

(2020) 03 DEL CK 0220
In the Delhi High Court
Case No : CO.APP. No. 8 Of 2020

Bharti Bhagwan Jadhav

APPELLANT

Vs

Jvg Finance Ltd

RESPONDENT

Date of Decision : 16-03-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100A, Order 3 Rule 2
Companies (Court) Rules, 1959 — Rule 164
Companies Act, 1956 — Section 446, 446(1), 450, 456(1), 483, 542
Transfer of Property Act, 1882 — Section 53A

Citation : (2020) 03 DEL CK 0220

Hon'ble Judges : Manmohan, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : Ravi Kant Chadha, Mansi Chadha, Sidhant Chaudhary, Dheeraj Gupta, Titasha Banerjee, Sanam Siddiqui, Diksha Arora, Kunal Sharma

Final Decision : Dismissed

Judgement

Manmohan, J

C.M. No. 9822/2020 (exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

C.M. No. 9823/2020 (delay)

Keeping in view the averments made in the application, the same is allowed and delay in filing the company appeal is condoned.

Accordingly, the application stands disposed of.

CO.APP. 8/2020 & C.M. No. 9821/2020

1. The present appeal has been filed challenging the order dated 10th January, 2020 passed by the Company Court in CA No. 2-5/2010 and CA No. 34/2011 in

CP No. 265/1998 titled as Reserve Bank of India v. M/s J.V.G. Finance Ltd. By virtue of the impugned order, the objections filed by the appellants to the Thareja Committee Report were dismissed and the Official Liquidator was directed to take possession of the four flats in question forthwith. The official liquidator was held entitled to seek police protection.

2. Since the impugned order encapsulates the facts and extensively deals with the submissions advanced by the learned counsel for the appellants, the relevant portion of the said order is reproduced hereinbelow:-

"15. I may now deal with the above contentions. I may first notice the observations of this court as stated in order dated 11.05.2005 while dealing with Co. Appl. No. 892/2000 filed by the ex-management. This court had recorded the following findings on the claim of the claimants:-

"17. The next question would be about the genuineness of the purported transactions. From the aforesaid description, it would be clear that the authority in favour of Dr.Sukhvir Singh allegedly flows from some Board Resolution dated 3rd January, 1997.

Further, all the Agreements to sell record Board Resolutions purporting to accept the proposals of the intervenors for purchase of respective flats. Therefore, after hearing the arguments, the Official Liquidator was directed to file minutes of the Board meetings of the company for period June to August, 1997.

18. On the other hand, payment of entire consideration of Rs.30 lacs in cash by all the four alleged purchasers/intervenors also puts question mark on the authenticity of the transactions. Further, if the property was purchased in the years 1997-1998 and it is not an ante-dated transaction manufactured later but an honest deal, the intervenors must have shown purchase of these flats in the income tax returns. Because of this reason the intervenors were also directed to file income tax returns for the counting year 1997-98 (assessment year 1998-99) indicating whether the purchase of flats in question was shown in their returns or not. They were also directed to file an affidavit stating source of Rs.30 lacs purportedly paid in cash for the purchase of flats in question.

Although two weeks' time was given for this purpose, requisite affidavits have not come on record. In the absence of these documents it cannot be conclusively determined as to whether the transactions in question are genuine or not.

It may be noted that this court has already appointed a One Man Committee of Mr.G.P.Thareja, retired Additional District Judge, Delhi who is going into large number of such claims filed by many applicants claiming to have purchased flats/land etc. from the company. The claims of these intervenors can also be looked into by him."

Clearly, this court noted that the claimants have failed to produce relevant documents to show their titles. However, an opportunity was granted to the claimants to produce their title documents before the Thareja Committee.

16. The Thareja Committee has rejected the contentions of the claimant. I may look at the findings recorded by the Thareja Committee in the light of the above noted facts. The report dated 22.12.2009 amongst others states as follows:-

(i) The report notes that none of the original document has been placed on record by the claimants. Study of documents of all the files reflects for reasons recorded that bogus claims have been preferred by the Attorney Mr. Tarun Rathi in the name of the four women.

