by Article 58 or 59 or 113 of the Schedule II of Limitation Act 1963, which would be 3 years and the starting point under Article 58 and Article 113 would be "*when the right to sue first accrued*", under Article 59 would be "*when the facts entitling the Plaintiff to*

have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him". The plea of illegal decree having been raised for the first time on 11th April 2017 by filing Official Liquidator's Report No.84 of 2017 is clearly beyond 3 years. Even otherwise, Official Liquidator was a party in O.A. No.27 of 2008 filed by Kotak Mahindra Bank Limited in which DRT passed order dated 21st May 2009 directing impleadment of applicant as one of the creditors of the Company. The limitation for applying to the Company Court for holding that the Decree is a fraudulent preference or filing a suit under Section 31 of the Specific Relief Act 1963 would therefore first commence on 27th August 2010, then on 24th June 2011.

(d) In any case, the present application is not a collateral proceeding where the defence of the alleged nullity of the Decree can be raised by Official Liquidator. Shri Godbole relied upon ***Prem Singh & Ors. V/s. Biebal & Ors.***¹.

(e) Further assuming without admitting, that Official Liquidator's Report seeking reliefs against applicant is not a suit, but is in the nature of an application made to the Company Court under the Company (Court) Rules, 1959, the same is nevertheless an application made to Court and hence, is governed by Article 137 of the Schedule of Limitation Act 1963. Even in such cases, unless, such application is made within the

1. (2006) 5 SCC 353

period of limitation prescribed by the said Article, the same cannot be entertained by the Court and the Karnataka High Court in the case of *Official Liquidator of Mysore Kirlokar Limited, Bangalore V/s. Kirloskar Institute of Advanced Management Studies*² has held that the contention that the Limitation Act 1963 cannot be applied to a report/application made by Official Liquidator is not tenable.

(f) While interpreting Article 59 of Limitation Act, the Hon'ble Supreme Court in the case of *Md. Noorul Hoda V/s. Bibi Raifunnisa & Ors.*³ has clearly held that a suit filed for setting aside Decree obtained by fraud is governed by Article-59, the starting point of limitation is the date of knowledge of alleged fraud, the remedy of plaintiff is to get a decree to set aside by filing a suit under Section 31 of the Specific Relief Act 1963.

(g) Applicant has received 20% of the sale proceeds of the Ambattur property pursuant to directions issued by DRT, in the course of which proceedings Official Liquidator did not raise any contention that there was any infirmity in the Consent Decree dated 9th July 2009. Official Liquidator was thus precluded from seeking refund of the amounts so withdrawn.

(h) This Court, in any event, has no jurisdiction to consider entertaining prayer - (b) in this OLR. Bank of Baroda had first charge by

2. (2015) SCC Online 9051

3. (1996) 7 SCC 767

registered mortgage and had agreed to cede the second charge in favour of applicant with the consent of BIFR and this second charge is duly registered under Section 125 of the Companies Act 1956. Bank of Baroda and its assignee Kotak Mahindra Bank were entitled to stand out of liquidation proceedings and recover the dues which is precisely what they did by filing O.A. No.27 of 2008 before the DRT in which Company, Bank of Baroda and applicant were impleaded. The provisions of the Recovery of Debts Due to Banks and Financial Institutions Act 1993 (RDDB Act) overrides Companies Act 1956 as held in *Allahabad Bank V/s. Canara Bank & Anr.*⁴. Applicant had received money under consent terms with Kotak Mahindra Bank in proceedings before DRT. The consent terms in DRT are valid and subsisting and is a result of commercial arrangement between applicant and Kotak Mahindra Bank and are outside the purview of this Court. Even for sake of argument, it is assumed that applicant has received excess money and is required to return it even in that case only Kotak Mahindra Bank can have cause of action. Even otherwise, except DRT, no other Court would have jurisdiction to do so. Any application/proceeding seeking recovery of alleged excess cannot be entertained. Once Kotak Mahindra Bank and Bank of Baroda being secured creditors are entitled to stand outside winding up to sell the property, which was done pursuant to the order of Madras High Court and DRT permitted to retain the same, except the liability to pay dues

4. (2000)4 SCC 406

to workers under Section 529 of the Companies Act, 1956, no other claim can be entertained. Kotak Mahindra Bank and not Official Liquidator can claim as Kotak Mahindra Bank still has not recovered the entire amount owed to it in full satisfaction of its claim/charge.

(i) Further, applicant is an undisputed second charge holder with respect to Ambattur property. In so far as prayer - (a) for declaration that the decree is a nullity, the Hon'ble Supreme Court in the case of ***Indian Bank V/s. Official Liquidator***⁵ has clearly observed that the Company Court does not have power to declare a Decree of the competent Court void in an application made by Official Liquidator and such an application is not maintainable. Hence, this Court does not have jurisdiction to entertain either prayer - (a) or prayer - (b) in Official Liquidator's Report.

(j) In any event, the Consent Decree dated 9th July 2009 does not constitute a fraudulent preference on account of the fact that the winding up proceedings could be deemed to have commenced only on 24th June 2011, when the Company was ordered to be wound up. The Consent Decree dated 9th July 2009 was therefore entered into prior to the period stipulated in Section 531 of Companies Act 1956, viz., 6 months prior to the commencement of winding up proceedings. The contention regarding fraudulent preference under Section 531 of the Companies Act

