

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

INTERIM APPLICATION NO.2917 OF 2021
IN

COMPANY PETITION NO.756 OF 2014

VISHAL
SUBHASH
PAREKAR

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Axis Bank and Others	...Applicants
<i>In the matter between</i>	
Export Import Bank of India	...Petitioner
vs.	
GOL Offshore Limited (Company in Liquidation)	...Respondent

Ms. Apurva Sanglikar i/b. Link Legal, for the Applicants.
Mr. Aditya Pimple, for the Respondent.

CORAM : N.J. JAMADAR, J.
RESERVED ON : 8th FEBRUARY, 2023
PRONOUNCED ON : 12th APRIL, 2023

ORDER:

1. The applicants who claim to be the secured creditors of Gol Offshore Limited, the company in liquidation, have preferred this application to seek permission to appropriate their purportedly exclusive security namely the amounts lying in the Trust and Retention Account and O & M expenses sub account of the company in liquidation as maintained by the applicant No. 1 Axis Bank Limited, the Lead Bank, on behalf of the applicants.

2. The background facts necessary for determination of this application can be stated in brief as under:-

a] The applicants claimed to be the secured creditors of the company in liquidation. Applicants No. 1 to 5, 8 and 9 and the assignors of applicant Nos. 6 and 7 had granted various loan facilities to the company in liquidation which were, inter alia, duly secured by the company in liquidation by creating various securities on its assets in favour of the applicants which included various vessels owned by the company in liquidation. The applicants had, inter alia, granted a loan facility in the sum of Rs. 385 Crores in relation to one of the vessels owned by the company in liquidation namely Malavia – 36. The said loan facility was secured by mortgage in favour of the applicants in accordance with the Merchant Shipping Act, 1958. The charge was also duly registered with the Ministry of Corporate Affairs (MCA) under section 77(1) and 78 of the Companies Act, 2013.

b] The said vessel Malavia- 36 was chartered to ONGC and the amounts generated by the said vessel were deposited by ONGC in the company in liquidation's Trust and Retention US\$ Account (TRA) and subsequently those amounts were transferred to TRA INR Account No. 914020041607073 held by Axis Bank Limited, the applicant No. 1, on behalf of the applicants. An account namely O & M Expenses Sub Account with Account No. 914020042093925 was also opened.

c] The applicants assert the funds in the TRA and O & M Expenses Sub Account have been, inter alia, used by the company in liquidation for the maintenance of vessel Malavia 36. As of 30th June, 2021 an amount of Rs. 16,60,67,829.96/- along with further interest was lying in the TRA account and an amount of Rs. 20,44,749.99/- along with further interest was lying in the O & M Expenses Sub Account.

d] In the meanwhile, by an order dated 5th May, 2017 passed in Company Petition No.119 of 2015, the Company Petition came to be admitted and the official liquidator attached to this Court was appointed as the provisional liquidator of the company in liquidation. By a further order dated 4th December, 2017, the company in liquidation was ordered to be wound up and the Official Liquidator came to be appointed as liquidator of the company in liquidation.

3. The applicants claimed that on account of the default committed by the company in liquidation in respect of the various loan facilities, the applicants in the capacity of the secured creditors enforced their respective security by standing outside the winding up proceeding. Therefore, the applicants have preferred this application to seek permission of the Court to appropriate the

amounts lying in the TRA and O & M Expenses Sub Account. The applicants undertake to satisfy pro rata the claims of the workmen of the company in liquidation upon adjudication under section 529A of the Companies Act, 1956 or section 326 of the Companies Act, 2013 along with interest at the prevailing rate by depositing a portion of the amount equivalent to the workmen's portion with the Official Liquidator as and when directed by this Court. Hence, this application.

4. The Official Liquidator resisted the application by filing an affidavit in reply. The Official Liquidator contends the Company Petition was presented on 20th August, 2014 and, post the winding up order, the Official Liquidator has invited the claims of workmen and other creditors and has adjudicated 1381 claims for an aggregate sum of Rs.1283.95,75,520/-. However, Official Liquidator pursuant to an order passed by this Court on 19th May, 2020 in Admiralty Suit No. 1 of 2017 with other connected suits has filed report seeking to re-adjudicate the claims as per the Companies Act.

