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

**OFFICIAL LIQUIDATOR'S REPORT NO. 139 OF 2018
IN
COMPANY PETITION NO. 756 OF 2014
AND
COMPANY PETITION NO. 119 OF 2015**

In the matter of the Companies Act, I
of 1956

And

In the matter of M/s. GOL Offshore
Limited (In Liquefaction.)

Export Import Bank of India

And

Punjab National Bank (International) Ltd.

... Petitioners

**ALONG WITH
COMPANY APPLICATION (LODGING) NO. 89 OF 2019**

M/s. Arambhan Hospitality Services Ltd.,
A Company incorporated under the Indian Companies
Act having its office at 17, Bahubali Building, Cawasji
Patel Street, Cawasji Patel Rd., Kala Ghoda, Fort,
Mumbai – 400 001.

... Applicant

Versus

The Official Liquidator, High Court, Mumbai
Having his Office at Bank of India Building,
5th Floor, M.G. Road, Fort, Mumbai – 400 023.
Appointed as the Official Liquidator of GOL Offshore
Limited.

... Respondent

.....

Mr. Prathamesh Kamat along with Mr. Shanay Shah for the Official Liquidator.

Mr. Sarosh Bharucha along with Mr. Som Sinha, Ms. Sneha Prabhu, Ms.Divya Vishwanath i/by M/s. Som Sinha and Associates for M/s.Arambhan Hospitality Services.

Mr. Mahendhar Aithe, Company Prosecutor for O.L. Present.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 13th NOVEMBER, 2019

PRONOUNCED ON : 14th JANUARY, 2020

JUDGMENT :

. Official Liquidator of M/s. GOL Offshore Limited (in liquidation) has filed OLR No. 139 of 2018 under Section 536 (2) of the Companies Act, 1956 *inter-alia* praying for a declaration that the transaction of payments made by M/s. GOL Offshore Limited (in liquidation) through director of the company (in liquidation) to M/s. Arambhan Hospitality Services Limited during the period between 10th October, 2016 and 14th June, 2017 are void and seeks direction against the M/s. Arambhan Hospitality Services Limited to refund Rs.4,07,99,612/- to the official liquidator.

2. Company Application (L) No. 89 of 2019 is filed by M/s. Arambhan Hospitality Services Limited *inter-alia* praying for an appropriate order and direction under Section 536(2) of the Companies Act, 1956 declaring that

the consent terms dated 24th October, 2016 in Commercial Admiralty Suit (L) No. 69 of 2016 is valid, subsisting and binding on the parties in the suit and to ratify the same and also the payment of Rs.4,07,99,612/- made by the M/s.GOL Offshore Limited (in liquidation) be ratified. By consent of parties, the official liquidator report and the company application filed by M/s. Arambhan Hospitality Services Limited were heard together and are being disposed off by a common order. Some of the relevant facts for the purpose of deciding these two proceedings are as under:-

3. It is the case of the M/s. Arambhan Hospitality Services Limited (for the sake of convenience referred to as “the Applicant”) that on 27th July, 2009, the applicant and the company in liquidation entered into a contract for catering and house keeping services for the vessel Malaviya Thirty Six for a period from 1st April, 2009 to 31st March, 2012. Another contract was executed between the two parties on the same date. On 22nd June, 2001, the applicant and the said company in liquidation entered into an agreement for catering services for a period from 15th December, 2010 to 31st March, 2012. On 1st October, 2012, the applicant and the company in liquidation entered into an agreement for catering and house keeping services for the said vessel Malaviya Thirty Six from 1st April, 2012 to 31st March, 2015. Three other contracts were executed between the parties on the same date. It is the case of the applicant that the applicant had raised various invoices on the said company in liquidation during the period between 26th August, 2014 to

30th June, 2016.