(ii) The Committee notes the statement of accounts filed by Milan Enterprises on the basis of which it was alleged that the said concern advanced money to the claimant. This alleged loan was the source of funds of the claimant to buy the flat. It is also noted that the statement of accounts does not bear the stamp or certificate of any of the bankers. The report concludes that scrutiny of the documents would reveal that not a single penny of the claimants is at stake. Though a string of borrowing is sought to be created but even at the end of the tunnel there is no proof regarding the payment of consideration that may satisfy the judicial conscience. It is further stated that if such borrowing is made, there is nothing to suggest that an effort was made by the persons lending the money to the extent of Rs. 1.20 crores to take back the money. This conduct itself belies the genuineness of the transaction.

(iii) No original resolution of JVG has been placed on record by the claimants.

(iv) Regarding the agreement to sell in question, it is stated that the document is manufactured for the purpose of the claim at a later stage.

(v) The Committee also notes that Dr. Sukhbir Singh has nothing to do with JVG and that the documents have been filed to commit a fraud before the Committee.

(vi) The Thareja Committee also records that the claimants have not appeared in person to support their claim. However, the report concludes that the documents produced by the OL indicate that it is Sh. Tarun Rathi who had been allegedly occupying the flats after breaking the seal of the Official Receiver of the Bombay High Court. Further it concludes that bogus claims have been made by the said Sh. Tarun Rathi. Had the claims been genuine, the claimants would have appeared in the witness box to submit their claims of the flats.

(vii) On the deposition of witnesses, the Committee states as follows:-

"1. I have scrutinized the deposition of Sh. Rathi, POA holder for all four files. His deposition clearly indicates that he has no personal knowledge about the transaction. The documents which he referred in his deposition have already been considered. His deposition is not of any worth particularly because no cogent reason has been given as to why the claimants have not appeared to support their claims. Moreover, a bunch of documents submitted by way of Report by Ms. Richa Kukreja, Dy. Official Liquidator with annexure indicate that it is Tarun Rathi who has illegally occupied the flats after breaking of the seal of the Official Receiver of Bombay. This clearly indicates that bogus claimants have

been made to stand by Sh. Rathi. Had the claimants been genuine they would have appeared in the witness box to support the claim of flat. The correspondence produced on record by the Official Liquidator which consists of the application submitted to the Official Liquidator by Sunita Aggarwal whereby she sought three weeks time to vacate the flat shows that the claimants have no capacity to acquire the flats and there is no claim of the claimant as has been set up through Sh. Rathi. Similarly claimant Swati Verma has sought three weeks time for vacating the flat. These applications of the claimant further negate the deposition of Sh. Tarun Rathi. The statement of Sh. Tarun Rathi is otherwise also rejected.

2. Another witness who has been examined is Sh. Sudhir Kumar. The documents reference to which has been made in his deposition has already been rejected. His oral evidence is of no worth. Moreover, Sudhir Kumar claims to have participated in the alleged transaction of loan but there is nothing on record to suggest the consideration for which he participated in the said transaction. Material on record indicates, as already noted, that he has aided the claimants and their attorney in the matter of false claims preferred by the said claimants.

3. Another witness examined is Sh. Sukhbir Singh. This witness has tried to help and aid the claimant by supporting the story set up by the claimant. This witness as per documents produced on record by the claimant was never a director in JVG Finance Ltd. And he went to the extent of making the false statement that he was a director in the said company. He has tried to develop the story that the flat had to be transferred to the claimant on account of the urgent necessity of JVG Finance to satisfy the investors. This witness in his deposition has admitted about the enquiry by the RBI and also admitted that alleged money was received without resolution and in cash. He has also not explained where he deposited this huge amount of Rs. 1.20 crores. Instead he deposed that he does not remember the date of deposit nor does he have any record. He further deposed that it was V. K. Sharma who introduced him to Sh. Tarun Rathi. I have gone through his deposition. It is not worth to be relied upon. Since the documentary evidence produced by the claimant in the form it has been produced has already been rejected. I need not further dilate upon his testimony.

