
(1996) 03 BOM CK 0014

In the Bombay High Court

Case No : Company Application No. 21 of 1995 in Company Petition No. 134 of 1986

Bombay Gas Co. Pvt. Ltd.

APPELLANT

Vs

Central Government and others

RESPONDENT

Date of Decision : 01-03-1996

Acts Referred:

Companies Act, 1956 — Section 2(7), 270, 271, 390, 390

Citation : (1996) 3 BomCR 312 : (1997) 89 CompCas 195

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : E. Selvaraj, Deputy Official Liquidator, Party in person, T.U. Khatri for the Regional Director, Department of Company Affairs, Virendra V. Tulzapurkar, V.R. Dhond, Y.R. Kapadia and S.A. Tripathi, instructed by Crawford Bayley and Co. and D.D. Madon, instructed by Kanga and Co, for the Appellant;

Judgement

D.R. Dhanuka, J.—By this application, the applicants have impugned order dated June 29, 1988, passed by this court in Company Petition No. 134 of 1986 sanctioning the scheme of amalgamation after several years of the said scheme having been acted upon on several technical grounds. It did appear to the court at one stage that the technical grounds urged on behalf of the applicants had at least an air of plausibility and required scrutiny. On scrutiny of all the grounds urged, the court has reached the conclusion that there is no substance whatsoever in any of the grounds and the application lacks merits. There is some merit in the contention of the petitioners that the application herein is not made bona fide. The application herein is dismissed with no order as to costs.

2. On April 26, 1862, the Bombay Gas Company Limited was incorporated as a company in the U.K. under the Joint Stock Companies Act, 1856-57. The said company is now known as "The Bombay Gas Public Limited Company". The registered office of the said company was situated at 368(a), Gray's Inn Road, London, WC IX 88, England, and its head office was situated at Empire House, 214, Dr. Dadabhoy Naoroji Road, Bombay 400 001. The said company was re-

registered as a public company under the English Companies Act, 1948 to 1980, under its name "The Bombay Gas Public Limited Company". This company is now under winding up in the U.K. This company is hereinafter referred to as the British company. This company had considerable assets and business in India at the relevant time. Applicant No. 1 was a shareholder of this company at the relevant time. Applicant No. 2 claims to be the beneficial owner of certain shares of this company.

3. On February 9, 1982, the Bombay Gas Company Private Limited (i.e., the petitioner herein) was incorporated as a private limited company under the Companies Act, 1956.

4. By its order dated January 29, 1988, passed in Company Petition No. 134 of 1986 connected with Company Application No. 227 of 1985 this court sanctioned the scheme of compromise or arrangement embodied in the scheme of amalgamation set out in exhibit "A" to Company Petition No. 134 of 1986. By its orders dated January 29, 1988, passed in Company Petition No. 134 of 1986, and Company Petition No. 133 of 1986 filed by the Bombay Gas Public Limited Company, this court sanctioned amalgamation of the Indian undertaking of the Bombay Gas Public Limited Company along with all its assets situate in India with the Bombay Gas Company Private Limited (i.e., the petitioners herein) in terms of the scheme of amalgamation propounded by both the companies.

5. In Company Petition No. 133 of 1986, as well as Company Petition No. 134 of 1986, the Bombay Gas Public Limited Company was described as the "transferor company" for the sake of convenience and the petitioner herein was described as the "transferee company". The transferor company was the owner of a flat, i.e., flat situated on 4th floor of the building known as Hari Bhuvan, situated at Hari Bhuvan Co-operative Housing Society Limited, Peddar Road, Bombay. By virtue of the scheme of amalgamation duly sanctioned by this court by its orders passed on January 29, 1988, in Company Petition No. 133 of 1986 and Company Petition No. 134 of 1986, the Bombay Gas Company Private Limited, i.e., the petitioners herein became owner of the said flat. The petitioners herein adopted proceedings against applicant No. 2 in Company Application No. 21 of 1995, for his eviction from the said flat invoking section 630 of the Companies Act, 1956. The said proceedings were numbered as Complaint No. 32/S/94. The petitioner company filed the said complaint in the court of the Metropolitan Magistrate at Girgaon, Bombay. The said complaint is pending.