5. Opposing the prayer of the applicants to appropriate the amounts standing in TRA and O & M Expenses Sub Account, the Official Liquidator disputes that the applicants are the secured

creditors. It is contended that the applicants are not entitled to the amounts lying in the TRA account as the said amount was generated by vessel Malavia 36. The Official Liquidator contends the said amount generated by the vessel while on charter would constitute an asset of the company in liquidation. Therefore, any transfer of the money generated by the vessel owned by the company in liquidation before six months of the commencing of winding up proceedings would constitute a fraudulent preference by the company of its creditors and would be invalid under section 531 of the Companies Act. The Official Liquidator, therefore, contends that the said amounts lying in TRA and O & M Expenses Sub Account are liable to be brought back to the custody and control of the Official Liquidator.

6. The Official Liquidator further contends that since the amounts lying to the credit of TRA and O & M Expenses Sub Account constitute the property of the company under section 456 of the Companies Act, 1956, the applicants can not lay any claim over the said property unless the applicants have a charge duly registered under the provisions of section 125 of the Companies Act, 1956. In any event, according to the Official Liquidator the said amount shall be subject to a *Pari Passu* claim of the workmen.

7. An affidavit in rejoinder came to be filed controverting the contentions in the affidavit in reply.

8. As there was no clarity as to the period during which the amounts were credited to TRA and O & M Expenses Sub Account, the applicants were directed to file a further affidavit. Thereupon, to the additional affidavit filed on behalf of the applicants, a copy of the extract of TRA account came to be annexed.

9. In the affidavit in reply to the additional affidavit the Official Liquidator contended that the transaction would be hit by the provisions contained in section 536(2) of the Companies Act, 1956. It was further asserted that the Official Liquidator has received claim from the seafarers and crew members in respect of vessel Malavia 36 and has admitted the claims to the tune of Rs. 6,01,14,233/-. It was thus contended that the amount standing to the credit of TRA and O & M Expenses Sub Account are liable to be brought back to the Official Liquidator for being utilized for settlement of claims of workers/ seafarers and for distribution of dividend amongst the creditors.

10. In the wake of the aforesaid pleadings, I have heard Ms.

Apurva Sanglikar, learned counsel for the applicants, and Mr. Aditya Pimple, learned counsel for the Respondent-Official Liquidator. With the assistance of the learned counsel for the parties, I have perused the material on record.

11. Ms. Sanglikar, learned counsel for the applicants, at the outset, urged that the objection of the Official Liquidator wavered from one end to another. Initially it was contended that the transfer of the amount to TRA and O & M Expenses Sub Account would amount to a fraudulent preference within the meaning of section 531 of the Companies Act, 1956. Subsequently, in the affidavit in reply to the additional affidavit, which was filed for the limited purpose of placing on record the account extract, a stand was taken that transactions are void under section 536 of the Act, 1956.

12. Ms. Sanglikar would urge that none of the aforesaid objections deserves any countenance. Taking the Court through the documents evidencing the creation and registration of the charge over the assets of the company in liquidation and the facility agreements extended to the company in liquidation as well as the TRA Agreement dated 29th September, 2014 and addendum 1 dated 11th December, 2014, Ms. Sanglikar would urge that receivables were

also hypothicated to the applicants. The TRA agreement created an exclusive charge over the amounts received by the company in liquidation. All these transactions were executed in the ordinary course of business. Thus, neither can the said transaction be termed as fraudulent preferences to one of the creditors nor can they be declared void under section 536 of the Act, 1956. Ms. Sanglikar urged with tenacity that the amount generated on charter of one of the vessels of the company in liquidation can by no stretch of imagination be said to be a matter of fraudulent preference.