5. (1998) 5 SCC 401

1956 is also incorrect. Section 531(2) provides for a deeming fiction only in case of presentation of a petition for winding up by or subject to the supervision of the Court as an act of insolvency. The suit was instituted with leave under Clause 12 on 30th December 2008 after the order recalling appointment of Official Liquidator was passed on 16th October 2008. The Decree was passed on 9th July 2009 whereas the fresh order of winding up was passed on 24th June 2011. This is clearly beyond six months. The order dated 27th August 2009 does not really recall order dated 16th October 2008 or revive the original winding up order dated 29th June 2006. The fresh winding up order dated 24th June 2011 is, therefore, not within the ambit of Section 531 of the Companies Act 1956 and therefore, there cannot be fraudulent preference of applicant. In any case, even in order dated 24th June 2011, the Court had clearly taken cognizance of Decree of Rs.12.49 Crores plus interest in favour of applicant and even at that stage, the defence of fraudulent preference or related party transaction had not been raised by Official Liquidator. The defence/plea of fraudulent preference could have been/ought to have been raised by Official Liquidator at the time of passing of order dated 27th August 2009 and in any case, on or before 24th June 2011 since applicant had filed an intervention application in the winding up proceeding which was allowed on 26th August 2010 after hearing Official Liquidator. Even the Learned Single Judge being

aware of the factual position did not think it fit to nullify the Decree on the ground of fraudulent preference under Section 531 of the Companies Act 1956. The contention about the fraudulent preference is therefore not open on the principles of *res judicata* under Section 11 (Explanation 4) of the Civil Procedure Code 1908 and principles analogous thereto. Even otherwise, the Division Bench of Gujarat High Court in the case of ***Bank of Maharashtra V/s. Official Liquidator***⁶ has extensively considered the law in this regard and held that mere admission of an existing liability by a Company prior to its winding up can never amount to a fraudulent preference.

(k) Section 531 of the Companies Act 1956 uses the word '*invalid*' and not '*void*'. Thus at the highest the Consent Decree against the Company would be voidable only at the instance of Official Liquidator. The difference between the terms *invalid*, *voidable* and *void* are judicially recognised in many judgments. It was observed by BIFR in its order dated 22nd January 2007 that the promoter Company – M/s. Swadeshi Mills Company Limited, had been ordered to be wound up vide order dated 5th February 2001 (Bench – I) and as such there was actually no promoter to revive the Company. Further, it is pertinent to mention that Swadeshi Mills Company Limited was wound up by this Court much prior to the consent terms dated 9th July 2009 as such the question of any indirect interest of

6. (1998) SCC Online Guj 370

applicant in the Company does not arise. The burden of proof is on Official Liquidator to prove fraud. Official Liquidator was aware about the consent terms/suit much before passing of order dated 4th January 2017 and hence is time barred.

(1) None of the Sections viz., 531, 531A and 536 of the Companies Act 1956 apply. Sub-section 2 of Section 531 deals only with presentation of petition for winding up. In that case, winding up is subject to the supervision of the Court or passing of resolution for winding up and there is deeming fiction that these two incidents shall be deemed to correspond to the act of insolvency in the case of an individual. This deemed fiction is obviously not attracted to an opinion of BIFR or AAIFR. In case of winding up, the supervision of the Court by or under Section 446 of the Companies Act 1956 accepts the Company Court and no other Court or authority can exercise any power in respect of the assets of the Company. But, in case of BIFR, as held in *NGEF Limited V/s. Chandra Developers (P) Ltd. and Anr.*⁷, the provisions of SICA 1985 overrides provisions of Companies Act 1956 and consequently, jurisdiction of the Company Court under Section 446 of the Companies Act 1956 is also taken away, meaning thereby Sub-section 2 of Section 531 of the Companies Act 1956 does not apply. In such cases of deeming fiction, the statute cannot be expanded to mean something more than the legislature has intended. Section 531A of

7. (2005) 8 SCC 219

the Companies Act 1956 is not applicable because attachment of property at Satara by judgment is not transfer of property. Assuming without admitting that the winding up petition is deemed to have been admitted on 22nd January 2007, when the opinion of BIFR was expressed or on 5th July 2007, when it was received, the Decree having been passed on 9th July 2009 (assuming that the attachment in judgment is transfer as alleged by Official Liquidator and intervenors), Section 531A of Companies Act 1956 would, in any case, be inapplicable. Section 536(1) of the Companies Act 1956 is per se inapplicable as it deals with transfer of share of a company. Section 536(2) is also not applicable for the same reason. Since in view of the Hon'ble Supreme Court judgment in *NGEF Limited (Supra)*, the Company Court does not have jurisdiction to hold that the act of submitting to a Consent Decree is void and if Official Liquidator ever desires to seek an order of submitting to such Decree, the only course was open to approach Board for Industrial and Financial Reconstruction (BIFR) of NCLT as SICA 1985 was repealed by Section 252 of the Insolvency and Bankruptcy Code, 2016 (IBC) w.e.f. 1st December 2016. This is strictly without prejudice to the contention that Section 536(2) of the Companies Act 1956 is even otherwise inapplicable since it was attachment in judgment and not disposal of property.

(m) Even otherwise, the Consent Decree dated 9th July 2009 was entered into *bona fide* and did not constitute a fraudulent preference within the meaning of Section 531 of the Companies Act 1956;

(n) The attachment by the said Consent Decree of the Satara property constitutes a charge in favour of applicant which entitles it to priority in payment over all other lenders;

Paragraph 13 in *Kerala State Financial Enterprises Ltd. V/s. Official Liquidator, Kerala*⁸ provides :

“13. Save and except certain special statutes in relation to recovery of debts from the properties of a company which has been directed to be wound up, the provision of the Companies Act shall apply. An order of attachment made prior to passing of an order of winding up may not be void, but then the executing proceedings must be allowed to continue with the leave of the court in terms of Section 446 of the Companies Act”.

(o) From Clause 6 of the Loan Agreement with the Company, it is evident that the Company had agreed not to create any charge over the Satara property at that particular time. This clearly evidences the intention of applicant to have charge over the same in future in the event the Company was unable to pay its dues under the Loan Agreement as it had only second charge over the Ambattur Property. The judgment in the case of *Mahadev Sahu V/s. Thakur Prasad Singh and Ors.*⁹ relied upon by the counsel for Official Liquidator is completely inapplicable since it is not the

8. (2006) 10 SCC 709

9. (1910) SCC Online Cal 60

case of applicant that either applicant has got a title to or charge over Satara property but submission is that there is a decree which has reached its finality and applicant is entitled to execute the same.