6. On being served with the process issued by the criminal court in the said complaint, the applicants in C.A. No. 21 of 1995 moved this court by taking out a judge's summons herein numbered as Company Application No. 21 of 1995 for an order to the effect that the order dated January 29, 1988, passed by this court in Company Petition No. 134 of 1986 be recalled and it be declared that the order of sanction passed by this court in the above referred proceedings was non est, without jurisdiction and of no legal effect. The applicants in this application have claimed various other consequential reliefs, inter alia, on the ground of

inherent lack of jurisdiction in this court in passing the impugned order and on the ground of alleged "fraud" on the court by reason of the alleged suppression of the fact that the name of the British company was struck off from the register prior to passing of the order dated January 29, 1988, and no order of amalgamation could be passed in respect of a non-existent company. The applicants have in substance contended that the impugned order dated January 29, 1988, is without jurisdiction and the impugned order suffers from total, patent and inherent lack of jurisdiction and is liable to be treated as nullity. The applicants have also contended that in any event the impugned order dated January 29, 1988, is liable to be recalled on the ground that the petitioner in Company Petition No. 134 of 1986 committed fraud on this court by suppressing the most material fact that on the date of sanction of the scheme the transferor company, i.e., the British company was not in existence and had already been struck off from the register by the Registrar of Companies, U.K., by his order dated October 7, 1986. It may be stated here and now that the said company is already restored to register and is now directed to be wound up by the court of competent jurisdiction in U.K. As a result of such restoration, it must be assumed as set out in applicable statutory provisions that the name of the above referred British company was never struck off from the register at any point of time.

7. In my opinion, there is no merit in this application and the application deserves to be dismissed. The application herein is argued at considerable length. The impugned order was passed by a court of competent jurisdiction. The alleged fraud has not been proved.

8. It is necessary to summarise the material facts having a bearing on the subject matter of this application.

(a) Soon after its incorporation, the British company commenced its business of manufacture distribution and sale of gas in Bombay through a network of pipelines installed for the purpose. The British company had put up a glass bottle manufacture unit at Banda. The British company used to carry on considerable business in India at the material time. The majority of the shareholders of the said company used to reside in India and about 99 per cent. of its assets were also situate in India at all relevant time. Some of its shareholders were Britishers.

(b) Some time prior to February 9, 1982, the Reserve Bank of India issued directions to the British company u/s 29(2)(a) of the Foreign Exchange Regulation Act, 1973, to the effect that the said company should transfer its undertaking and business to an Indian company to be formed for the said purpose.

(c) On February 9, 1982, the Bombay Gas Company Private Limited was incorporated as a private limited company with an authorised share capital of Rs. 1 crore (rupees one crore). The Bombay Gas Company Private Limited was incorporated with the main object of acquiring the Indian undertaking, business and all the assets of the British company situated in India in terms of the

Reserve Bank directive as set out in the memorandum of the petitioner-company. Applicant No. 1 herein was one of the shareholders of the British company. Applicant No. 2 claims to be the beneficial owner in respect of 500 shares of the British company in respect whereof applicant No. 2 had sought the transfer of shares to his own name at one point of time, which transfer was declined.

(d) In the memorandum of association of Bombay Gas Company Private Limited, it is in terms stated that one of the main objects of the petitioner-company was as under :

"(1) to acquire and undertake by amalgamation or otherwise, the whole or any part of the business, property and liabilities of "Bombay Gas Company Limited" a company incorporated in England with its registered office at 368(a) Gray's Inn Road, London, W.C. IX, 8BB England, and having its head office at Empire House, 214, Dr. Dadabhoy Naoroji Road, Bombay - 400 001".

(e) Soon after the incorporation of the petitioner-company, a scheme of amalgamation in respect of the Indian undertaking of the British company along with its business assts, etc., situate in India was prepared by both the above referred companies. The said scheme was approved not merely by the board of directors of the two companies but was also approved by the Reserve Bank of India. The said scheme was approved by the shareholders of two companies as well.

(f) By clause 1 of the said scheme of amalgamation, it was provided that with effect from the commencement of the business "on 1st January, 1982", therein called the "appointed date" and subject to the terms and conditions set out therein, the entire business and undertaking in India of the British company including all its business and other assets, etc., situate in India shall be deemed and stand transferred to and vested in the transferee company pursuant to section 394 of the Companies Act, 1956. The said scheme contemplated allotment of shares by the transferee company to the members of the British company in terms of clause 9 of the said scheme. By clause 20 of the said scheme it was provided that the said scheme although operative from the "appointed date" shall take effect finally upon and from the date on which the sanction or provision or orders shall be last obtained which shall be the effective date for purpose of the said scheme. The said scheme in terms provided that the British company as well as the transferee company shall make an application to this court for sanction of the scheme of amalgamation referred to hereinabove the said scheme generally provided in clause 1 thereof that with a view to effectuate the amalgamation of the Indian undertaking of the British company with the transferee company, the British company shall take such necessary steps as were required under the applicable laws of the United Kingdom for dissolution of the English company. Since only the Indian assets of the British company were to be transferred to the transferee company, the question of obtaining orders of dissolution of the British company prior to or at the stage of sanction of the scheme of amalgamation was not required in law.