13. As against this, Mr. Aditya Pimple, the learned counsel for the Official Liquidator, strenuously submitted that charter hire clearly forms part of the assets of the company in liquidation. Conceding that the initial objection of the Official Liquidator was centered amount fraudulent preference within the meaning of section 531 of the Act, 1956 and, later on, the Official Liquidator pleaded that the transactions were void under section 536 of the Act, 1956, Mr. Pimple would urge that the substance of the matter has to be looked into. Once the order of winding up is passed, it relates back to the date of the presentation of the petition and, therefore, all amounts deposited in the TRA account and generated from the charter of the vessel of the company in liquidation post presentation of the

Company Petition constitute an asset of the company in liquidation and thus the transfer would be void under section 536 of the Act, 1956, urged Mr. Pimple.

14. It is in this backdrop, according to Mr. Pimple, the Official Liquidator filed Official Liquidator's Report No. 83 of 2018 seeking direction, inter alia, to the applicant No. 1 to deposit all the amounts lying in the accounts in the name of company in liquidation maintained by the applicant No. 1, with the Official Liquidator (prayer clause (f)).

15. The preliminary objection on behalf of the Official Liquidator that the applicants are not secured creditors and the applicants did not enforce their security standing outside the winding up proceedings are not required to be delved into elaborately. The fact that a charge on the assets of the company in liquidation was created to secure the amount of Rs. 385 Crores is evidenced by the certificate of registration of charge dated 23rd January, 2015 (Exhibit B-1). Form No. CHG-1 (Exhibit B-2) lends support to the claim of the applicants that a first priority mortgage of vessel Malavia 36 came to be registered with the Ministry of Corporate Affairs in the sum of Rs. 385 Crores. Copies of the agreements

evidencing the extension of the financial facilities by the applicants annexed at Exhibit C-1, lend further support to the claim of the applicants.

16. Ms. Sanglikar was justified in placing reliance on the observations in an order passed by this Court dated 25th September, 2019 in Company Application No. 218 of 2019 in Company Petition No. 756 of 2014 wherein the capacity in which the applicant No. 1 was enforcing its securities was explained. The observations in paragraphs 9 and 10 read as under:-

9] Having considered the submissions, in my view, the Applicant has been held by this Court only to be acting in the capacity of mortgagee as well as secured creditor and this is apparent from the orders dated 6th June 2017 and 30th April 2019 by which orders, the Applicant has been granted leave to take out the application in the winding up proceedings for sale of Rig Kedarnath belonging to the Respondent Company (in liquidation). By the order dated 30th April 2019, the Applicant was directed not to use the amounts deposited in the Designated Account (no-lien account) without prior approval of this Court and the relief of appropriation of the sale proceeds as sought by the Applicant would be considered by the Company Court.

10. It is further apparent from the Affidavit filed by the Applicant pursuant to the order dated 12th April 2019 passed in the Notice of Motion taken out in Admiralty Suit No. 41 of 2015 (DVB Group Merchant Bank (Asia) Ltd. Vs. M.V. Malaviya 23 IMO No. 9299082 & Ors.) that the Applicant in the Affidavit

dated 15th April 2019 has stated that the Applicant has opted to stand outside the present liquidation proceedings of the Company (in liquidation) and further that the Applicant is entitled to enforce the securities belonging to the Company (in liquidation) which have been secured to the Applicant by way of mortgage/hypothecation. It is in this context that the present application sought the appropriate sale proceeds from sale of the Rig Kedarnath. In fact, the submission of the learned Counsel for the Official Liquidator that the Applicant having taken out the Company Application in the winding up proceedings would have given up its security and would have to lodge and prove its claim with the Official Liquidator and stand in line with the other unsecured creditors cannot be accepted. This Court has in the said orders referred above, clearly accepted the position of the Applicant as acting only in the capacity of mortgagee and secured creditor and the Applicant has also made it clear that it was acting in such capacity as mortgagee by choosing not to be a part of the winding up proceedings.

