

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 331 OF 2018
IN
COMPANY APPLICATION NO. 341 OF 2016

FORBES & COMPANY LIMITED ...APPELLANT/APPLICANT
(earlier known as Forbes Gokak Ltd.)

V/s.

BOARD FOR INDUSTRIAL AND FINANCIAL
RECONSTRUCTION (B.I.F.R.) AND ANR. ...RESPONDENTS.

Mr. Janak Dwarkadas, Sr. Counsel a/w. Mr. Cyrus Ardhesir, Mr. Babul Dwarkadas, Mr. Joram Diwan I/b Veritas Legal for the Appellant/Applicant.

Mr. J.P. Sen, Senior Counsel a/w. Ms Sapna R. for the Official Liquidator.

CORAM : A.S. OKA AND M.S. SONAK, JJ.

DATE : 24th SEPTEMBER 2018.

JUDGEMENT (PER M.S.SONAK, J.)

1] Heard the learned Counsel for the parties.

2] The challenge in this Appeal is to the order dated 13th July 2018 made by the learned Company Judge disposing of Company Application No. 341 of 2016 taken out by the appellant along with Official Liquidator's Report No. 84 of 2017 with Company Application (L) No. 85 of 2018 in Company Petition No. 505 of 2006. The operative portion of the impugned order dated 13th July 2018 reads as follows:

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(c) applicant is directed to refund with interest at 12% p.a. the amount of Rs.10,17,03,493/- withdrawn by it from the sale proceeds of the Ambattur property.”

3] The challenge arises in the context of an application filed by the appellant seeking leave of the learned Company Judge under section 446 of the Companies Act, 1956 (Companies Act) to execute consent decree dated 9th July 2009 in Suit No. 164 of 2009 instituted by the appellant against Coromandal Garments Ltd., now in liquidation (Company) – respondent No.2. The impugned order made by the learned Company Judge disposes of not only such application made by the appellant, but also the Official Liquidator's Report No. 94 of 2017 seeking *inter alia* that the consent decree dated 9th July 2009 be set aside, being a fraudulent preference and for directions to the appellant to restore the amounts recovered by the appellant on the basis of such consent decree. As it is clear from the operative portion of the impugned order, the learned Company Judge has not only declined leave under section 446 of the Companies Act, but

further declared that the consent decree dated 9th July 2009 is indeed illegal and void as constituting a fraudulent preference. Consequential directions have also been issued to the appellant to restore the amount of Rs.10,17,03,493/-, so that the same can be appropriately dealt with in the course of winding up proceedings.

4] The Company in liquidation is a wholly owned subsidiary of Swadeshi Mills Co. Ltd.. The appellant held a stake of 22% in Swadeshi Mills Co. Ltd. It is the case of the appellant that in terms of the Loan Agreement dated 21st September 2000, the appellant advanced a loan of Rs.325 Lakhs to the Company which was to be repaid by the Company in terms of repayment schedule provided in the Loan Agreement. At the stage when such loan was advanced, both Swadeshi Mills Co. Ltd., as also the Company in liquidation were declared as sick Companies, in respect of whom reference was pending with the Board for Industrial and Financial Reconstruction (BIFR) under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

5] After efforts of revival of the Company had failed, the BIFR by its order dated 22nd January 2007 made a recommendation that the Company be wound up. With full knowledge that such recommendation had been made by the BIFR, the appellant instituted Suit No. 164 of 2009 seeking to recover an amount of Rs. 13,92,45,091/- together with interest thereon from the Company relying on the Loan Agreement dated 21st September 2000. In the said Suit a declaration was sought to the effect that such amount was secured by second charge on the Ambattur property of the Company and therefore, the sale proceeds of this property must ennure for the payment of this amount to the appellant. The figure of Rs.13,92,45,091/- which was claimed in the suit, was arrived at by computing interest at the rate of '*18% per annum compounded quarterly*'. This is despite of the fact that the Loan Agreement dated 21st September 2000 had merely stated that the loan shall carry interest at bank rate and further, even the same was to be subject to the provisions of SICA, orders of BIFR and instructions to be issued by the operating agencies, i.e., Bank of Baroda and BIFR. In the Suit, a Notice of Motion was taken out for seeking a decree on

admission and in any case interim reliefs for appointment of the Court Receiver etc..