(g) By orders passed by this court on October 3, 1985, in Company Application No. 227 of 1985, and Company Application No. 226 of 1985, directions were issued by this court for convening of the meetings of the shareholders of the British company as well as the petitioner-company. The chairmen of the respective meetings made their report to this court. All the directions issued by the court were complied with. Ultimately, Company Petitions Nos. 133 and 134 of 1986 were filed in this court for obtaining sanction of this court in respect of the scheme of amalgamation set out in exhibit "A" to Company Petition No. 133 of 1986 and Company Petition No. 134 of 1986. Necessary notices were served on the Central Government as required by law. Ultimately, on January 29, 1988, passed on Company Petition No. 134 of 1986, as well as Company Petition No. 133 of 1986, the said scheme of amalgamation propounded by the two companies hereinabove was duly sanctioned by this court. The said scheme became effective and operative on January 29, 1988, in view of clause 20 of the scheme although the "appointed date" as set out in the said scheme for the purpose of identification of the Indian assets of the transferor company which were to stand transferred in favour of the transferee company was stipulated to be January 1, 1982, in the said scheme. The said scheme was duly acted upon for all these years. The petitioner-company allotted shares to all the erstwhile shareholders of the British company in terms of its obligation under clause 9 of the said scheme and forwarded bonus shares to the erstwhile shareholders of the British company. The petitioners herein have exercised ownership rights in respect of all the assets, business, contracts, etc., of the British company which were situate in India in view of the sanction of the court to the scheme of amalgamation as aforesaid.

9. On October 7, 1986, the Registrar of Companies, U.K., had directed that the name of the above referred British company be struck off from the register as contemplated u/s 652 of the English Companies Act, 1985. The said Act provides for restoration of the company to the register by order of the court. On May 24, 1995, one Peter Arthur Stanton presented a petition before the High Court of Justice, Chancery Division, Company Court, for restoration of the Bombay Gas Public Limited, i.e., the above referred British company to the register and for the winding up of the said company thereafter under the provisions of the Insolvency Act, 1986. Section 653 of the English Companies Act, 1985, provides for restoration of the company which is struck off from the register in pursuance of an order of the court. It is not disputed that section 560 of the Companies Act, 1956, is in pair materia with the corresponding provisions of the English Companies Act and the effect of an order of restoration is to place the company whose name was struck off by the Registrar in the same position as if the name of the company had never been struck off during the interregnum. If a court of competent jurisdiction directs restoration of the name of the company to the register, it follows that the company shall be deemed to have continued throughout. It is so provided in the statutory provisions contained in the English Companies Act, 1985, as well as Companies Act, 1956. No reference to decide

cases or case-law is, therefore, necessary on this aspect of the case. It cannot be, therefore, assumed that the British company was not in existence on January 29, 1988, since it has been restored to register only on July 20, 1995, in pursuance of the order of the court dated July 5, 1995, and order of restoration must have its full effect as provided in law. It must be conclusively assumed as a matter of law that the British company was very much in existence on January 29, 1988, and at all times thereafter as well.

10. Learned counsel for the applicants has contended that the impugned order dated January 29, 1988, was passed by this court although this court had no jurisdiction to pass the said order. Learned counsel for the applicant has contended that the impugned order is liable to be treated as a nullity for inherent lack of jurisdiction. Learned counsel for the applicants has developed his submissions from different angles as would be obvious from the discussion of the submissions made by learned counsel for the petitioner in the latter part of this order.

11. Learned counsel for the applicants submitted that on January 29, 1988, when the scheme of amalgamation was sanctioned by this court the above referred British company known as "The Bombay Gas Public Limited Company", was not even in existence in view of the fact that its name was struck off from the register by the Registrar of Companies, U.K., by his order dated October 7, 1986, passed in exercise of the powers conferred on him by section 652 of the English Companies Act, 1985, it being irrelevant that its name was later on restored to the register. It is not disputed that the Bombay Gas Public Limited Company was restored to the register by an order passed by the court in the U.K., on July 5, 1995, and the Registrar of Companies, U.K., has in fact certified that the said company was restored to the register on July 20, 1995, it may be stated in passing that by the same order the High Court of Justice further directed that the Bombay Gas Public Limited Company (being the company restored to the register) be wound up by the court under the provisions of the Insolvency Act, 1986. In view of the specific statutory provisions of the English Act providing for the effect and legal consequences of restoration of the company to the register to the effect that the company shall be deemed to have been in existence throughout, the submission made by learned counsel for the applicants is not acceptable to the court. There is no merit in the submission.