17. In the face of the aforesaid material and order, I find it rather difficult to accede to the submissions on behalf of the Official Liquidator that the applicants status as the secured creditors has not been established and they had not stood outside the winding up proceedings. This takes me to the core question as to whether in the capacity as secured creditors, the applicants are entitled to appropriate the amounts standing to the credit of TRA and O & M Expenses Sub Account.

18. To start with, it may be necessary to note few clauses of the

TRA Agreement dated 29th September, 2014. Clauses B, E and F of the TRA Agreement indicate the circumstances in which the said agreement came to be executed. They read as under:-

B] The Borrower has requested the lenders to provide financial assistance on the terms of corrective action plan by way of a term loan for an amount not exceeding Rs. 385,00,00,000/- (Loan Facility) with interchangeable sub-limits in the form of letter of credit limit (LC facility) and bank guarantee (BG facility) as set out against their respective names in Schedule I hereunder.

.....

E] One of the conditions of the Facility Agreement is that the borrower shall enter into a trust and retention account agreement and the trust and retention account shall have been opened/established with the Account Bank into which all the proceeds (as defined in the corrective action plan and the Facility Agreement) shall be deposited and appropriated in the manner specified in this agreement; and

F] The Lenders, in consultation with the Borrower, has decided to appoint Axis as the Account Bank on the terms and conditions set out hereunder.

19. Clause 2.6 obligated the Borrower to pay into the TRA the amounts received by the Borrower, reads as under:-

2.6] Payments into the TRA :-

The Borrower shall pay or cause to be paid into the TRA as provided in this Agreement, immediately on receipt, any proceeds received by the Borrower from any source whatsoever, whether received by the Borrower or by any other person on behalf of the Borrower and the Sale Proceeds. Unless otherwise provided in this Agreement, the Borrower further undertakes that all invoices and other demands or requests for payment of amounts relating to the business of the Borrower (including amounts in respect of trade receivables, proceeds of sales of

assets of the Borrower, rebates and other receipts) owed or payable or to be owed or payable to the Borrower from whatever source, shall be so directed that such amounts are payable by telegraphic transfer to, or by any other means which shall result in the payment of such amounts directly into the TRA or shall result in the deposit/transfer of such amounts into the TRA and shall ensure that such amounts are paid directly into the TRA or are deposited/transferred into the TRA.

20. An operational fund account was to be maintained in accordance with Clause 4 which reads as under:-

4. Operational Fund Account :-

The Borrower shall open and maintain, in its name, Operational Fund Account on the date hereof until the Final Settlement Date. The Borrower shall pay all the amounts by real time gross settlement, or by any other means which results in the payment of such amounts directly into the Operational Fund Account or results in the deposit/ transfer of such amounts into the Operational Fund Account. The Borrower shall pay or cause to be paid into the Operational Fund Account, the following immediately on receipt:

(a) all proceeds including the cash flows from the Vessels (excluding 9 (nine) charter vessels financed by foreign lenders until repayment of the entire loan such foreign lenders) and project receipts from ONGC to be routed through account of YES Bank Limited.

(b) all Disbursements under the Facility; and

(c) Investment income and investment proceeds from the permitted investments made from the funds lying in the Operational Fund Account, save to the extent that the Borrower is allowed to reinvest such investment income in further permitted investments.

The Operational Fund Account shall have the following Sub-Accounts:

a. "Statutory Dues Sub-Account"

- b. "O & M Expenses Sub-Account"
- c. "Debt Service Payment Sub-Account"
- d. "Surplus Sub-Account; and"
- e. "Distribution Sub-Account".

21. Clause 5.2 provided for O & M Expenses Sub-Account -

(a) Deposits :

To the extent that there are sufficient funds available in the Operational Fund Account, the transfers to be made into this account shall be as set out in Clause 4.2(b) hereof.

In the event that there are insufficient funds available Operational Fund Account on any Monthly Cash Transfer Date to transfer the Amount Due towards the O & M Expenses to the O & M Expenses Sub-Account, the Account Bank shall transfer such amounts (to the extent of the Required Amount), from the Surplus Sub-Account.