6] The Company in fact resisted the grant of any reliefs in favour of the appellant by filing appropriate replies in Suit No. 164 of 2009 in the months of February and March 2009. However, barely three months later, the appellant and the Company filed consent terms, in which, the Company agreed to suffer a decree on admission in a sum of Rs.12,49,27,897/- together with interest thereon at the rate of 15.76% per annum with quarterly rests from 8th June 2009 till payment and/or realization.

7] In the meanwhile by order dated 27th August 2009, the learned Company Judge ordered the admission of the proceedings for winding up of the company on the basis of BIFR's recommendation made by the order dated 22nd January 2007. This was followed by a further order dated 24th June 2011 by which the learned Company Judge ordered the winding up of the Company.

8] The impugned order made by the learned Company Judge also makes brief reference to the proceedings taken out by the Kotak Mahindra Bank Limited claiming rights as purported assignee of Bank of Baroda in the proceedings for winding up of the Company and the proceedings against the Company before the Debt Recovery Tribunal. Since, such reference is really not necessary for deciding the issues which arise in the present appeal, no separate reference is made to them in this judgment and order.

9] Since, the Official Liquidator came to be appointed in the winding up proceedings, the appellant, who, in the meanwhile had already recovered an amount of Rs.10,17,03,493/- from the Company from the sale proceeds of Ambattur property, filed an application before the learned Company Judge seeking leave under section 446 of the Companies Act to further execute the consent decree dated 9th July 2009. The Official Liquidator, also filed a report seeking *inter alia* for setting aside the consent decree dated 9th July 2009 on the ground that it constituted a fraudulent preference and for directions to require the appellant to refund the amount of Rs.10,17,03,493/- with interest, so that

such amount is available for *pro rata* distribution in the course of proceedings for winding up of the company. The impugned order whilst declining leave to the appellant under section 446 of the Companies Act has accepted the Official Liquidator's report and declared the consent decree dated 9th July 2009 as illegal and void, being a fraudulent preference. The directions have also been issued in the impugned order to the appellant to refund with interest at the rate of 12% per annum, the amount of Rs.10,17,03,493/- withdrawn by the appellant from the sale proceeds of the Company's Ambattur property. Hence, the present appeal.

10] Mr. Janak Dwarkadas, the learned Senior Advocate for the appellant made the following submissions in support of the present appeal:-

(a) That the date of commencement of winding up proceedings, in the present case, will be 24th June 2011 (the date on which the winding up was actually ordered) or in any case, 27th August 2009, i.e., the date on which the learned Company Judge, for the first time applied his mind to the matter and admitted the petition seeking winding up

of the respondent No.2 Company. Therefore, the filing of consent terms and the issue of consent decree on 9th July 2009 being well beyond the period of six months prior to the commencement of the winding up proceeding, the provisions of section 531 of the Companies Act were not at all attracted to the transaction in question. The learned Company Judge has therefore, seriously erred in treating such transaction as some preference, much less a fraudulent preference;

(b) That there was ample and uncontested material on record which establishes that the appellant had in fact advanced to the Company a loan of Rs.325 Lakhs, which was payable with interest as per the schedule of repayment set out in the Loan Agreement. In Suit No. 164 of 2009 instituted by the appellant against the Company, later specifically admitted that it was due and payable to the appellant an amount of Rs.12,49,27,897/- together with interest thereon at the rate of 15.76% per annum payable with quarterly rests. Based upon all such uncontested material on record, the learned Company

Judge seriously erred in styling the very filing of consent terms has some fraud or holding that the consent decree dated 9th July 2009 was result of some collusion or fraud;

(c) In order to conclude fraud, the learned Company Judge has mainly relied upon the presumed circumstance that the appellant was a '*substantial stake holder*' of Swadeshi Mills Co. Ltd., of which the Company in question was a wholly owned subsidiary. Mr.Dwarkadas submits that this is contrary to the record because in the Loan Agreement entered into between the appellant and the Company, it is merely stated that the appellant held '*significant portion of the share capital of Swadeshi Mills Co. Ltd.*' and not that the appellant was '*substantial stake holder of Swadeshi Mills Co. Ltd.*'. Mr. Dwarkadas, therefore, submits that the learned Company Judge by misreading or in any case misconstruing the statement in a Loan Agreement has returned an erroneous finding of fraud or fraudulent preference;