(p) The principal defence taken by Official Liquidator in his report is that the order of winding up dated 24th June 2011 passed by Shri S. J. Kathawalla, J. relates back to the date of reference issued by BIFR on 22nd January 2007. Thus according to Official Liquidator, winding up proceeding is deemed to have commenced from 22nd January 2007. To support this contention, Official Liquidator has relied upon the judgement delivered by Shri R.D. Dhanuka, J. in the matter of “**Modi Stone Ltd. (in liquidation)**”¹⁰ However, the said order is challenged before Hon’ble Division Bench under two separate Appeals, viz., Appeal No.359 of 2017 and Appeal No.34 of 2018. Thus, the said judgement has not attained finality.

Without prejudice, the said judgement is contrary to the binding precedents and hence per incuriam.

(q) While considering the validity of Section 20 of SICA 1985, Division Bench of Madras High Court in **J.M. Malhotra V/s. UOI**¹¹ has clearly held that Section 20(2) of SICA merely dispenses with the procedural requirements of Section 349 or 440 of the Companies Act 1956

10. (2017) 202 Company Cases 551

11. (1994) SCC Madras 349

and it is not obligatory on the part of High Court to wind up a sick Company once it receives an opinion from the Board in this regard without examining correctness of such opinion on hearing the concerned parties. This judgement has been subsequently approved by the Hon'ble Supreme Court in ***V.R. Ramaraju V/s. UOI***¹² and it is held that High Court has to take into account the opinion, but it is not to abdicate its own function of determining the question of winding up. The Learned Single Judge in *Modistone (Supra)* (R.D. Dhanuka, J.), has relied upon the Hon'ble Supreme Court judgement in *NGEF Limited (Supra)* and the real issue involved in the said judgement of the Hon'ble Supreme Court was not regarding the date of commencement or deemed commencement for winding up.

(r) The ratio of the judgment in *NGEF Limited (Supra)* was that the Board and Company Court exercise concurrent jurisdiction and the provisions of SICA have overriding effects and the inherent power of the Company Court does not exist in such cases.

(s) The judgment of Madras High Court has been consistently followed in the cases of ***Ashok Alloy Steel Ltd. V/s. BIFR***¹³, ***BIFR V/s. Unity Steels Ltd.***¹⁴, ***Tata Iron Steel Company V/s. Him Ispat Ltd.***¹⁵, ***Board Opinion V/s. Hathising Manufacturing Company Ltd. & Ors.***¹⁶ and

12. (1997) 89 Company Cases 609

13. (2008) 142 Company Cases 915 HP

14. (2002) 109 Company Cases 236

15. (2002) 108 Company Cases 537

16. 2009 SCC Online Guj. 10270

Kamdar Ladat Simiti V/s. Nanikram Shobraj Mills Ltd.¹⁷, etc. Therefore, the winding up proceeding of the Company was initiated on 24th June 2011, when the Learned Company Judge of this Court applied his mind to reference dated 22nd January 2007 of BIFR ultimately ordering winding up of the Company.

(t) The constituted attorney of the Company - Shri R. Venkateswaran was duly authorised through a Power of Attorney dated 9th August 2002 and the same was attached alongwith the consent terms and therefore presumption can safely be drawn that the said person had the authority to execute the consent terms. In any event, the authority of Mr. Venkateswaran had not been challenged either by Official Liquidator in Official Liquidator's Report No.84 of 2017 nor the same had been questioned by anyone from 9th July 2009 till date. Applicant is entitled to claim benefit under Doctrine of Indoor Management for irregularities, if any, in affairs of the Company as per rule laid down in ***Royal British Bank V/s. Turquand***¹⁸. The person entering into a transaction with the Company only needed to satisfy himself that his proposed transaction is not inconsistent with the articles and memorandum of the Company. He is not bound to see the internal irregularities of the Company and if there are any internal irregularities then the Company will be liable as the person has

17. (2005) 125 Company Cases 740

18. (1856) 119 E.R. 886

acted in good faith and he did not know about the internal arrangement of the Company. The rule is based upon obvious reason of convenience in business relations. The articles of association and memorandum are public documents and they are open to public for inspection.

19 It is Official Liquidator's case that :

(a) The winding up proceedings in respect of the Company commenced on 22nd January 2007, when the BIFR recommended that the Company be wound up.

(b) The Consent Decree dated 9th July 2009, which was entered into after the commencement of the winding up proceedings, constitutes a fraudulent preference within the meaning of Section 531 of the Companies Act 1956 and is *ex-facie* illegal and void.

(c) In any event, the attachment in respect to the Satara property effected by the Consent Decree does not constitute a charge in favour of applicant and does not make it a secured lender entitled to any priority over other payments.

(d) Applicant is therefore liable to refund the amount of Rs.10,17,03,493/- withdrawn by it from the sale proceeds of the Ambattur property along with interest at such rate as this Court may deem appropriate.

(e) Even otherwise, applicant not having any prior charge in

respect to the Satara property, the leave sought by it to execute the Consent Decree and to put the Satara property to sale and execution ought to be refused and;

(f) The interest of all stakeholders would be better served if the 1/3rd undivided share of the Company in the Satara property were to be sold by Official Liquidator under the supervision of the Company Court.

20 Ms. Kumbhat, counsel appearing for Interveners apart from adopting the submissions of Shri Sen, counsel for Official Liquidator, submitted that :

(a) The amount of Rs.3.25 Crores provided by applicant to the Company was by way of promoter's contribution without any interest as per the guidelines of BIFR.

(b) BIFR in the proceedings held on 2nd June, 1998, laid down certain guidelines wherein the board ascertained the requirement of interest free promoters contribution and also made clear that there should not be diversion of funds by promoters.

(c) the scheme of Operating Agency (BoB) being proposed on the basis of guidelines framed by BIFR, sought for promoter group to pump-in interest free promoter's contribution to which the BIFR gave its approval.