(b) Withdrawals :

The Borrower may withdraw amounts from the O & M Expenses Sub-Account to meet the O & M Expenses falling due, from time to time in accordance with the Operational Budget. The Borrower may withdraw amounts standing to the credit of the O & M Expenses Sub Account only if the procedure as set out in Clause 9.2 hereof has been complied with.

If, on any Monthly Cash Transfer Date, the aggregate of the balances standing to the credit of the O & M Expenses Sub-Account exceeds the Required Amount, the surplus shall be transferred by the Account Bank to the Operational Fund Account and applied in the Operational Period Order of Priority.

22. Under clause 11(b) the Borrower undertook, inter alia, to ensure that the Trust and Retention Account and each of the Sub Accounts were and continued to be, charged in favour of the Security Trustee/Lender.

23. Finally the Event of Default Clause 13 provided as under:-

13] Event of Default :-

On occurrence of Event of Default, the Facility Agent, without the consent of the Borrower and upon Facility Agent giving notice to the Account Bank, shall become the sole signatory on the Trust and Retention Account, the TRA and all Sub-Accounts shall apply all amounts in the Trust and Retention Account, the TRA and all Sub-Accounts in or towards the discharge of Obligations (including Permitted Investments) as the Facility Agent may decide (and may appropriate such amounts to such obligations in such order as the Facility Agent think fit). After delivery of such notice, no amount will be payable to the Borrower, or may be withdrawn by the Borrower, with respect to the TRA and any Sub-Account save as the Facility Agent otherwise agree.

24. A conjoint reading of the aforesaid clauses would indicate that in consideration of the financial assistance upto Rs. 385 Crores extended by the creditors the company in liquidation had agreed to pay or caused to be paid into the TRA all the proceeds received by the company in liquidation from any source whatsoever whether received by the company in liquidation or any other person on behalf of the company in liquidation and the sale proceeds. The company in liquidation also undertook to pay or caused to be paid into the Operational Fund Account all proceeds including the cash flows from the vessels and project receipts from ONGC. The Operational Fund Account was to have O & M Expenses Sub Account as one of the Sub Accounts. The company in liquidation further

undertook that the Trust and Retention Account and each of the Sub Accounts were to be continued to be charged in favour of the security trustee/ lenders. In the event of default, the company in liquidation ceased to have authority to withdraw any amount from the TRA and any of the Sub Accounts.

25. In the backdrop of the aforesaid nature of the transactions between the applicant and the company in liquidation, the core question noted above deserves determination. It would be contextually relevant to note that the Company Petition No. 756 of 2014 was presented on 28th August, 2016. The TRA came to be executed on 29th September, 2014 followed by Addendum- 1 dated 11th December, 2014. Provisional Liquidator came to be appointed on 5th May, 2017 and eventually the winding up order was passed on 14th December, 2017.

26. In the context of the nature of the transactions, where a huge financial facility was extended to the company in liquidation, the objection on behalf of the Official Liquidator that the credit of amounts in the TRA and O & M Expenses Sub Account amounts to fraudulent preference to the creditor does not merit acceptance. Evidently, these agreements were executed by the company in

liquidation in the ordinary course of business. The charter of Malavia 36 to ONGC and the transfer of the receivables consequent to the charter can not be explained on any premise other than that of the dealing with the assets of the company in the ordinary course of business. The contention on behalf of the Official Liquidator that such credit of the charter hire to TRA and O & M Expenses Sub Account would be invalid for being a fraudulent preferences to one of the creditors does not seem to be borne out by the material on record.

27. One gets an impression that realizing the difficulty in pursuing the objection that the transactions constitute fraudulent preference within the meaning of Section 531 of the Companies Act, 1956, the Official Liquidator contended that the transaction would be void under section 536 of the Act, 1956.

Section 536 reads as under:-

536 Avoidance of transfers, etc., after commencement of winding up -

(1) In the case of a voluntary winding up, any transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void.

(2) In the case of a winding up by [the Tribunal], any

disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall [unless the Tribunal] otherwise orders, be void.