12. Learned counsel for the applicants then submitted that the impugned order is liable to be treated as a nullity also on the ground that the transferee company was not in existence on the "appointed date" referred to in the scheme of amalgamation, i.e., January 1, 1982, the transferee company having been incorporated only on February 9, 1982. Learned counsel for the applicants emphasised that the transferee company was incorporated as a private limited company under the Companies Act, 1956, on February 9, 1982, and the scheme of amalgamation as sanctioned by the court did provide that the "appointed date" in respect of the said scheme was January 1, 1982. Learned counsel for the

applicants submitted that both the transferor company as well as the transferee company should be in existence "on the appointed date". It is obvious that the transferor company is deemed to be in existence on the appointed date in view of the order of restoration of the transferor company passed by the High Court of Justice in England. The order of restoration or its legal effect as provided in the Act cannot be ignored by the court as a subsequent legal event. The transferee company was undoubtedly incorporated only on February 9, 1982. Learned counsel for the petitioners has rightly invited the attention of the court to the relevant case law on the subject and has submitted that the "appointed date" was stipulated in the scheme only for purpose of identification of assets on a particular date which were sought to be transferred to the transferee company. Learned counsel for the petitioners invited the attention of the court to clause 20 of the scheme sanctioned by the court by its order dated January 29, 1988. The said clause in terms provided that the scheme shall take effect finally upon and from the date on which the necessary sanction or approval was last obtained. The necessary approval or sanction last obtained by the transferee company was much after the date of its incorporation, i.e., January 29, 1988. Learned counsel for the petitioners submitted that the "effective date" referred to in clause 20 of the scheme was relevant for the purpose and not the "appointed date".

13. On this aspect of the case, learned counsel for the petitioners rightly invited the attention of the court to the ratio of the judgment of the High Court of Delhi in the case of HCL Ltd., In re and HCL Hewlett-Packard Ltd., In re [1994] 80 Comp Cas 228. This judgment is directly on the point raised by learned counsel for the applicants and is a complete answer to the contention raised on behalf of the applicants. I am in respectful agreement with the view taken by the High Court of Delhi in this case. In this case, the "appointed date" for transfer as set out in the scheme under consideration was fixed as July 1, 1990, although the transferee company was incorporated only on May 15, 1991. In this case, it was contemplated that certain divisions of the transferor company will be transferred to the transferee company to be newly incorporated. In this case, learned counsel for the respondents did oppose the scheme of arrangement sought to be sanctioned on the ground that the scheme suffered from a fundamental defect as "the appointed date" as set out in the scheme was anterior to the date of incorporation of the transferee company, and no such scheme could be sanctioned by the court. The court held that the "appointed date" was stipulated in the scheme only for the purpose of identification and quantification of the assets and liability of the existing company which would be transferred to the transferee company and the submission made on behalf of the Central Government in this case overlooked the differentiation made between the "appointed date" and the "effective date" in the scheme becoming operative. In this case also the expression "effective" was defined in the scheme as under (at page 235) :

"The "effective date" means the later of the date on which all the consents and approvals referred to in Part VI, clause 9, of this scheme are obtained and/or the

date on which the certified copy of the order passed by the High Court of Delhi sanctioning this scheme of arrangement is filed with the Registrar of Companies, Delhi".

14. In our case here, clause 20 of the scheme sanctioned by the court by its order dated January 29, 1988, is substantially similar to the clause defining the expression "effective date" in the scheme of amalgamation sanctioned by the High Court of Delhi. Learned counsel for the petitioner-company has cited several other authorities on this aspect of the case. In my opinion, it is not necessary to refer to the other authorities cited at the Bar as the ratio of the above referred judgment of the High Court of Delhi is directly and clearly applicable to this case and the said ratio appears to be clearly right.