(d) In view of the clear guidelines of BIFR and the Loan Agreement specifying that the loan shall carry interest at the Bank Rate

subject to instructions of BIFR, the interest charged by applicant is unapproved of and cannot be permitted.

21 Before we proceed further, it will be useful to reproduce the Consent Terms dated 9th July 2009 in Suit No.164 of 2009, which is sought to be executed, for which leave is being sought. The same reads as under :

1. *The defendants submit to the decree on admission in the sum of Rs.12,49,27,897/- (Rupees Twelve Crores Forty Nine Lacs Twenty Seven Thousand Eight Hundred Ninety Seven only) together with interest thereon at the rate of 15.76% per annum with quarterly rests from 8th June 2009 till payment and/or realization.*
2. *It is declared that the aforesaid sum of Rs.12,49,27,897/- (Rupees Twelve Crores Forty Nine Lacs Twenty Seven Thousand Eight Hundred Ninety Seven only) together with interest as set out in clause – 1 above is secured by charge by way of mortgage on the land situate at Plot No.21, Industrial Estate, Ambattur, Chennai together with buildings, structures, plant and machinery standing thereon more particularly described in Schedule – Ex-A hereto including sale proceeds thereof together with interest thereon.*
3. *However, if the Defendants pay to the Plaintiffs Rs.10,00,00,000/- (Rupees Ten Crores only) with three months from the date hereof the decree shall be marked fully satisfied.*
4. *In the event of default in the payment of Rs.10,00,00,000/- (Rupees Ten Crores only) within the period limited by clause – 3 above the entire decretal amount as per clause – 1 shall become due and payable forthwith and the Plaintiffs shall be at liberty to execute the decree for the entire decretal amount as per clause – 1 above then outstanding.*
5. *The immovable property being one-third undivided share, right, title and interest in Final Plot No.540 situate lying and being in the Village of Taighat Registration Sub-District of Wai in the District of Satara together with structure standing thereon more particularly set out in Schedule – Ex-B hereto is hereby stand attached forthwith in execution of the decree and Defendants also undertake not to sell and dispose of or create any third party interets into the said property or any part thereof.*
6. *The Plaintiffs are at liberty to execute the decree on the basis of the Minutes of Consent Terms without sealing of decree and sealing of decree is dispensed with under Rule 314 of the High Court Original Side Rules, 1980. The Prothonotary and Senior Master is directed to act on the authenticated copy of the Minutes of Order and Consent Terms duly authenticated by the Associate and issuance of decree is expedited.*

7. 2/3rd of Institution fees be refunded to the Plaintiffs.

8. Suit stand disposed of in the aforesaid terms with no order as to costs.

22 *Date of commencement of winding up proceedings :*

(a) The first issue that arises for consideration is as to when the winding up proceedings against the Company (in liquidation) commenced. It is the case of Official Liquidator that the winding up proceedings commenced on the date of recommendation by the BIFR that the Company be wound up while it is applicant's case that, in the absence of a petition for winding up, the winding up proceedings must be deemed to have commenced only on a winding up order being passed, i.e., on 24th June 2011. In support of his contention that the winding up proceedings commenced on the BIFR making a recommendation, Official Liquidator relied on the judgment of the Hon'ble Supreme Court in *NGEF Limited (Supra)* and the judgments of various High Courts in *Modi Stone (Supra)* ***Kapri International Pvt. Ltd.*¹⁹ and *Indoco Remedies Ltd. V/s. Official Liquidator of Kay Packaging P. Ltd. & Anr.*²⁰**

(b) Section 441 of the Companies Act 1956 provides that the winding up of the Company by the Court “*shall be deemed to commence at the time of the presentation of the petition for the winding up*”. Section 441 does not expressly address a situation where a Company is wound up not on

19. 2013 SCC Online Del. 2176

20. (2009) 150 Company Cases 770

a winding up petition filed by a creditor or other stakeholder, but on a recommendation made in this behalf by the BIFR under the provisions of SICA. Section 20 of SICA provides for the winding up of a sick industrial company and reads in relevant part:

“20. Winding-up of sick industrial company: -

(1) Where the Board, after making inquiry under section 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.

(2) The High Court shall, on the basis of the opinion of the Board, order winding-up of the sick industrial company and may proceed and cause to proceed with the winding-up of the sick industrial company in accordance with the provisions of the Companies Act, 1956 (1 of 1956).

.....”

(c) Applicant relied on various judgments, both of the Hon’ble Supreme Court and of various High Courts on the issue as to whether a recommendation by the BIFR to wind up a Company was conclusive or whether the High Court had any discretion in the matter. It is applicant’s case that the High Court indeed has discretion in the matter of winding up a Company before it and was not bound to accept without reflection, the recommendation made in this behalf by the BIFR. However, this issue is of limited relevance since the Company has already been wound up. The only question that survives for consideration is the date when the winding up

proceedings must be treated as having commenced.

(d) The question as to when winding up proceedings must be deemed to have commenced when a Company is wound up pursuant to the recommendation by the BIFR has been considered by various Courts. This issue fell for consideration by the Hon'ble Supreme Court in *NGEF Limited (Supra)* where, while overruling the opinion of the Division Bench of the Hon'ble Gujarat High Court that a winding up proceeding arising out of a recommendation by the BIFR would commence only on the passing of an order of winding up, the Court observed:

“50. We may, however, observe that the opinion of the Division Bench in BPL Ltd. to the effect that the winding-up proceeding in relation to a matter arising out of the recommendations of BIFR shall commence only on passing of an order of winding up of the Company may not be correct. It may be true that no formal application is required to be filed for initiating a proceeding under Section 433 of the Companies Act as the recommendations therefor are made by BIFR or AAIFR, as the case may be, and, thus, the date on which such recommendations are made, the Company Judge applies its mind to initiate a proceeding relying on or on the basis thereof, the proceeding for winding up would be deemed to have been started; but there cannot be any doubt whatsoever that having regard to the phraseology used in Section 20 of SICA that BIFR is the authority proprio vigore which continues to remain as custodian of the assets of the Company till a winding-up order is passed by the High Court.”