4. On 28th August, 2014, the Company Petition bearing No. 756 of 2014 was presented in this Court *inter-alia* praying for winding up of the M/s. GOL Offshore Limited (in liquidation) by Export Import Bank of India. Sometime in the year 2015, Company Petition No. 119 of 2015 was presented by Punjab National Bank (International) Limited against the company in liquidation. It is the case of the applicant that on 8th May, 2015, two more contracts were entered into between the applicant and the company in liquidation for catering and house keeping services of the separate vessel operating on west-cost and east-cost of India for the period between 1st April, 2015 and 31st March, 2018 and for 6 Rigs/Barges/MSV.

5. On 15th April, 2015, the applicant through its advocate issued a notice of demand upon the company in liquidation to pay an amount of Rs.3,92,01,031/- allegedly due and payable to the applicant by the company in liquidation under various invoices. On 22nd July, 2015, the company in liquidation replied to the said notice dated 15th July, 2015 and requested applicant to withdraw the said notice and called upon to resolve the matter in an amicable manner.

6. It is the case of the applicant that on 9th March, 2016, the said company in liquidation in one of the meeting agreed to settle the alleged

outstanding amount due and payable to the applicant and admitted that the outstanding dues of the applicant were in excess of Rs.3 crores. It was allegedly agreed that to provide its services to company in liquidation on the assurance that the said company in liquidation will pay an amount of upto Rs.1,50,00,000 per month of which Rs.1 crore would be disbursed through the letter of credit and balance would be paid by cheque. It is the case of the applicant that the respondent addressed emails dated 10th March, 2016 and 17th March, 2016 showing outstanding dues owed to the applicant. The applicant forwarded its statement of accounts evidencing the outstanding dues. The company in liquidation failed to clear the alleged dues of the applicant. The applicant continued to provide its services to the company in liquidation. Various emails were exchanged between the parties.

7. On 27th July, 2016, the applicant filed an Admiralty Suit against the company in liquidation being Commercial Admiralty Suit No. 15 of 2018. In the said said Comm. Admiralty Suit No. 15 of 2018, the applicant and the company in liquidation filed consent terms dated 24th October, 2016. The said Comm. Admiralty Suit was disposed off in terms of the consent terms. In clause 2 of the said consent terms, the respondent company in liquidation undertook to pay a sum of Rs.5,34,00,000/- as per payment schedule mentioned in the consent terms. The respondent company in liquidation paid a sum of Rs.4,07,99,612/- to the applicant under the said consent terms from the bank account with banks i.e. HDFC Bank Ltd., Saraswat Co-operative

Bank and Bassein Catholic Co-operative Bank Ltd. In the said consent terms, it was provided that the respondent vessel shall remain in port and harbour and shall not leave Mumbai without prior permission of the Court. The respondent shall not directly or indirectly sell, transfer, alienate in any manner and encumber the respondent company without prior permission of this Court.

8. On 5th May, 2017, this Court appointed official liquidator attached to this Court as provisional liquidator of the respondent company in liquidation in the Company Petition No. 119 of 2015. On 23rd May, 2017, the order passed by this Court appointing the official liquidator as a provisional liquidator came to be notified to the official liquidator. It is the case of the official liquidator that on taking inspection of the records of the respondent, it is found that there are 17 creditors of the respondent who appeared to be secured creditors. The official liquidator has already taken symbolic possession of the registered office of the respondent in the meeting held with the ex-director of the respondent on 30th June, 2017 with the ex-director, taken symbolic possession of the Godown on 30th June, 2017 and of the office premises on 1st April, 2017. On 3rd July, 2017, the official liquidator took possession of 20 vessels of the respondent.

9. In so far as the vessel Malaviya Thirty is concerned, possession of the said vessel was taken on 3rd July, 2017 and has been sold for

Rs.10,11,00,000/- On 7th July, 2017, the official liquidator has taken possession of GAL Constructor and has sold the same for Rs.7,70,00,000/-. On 4th December, 2018, this Court passed final order of winding up against the respondent. The official liquidator has invited claims as per Rule 148 of the Companies (Court) Rules, 1959. The official liquidator has received about 2,000 claims from members/workers/creditors. On 6th June, 2018, the petitioner filed its claims against the respondent with the official liquidator.