4. The last witness examined is Sh. M. N. Wadhwa, Chairperson of the Panchtantra Society. The said society was constituted on 26.06.2001. He supported the version of the Official Liquidator that the flats belong to JVG Finance Ltd. In flat No. 104 Sh. V.K. Sharma stayed in the year 2002-2003. After 2003 none stayed until new occupants forcibly broke open the seal and occupied the said flat. He deposed that in flat no. 504 and 505 Swati Verma and Sunita Aggarwal were staying. They were there before the societies were formed but new persons were staying in the said flats at the time the deposition was made and they had left the flats. Neither Swati Verma nor Sunita Aggarwal are the members of the society. He produced the documents exhibit OW1/1-6. Sunita Aggarwal sought the membership but she was not made member as the

agreement she gave had no stamp duty paid nor were registered. The letter Exhibit OW1/10/1 dated 26.06.2001 produced by Sh. Wadhwa shows that flat no. 104 is unoccupied. In flat no. 105 servants often change. In flat no. 504 Pradeep Aggarwal runs some office. In flat no. 505 also some office is run and Swati Verma does not reside there. Under the circumstances the deposition of Mr.Wadhwa is also of no assistance to the claim of claimants."

17. Based on the above conclusions, the Thareja Committee rejected the claim of the claimants.

18. I now have a look at the nature of documents produced by the claimant-Ms.Bharti Bhagwan Jadhav to claim her title to the flat in question. The documents include Exhibit P-1 which is a GPA executed by the claimant in favour of Mr.Tarun Rathi. Thereafter to prove the transaction, the claimant produced Exhibit P-2 a communication dated 14.07.1997 addressed by the claimant to JVG wherein she states that Flat No. 104 in question has been agreed to be sold to her for a consideration of Rs. 30 lakhs which amount was enclosed alongwith said communication as full and final payment of said flat in cash. The letter also has a thumb impression allegedly of the claimant. On the same date Dr. Sukhbir Singh (presumably) issued a cash receipt of Rs.30 lakhs on behalf of JVG stating that the proposal has been accepted by the Board of Directors and the agreement to sell was purportedly entered on 17.07.1997 copy of which is Exhibit P-4. By the said agreement it is claimed that the property has been sold to the claimant. This document was again allegedly executed by Dr. Sukhbir Singh and Ms. Bharti Bhagwan Jadhav (by affixing her thumb impressions) on the document. A letter dated 17.07.1997 was also written by JVG to the claimant handing over possession/keys of the flat. The above photocopies of unregistered documents are the sum and substance of the title papers of the claimant.

19. To prove the source of funds to purchase the flat, Ms.Bharti Bhagwan Jadhav has filed some documents which include a copy of a letter written by one Sh. Sudhir Kumar, Power of Attorney Holder of Mr.Mukesh C. Shah of Milan Enterprises dated 02.06.1997 whereby it is proposed to give a loan of a sum of Rs. 30 lakhs against the security /purchase of the property being Flat No. 104 to the claimant. A photocopy of a statement of account is placed on record to try and show adequate funds in the account of Milan Enterprises. Exhibit P-8 is an acknowledgement of receipt of Rs. 30 lakhs allegedly received from Sh. Mukesh C. Shah by Ms.Bharti Bhagwan Jadhav. Some notices were sent to Ms.Bharti Bhagwan Jadhav for refund of the money.

20. In this context there are two interesting letters which are placed on record to show as to how the sum of Rs. 30 lakhs was generated by Ms.Bharti Bhagwan Jadhav. One NE Electronic Ltd. on 22.08.1997 offered to sell to Ms.Bharti Bhagwan Jadhav shares worth Rs.30-35 lakhs (approximately). The said NE Electronic Ltd. forwarded the shares to Ms.Bharti Bhagwan Jadhav on 22.08.1997 without receipt of sale consideration. These shares have been subsequently forwarded to Sh.Mukesh C.Shah through the Power of Attorney Holder Sh.Sudhir

Kumar as return of the loan of Rs.30 lakhs that was received from the said Sh. Mukesh C. Shah/the concern Milan Enterprises. No consideration has been paid by Ms.Bharti Bhagwan Jadhav to NE Electronic Ltd. for the shares bought from the said company. Some reminders allegedly received from NE Electronic Ltd. addressed to Ms.Bharti Bhagwan Jadhav have been placed on record where the said NE Electronic Ltd. seeks payment of Rs. 30 lakhs with interest for the shares purchased by Ms.Bharti Bhagwan Jadhav. The chain of documents ends there. So as per this chain, Ms.Bharti Bhagwan Jadhav still owes Rs.30 lakhs to NE Electronic Ltd. for the shares bought. That is the manner in which it is claimed that Ms.Bharti Bhagwan Jadhav generated funds for purchase of the flat in question.