(e) While this observation was characterized as ambiguous by Shri Godbole, there is little doubt that the date of the winding up order was rejected by the Hon'ble Supreme Court as the date on which the winding up proceedings would commence. In fact, this Court in its judgment in *Modi Stone Limited (Supra)* has, while relying on the judgment in *NGEF Limited*

(*Supra*), held that the date of recommendation by the BIFR would be considered the date of commencement of winding up. This view is also shared by the Delhi High Court in *Kapri International (Supra)* and the Gujarat High Court in *Indoco Remedies Limited (Supra)*. As such, the weight of authority is clearly in favour of the view that winding up proceedings would be deemed to have commenced on the date of recommendation by the BIFR that a Company be wound up and I respectfully agree with the said view. In any event, whether one were to take as the relevant date to commence the winding up proceedings, the date of recommendation, i.e., 22nd January 2007, the date of receipt by this Court of the recommendation, i.e., 5th July 2007, or the date of admission of the winding up proceedings, i.e., 27th August 2009, the Consent Decree dated 9th July 2009 falls within the period stipulated in Section 531 of the Companies Act, 1956 for an enquiry as to whether a transaction constitutes a fraudulent preference.

23 *The Consent Decree and Section 531 :*

(a) The next question that arises is as to whether the Consent Decree in question falls foul of section 531. Section 531 (1) reads as under :

“531. FRAUDULENT PREFERENCE

(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his

insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly :

Provided that, in relation to things made, taken or done before the commencement of this Act, this sub-section shall have effect with the substitution, for the reference to six months, of a reference to three months.”

(b) It is the Official Liquidator’s case as submitted by Shri Sen, with whom I agree, that the Consent Decree was collusive and a fraud on the Court and clearly a fraudulent preference within the meaning of Section 531. This would be apparent from the following :

(i) The Company filed company application (L) No. 951 of 2008 to recall the order dated 29th June 2006, whereby the company petition had been admitted and a Provisional Liquidator appointed in respect of the Company. They did so on the basis that the earlier recommendation for winding up issued by the BIFR on 9th April 2002 had been set aside by an order dated 23rd February 2006 of the Madras High Court;

(ii) When this application was argued on 16th October 2008, it was not brought to the notice of the Company Judge that in the interregnum a fresh recommendation had been made by the BIFR on 22nd January 2007 that the Company be wound up and that the Company had in fact withdrawn Appeal No.385 of 2007 filed before the AAIFR challenging the BIFR recommendation. In his order of admission dated 27th August 2009, Kathawalla, J. notes that if the later recommendation had been brought to the notice of the Company Court, it

would surely have passed a fresh order admitting the Petition and appointing the Provisional Liquidator;

(iii) After the order dated 16th October 2008 came to be passed in the aforementioned circumstances and the earlier order of admission was recalled, applicant on 30th December 2008 filed Suit No. 164 of 2009 claiming a sum of Rs.13,92,45,091/- and other ancillary reliefs;

(iv) Applicant was a promoter group company of the Company in liquidation. This would be evident, both from the orders passed by the BIFR as well as the Loan Agreement itself. It is an admitted position that applicant was a substantial stakeholder (22%) of Swadeshi Mills Limited, of which the Company in Liquidation was a wholly owned subsidiary;

(v) The order dated 2nd June 1998 of the BIFR required promoter contribution for the revival of the Company to be interest free. The Loan Agreement, apart from making an obtuse reference to interest being levied at a 'bank rate', did not stipulate any rate of interest and contemplated a fixing by BIFR of such rate of interest at a future date. It is an admitted position that no such rate of interest was fixed by the BIFR;

(vi) It is clear, both from the correspondence addressed and pleadings filed by the Company in Liquidation, that they were fully aware that no interest was payable on the Promoter's contribution brought in by applicant. Both the

letter and the Affidavit refer specifically to the absence of any interest being stipulated by the BIFR;

(vii) a mere three months after the filing of the affidavit in reply opposing aggressively the grant of any interlocutory reliefs in favour of applicant in Suit No.164 of 2008 including a prayer for a decree on admission for a sum of Rs.3.25 Crores, the Company is alleged to have agreed to a decree on admission for a much larger sum of Rs.12,49,27,897/- along with interest thereon at the rate of 15.76% p.a. with quarterly rests from 8th June 2009 till payment and/or realization. There is nothing whatsoever on record to explain or justify this abrupt reversal in position by the Company. The only possible inference in the circumstances can be that the Company was attempting to favour applicant, a promoter group company, in preference to its other creditors;

(viii) Applicant was fully aware of the recommendation dated 22nd January 2007 of the BIFR that the Company be wound up. In fact, there is a reference to it in the plaint. However, neither applicant nor the Company appear to have brought this recommendation to the notice of the learned Single Judge considering the Consent Terms. The parties also appear not to have brought to the notice of this Court the orders of the BIFR which required promoter contribution to be interest free or the terms of the Loan Agreement which failed to stipulate any rate of interest and indeed required the BIFR to fix it which it never did;

(ix) The Consent Terms were signed on behalf of the Company by one Shri Venkateshwaran. He is stated to have done so on the basis of a Power of Attorney dated 9th August 2002. The said Power of Attorney could not have been acted upon in so far as it could not have survived the appointment of the Provisional Liquidator by the order dated 29th June 2006 and the consequent displacement of the board of the Company. The setting aside of the Order dated 29th June 2006 would not revive the power which would have been required to be re-conferred. There is no evidence of any such conferral. In any event, the Power of Attorney did not confer an express power to compromise or compound any legal proceeding. It is settled law that an agent would be entitled to compromise a proceeding only in the event such an express power has been conferred by the document constituting him an agent. In this behalf, Official Liquidator relied on the judgement of the Delhi High Court in ***Manmohan Singh Dahliwal V/s. Gurbax Singh***²¹ where the Court observed:

“13. The interpretation of the word 'prosecute' provides by the learned counsel for the defendants that the power to prosecute includes the power to withdraw or effect a compromise is entirely misconceived and miscomprehended. The power conferred upon the attorney to 'prosecute' the suit or proceedings is to pursue it and not to withdraw or compromise it unless specific power to withdraw or compromise the suit has been bestowed upon the attorney. To say that the power to prosecute includes the power to effect the ultimate conclusion of the suit by way of compromise or withdrawal is erroneous and highly untenable as such a

21. 2002 AIHC 275

power is special power can be exercised by the attorney only when he is authorised to do so.