(d) That merely because the Loan Agreement had not stipulated any specific rate of interest, does not either mean that no interest whatsoever was payable on the loan amount admittedly advanced by the appellant to the Company or that the specification of interest at 15.76% per annum in the consent terms is some indicator of fraud or collusion. Mr. Dwarkadas submits that the Loan Agreement had in fact specified interest at bank rates. In any case, and with a view to give a quietus to the matter, Mr. Dwarkadas, on the basis of instructions from the appellant, made a statement that the appellant was not at all averse to scaling down the interest rate to 5.28% per annum which is the rate suggested by the Official Liquidator himself, as being appropriate bank interest rate. Mr. Dwarkadas submits that with such a statement, the charge of fraud or fraudulent preference no longer survives, and the impugned order therefore, warrants interference; and

(e) That the learned Company Judge failed to take note of a very significant circumstance that the Swadeshi Mills

Co. Ltd., of which the Company was a wholly owned subsidiary, was itself in liquidation, in pursuance of the order dated 5th September 2005 made almost 4 years prior to the issue of consent decree dated 9th July 2009. Since this vital circumstance was totally overlooked by the learned Company Judge, the finding that the consent decree dated 9th July 2009 was a product of collusion or fraud, deserves to be set aside. Since the impugned order is entirely premised upon such finding, the same is also liable to be set aside.

11] Mr. J.P. Sen, the learned Senior Advocate for the Official Liquidator, supported the impugned order on the basis of reasons reflected therein.

12] We have given careful consideration to the submissions. We have also perused the impugned order and the material on record. On analysis of the material on record as well as the legal position, which according to us has been correctly appreciated by the learned Company Judge, we see no good grounds to interfere with the impugned order.

13] In the present case, the proceedings for winding up of respondent No.2 commenced on the basis of recommendation made by the BIFR vide its order dated 22nd January 2007. Section 441 of the Companies Act provides that the winding up of a Company by the Court shall be deemed to commence at the time of the presentation of the petition for winding up. Though this was not a case of presentation of a petition for winding up by some Creditor, nevertheless, on conjoint consideration of the provisions of section 441 of the Companies Act and section 20 SICA, it is quite clear that the date on which the BIFR made its recommendations for winding up of the respondent No.2 Company, must be regarded as the date of presentation of petition for winding up of the respondent No.2 Company. Accordingly, the date of commencement of winding up, in the present case, would be 22nd January 2007 and not the other two dates as suggested by the appellant. In fact, this issue is no longer *res integra*.

14] In ***NGEF Limited vs. Chandra Developers (P) Ltd. And anr. - (2005) 8 SCC 219*** , the Apex Court has expressly

rejected the contention that proceedings for winding up, in relation to a matter arising out of recommendations of the BIFR shall commence only from the date an order for winding up is made by the Company Court.

15] Following *NGEF Limited vs. Chandra Developers (supra)*, the learned Single Judge of this Court in ***In re (Bom) Modi Stone Ltd. (in Liquidation) - (2017) 202 Company Cases 551*** has held that the proceedings for winding up of a Company would be deemed to have commenced on the date on which BIFR or AAIFR, as the case may be, makes recommendation for winding up of the Company. To the same effect are the rulings of Delhi High Court in ***Kapri International Pvt. Ltd. - 2013 SCC Online Del.2176*** and Gujarat High Court in ***Indoco Remedies Ltd. vs. Official Liquidator of Kay Packaging P.Ltd. - (2009) 150 Company Cases 770***. Therefore, it is quite clear that the winding up proceedings in the present case must be deemed to have commenced from 22nd January 2007 and not either on 27th August 2009 when the Company Petition was formally admitted or on 24th June 2011 when the Company was actually ordered to be wound up. Accordingly, we are unable to

uphold Mr.Dwarkadas's first contention in support of the present appeal.