28. Sub section (2) of Section 536 provides that any disposition of the property of the company in liquidation and any transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall be void unless the Tribunal otherwise orders. Under section 441 of the Act, 1956, the winding up of a company shall be deemed to have commenced at the time of the presentation of the petition for winding.

29. It would thus imply that any transaction entered into by the company from the date of the presentation of the petition, (where a winding up order is eventually passed) would be void. It is for this reason the expression 'unless the Tribunal otherwise orders' used in section 536(2) of the Act, 1956 assumes critical salience. The Court/ Tribunal is invested with authority to validate the disposition of the property which have been made since the date of the presentation of the petition. The matter clearly lies in the arena of discretion. It is trite such discretion has to be exercised judiciously. A very rigid view of the matter has the inevitable

consequence of bringing the operations of the company to a grinding halt, the moment winding up petition is preferred. Conversely, a too liberal a view may lead to a situation that nothing comes in the hands of the liquidator to satisfy the claims of the creditors and other stake holders. Thus the Court has to steer clear of the two extremes.

30. The approach to be adopted by the Court while dealing with a case covered by the provisions contained in section 536 of the Companies Act, 1956 was delineated by a Division Bench of this Court in the case of **Tulsidas Jasraj Parekh vs. Industrial Bank of Western India and Others**¹, which is often quoted, in the following words:-

33] Now here as regards Section 227 (O) the Court has to steer a middle course between two extremes. On the one hand the words of the section are wide enough to include any sale or payment that a company may make after the date of the winding-up petition. On that basis any business would practically, have to be stopped if Section petition was presented, because it would be unsafe to dispose of any of the company's assets. For instance, a Mill company might not be able to buy a ton of coal for the use of its furnaces, or on the other hand it might not be able to sell any of its goods in the ordinary course of business, Consequently, the Court has very properly laid down that speaking generally any bona fide transaction carried out and completed in the ordinary course of current business will be sanctioned by the Court under Section 227(2). On the other hand it will not allow the assets to be disposed of at the mere

1 1930, Indian Law Reports (Vol. LIV), 718.

pleasure of the company, and thus cause the fundamental principle of equality amongst creditors to be violated. To do so would in effect be to add to the preferential debts enumerated in Section 230 a further category of all debts which the company might choose to pay wholly or in part.

(emphasis supplied)

31. The aforesaid judgment was referred with approval by the Supreme Court in the case of **Pankaj Mehra and Another vs. State of Maharashtra and Others**². The Supreme Court expounded the import of the term 'void' used in the section 536 of the Companies Act, 1956. It was enunciated that the expression, "unless the court otherwise orders" are capable of diluting the rigor of the word "void" and warrants its construction in a less rigid manner. The observations of the Supreme Court in paragraphs 14, 15 and 20 are instructive and, hence, extracted below.

14] In the above backdrop alone we can consider the impact of the legislative direction in Section 536(2) that any disposition of the property of the company made after the commencement of the winding up (i.e. after the presentation of a petition for winding up) shall be void. There are two important aspects here. First is that the word "void" need not automatically indicate that any disposition should be ab initio void. The legal implication of the word "void" need not necessarily be a stage of nullity in all contingencies. Black's Law Dictionary gives the meaning of the word 'void' as having different nuances in different connotations. One of them is of course "null, or having no legal force or binding effect". And the other is "unable in law, to support the purpose for which it was intended". After referring to the nuances between void and voidable the Lexicographer pointed out the following :

2 (2000) 2 Supreme Court Cases 756.

"The word 'void' in its strictest sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force, but frequently the word is used and construed as having the more liberal meaning of 'voidable'.

The word 'void' is used in statutes in the sense of utterly void so as to be incapable of ratification, and also in the sense of voidable and resort must be had to the rules of construction in many cases to determine in which sense the Legislature intended to use it. An act or contract neither wrong in itself nor against public policy, which has been declared void by statute for the protection or benefit of a certain party, or class of parties, is voidable only."