10. On 6th July, 2018, this Court passed an order in the said Admiralty Suit No. 15 of 2018 recording that Rs.4 crores had been paid by the respondent to the applicant M/s. Arambhan Hospitality Services Ltd. and an amount of Rs.1,34,00,000/- remained unpaid. Official liquidator was served with a copy of the said Commercial Admiralty Suit No. 15 of 2018 on 11th July, 2018 and was subsequently served with a copy of the compilation of documents and evidencing payment of installments from the respondent to the said M/s. Arambhan Hospitality Services Ltd. On 27th August, 2018, the official liquidator filed his written statement in the said Admiralty Suit. On 7th December, 2018, the official liquidator filed its report seeking deposit of the amount received by M/s. Arambhan Hospitality Services Ltd., under consent terms dated 24th October, 2016. The official liquidator thereafter filed this report on 27th December, 2018. The applicant M/s. Arambhan Hospitality Services Ltd. filed Company Application (L) No. 89 of 2019 on 28th February, 2019.

11. Mr. Prathamesh Kamat, learned counsel for the official liquidator invited my attention to the consent terms dated 24th October, 2016 filed by the applicant and the respondent in the Commercial Admiralty Suit No. 15 of 2018. He submits that under the said consent terms, the respondent company in liquidation undertook to pay sum of Rs.5,34,00,000/- as per payment schedule to the applicant. It appears that out of the said amount of Rs.5,34,00,000/-, the respondent paid a sum of Rs.4,07,99,612/- to the applicant. He submits that from the bank statement produced in the proceedings by the applicant, it is clear that the respondent has paid a sum of Rs.4,07,99,612/- to the applicant during the period between 10th October, 2016 and 14th June, 2017 from its account with HDFC Bank Ltd., Saraswat Co-operative Bank and Bassein Catholic Co-operative Bank Ltd.

12. It is submitted that in view of Section 441(2) of the Companies Act, 1956, the winding up of the respondent company by this Court shall be deemed to have commenced on the date of presentation of the winding up petition i.e. 28th August, 2014. He submits that in view of the commencement of the winding up petition of the respondent as on 28th August, 2014, all payments made by the respondent to the applicant in terms of consent terms dated 24th October, 2016 after the date of presentation of winding up petition would clearly attract the provisions of Sections 536 (2) and 537 of the Companies Act, 1956 and are thus null and void. The

applicant i.e. M/s. Arambhan Hospitality Services Ltd. thus be directed to refund the said amount of Rs.4,07,99,612/- to the official liquidator. He submits that the official liquidator was already appointed as a provisional liquidator of the respondent as on 5th May, 2017. The official liquidator of the respondent has been already appointed on 4th December, 2018.

13. It is submitted by the learned counsel that the transactions carried out after the date of commencement of winding up of the respondent company must be in the ordinary course of business and has to be in the interest of company. He submits that the applicant who had applied for ratification of the transaction has to not only plead that the transactions carried out by the respondent after commencement of winding up proceedings were in the ordinary course of business and were in the interest of company but also to prove such plea. He submits that the applicant has already filed its affidavit of debt before the official liquidator.

14. Learned counsel for the applicant placed reliance on the judgment of this Court in case of ***Forbes and Company v/s. Coromandel Garments Ltd. and Ors., (2018) 5 Bom CR 550*** and in particular paragraph 25(ix) and would submit that on appointment of the official liquidator as provisional liquidator, the board of the respondent company was displaced. He submits that under Section 450 of the Companies Act, 1956, the powers of the provisional liquidator are identical to the powers i.e. of the official liquidator

unless and otherwise specifically ordered by the Court. Under Section 456 of the Companies Act, 1956 all the assets of the company in liquidation vests in official liquidator or provisional liquidator as the case may be. All the properties and assets of the company in liquidation are deemed to be in custody of the Court under Section 456(2) of the Companies Act, 1956.