16] The issue involved before the learned Company Judge in the present case was not really whether the respondent No.2 Company was genuinely liable to pay any amounts to the appellant towards discharge of loan liability. The main issue involved was whether, after the commencement of the winding up proceedings, the appellant and the Company, could have entered into consent terms, secured a consent decree and on such basis appropriated amount of over Rs.10 Crores from coffers of the respondent No.2 Company, in preference to the claims of several other creditors, who may have had claims, perhaps much more genuine than the appellant's claim *qua* the respondent No.2 Company not to mention claims to which the Companies Act affords statutory priorities. The issue involved before the learned Company Judge also related to the manner in which the consent terms were filed, particularly taking into consideration the relationship between the appellant on one hand and the respondent No.2 Company on the other. The learned Company Judge has, therefore, addressed such issues in

the proper perspective and by giving due weightage to the material and the circumstances borne on the record.

17] Mr. Dwarkadas's third contention in support of this appeal is really nothing but some exercise in semantics. The record establishes and it is even otherwise not disputed that the appellant held a stake of about 22% in Swadeshi Mills Co. Ltd., of which, the Company was a wholly owned subsidiary. There is also material on record that the appellant was indeed a Promoter Group Company of the Company. This is evident from the orders made by the BIFR as well as the Loan Agreement itself, in terms of which the appellant advanced a loan to the Company. The Loan Agreement specifically records that the appellant held '*significant portion of the share capital of Swadeshi Mills Co. Ltd.*'. On the basis of such material, if the learned Company Judge has observed in the impugned order that the appellant was a '*substantial stake holder*' of Swadeshi Mills Co. Ltd., then, it cannot be said that such a finding is vitiated by perversity or unsupported by any material on record.

18] In any case, the fact that the appellant held substantial or at any rate significant stake in Swadeshi Mills Co. Ltd, of which, the Company was a wholly owned subsidiary was certainly not the only circumstance on which the learned Company Judge ultimately held that the consent decree dated 9th July 2009 constituted a fraudulent preference. In fact, the learned Company Judge in paragraph 23 (b) of the impugned order has listed several circumstances in support of the finding that the consent decree dated 9th July 2009 and the payments recovered by the appellant in pursuance thereof, indeed constituted fraudulent preference for the purposes of Section 531 of the Companies Act. Such circumstances are very much borne from the record and consequently there is no case made out to warrant interference or to take some different view in the matter.

19] Again, the finding regards fraudulent preference is not based only on the circumstance that the consent decree had provided for payment of interest to the appellant at the rate of 15.76% per annum with quarterly rests, when in fact, no such

rate of interest was at all stipulated in the Loan Agreement entered into between the appellant and the respondent No.2 Company. This was only one of the circumstances taken into consideration by the learned Company Judge. This circumstance, in the facts and circumstances of the present case, was surely not some irrelevant circumstance. The Loan Agreement had provided for interest at bank rates when it came to repayment of loan by the respondent No.2 Company to the appellant. There was no reference to the payment of any interest at the rate of 15.76% and that too with quarterly rests. By including such a onerous stipulation in the consent terms, the appellant secured a decree in an amount of Rs.12,49,27,897/- as against the loan of Rs.325 Lakhs said to have been advanced by the appellant to the respondent No.2 Company. This circumstance coupled with several other circumstances referred to by the learned Company Judge in the impugned order support the finding that this was indeed a case of fraudulent preference hit by the provisions of section 531 of the Companies Act. The belated offer to scale down the interest rate, therefore, does not constitute any good ground to interfere with the impugned order.

20] In the present case, the record indicates that the fact that BIFR had made a fresh recommendation for winding up of the Company on 22nd January 2007 was not pointed out to the Company Court when it made its order dated 16th October 2008. The record also indicates that the BIFR by its order dated 2nd June 1998 had required the promoter contribution for revival of the Company to be interest free. The learned Company Judge has quite correctly noted that from the pleadings as well as correspondence on record, it is quite clear that the appellant was fully aware that no interest was payable on the promoter's contribution, yet, interest at an exorbitant rate was claimed and further even consent terms were filed in which the Company agreed to pay interest at the rate of 15.76% with quarterly rests. The learned Company Judge has noted that the Company had aggressively opposed grant of any interim relief in favour of the appellant in Suit No. 164 of 2009 including any decree of admission for an amount of Rs.325 Lakhs. However, merely three months after such aggressive opposition, the Company filed the consent terms agreeing to a decree on admission in an amount of Rs.12,49,27,897/- and that too with interest at the

rate of 15.76% per annum with quarterly rests from 8th June 2009 till payment and/or realization. All these circumstances can, by no means be said to be irrelevant circumstances when it comes to determination of the issue of fraudulent preference. The finding recorded by the learned Company Judge is based upon a cumulative consideration and evaluation of all such circumstances. As noted earlier, all such circumstances are duly supported by the material on record which has been critically evaluated by the learned Company Judge. Therefore, there is no case made out to take any different view in the matter.