15] For discerning the legislative idea in employing the word "void" in the context set out in Section 536(2) of the Companies Act the second aspect to be noticed is that the provision itself shows that the word void is not employed peremptorily since court has power to order otherwise. The words "unless the court otherwise order" are capable of diluting the rigor of the word "void" and to choose the alternative meaning attached to that word.

.....

20] It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralysed, for, the company may have to deal with very many day-to-day transactions, make payments of salary to the staff and other employees and meet urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is adopted, a fraudulent company can deceive any bonafide person transacting business with the company by stage-managing a petition to be presented for winding up in order to defeat such bonafide customers. This consequence has been correctly voiced by the Division Bench in the impugned judgment.

(emphasis supplied)

32. A judgment of a learned single Judge of Calcutta High Court in Re: J. Sen Gupta (Private) Limited (In Liquidation)³, on which reliance was placed by Ms. Sanglikar, is also often quoted for the propositions succinctly postulated therein. Paragraph No. 14 which culls out the principles reads as under:-

14] It seems to me, therefore, upon considering various authorities on this subject that the following principles are doubtless applicable to sub-section (2) of section 536 of the Companies Act, 1956:

(1) The Court has an absolute discretion to validate a transaction.

(2) This discretion is controlled only by the general principles which apply to every kind of judicial discretion.

(3) The court must have regard to all the surrounding circumstances and if from all the surrounding circumstances it comes to the conclusion that the transaction should not be void, it is within the power of the court, under Section 536(2) to say that the transaction is not void.

(4) If it be found that the transaction was for the benefit of and in the interests of the company or for keeping the company going or keeping things going generally, it ought to be confirmed.

33. Mr. Pimple, the learned counsel for the Official Liquidator would urge that if the case at hand is considered on the touchstone of aforesaid principles, an inference become inescapable that the transactions in question do not commend validation. To bolster up this submission, Mr. Pimple placed reliance on another Division Bench judgment of this Court in the case of Sunita Vasudeo Warke

3 1961 SCC OnLine Cal. 143.

vs. Official Liquidator and Others⁴. In the said case, after adverting to the pronouncements in the case of **Tulsidas Parekh** (supra) and **Pankaj Mehra** (supra), the legal position was expounded as under:-

10] The effect of Section 536(2) is that where a winding-up proceeding is by or subject to the supervision of the Court, any disposition of the property of the company which is made after the commencement of the winding-up is void, unless the Court otherwise orders. Under section 441(2), a winding-up of a company by the Court is deemed to have commenced at the time of the presentation of a petition for winding-up. Sub-section 2 of Section 536 confers an enabling power on the Court to direct that a disposition of the property of a company shall not be void, though it was effected after the commencement of winding-up proceedings. Since an enabling power is conferred upon the Court, to order otherwise, a disposition after the commencement of a winding-up proceeding is not, in law, regarded as void ab-initio or a nullity in all situations. Parliament has used the words "unless the Court otherwise orders" to dilute the rigour of the word "void" by conferring a power on the Court to protect a bona fide transaction. This principle is incorporated to protect bona fide transactions carried out and completed in the ordinary course of the current business of a company. The presentation of a petition for winding-up does not by itself disable a company from carrying on its business. Companies in the ordinary course of business have to carry out transactions involving a disposition of properties as an incident of their business activities. These transactions are not foreclosed, for to hold otherwise would bring the business to a grinding halt. The law would not permit such a consequence by disabling a company from attending to business in the ordinary course merely because a petition for winding-up is instituted. The law recognizes this position and the practical necessity for a company against which a petition for winding-up has been presented to continue its business.

.....

4 2013 (2) Mh.L.J. 777.

12] In view of the judgment of the Supreme Court it is now a settled principle of law that if a transfer is not completed before an order of winding-up has been passed, an application would not be maintainable before the Court for a direction to the Official Liquidator to complete the transfer. This principle necessarily follows the settled legal position that upon the passing of an order of winding-up, no new rights can be completed and no uncompleted rights can be completed.