15. Learned counsel for the applicant also placed reliance on the judgment of this Court in case of ***Board of Industrial and Financial Reconstruction v/s. M/s. Hindustan Transmission Products Ltd., (2012) 5 Bom CR 631*** and in particular paragraph nos. 3, 5, 18 to 24 and would submit that in case of the company in liquidation, a party seeking to validate of the transactions carried out after the date of commencement of winding up has not only to plead but also has to prove that such transfer was in the best interest of the company. The burden is on the applicant to prove that such transfer was in the best interest of the company and not upon the official liquidator. He submits that the provisions of Section 536 of the Companies Act, 1956 have to be read with Section 441 of the said Act. The official liquidator has already received about 2,000 claims from members/workers/creditors. There are large number of secured creditors of the respondent.

16. Learned counsel for the official liquidator relied upon the judgment of this Court in case of ***Asha Bhosale v/s. M/s. Magnasound India Ltd.,***

(2015) 193 Comp Cas 326 and in particular paragraph nos. 32 to 34 and would submit that even transfer sought to be effected by third parties of the assets of the company in liquidation would also fall within the prohibitive ambit of Section 536 (2) of the Companies Act, 1956 and can be declared as null and void. The burden is on the person seeking to validate the transfer to prove that the sale was for the benefit of the company. He submits that all the payments made by the respondent to the applicant in this case are made after the commencement of the winding up proceedings. Two of the payments are made after appointment of official liquidator as a provisional liquidator of the respondent by this Court. The payments made by the respondent to the applicant were under the consent terms and was standalone transaction. The applicant cannot rely upon the earlier transactions, if any with the respondent prior to the date of filing of consent terms. He submits that even the consent terms were filed after the date of the commencement of the winding up of the respondent.

17. Mr. Bharucha, learned counsel for the applicant M/s. Arambhan Hospitality Services Ltd. on the other hand submits that the word 'void' mentioned in Section 536 (2) has to be read as 'voidable'. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of **Pankaj Mehra and another v/s. State of Maharashtra and Others, (2000) 2 SCC 756** and more particularly in paragraph 1 and 14. It is submitted that the applicant had already raised various invoices upon the

respondent prior to the date of commencement of winding up of the respondent. The dispute between the parties had already arisen prior to the date of commencement of winding up of the respondent. The consent terms filed between the applicant and the respondent were thus not illegal and were rightly approved by this Court in Comm. Admiralty Suit (L) No. 69 of 2016 on 24th October, 2016.

18. It is submitted by the learned counsel that the payments made by the respondent to the applicant were made under compelling circumstances. The official liquidator has not alleged any fraud against the applicant in entering into the consent terms with the respondent in the official liquidator's report. He submits that the substantial amount has been already paid by the respondent to the applicant under the said consent terms. It is submitted that the consent terms were executed in the ordinary course of business. The transactions were already completed before the date of commencement of winding up proceedings against the respondent and were bonafide. This Court has absolute discretion to validate a transaction under Section 536 (2) of the Companies Act, 1956.

19. It is submitted by the learned counsel that the bonafide transactions carried out by the applicant with the respondent were beneficial and in the interest of respondent company going and thus such transactions have to be ratified. There was outstanding amount of Rs.8,11,02,041/- that was due and

payable by the respondent to the applicant for supplying food and catering services to the vessels of the respondent. The applicant had filed the said Admiralty Suit seeking to detain/arrest three of the vessels which were found at the port of Bombay. At the ad-interim stage, the respondent had agreed that one of its vessels would not leave the port and further that no third party rights would be created with respect to the said vessels. He submits that the applicant had agreed to the reduction in the claim amount from Rs.8,11,02,041/- to Rs.6,67,40,073/- recoverable in 10 installments. It is submitted that the official liquidator is required to prove that the transactions between the applicant and the respondent were *mala fide* and fraudulent before it could be treated as void. The official liquidator has not discharged this burden. The bonafide transaction between the applicant and the respondent thus shall be protected and be validated under Section 536(2) of the Companies Act.