21. It is clear that the nature of documents placed on record cannot inspire confidence of a court of law. As already noted above, RBI passed a prohibitory order against JVG on 10.10.1997. As per the said order, JVG was restrained from selling any assets without necessary permission of RBI. The documents above show that the sale transaction appears to have been carried out hastily before the prohibitory order was passed by RBI on 10.10.1997. By means of unregistered documents, sale of a valuable immovable property is sought to be done. The consideration was allegedly paid in cash by the claimant who cannot sign her name. There is no record with JVG showing receipt of this money.

To show that the claimant had the means to pay the consideration for the flat, some more suspicious documents are placed on record. One Sh.Mukesh C. Shah (Milan Enterprises) through his Power of Attorney Holder Sh. Sudhir Kumar executes a communication dated 02.06.1997 giving a loan to the claimant of Rs. 30 lakhs, that too in cash. Admittedly, the claimant is unable to refund the loan. The claimant thereafter on 22.08.1997 without paying any amount pursuant to an agreement buys shares of three different companies allegedly worth Rs. 30 lakhs. These shares for which no consideration is paid by the claimant are thereafter sought to be handed over to Sh. Mukesh C. Shah, the proprietor of Milan Enterprises through POA Holder Sh. Sudhir Kumar in lieu of return of the loan amount of Rs. 30 lakhs. There is nothing to show that the seller of the shares, namely, NE Electronic Ltd. was ever paid the consideration for purchase of the shares by the claimant. One cannot but concur with the view taken by the Thareja Committee that the documents are nothing but a camouflage to show as to how the claimant has come in possession of the sum of Rs. 30 lakhs to pay the consideration for the flat in question. In fact the claimant have with no personal contribution of funds have allegedly managed to buy a flat for Rs.30 lakhs.

22. Apart from the nature of the above documents placed on record as noted above, there are other aspects which persuade me to confirm my conclusion that the claimants have failed to discharge their duty to show their title to the flats in question. I may note these aspects also.

23. Firstly, I may note that this court on 11.5.2005 heard arguments on CA

892/2000 and reserved judgment. The Court had directed the claimants to file their Income Tax Return for the Accounting Year 1997-98 Assessment Year 1989-99 indicating whether the purchase of the flats in question was shown in their Income Tax Returns or not. They were also directed to file an affidavit stating the source of Rs.30 lacs which they claim to have paid in cash as consideration for purchase of the flats. This Court while disposing of CA 892/2000 by judgment dated 4.7.2005 noted that despite the above order of this court the claimants have failed to file the Income Tax Returns for the relevant period or to file the concerned affidavit stating the source of Rs.30 lacs. I may note that the Income Tax Returns have still not been placed on record by the claimants to show that they have declared purchase of this flat in their said returns.

24. The second aspect which needs to be noticed is that the claimants have failed to step into the witness box and lead their evidence. A power of attorney holder Shri Rathi has referred to the said alleged title documents in his deposition. The Supreme Court in *Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd. and Others*, (2005) 2 SCC 217 on the evidence of an Attorney Holder held as follows:-

"17. On the question of power of attorney, the High Courts have divergent views. In the case of *Shambhu Dutt Shastri v. State of Rajasthan* [(1986) 2 WLN 713 (Raj)] it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in the case of *Ram Prasad v. Hari Narain* [AIR 1998 Raj 185 : It was held that the word "acts" used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

....

21. We hold that the view taken by the Rajasthan High Court in the case of *Shambhu Dutt Shastri* (supra) followed and reiterated in the case of *Ram Prasad* (supra) is the correct view. The view taken in the case of *Floriano Armando Luis* [(2002) 2 Bom CR 754] cannot be said to have laid down a correct law and is accordingly overruled."