14. Black's Law Dictionary itself shows that the meaning of the word 'prosecute' is to follow up an action or other judicial proceedings which includes ultimate conclusion. By no stretch of imagination the withdrawal or compromise of the suit without legal authority amounts to bringing the suit to ultimate conclusion. In ordinary sense, the terms "ultimate conclusion" connotes getting the suit decreed by making honest and bonafide efforts to prove the claim in the suit. If the suit is to be disposed of by way of compromise, it may loosely be termed as "ultimate conclusion" but for such a conclusion of the suit, specific authority has to be given to the attorney. Even otherwise in the power of attorney the words 'prosecute the suit' don't figure. There is only reference in the plaint.

15. The attorney has only those powers which are specified in the power of attorney and mere reference in the plaint that he is also authorised to prosecute the plaint does not mean that he is vested with the power to withdraw the suit or settle it by way of compromise.

19. As is apparent these clauses gave the power to pursue the suit. Pursue means to continue or proceed along a course of action and not to withdraw.

20. Power of attorney is always to be interpreted strictly in its terms. There is no scope for searching meanings or intentions. Nor is it permissible to stretch or provide elasticity to the meaning of the words such as "prosecute", "pursue", "proceed", "execute", "sign" etc. Mere execution of power of attorney does not mean that the attorney has been conferred with power to do all such acts which the executor of the attorney possesses. Unless and until a specific power has been conferred upon the attorney, attorney is not free to arrogate the powers of "dominus".

(x) In any event, the exercise by Shri Venkateshwaran of the powers conferred under the Power of Attorney in question is

expressly made subject to the sanction of the board. The scope of the powers permitted to be exercised by Shri Venkateshwaran appear to have been purely ministerial and as a matter of convenience. He does not appear to have had, under the Power of Attorney, any authority to take any decision which would significantly impact the outcome of any legal proceeding to which the Company was a party, leave alone the authority to compound it.

(xi) The parties do not appear to have brought to the notice of the learned Single Judge considering the Consent Terms any of the aforementioned infirmities in the authority of Shri Venkateshwaran to bind the Company or to enter into a settlement.

(c) In the aforementioned circumstances, that the events reveal an orchestrated attempt by applicant and the Company acting in conjunction to fraudulently prefer one creditor, viz, applicant, over the others. The Consent Terms has the effect of not only enhancing dramatically the entitlement of applicant from Rs.3.25 Crores to Rs.12.5 Crores approximately, but also affirms that the Ambattur property would constitute a security in favour of applicant for the entire enhanced amount. This was clearly a fraudulent preference and plainly illegal.

(d) Applicant has attempted to defend the Consent Terms on the basis that applicant did not enjoy a controlling interest in the Company,

holding as it did only 22% of the shares of the parent, i.e., Swadeshi Mills Limited. It was sought to be suggested on this basis that the parties were not related and that the Consent Terms was an arms length transaction. However, it is apparent, both from the orders of the BIFR and the terms of the Loan Agreement, that applicant was an entity belonging to the Promoter Group which clearly controlled the Company (in liquidation). Applicant has been unable to explain the aforementioned circumstances which are plainly suspicious and allow no inference save that of a fraudulent preference.

24 *Remedy Available to Official Liquidator :*

(a) Applicant, however, sought to contend that Official Liquidator was not entitled to challenge the Consent Decree, either by means of a report filed before the Company Court or by his reply to the application for leave under Section 446. Shri Godbole relied on the judgment of the Hon'ble Supreme Court in ***Indian Bank V/s. Official Liquidator Chemmeens Exports (P) Ltd. & Ors.***²² and in particular paragraph 12 thereof, which is reproduced hereinbelow:

“It may be noted that these provisions have no application to any proceeding pending in appeal before a High Court or the Supreme Court. From this what follows is when a suit is instituted in the court of competent jurisdiction with the leave of the court under sub-section (1) and a decree is passed by that court whether on the basis of mortgage or otherwise, it would be binding on Official Liquidator and no plea inconsistent with the decree passed against Official Liquidator can be raised while deciding the questions of priorities under clause (d) of sub-section (2). We wish to make it clear that under [Section 446](#), no power is

22. (1998) 5 SCC 401

conferred on the company court to declare a decree of the competent court void - a prayer which is made by Official Liquidator in the application out of which this appeal arises - so to that extent the application filed by the liquidator in the company court is not maintainable.”

(b) This judgment concerned a case where leave had already been granted under section 446 of the Companies Act to a creditor to prosecute the suit, in which Official Liquidator had been joined. A Decree in such a suit where Official Liquidator had participated was held to be binding on him. Official Liquidator could not have ignored such a Decree by a competent Court or sought to challenge it under Section 446 of the Companies Act 1956. It is in this context that the observations relied upon by applicant appear to have been made. In the present case, however, Official Liquidator was not a party to the said suit. The *Indian Bank (Supra)* judgment is certainly no authority for the proposition that a decree can never be set aside by the Company Court in exercise of its powers under section 446 of the Companies Act 1956.

(c) It is in fact settled law that a Decree that has been procured by fraud can be set aside at any stage and in any proceedings, even a collateral one. The Hon’ble Supreme Court has in fact affirmed this principle on several occasions including in its judgment in ***S.P. Chengalvaraya Naidu V/s. Jagannath***²³ where it observed:

23. (1994) 1 SCC 1

“Fraud avoids all judicial acts, ecclesiastical or temporal” observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.”