20. It is submitted by the learned counsel that after receiving the substantial amount under the said consent terms, the applicant has disbursed part of the said amount towards payment of statutory dues of the applicant towards various authorities and various payments and thus applicant shall be exempted from the purview of Section 536(2) of the Companies Act, 1956. He submits that the very vessel which was impounded and subsequently released on execution of the consent terms was sold by the official liquidator for an amount of Rs.7,70,00,000/-.

21. Mr. Bharucha, learned counsel for the applicant, distinguished the judgment of this Court in case of ***Board of Industrial and Financial Reconstruction*** (supra) and submits that the Court must have regard to all the compelling circumstances to come to the conclusion that the transaction should not be void. If Court comes to the conclusion that the transaction was for the benefit of and in the interest of company or in keeping the company going same should be ratified.

22. Learned counsel for the applicant placed reliance on the judgment of this Court in case of ***Maharashtra State Financial Corporation and Ors. v/s. Official Liquidator, High Court, Mumbai and Ors., 2012(5) ALL MR 54*** and in particular paragraphs 18 in support of the submission that merely because winding up process has started would not mean that transaction carried out after commencement of winding up proceedings should be declared as void. The Court can in appropriate cases protect and save bonafide transactions. He submits that since the respondent had got the vessel released by making payment of the reduced amount against the larger claim of the applicant, such transaction cannot be declared as null and void, which was for the benefit of the company and its creditors.

23. It is submitted by the learned counsel that there was 36 years business relation between the applicant and the respondent and thus the consent terms

entered into between the applicant and the respondent were in ordinary course of business and thus deserves to be validated. The respondent had already admitted its liability under those transaction entered into between the applicant and the respondent. The claim of the applicant was more than Rs.8 crores which was settled for substantially reduced amount. On the date of filing consent terms by the parties, there was no appointment of provisional liquidator. There was no arrest of vessel.

24. In so far as the submission of the learned counsel for the official liquidator that not only there should be pleadings but also it shall be proved by the applicant that the transaction was in the ordinary course of business and was in the interest of the company is concerned, learned counsel for the applicant invited my attention to the averments made in paragraphs 33, 35 and 38 of the company applicant filed by his client in this regard and would submit that the applicant has not only pleaded but has also proved that the consent terms filed between the applicant and the respondent were not only in ordinary course of business but were also in the interest of the company in liquidation. All available proofs with the applicant have been produced by the applicant before this Court.

25. Mr. Kamat, learned counsel for the official liquidator in rejoinder distinguished the judgment of Supreme Court in case of **Pankaj Mehra and another** (supra) on the ground that the said judgment does not deal with the

payment made after the appointment of provisional liquidator by the company in liquidation. All the assets of the company in liquidation vest in the provisional liquidator or the official liquidator as the case may be. The board of the respondent had been already displaced upon appointment of the official liquidator as a provisional liquidator and thus the respondent company through its ex-directors could not have dealt with the assets of the company in liquidation with the applicant. The applicant has not justified the execution of consent terms with the respondent company after the date of commencement of winding up proceedings.

26. In so far as the judgment of this Court in case of ***Maharashtra State Financial Corporation and Ors.*** (supra) relied upon by the learned counsel for the applicant is concerned, Mr. Kamat, learned counsel for the official liquidator distinguished the said judgment on the ground that in the said judgment this Court had considered a situation where the sale proceeds of the assets of the company in liquidation after the date of commencement of winding up proceedings were utilized for payment of the dues of secured creditors. The applicant in this case, however is admittedly one of the unsecured creditor. The applicant ranks last in the list of priority under the provisions of Companies Act, 1956. He submits that in the facts of this case, the respondent had paid two installments after appointment of the official liquidator as the provisional liquidator. He submits that if the respondent would not have settled the alleged dues of the applicant by entering into the

consent terms after the date of commencement of winding up proceedings, that amount would have been made available to the respondent for the benefit of payment of the secured creditors and for payment to the other creditors required to be given priority under Section 529A of the Companies Act, 1956. It is not the case of the applicant that the applicant could not have recovered more than amount agreed to be received under the said consent terms.