34. Mr. Pimple also placed reliance on a judgment of a learned single Judge of this Court in the case of Board of Industrial and Financial Reconstruction vs. M/s. Hindustan Transmission Products Limited (In liqn.)⁵ wherein it was, inter alia, observed that the applicants seeking the validation of a transaction under section 536(2) must plead and prove not only that the transfer is bona fide but also that the transfer was in the interest of the company. Mr. Pimple would urge that, in the case at hand, the applicants have failed to establish these pre-requisites.

35. I am afraid to accede to the aforesaid submission. A distinction is required to be drawn between the cases where disposition is in the ordinary course of business and where the transactions were shown to be not in the ordinary course of business. In the former case, the burden which rests on a party who seek the validation is less rigorous. In the later case, the question as to whether the

5 OLR No.145/2011 Dt. 05/09/2012.

transaction was for the benefit of the company or for keeping the company a going concern or keeping things going generally may become more poignant. However, where the disposition is shown to have been in the ordinary course of business, the Court may not insist upon the fulfillment of all the conditions which are referred to in the fourth principle culled out in the case of Re: J. Sen Gupta (supra).

36. On the aforesaid anvil reverting to the facts of the case, it is imperative to note that the TRA was executed by the company in liquidation apparently in the ordinary course of business and by way of a measure of repayment of the financial facilities extended by the creditors. There is a specific reference to the obligation to deposit of proceeds including the cash flows from the vessel, and project receipts from ONGC. Letting on hire the vessel, owned by the company in liquidation, was the primary and principal business of the company in liquidation. It would be inconceivable to hold that the said exercise was not in the ordinary course of business of the company in liquidation.

37. I find substance in the submission of Ms. Sanglikar that the amount which was generated by the vessel Malavia 36 upon its

charter and duly credited to the TRA can not carry taint of fraudulent disposition. In substance, the transfer of the said amount was a bonafide act in the ordinary course of business.

38. Since the company in liquidation had created the security over the said amount as well, the secured creditors are within their rights in standing outside the liquidation process and enforce the security subject to the obligation under section 529A of the Companies Act, 1956. In fact, the applicants have undertaken to bring back the amount to satisfy the workmen's dues.

39. In the affidavit in reply to the additional affidavit, the Official Liquidator has asserted that the Official Liquidator has admitted the claims of seafarers and crew members in respect of vessel Malavia 36 aggregating to a sum of Rs. 6,01,14,233/-.

40. The said affidavit in reply further adverse to the fact that the vessel M.V. Malavia 36 has been sold for Rs. 8,50,00,000/- and the sale proceeds are lying with the office of Official Liquidator. The seafarer and crew members have highest priority as the maritime lease holder under section 9(1)(a) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017. The claim of seafarer

and crew members can thus be satisfied out of the sale proceeds. Therefore, in my view, the fact that the Official Liquidator has admitted the claim of seafarer and crew members of the vessel M.V. Malavia 36 would not constitute an impediment in allowing this application subject to an undertaking by the applicants to bring back the amount to satisfy the workmen's dues.

41. The aforesaid direction also deals with the prayer clause (f) of the Official Liquidator's Report No. 83 of 2018.

Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicants are permitted to appropriate the amounts of Rs. 16,81,12,579.95/- standing to the credit of Trust and Retention Account and O & M Expenses Sub Account as of 30th June, 2021 along with the interest accrued thereon towards the secured dues of the applicants against the company in liquidation subject to furnishing an undertaking that the applicants would bring back the amount required to satisfy the workmen's dues under section 529A of the Companies Act, 1956.
- 3] Such undertaking be filed within a period of two weeks from today.

- 4] The applicants shall also furnish a statement indicating the total amount which the applicants have appropriated, to the Official Liquidator.
- 5] Such statement be furnished to the Official Liquidator within two weeks of the appropriation.
- 6] The prayer clause (f) of the Official Liquidator's Report No. 83 of 2018 stands worked out.
- 7] Official Liquidator's Report No. 83 of 2018 be listed separately.
- 8] There shall be no order as to costs.

(N.J.JAMADAR, J.)