25. Clearly, a Power of Attorney holder of a party can appear as a witness in his

personal capacity. He cannot appear as a witness on behalf of a party. In the present case the claimants themselves have not appeared in the witness box. It is a Power of Attorney Holder who has appeared as a witness on behalf of the alleged title holders of the flat. The Thareja Committee has rightly discarded the evidence of the Power of Attorney Holder as to no effect.

26. The third aspect that I may note which aspect has also been noted by the Thareja Committee is that the claimants have failed to file the original title documents on the basis of which JVG Finance Limited became the owner of the flats in question. It is claimed that these original documents are in the custody of the OL but no credible evidence to that effect has been placed on record. A purchaser of immovable property will normally be in possession of title papers by which the seller of the property claims title.

27. I may also note that the SFIO in its report dated 11.02.2010 has also commented upon the alleged sale of the said flats. The SFIO concludes as follows:-

"4.6.11 From the above it is clear that these four ladies were used as front persons to camouflage the dubious sale of these flats by Shri Sukhbir Singh to these ladies. These flats were the properties of M/s JVG Finance Ltd. and were sold unauthorisedly and the proceeds of sale were misappropriated by Shri Vijay Kumar Sharma and Shri Sukhbir Singh. The funds of the company were thus siphoned off by Shri Vijay Kumar Sharma in connivance with Shri Sukhbir Singh."

28. Hence, the SFIO has concluded that these are fictitious transactions and only a mechanism to siphon the funds by the ex-management through Dr. Sukhbir Singh, the alleged signatory of the documents in question and Mr.V.K.Sharma.

29. In my opinion, the claimants have not been able to show any reason as to why the findings recorded by the Thareja Committee are erroneous or are liable to be set aside. Facts speak for themselves.

30. Reference may be had to Section 542 of the Companies Act, 1956 which reads as follows:

"542. LIABILITY FOR FRAUDULENT CONDUCT OF BUSINESS.

(1) If in the course of the winding up of a company, it appears that any business of the company has been carried on, with intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the Court, on the application of the Official Liquidator, or the liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

On the hearing of an application under this sub- section, the Official Liquidator or

the liquidator, as the case may be, may himself give evidence or call witnesses.

(2) (a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

(b) In particular, the Court may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf.

(c) The Court may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

(d) For the purpose of this sub-section, the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.

(4) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made."

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33. Clearly, given the fraudulent acts undertaken under deceit and camouflage, herein the standard of proof required to prove such fraudulent conduct would necessarily be less. In my opinion, the claimants have completely failed to prove their title to the properties in question. The documents, namely, agreement to sell and the receipt placed on record are make belief. The sale of immovable properties said to have been effected through the unregistered agreement to sell and the alleged receipt of consideration in cash raises grave suspicion on the validity of the sale. The claimants have failed to discharge their onus to prove their title to the properties.

34. I may now deal with another plea strongly raised by the learned senior counsel for the claimant, namely, reliance on the compromise decree passed by the Bombay High Court in favour of the claimant. The compromise decree is based on consents term which reiterates the alleged transaction of sale of the

flat.

35. In the case of Ms.Bharti Bhagwan Jadhav the decree was passed on 21.01.2000. A perusal of the decree shows that the consent terms were filed between the plaintiff-Ms.Bharti Bhagwan Jhadva and JVG Finance Ltd. which are said to have been signed by Dr. Sukhbir Singh and Ms.Bharti Bhagwan Jadhav by affixing her thumb impressions on the consent terms dated 21.01.2000. It is an admitted fact that on that date, the OL had already been appointed as the Provisional Liquidator vide order dated 05.06.1998. Under section 450 of the Companies Act the OL was in possession of the entire assets of the company on that date. Under section 446 of the said Act, no proceedings could have been continued against the respondent Company without prior permission of this court. The act of Dr. Sukhbir Singh entering into the settlement terms and not informing the Bombay High Court about the appointment of the OL as Provisional Liquidator is a fraudulent act and an attempt to overreach the orders of this court.