27. Learned counsel placed reliance on the judgment of this Court in case of ***Board of Industrial and Financial Reconstruction v/s. Modi Stone Ltd. (In. Liqn.), (2017) 202 Comp Cas 551*** and in particular paragraphs 64, 78, 102 to 106, 108, 110, 112 and 148 to 150. Mr. Bharucha, learned counsel for the applicant distinguished the judgment of this Court in case of ***Board of Industrial and Financial Reconstruction*** (supra) and would submit that the facts before this Court in the said judgment were totally different. There were antedated transactions carried by the ex-directors of the company in liquidation with the third parties.

REASONS AND CONCLUSION

28. There is no dispute that the Company Petition No. 756 of 2014 was presented against the respondent on 28th August, 2014. Under Section 441(2) of the Companies Act, 1956, the winding up of the respondent thus shall be

deemed to have commenced on the date of presentation of the petition for winding up i.e. 28th August, 2014. It is admitted position that the consent terms between the applicant and the respondent in the said Comm. Admiralty Suit No. 15 of 2016 were filed only on 24th October, 2016. There is no dispute that this Court had already appointed official liquidator as provisional liquidator of the respondent on 5th May, 2017 and had appointed the official liquidator of the respondent on 4th December, 2018. It is not in dispute that the respondent had made payment of Rs.4,07,99,612/- to the applicant under the said consent terms during the period between 10th October, 2016 and 14th June, 2017. Two of the payments were made to the applicant on 12th May, 2017 and 14th June, 2017 in the sum of Rs.49,97,357/- and Rs.50,00,059/- after the date of appointment of the official liquidator as the provisional liquidator i.e. 5th May, 2017. Final order of winding up of the respondent is already passed by this Court on 4th December, 2018. The applicant has already filed its claim against the official liquidator of the respondent on 6th June, 2018. A copy of the Comm. Admiralty Suit No. 15 of 2018 was served upon the official liquidator only on 11th July, 2018.

29. The question that arises for consideration of this Court is whether the applicant has pleaded and proved that the consent terms arrived at between the applicant and the respondent in the Comm. Admiralty Suit on 24th October, 2016 after commencement of the winding up proceedings was in the ordinary course of business and was in the best interest of the respondent

company in liquidation or not.

30. The applicant has strongly urged before this Court that there were various contracts entered into between the applicant and the respondent prior to the date of filing company petition by one of the secured creditors against the respondent. It is the case of the applicant that the applicant had to recover a substantial amount under those agreements from the respondent. The applicant thus filed the said Comm. Admiralty Suit for various reliefs against the respondents. The applicant does not dispute that under Section 441(2) of the Companies Act, 1956, the winding up of the respondent company shall be deemed to commence on the date of presentation of the petition for winding up i.e. 28th August, 2014. The applicant does not dispute that all the payments received by the applicant from the respondent under the said consent terms dated 24th October, 2016 were received after the date of commencement of the winding up proceedings against the respondent company in liquidation. The applicant also does not dispute that the payment of Rs.49,97,357 and Rs.50,00,059/- were received by the applicant on 12th May, 2017 and 14th May, 2017 respectively after the appointment of the official liquidator as the provisional liquidator of this Court i.e. on 5th May, 2017. Consent terms itself were filed after commencement of winding up proceedings.

31. In paragraphs 33, 35 and 38 of the Company Application (Lodging)

No. 89 of 2019 filed by the applicant *inter-alia* praying for declaration that the consent terms dated 24th October, 2016 in Comm. Admiralty Suit No. 15 of 2018 between the applicant and the respondent are valid, subsisting and binding. It is averred by the applicant that the applicant had supplied food and catering services to the vessels of the respondent.

32. The applicant had applied for ad-interim relief in respect of the three vessels of the respondent in the said Comm. Admiralty Suit. The respondent agreed to make the payments under the consent terms to save its vessels since there was a commercial compulsion to make the payments due to the applicant to ensure that the vessels shall not be commercially exploited. It is averred that the execution of the consent terms and the payments made thereunder are bonafide and in the interest of keeping the respondent as an on going concern. It is averred that the most of the contracts underlying the consent terms were arrived and concluded prior to the filing of winding up proceedings. If the respondent would not have entered into the consent terms, it would have been difficult to keep the respondent going and its business would have been adversely effected, if not fully paralyzed.