15. Learned counsel for the applicants then contended that this court had no jurisdiction to pass an order of amalgamation in respect of the Indian assets and India business of the British company relying on section 584 of the Companies Act, 1956. Learned counsel submitted that the courts in India could direct winding up of a body corporate incorporated outside India as an unregistered company although dissolved in the country of its incorporation, only if it had ceased to carry on business in India and not otherwise. In my opinion, section 584 of the Indian Companies Act, 1956, is not relevant and is not applicable to this case. It cannot be assumed that the British company was a company dissolved in the country of its incorporation on January 29, 1988. The court shall have to assume that the British company existed throughout till July 5, 1995, and was directed to be wound up by the court in the U.K. only on July 5, 1995.

16. On this aspect of the case, the applicants have filed a further affidavit of Shri Ashok Kumar Jalan, applicant No. 2, being affidavit dated January 19, 1996. In response to the said affidavit the petitioners filed an affidavit of Mr. S.L. Makhijani, being affidavit dated February 9, 1996. It appears that the petitioner-company had ceased to carry on its main business in India by the time the petition for sanction of the scheme of amalgamation was filed in this court by the two companies referred to hereinabove. It is, however, obvious from the statements appearing in the affidavit of Mr. S.L. Makhijani dated February 9, 1996, that the British company had not altogether ceased to carry on its business in India on the relevant date. Learned counsel for the company has submitted that, that, however, makes no difference having regard to the true interpretation of the relevant provisions of the Companies Act, 1956, and the applicable provisions of the Act as indicated below.

17. Learned counsel for the petitioner-company has convincingly replied to the contention of learned counsel for the applicants by advancing twofold arguments as set out hereinafter.

18. Learned counsel for the petitioner-company contended that the court had jurisdiction to sanction the scheme of amalgamation in respect of the companies which could be wound up by the court under the Companies Act, 1956. Learned

counsel for the petitioner-company contended that this court had jurisdiction to wind up a foreign company as an unregistered company u/s 583 of the Companies Act, 1956. Learned counsel for the petitioner-company further contended that in any event sub-section (4)(b) of section 394 of the Companies Act, 1956, was a complete answer to the contention raised on behalf of the applicants on this aspect of the case. Section 394 of the Companies Act, 1956, directly deals with the subject-matter of amalgamation of the companies. Section 394(4)(b) of the said Act reads as under

"(b) 'transferee company' does not include any company other than a company within the meaning of this Act but 'transferor company' includes any body corporate, whether a company within the meaning of this Act or not".

19. It is thus obvious that the "transferor company" referred to in the scheme of amalgamation could be a body corporate incorporated outside India. Learned counsel for the petitioners invited the attention of the court to the definition of the expression "body corporate" as set out in section 2(7) of the Companies Act, 1956. The expression "body corporate" as defined under the Act includes a company incorporated outside India. Learned counsel for the petitioners contended that section 584 of the Companies Act, 1956, provided an additional ground for winding up of foreign companies although dissolved in the country of its incorporation and the said section did not restrict the jurisdiction of this court to sanction the scheme of amalgamation or wind up a foreign company or its business carried on in India as an unregistered company in terms of section 583 of the Companies Act, 1956. Learned counsel for the petitioner-company invited the attention of the court to clause 230 of the Bhabha Committee Report as a background material for incorporation of the special provisions contained in sub-clause (4)(b) of section 394 of the Act. Learned counsel for the petitioner-company appears to be completely right in respect of the submissions made by him on this aspect of the case.

20. Learned counsel for the petitioner-company rightly invited the attention of the court to the judgment of the High Court of Madras in the case of Travancore National and Quilon Bank, In re [1939] 9 Comp Cas 14: AIR 1939 Mad 318. In this case, it was held by the court that a foreign company was liable to be wound up as an unregistered company under the Indian Companies Act, 1913. At pages 321-322, Venkataramana Rao J. speaking for the court, observed as under :

"There can be no doubt that the Travancore National Bank though incorporated outside British India and, therefore, a foreign company, would be an unregistered company within the meaning of sections 270 and 271 of the Act."