36. In any case, in my opinion, this court vide order dated 04.07.2005 has already held that the said decree of the Hon"ble Bombay High Court is not binding. This court held as follows:-

"16. Furthermore, on the very first date in all these suits and without notice to the Official Liquidator, Dr. Sukhvir Singh appeared through counsel and consent terms were filed on the basis on which suits were decreed. The Bombay High Court was not informed about the liquidation proceedings or the appointment of the provisional liquidator by this court. In fact, it appears, there is no averments made about this order in the suits filed. The company is impleaded as the defendant and after the appointment of the provisional liquidator, it is only he who could represent the company. It is, thus, clear that not only the proceedings in the suits were impermissible as they were initiated without the leave of the court, even they appear to be collusive a well. Such a decree will neither be binding on the official Liquidator or the company and would be void. It is not necessary to take steps for recall of those decrees by filing appropriate proceedings in those sutis. The Company Court seized with liquidated proceedings has ample power to pass necessary directions in this behalf. This aspect is succinctly explained and elaborated by the supreme Court in the case of Sudarsan Chits (I) Ltd. vs. G. Sukumaran Pillai and Others reported as AIR 1984 SC 1579."

37. The Division Bench of this court on 18.07.2006 in appeal did not set aside the above conclusion. The said order dated 04.07.2005 held as follows:-

"Co.App. No. 74-77/2005 and CMs. 7728-29/2006

This appeal can be disposed of as the learned Company Judge has only given direction that the appellants were only to show the source of Rs.30 lacs paid by each of them in cash and therefore, the direction was given to the official liquidator to take possession of the flats immediately as prima facie transactions

do not appear to be genuine. It was further stated in the order passed by the learned Company Judge that intervenors were to establish by necessary documentary evidence that they were the genuine purchasers then only orders for restoration of possession can be passed at that time Counsel for the appellant has contended that they have got the documentary evidence with them and same can be filed in this Court.

We think that it is not necessary to keep the appeal pending. The documents can be filed before Shri G.P. Thareja who has been appointed by the Company Court to investigate about the genuineness of the purchase of the flats in question by the appellant. In view of the fact that the appellants are claiming to be in possession of the flats from 1997 as has been told to us by the counsel for the appellant. We direct the appellant to file necessary documents before Shri G.P. Thareja within one week. Shri. G.P. Tharja will hear and decide after giving notice to the parties about the genuineness of the purchase of the flats in question on the basis of the documents within a period of eight weeks. The appellants will continue in possession of the flats till the decision is made by Shri G.P. Thareja. Mr. Jayant Bhusan says that the statement of the counsel for the appellant is not correct as they are in possession of the flats through Raj Nandini Entertainment Pvt. Ltd., and the appellants are not in possession which statement is refuted by the counsel for the appellants. This is the issue that Thareja Committee will decide.

Appeal stands disposed of."

38. Clearly, the Division Bench in its order dated 18.07.2006 did not set aside the findings recorded by the Coordinate Bench of this court on 04.07.2005 as to the effect that the decree passed by the Bombay High Court would be void and would not bind the official liquidator. The said finding remains in operation.

39. Even otherwise, it is manifest that the order passed is contrary to the statutory provisions and not binding. Reference may be had to Sections 446 and 456 of the Companies Act, 1956 which read as follows:

40. Section 446(1) of the Companies Act 1956 reads as follows:-

"446. Suits stayed on winding up order.

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced. or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

41. Section 456(1) of the Companies Act 1956 reads as follows:-

"456. Custody of company' s property. (1) Where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator 2 or the provisional liquidator, as the case may be,] shall take into his custody or

under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

42. Hence, on passing of an order of appointment of a Liquidator, the Liquidator/ Provisional Liquidator takes into custody all the properties, effects, etc. of the company. Similarly, under section 446 of the Act after the OL has been appointed as the Provisional Liquidator no suit or other legal proceedings could be proceeded with against the company except with the leave of the court. When the consent decrees have been passed in 2000 the OL had already been appointed as the Provisional Liquidator in 1998. The suit in question pending before the Bombay High Court could not proceed further in any manner. The claimants and the alleged attorney of JVG Dr.Sukhbir Singh have fraudulently withheld this information from the Bombay High Court and got the suit decreed based on alleged consent terms. The said Dr.Sukhbir Singh also had ceased to have any authority as an alleged director on that date to sign the consent terms. Clearly, the said decree is not binding on the OL and is of no effect."