33. On the other hand the official liquidator has received about 2,000 claims from members/workers/creditors pursuant to the public notice issued by the official liquidator inviting claims as per Rule 148 of the Company (Court) Rule, 1959. It is not disputed by the applicant that the applicant is

one of the unsecured creditors of the respondent and has already filed its claim with the official liquidator on 6th June, 2018 i.e. after filing of the consent terms in the said Comm. Admiralty Suit No. 15 of 2016. This Court in case of ***Board of Industrial and Financial Reconstruction v/s. M/s. Hindustan Transmission Products Ltd.*** (supra) has held that the applicant must plead and prove not only that the transfer is bonafide but also that the transfer was in the interest of the company.

34. Section 536 (2) of the Companies Act, 1956 provides that any disposition of the property made after commencement of winding up shall unless the Court otherwise orders be void. This Court rejected the contention of the applicant that the official liquidator must plead and prove that the transaction was fraudulent before it can be treated as void under Section 536(2) of the Companies Act, 1956. It is held by this Court that Section 536 treats the transfer after commencement of winding up void unless the Court otherwise directs. The official liquidator is not required to file any application seeking a declaration that the transfer is void. The question of any burden cast on the liquidator cannot possibly arise. The principles of law laid down by this Court in the said judgment squarely applies to the facts of this case.

35. The applicant who seeks validation of the transaction carried out after the date of commencement of winding up proceedings in view of Section

441(2) of the Companies Act, 1956 has to not only plead but also has to prove that such transactions were carried out in ordinary course of business and were in the benefit of the company in liquidation. A perusal of the averments made in the company application filed by the applicant seeking validation of the consent terms does not indicate that there is sufficient pleadings of the applicant in this regard. Be that as it may, the applicant has not proved before this Court that the said consent terms arrived at between the applicant and the respondent were in ordinary course of business and were for the benefit of the respondent company in liquidation. Most of the invoices produced on record by the applicant arising out of various agreements between the parties are for the period after commencement of the winding up proceedings against the respondent. It is not the case of the applicant that the applicant was not aware of the pendency of the winding up petition against the respondent when several transactions were carried out by the applicant with the respondent post the date of commencement of winding up proceedings against the respondent.

36. This Court in case of ***Asha Bhosale v/s. M/s. Magnasound India Ltd.*** (supra) has held that the burden clearly lies on the person seeking to maintain a sale which is not in the ordinary course of business under Sections 536(2) and 533(1)(b) of the Companies Act, 1956 to prove that the sale was for the benefit of the company. In my view, there is thus no substance in the submission of the learned counsel for the applicant that the

official liquidator had to prove that the consent terms filed between the applicant and the respondent after the date of commencement of winding up proceedings were fraudulent or was not in the ordinary course of business or not in the interest of the company in liquidation. The submission made by the learned counsel for the applicant is contrary to the law laid down by this Court in case of **Asha Bhosale v/s. M/s. Magnasound India Ltd.** (supra).

37. This Court in case of **Board of Industrial and Financial Reconstruction v/s. Modi Stone Ltd. (In. Liqn.)** (supra) has held that in view of Section 441(2) of the Companies Act, 1956, the winding up of the company by the Court shall be deemed to have commenced at the time of the presentation of the petition for the winding up in cases other than the provisions of Section 441(1) of the Companies Act, 1956. This Court adverted to the judgment of Supreme Court in case of **J.K. (Bombay) (P) Ltd. v/s. New Kaiser-I-Hind Spinning and Weaving Co. Ltd., AIR 1970 SC 1041** in which it was held by the Supreme Court that once a winding up order is passed, the undertaking and the assets of the company pass under the control of the liquidator, whose statutory duty is to realize them and to pay from out of the sale proceeds to its creditors. Such creditors acquire on such order being passed right to have the assets realize and distributed among them *pari passu*. It is held that no new rights can thereafter be created and no uncompleted rights be completed and doing so would be contrary to the creditor's rights to have proceeds of the assets distributed

among them *pari passu*.