(d) The Consent Decree in question, which has been procured by fraud can be set aside at any stage including in an application for leave to execute it or in an Official Liquidator's Report challenging it. Even otherwise, the scope of the Company Court's power under Section 446 has been very broadly construed by the Hon'ble Supreme Court in ***Sudarsan Chits (I) Ltd. V/s. O. Sukumaran Pillai and Others***²⁴, where the Court observed :

“8.... Now at a stage when a winding up order is made the company may as well have subsisting claims and to realise these claims the Liquidator will have to file suits. To avoid this eventuality and to keep all incidental proceedings in winding up before the court which is winding up the

24. (1984) 4 SCC 657

company, its jurisdiction was enlarged to entertain petition amongst others for recovering the claims of the company. In the absence of a provision like Sec. 446 (2) under the repealed *Indian Companies Act, 1913*, Official Liquidator in order to realise and recover the claims and subsisting debts owed to the company had the unenviable fate of filing suits. These suits as is not unknown, dragged on through the trial court and Courts of appeal resulting not only in multiplicity of proceedings but would hold up the progress of the winding up proceedings. To save the company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding up proceedings, the parliament devised a cheap and summary remedy by conferring jurisdiction on the court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Sec. 446 (2) and therefor, it must receive such construction at the hands of the court as would advance the object and at any rate not thwart it.”

(e) The position that Official Liquidator can invite the Company Court to exercise its powers under Section 446 by way of a report seeking directions and is not required to file a company application in that behalf is also firmly established. This question fell for consideration by this Court in *Modi Stone Limited (Supra)*, where the Court observed:

“115. In so far as the submission of the learned senior counsel for the *Modi Rubber Ltd.* that the directions sought by Official Liquidator for recovery of possession from sub-lessee cannot be granted by this Court in the report submitted by Official Liquidator but can be considered if at all in the company application on the ground that the report submitted by Official Liquidator is in the nature of an administrative direction and not for adjudication of the dispute is concerned, in my view, there is no merit in this submission of the learned senior counsel. Under *Section 455* of the *Companies Act, 1956* read with *Rule 135 and 137* of the *Companies (Court) Rules, 1959*, Official Liquidator is empowered to submit a report in a case where the winding up order is made by the Company Court for appropriate directions and reliefs. Official Liquidator is not required to file any suit for seeking any reliefs which can be granted by the Company Court by exercising powers under *Section 446(2)* of the *Companies Act, 1956*. All contentious issues can be decided by the Company Court by exercising powers under *Section 446(2)* of the *Companies Act, 1956* including any claims by or against the company in liquidation (including any claims by or against any of its branches in India.

116. Under [Section 446\(2\)\(d\)](#) of the Companies Act, 1956, the Company Court is also empowered to entertain or dispose of any question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company. In my view, there is no substance in the submission of the learned senior counsel for Modi Rubber Ltd. that only an administrative direction can be granted by the Company Court in the report submitted by Official Liquidator or that the evidence can be recorded only in the company application and not in the report submitted by the official liquidator. The powers exercised by the Company Court by issuing such directions and/or orders under various provisions of the [Companies Act](#), 1956 whether passed in company applications or in the official liquidator's report, as the case may be, are the judicial orders and have equal force of law. Official Liquidator is not required to file a company application for seeking directions and/or reliefs before the Company Court for recovery of possession, assets and other things from the Ex-directors of the company in liquidation or from any third party. In my view, whatever may be the nomenclature of the proceedings i.e. whether by way of the official liquidator's report or by way of company application for seeking various directions including the relief for recovery of possession, powers of the Company Court are the same.”

(f) In fact, the judgment of the Division Bench of this Court in ***The Official Liquidator, High Court Bombay and the Liquidator of Kamani Brothers Private Limited (In Liquidation) V/s. Suryakant Natvarlal Surati***²⁵ relied upon by applicant itself, is authority for the proposition that the Company Court may set aside or refuse to enforce a Decree. That was a case in which a Decree had been obtained confirming an unregistered charge which was void as against Official Liquidator on account of Section 125 of the Companies Act 1956. The Decree holder had applied for and obtained leave under Section 446 of the Companies Act 1956 to put the Decree in execution. This leave was sought to be revoked by three contributories of the Company on the ground that the charge on the

25. (1986) 59 Company Cases 147

basis of which the Decree had been rendered was void on account of Section

125. In agreeing with the contributories, the Court observed :

“42.The decree fixed a date for redemption of the “mortgage or charge” so declared. It ordered the mortgagees to deliver up all deeds relating to the mortgage property to the mortgagors (the company) should the mortgagors make payment on or before the date of redemption of the amount declared by the decree to be due under the mortgage. From these provisions of the decree declaring the equitable mortgage and the charge created thereby and permitting redemption thereof within the stated period, we find that the unregistered charge created by the company in favour of the mortgagees is kept alive. The order of sale of the mortgage property under the decree is to operate only if by the stated period redemption has not been effected. Upon such sale the charge could be extinguished. The provisions of s. 125, therefore, apply to the unregistered charge created by the equitable mortgage and declared by the decree and it is void as against the Official Liquidator. The unregistered charge has no effect upon the property of the company in liquidation. The mortgagees cannot sell the mortgage property notwithstanding the decree obtained prior to the order winding-up the company.

44. It was contended by Shri Tulzapurkar that Official Liquidator could not go behind the decree unless there be fraud or collusion. In view of the provisions of s. 125 Official Liquidator is entitled, if not obliged, to place before the executing court his objection based thereon.”

(g) The present case bears a striking resemblance to the facts considered by the Division Bench, save for the added feature that the Consent Decree that applicant seeks to enforce was procured by fraud. This would, of course, make the Decree more vulnerable rather than less.

25 *Attachment not a charge :*

(a) The application proceeds on the basis that the attachment of the Satara property constitutes a charge in favour of applicant. In the course of the hearing, however, applicant has sought to abandon its stand that the

attachment would constitute a charge. If it did, it would in any event fall foul of both Sections 531 and 536 of the Companies Act 1956. However, applicant has continued to maintain that by virtue of the attachment, applicant was a secured lender and was entitled to priority of payment out of the sale proceeds from the Satara property.