3. Mr. Ravi Kant Chadha, learned senior counsel for the appellants states that the agreements to sell were duly signed between the parties as well as exhibited before the Thareja Committee and even the consideration amount had been paid, prior to a provisional liquidator being appointed. In support of his contention, he relies upon the report of the Serious Fraud Investigation Office (hereinafter referred to as 'SFIO') dated 11th February, 2010 wherein it has been held as under:

"4.6.11 From the above it is clear that these four ladies were used as front persons to camouflage the dubious sale of these flats by Shri Sukhbir Singh to these ladies. These flats were the properties of M/s JVG Finance Ltd. and were sold unauthorisedly and the proceeds of sale were misappropriated by Shri Vijay Kumar Sharma and Shri Sukhbir Singh. The funds of the company were thus siphoned off by Shri Vijay Kumar Sharma in connivance with Shri Sukhbir Singh."

4. He submits that on account of consideration amount having been received and title documents having been executed by Dr. Sukhbir Singh for JVG Finance Ltd. (the company in liquidation), the appellants were protected under Section 53A of the Transfer of Property Act.

5. Learned senior counsel for the appellants further submits that the learned Single Judge fell in error in holding that non-stepping of the appellants in the witness box was fatal. He states that there was no necessity for the appellants to step into the witness box as their power of attorney holder had executed agreements to sell and further the said agreements had been duly exhibited by him. In support of his submission, he relies upon Bhimappa & Ors. Vs. Allisab & Ors. reported in 2007 (6) KarLJ 286, Syed Abdulkhader Vs. Rami Reddy & Ors. reported in 1979 SCC (2) 601 as well as the order dated 05.10.2010 passed by the Hon'ble Supreme Court in C.A.Nos.147-148/2001 titled as Man Kaur (D) by LRs. Vs. Hartar Singh Sangha.

6. Mr. Chadha lastly submits that in view of the Division Bench order dated 18th July, 2006, the earlier order of the learned Single Judge dated 04th July, 2005 holding the consent decrees passed by the Bombay High Court in favour of the appellants to be null and void stood set aside. He emphasizes that the applications on which the Company Court had initially set aside the consent decrees passed by the Bombay High Court in favour of the appellants were not maintainable as they had not been filed by the Official Liquidator but by the Ex-Management i.e. V.K. Sharma, Ex-Managing Director.

7. Per contra, Mr. Dheeraj Gupta, learned counsel for Mr.V.K. Sharma, the Ex-Management submits that the present appeal is not maintainable as it is in the nature of a second appeal. In support of his submission, he relies upon the judgment of the Allahabad Court in U.P. Cement Vetanbhogi Sahkari Rin Samiti Ltd. v. Official Liquidator in the matter of M/s. U.P. State Cement Corporation Ltd., Allahabad, 2010 (2) ALJ 483 wherein it has been held as under:

"20. In view of the foregoing discussion, it is clear that even if under Section 483, there was no condition prohibiting an appeal against an order of the learned Single Judge passed in appellate exercise of jurisdiction, the said exclusion has been now specifically provided in by the Legislature under Section 100-A C.P.C. The judgment of the Apex Court in Kamal Kumar Dutta (supra) applies with full force in the facts of the present case.

21. In the present case, the order impugned was passed by the learned Single Judge in Civil Misc. Appeal/Objection 85/2007. An application for correction was moved in the order which has also been rejected. The learned Single Judge decided the appeal/objection against the report of the Official Liquidator exercising power under Rule 164 of the Company Rules.

22. Rule 164 of the Company Rules is quoted below:

"164. Appeal by creditor.- If a creditor is dissatisfied with the decision of the Liquidator in respect of his proof, the creditor may, not later than 21 days from the date of service of the notice upon him of the decision of the Liquidator, appeal to the Court against the decision. The appeal shall be made by a Judge's summons, supported by an affidavit which shall set out the grounds of such appeal, and notice of the appeal shall be given to the Liquidator. On such appeal, the Court shall have all the powers of an appellate Court under the Code."