21] Finally, there is no merit in the contention that the learned Company Judge failed to take note of the circumstance that the Swadeshi Mills Co. Ltd., of which the Company in question was wholly owned subsidiary, was itself in liquidation and therefore, the appellant was not in some favoured position *qua* the Company. The fact that the learned Company Judge was alive to this position is clearly reflected from paragraph 18(k) and paragraph 23(d) of the impugned order. In any case, such a situation does not wipe out dilute the several circumstances referred to by the learned Company Judge in paragraph 23(b) of

the impugned order, on basis of which finding in relation to fraudulent preference was returned.

22] The impugned order, whilst declining leave to the appellant to enforce the consent decree dated 9th July 2009 had declared the consent decree dated 9th July 2009 illegal and void, being a fraudulent preference availed by the appellant in the teeth of the provisions of section 531 of the Companies Act. The issue as to whether the appellant had indeed advanced a loan to the Company and whether the appellant was liable to recover such amount with interest has not been foreclosed by the impugned order. The appellant, notwithstanding the impugned order, will always be at liberty to prove its claim before the Liquidator in the winding up proceedings. The impugned order merely prevents the appellant from claiming any fraudulent preference in the matter of recovery of its claims. Therefore, this is not a case where a consent decree has been set aside on the ground of fraud simplicitor. This is only a case where the attempt of the appellant to seek a fraudulent preference has been thwarted. Further, since, by virtue of fraudulent preference, the appellant recovered an amount of Rs.10,17,03,493/- from the

Company (from sale proceeds of Amabattur property), the learned Company Judge has quite correctly ordered the refund of this amount with interest at the rate of 12% per annum, so that such amount can be appropriately dealt with in the course of winding up proceedings by the Official Liquidator.

23] In ***DCM Financial Services Ltd. vs. Neel Kamal Plastics Ltd. And anr. - (2008) 145 Comp. Cas 179 (SC)***, the Apex Court had clarified that the proceedings for liquidation of a Company under the Companies Act are not the same as an intra-party suit for recovery of money. In a money suit it may be open to the plaintiff to accept any money outside the Court from or on behalf of the defendant towards full or partial satisfaction of his claim in the suit and to report the payment to the Court for passing appropriate orders. But such is not the position in proceedings for liquidation of the company. Once such proceedings commence, even the party at whose instance the proceedings are initiated does not enjoy any preferential claim and any proceeds from the sale of assets of the Company must be disposed of in terms of the scheme as provided under sections 529A and 530 of the Companies Act. In the case before

the Apex Court, the appellant had received a sum of Rs.1.95 Crores from one Motor and General Finance Limited (MGF) purportedly in a transaction falling outside the purview of the company petition pending before the Punjab and Haryana High Court. The Apex Court held that it was misleading to say that the money received by the appellant was part of the consideration money payable to the sister concern of the Company and it had no connection with the Company. The Apex Court held that it was not the source of money that was important but the cause on the basis of which the appellant was able to get the money from MGF that was relevant. The payment of large sum by MGF to the appellant was not gratuitous. It was evidently intended to patch up the brazen breach of the Court's orders committed by the Company and MGF in effecting the sale of the property in question. The Apex Court ruled that the creditor in arrangement with purchaser and Company receiving payment in another transaction with the sister concern of the Company amounts to a fraudulent preference. In such circumstance, the Apex Court affirmed the direction issued by the High Court requiring the appellant to deposit in the Court the amount that it had received

in connection with the sale and the property of the Company. The principle explained in *DCM Finance Services Ltd. (supra)* applies to the present case as well.

24] For all the aforesaid reasons, therefore, we see no good ground to interfere with the impugned judgment and order. This appeal is therefore liable to be dismissed and is hereby dismissed. There shall, however, be no order as to costs.

25] Pending Notices of Motion, if any, do not survive and the same are disposed of accordingly.

(M. S. SONAK, J.)

(A.S.OKA, J.)