(b) There is nothing in law to support this proposition. In fact, the authorities are quite clear that an attachment does no more than prevent a debtor from dealing with an asset, thus ensuring that it would be available to satisfy any legitimate debt. Official Liquidator has relied in this behalf on the judgment of the Hon'ble Supreme Court in *Kerala State Financial Enterprises Ltd. V/s. Official Liquidator, High Court of Kerala*²⁶ where the Court, *inter alia*, observed that “an attachment itself does not create any charge in the property”. Official Liquidator also relied on the judgment of the Hon'ble Calcutta High Court in *Mahadeo Saran Sahu (Supra)* where the Court following the Full Bench ruling in *Frederick Peacock V/s. Madan Gopal*²⁷ and the dictum of the Judicial Committee in *Motilal V/s. Karrabuldani*²⁸ held that it was impossible to contend that plaintiff in that case “acquired any title or charge upon the property by reason of the attachment in question”.

26. (2006) 10 SCC 709

27. I.L.R. 29 Cal 428

28. I.L.R. 25 Cal 179 (1897)

(c) In the light of the aforesaid, apart from the fact that the Consent Decree itself is liable to be set aside, applicant also acquired no title or interest in the Satara Property merely by virtue of the attachment. Applicant is no more than an unsecured creditor who has no prior right in law over any other lender for payment out of the sale proceeds of the Satara property. The interest of all stakeholders would therefore be far better served if leave as sought for by applicant is refused and the property is sold by the Official Liquidator.

26 *Plea of Limitation :*

(a) Applicant has contended that the directions sought by Official Liquidator for setting aside the Consent Decree are time barred. Shri Godbole for applicant relied on the judgment of the Andhra Pradesh High Court in *Official Liquidator, High Court V/s. Andhra Pradesh State Financial Corporation*²⁹ in support of the proposition that the law of limitation would apply as much to Official Liquidator as to any other litigant and that an application of the nature brought by Official Liquidator was required to be brought within three years from when the cause of action accrued. The Consent Decree having been passed on 9th July 2009, applicant contends that the reliefs sought in the Official Liquidator's Report were clearly barred by time.

29. 2001 (3) ALT 334

(b) The argument of applicant is misconceived. While the Limitation Act would undoubtedly apply to Official Liquidator subject to the qualification introduced in Section 458A³⁰ of the Companies Act 1956 the reliefs sought in the Official Liquidator's Report are not time barred for two reasons, viz. applicant's argument loses sight of the fact that the Consent Decree impugned in the Official Liquidator's Report was procured by fraud. Any act of Court, which is the result of fraud ought be undone, regardless of the stage at which it is impugned and or before which forum and secondly, Official Liquidator became aware of the fraud only on coming into possession of the papers and proceedings in Suit No.164 of 2009 pursuant to the Order dated 4th January 2017 in the present company application.

(c) Shortly thereafter, Official Liquidator filed a reply in the company application and an Official Liquidator's Report, in both of which he impugned the Consent Decree as constituting a fraudulent preference. Thus, in any view of the matter, the cause of action in favour of Official Liquidator can be held to be complete only on his becoming aware, from the suit proceedings, of the nature of the fraud perpetrated by applicant in collusion with the Company. As such the directions sought by Official Liquidator are clearly within time.

30. Section 458A : Exclusion of certain time in computing periods of limitation. Notwithstanding anything in the Indian Limitation Act, 1908 (9 of 1908) or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the [Tribunal], the period from the date of commencement of the winding up of the company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded.

27 *Refund of amounts withdrawn :*

(a) It is applicant's case that Official Liquidator is, in any event, not entitled to apply for refund by applicant of the amounts withdrawn by it. Applicant so contends on the ground that the distribution was permitted by DRT and that Official Liquidator, despite being heard, did not object to such distribution and certainly not on the basis that the consent decree was fraudulent.

(b) The formulation of this argument is problematic. The distribution was effected not under orders passed by DRT. While applicant and Kotak Mahindra Bank did place before the DRT consent terms defining the proportion in which the sale proceeds of the Ambattur property would be distributed as between them, no order was passed in terms of the said consent terms by DRT. Directions in this behalf were eventually sought by Kotak Mahindra Bank from this Court.

(c) The order dated 21st April 2016 of this Court permitting such distribution was careful to qualify the order by the observation that it would be an interim arrangement subject to final outcome of the issue on status of the creditors of the Company (in liquidation) and that the order was being passed at the instance of Kotak Mahindra Bank and applicant and "without prejudice to the rights and contentions of the Official Liquidator". As such, this order merely permitted an ad-hoc distribution of the sale

proceeds and did not conclude any rights between the parties.

(d) Indeed, this issue regarding the illegality of the Consent Decree sought to be enforced by applicant was neither considered nor determined by either the DRT or this Court. This was on account of the fact that the papers and proceedings in Suit No.164 of 2009, which induced Official Liquidator to form the view that the Consent Decree is a fraudulent preference, was not then in his possession. His omission in these circumstances to raise a specific plea that the Consent Decree was fraudulently procured cannot preclude Official Liquidator, being more fully informed, from raising that plea now.

28 In these circumstances,

(a) the leave sought by applicant under Section 446 of the Companies Act 1956 to enforce the Consent Decree dated 9th July 2009 is refused;

(b) the Consent Decree dated 9th July 2009 is declared illegal and void as a fraudulent preference; and

(c) applicant is directed to refund with interest at 12% p.a. the amount of Rs.10,17,03,493/- withdrawn by it from the sale proceeds of the Ambattur property.

29 Company application no.341 of 2016 and Official Liquidator's Report accordingly disposed.

30 In view of the above, company application (lodging) no.85 of 2018 also disposed.

(K.R. SHRIRAM, J.)

Gauri
Amit
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