23. The application moved for correction in the order passed in the appellate exercise of jurisdiction by the learned Single Judge clearly bars further appeal under Section 483 of the Companies Act, as well as Letters Patent as laid down by the Apex Court in the case of Kamal Kumar Dutta (supra)."

8. Mr. Kunal Sharma, learned counsel for the Official Liquidator submits that the order dated 4th July, 2005 passed by the Company Court cannot be assailed in the present proceedings as it has attained finality in view of the earlier Division Bench's order dated 18th July 2006.

9. Having heard learned counsel for the parties, we are of the opinion that the present appeal is maintainable as it is not in the nature of a statutory second appeal. In the present case, the initial claims were decided not by the Official Liquidator but by a Committee appointed by a Division Bench. Consequently, the preliminary objection raised by the learned counsel for the Ex-Management is rejected.

10. We are, however, in agreement with the finding of the learned Single Judge that the appellants had failed to prove their ownership to the flats in question as they had not produced any original title documents, but only photocopies. Even during the course of hearing, it was admitted before us that the appellants had not produced their income tax returns to prove the payment of consideration to M/s J.V.G. Finance Ltd. despite being repeatedly asked by the learned Single Judge.

11. Moreover, the purchasers under the alleged title documents i.e. the appellants had not stepped into the witness box. The argument of the appellants that there was no necessity in the present case for the appellants to step into the witness box is contrary to facts and untenable in law. It is settled law that to succeed in a suit for specific performance (which is the nature of the claim filed by the appellants), the appellants had to prove that a valid agreement of sale was entered into by the company in liquidation in their favour and also the terms thereof; that the company in liquidation committed breach of the said agreements; and the appellants were always ready and willing to perform their part of the obligations in terms of the agreement. If the appellants had to prove that they were always ready and willing to perform their part of the agreement, that is, to perform their obligations in terms of the contract, necessarily they should have stepped into the witness box and given evidence that they had all along been ready and willing to perform their part of the contract and subjected themselves to cross-examination on that issue. Appellants could not obviously examine in their place, their attorney holder who did not have personal knowledge of their readiness and willingness. Readiness and willingness refers to the state of mind and conduct of the purchaser as also his/her capacity and preparedness on the other. One without the other is not sufficient. Therefore, a third party who has no personal knowledge and is not an immediate relative cannot give evidence about such readiness and willingness, even if he/she is an attorney holder of the person concerned. [See: *Man Kaur (D) by LR. vs. Hartar Singh Sangha* (supra)].

12. This Court is also of the opinion that the consent decrees dated 04th January, 2000, 06th January, 2000 and 21st January, 2000 passed by the Bombay High Court cannot be said to be legal, valid and subsisting by virtue of the order dated 04th July, 2005 passed by the Company Court, which has attained finality. Further, the argument of learned senior counsel for the appellants that the Division Bench order dated 18th July, 2006 had set aside the order dated 04th July, 2005 of the Company Court is untenable in law, as in that eventuality, there

was no question of the said Division Bench directing the appellants to prove their title before a Committee under the chairmanship of Mr. G.P. Thareja. The necessity to prove the title before the Committee arose only because the consent decrees passed by the Bombay High Court were invalid.

13. Also, the maintainability of the application which led to the passing of the order dated 4th July, 2005 in our opinion cannot be challenged today as much water has flown since then and the said order had not been set aside by the Division Bench in the earlier round of litigation despite such a plea being advanced before the said Bench.

14. As far as the reference to the SFIO report is concerned, this Court is of the view that SFIO is an investigating agency and its report is neither final nor binding. The appellants had to prove their titles dehors the SFIO report - which they have failed to do in the present case.

15. In any event, the SFIO report itself concludes that the flats had been sold unauthorizedly by the Ex-Management and no money had been received in the account of the company itself.

16. Keeping in view the aforesaid as well as the fact that the appellants have failed to step into the witness box and/or prove the payment of any consideration amount to the company in liquidation, there is no question of Section 53A of the Transfer of Property Act being attracted to the present proceedings.

17. Accordingly, the present appeal being bereft of merits is dismissed and the pending application stand disposed of on account of it being infructuous.