38. This Court in the said judgment has held that under Section 536(2) of the Companies Act, 1956 Court has to decide whether the transactions in question were entered into after commencement of the winding up proceedings or not. It is held that under the provisions of the Companies Act, 1956, the official liquidator is a trustee of the secured and unsecured creditors, the workers and the contributories. The rights of the companies in the liquidation are subordinate to the powers of the official liquidator under the provisions of the Companies Act, 1956. It is the duty of the official liquidator to gather all the assets of the company in liquidation for the purpose of distribution of those assets, amongst secured or unsecured creditors, workers, contributories and others prescribed under the provisions of Companies Act, 1956.

39. In so far as the judgment of Supreme Court in case of ***Pankaj Mehra and another*** (supra) relied upon by the learned counsel for the applicant is concerned, this Court in the said judgment in case of ***Board of Industrial and Financial Reconstruction v/s. Modi Stone Ltd. (In. Liqn.)*** (supra) has adverted to the said judgment of Supreme Court in case of ***Pankaj Mehra and another*** (supra). In the said judgment of the Supreme Court in case of ***Pankaj Mehra and another*** (supra), the Supreme Court had quoted the authority the judgment of the Gujarat High Court in case of reported in

(1986) 59 Comp Cas 201 (Guj) with approval in which it was held that in bonafide transaction carried out and completed in ordinary course of current business can be sanctioned by the Court and on the contrary it will not allow the assets to be disposed off at the mere pleasure of the company and would cause fundamental principles of equality among the creditors to be violated.

40. The Supreme Court quoted the judgment of Court of appeal in **Gray's Inn Construction Co. Ltd.,(1980) 1 ALL ER 814 (CA)** with approval in which it was held that the Court would be ready circumspect in the matter of validating the payments and interest of the creditors as well as the company would be kept uppermost in consideration. This Court also held that while validating a transaction, the Court has to consider that the transfer must be for the best interest of the company. The principles of the law laid down by this Court in case of **Board of Industrial and Financial Reconstruction v/s. Modi Stone Ltd. (In. Liqn.)** (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

41. The official liquidator has already received about 2,000 claims from the various members/workers/contributors. The large number of the creditors out of them are secured creditors. The applicant is one of the unsecured creditor. The applicant has already filed its affidavit of debt before the official liquidator. The Court while considering an application for validating the transactions carried out post the date of commencement of winding up

proceedings has to also consider the factum of substantial claim received by the official liquidator from various secured creditors and the other creditors who are entitled to be paid their debts on priority under Section 529A of the Companies Act, whose claims would be superior to the claims of the applicant who would be one of the unsecured creditor.

42. In my view, the applicant has failed to plead sufficiently and to prove that the consent terms entered into between parties were for the benefit and interest of the respondent. Various transactions carried out by the applicant with the respondent company in liquidation post the date of commencement of the winding up proceedings and thereafter filing consent terms with the respondent post the date of such commencement and winding up proceeding were not in ordinary course of business and the same were not in the interest of and for the benefit of the respondent company in liquidation. The applicant has thus not made out any case for validation of the transactions and the consent terms under Section 536(2) of the Companies Act, 1956. Applicant has failed to discharge the burden. In my view, the official liquidator has made out a case for declaration of the entire transactions as null and void as prayed.

43. I therefore pass the following order :-

- (i) The Official Liquidator's Report No.139 of 2018 is allowed in terms of prayer clause (a).

- (ii) Company Application (Lodging) No.89 of 2019 filed by the applicant is dismissed.
- (iii) Applicant i.e. M/s. Arambhan Hospitality Services Limited is directed to deposit the sum of Rs.4,07,99,612/- with the Official Liquidator within four weeks from today with interest thereon @ 9% per annum from the date of recovery of the amount from the respondent company (in liquidation).
- (iv) There shall be no order as to costs.

(R.D. DHANUKA, J.)