21. In the latter part of the same judgment the court observed that a foreign company could be wound up by the High Court as an unregistered company. It is not necessary to examine this line of argument in detail as this court is mainly concerned in this application only with the question of jurisdiction of this court to sanction the scheme of amalgamation pertaining to an Indian undertaking of a

foreign company with the consent of the Reserve Bank of India and this court had requisite jurisdiction to sanction the scheme of amalgamation in view of sections 390, 391 to 394 and 394(4)(b) of the Act. It is quite clear from the special provisions of law contained in section 394(4)(b) of the Act that the transferor company could be a body corporate incorporated outside India but the transferee company could not be a foreign company. In this case, the transferor company was a foreign company but the transferee company was and is an Indian company. Section 394(4)(b) of the Companies Act, 1956, is a special provision directly in point. I have, therefore, no hesitation in holding that this court had jurisdiction to pass the impugned order sanctioning the scheme of amalgamation referred to hereinabove and the impugned order dated January 29, 1986, does not suffer from inherent lack of jurisdiction. In my opinion, there is no merit in the contention that the impugned order is liable to be considered as a nullity. Section 584 of the Act is not relevant. The said section does not prohibit or restrict the jurisdiction of the court to wind up a foreign company or sanction amalgamation of the Indian undertaking of a foreign company with the Indian company as required by the Reserve Bank of India.

22. In a recent judgment of the Full Bench of the High Court of Kerala in K.P. Antony, "Santhosh", Calicut Vs. Thandiyode Plantations (Private) Ltd., Thandiyode, South Wynad and Others, , the learned Chief Justice of the High Court of Kerala, speaking for the Full Bench, has neatly explained the subject of "inherent lack of jurisdiction", after referring to several Supreme Court judgments, in the following words (at page 39) :

"A court lacks inherent jurisdiction when the subject-matter is wholly foreign to its ambit and is totally unconnected with its recognised jurisdiction".

23. It is not open to a party to challenge an order of the court merely on the ground that the judgment is erroneous on the jurisdictional aspect of the case. The nature and scope of the enquiry on jurisdictional aspect at this stage is rather narrow and limited. The impugned order does not suffer from lack of jurisdiction on the face of the record and is not shown to be a nullity.

24. Section 390(a) of the Act defines the expression "company" as any company liable to be wound up. The said expression means any company which is subject to the winding up provisions contained in the Act. Section 390(a) of the Act is thus applicable to bodies incorporated outside India. If the court has jurisdiction to wind up a company on any of the grounds specified in the Act, whether an Indian company or a foreign company, it follows that such a company is liable to be wound up under the Act on proof of applicable grounds for winding up and such a company is subject to the jurisdiction of the court to sanction the scheme of its amalgamation with the company incorporated under the Companies Act, 1956. The impugned order is thus valid and not shown to be non-est, from whichever angle the matter is examined.

25. Learned counsel for the petitioner has cited several authorities at the Bar in

support of his submission. I have considered all the authorities and the statutory provisions relied on by learned counsel. I do not consider it necessary to discuss all the cases cited at the Bar and have referred to only the relevant case law directly in the point. The authorities cited are listed below :

Tymans Ltd. v. Craven [1952] 1 All ER 613 ; Purushottamdass and another (Bulakidas Mohta Co. P. Ltd.) Vs. Registrar of Companies, Maharashtra and others, ; Russian and English Bank (In Liquidation) v. Baring Brothers and Co. Ltd. [1936] All ER 505 (HL); Travancore National and Quilon Bank, In re AIR 1939 Mad 318; Bank of India Ltd. Vs. Ahmedabad Manufacturing and Calico Printing Co. Ltd., , In re and HCL Hewlett-Packard Ltd., In re [1994] 80 Comp Cas 228; Commissioner of Income Tax, Pune-I Vs. Swastik Rubber Products Ltd., ; Marshall Sons and Co. (India) Ltd. v. ITO [1992] 74 Comp Cas 236 (Mad) : 9 Cla 92; Khandelwal Udyog Ltd. and Acme Mfg. Ltd., In re [1977] 47 Comp Cas 503; Malayalam Plantations (India) Ltd. v. Harrisons and Crossfield (India) Ltd. [1985] 2 C LJ 409 .

26. In the case of Khandelwal Udyog Ltd. and Acme Manufacturing Ltd., In re [1977] 47 Comp Cas 503 , Mridul J. of the High Court of Bombay, interpreted section 390 of the Companies Act, 1956, in the context of section 153 of the Indian Companies Act, 1913, and sub-section (6) of the English Companies Act, 1948, and held that the expression "any company liable to be wound up under the Act" meant "all companies to which the provisions relating to winding up apply". After referring to footnote 7 in Buckley's Companies Acts, the learned judge summed up his conclusion as under :

"(a) The expression "any company liable to be wound up under this Act" takes within its sweep all companies registered under the provisions of the Companies Act, 1956, as also all unregistered or other companies in respect of which winding up orders can be made by a court under the provisions of the Companies Act, 1956;

(b) In other words, the above referred expression embraces not only companies which are registered companies under the provisions of the Companies Act, 1956, but also the companies which come within the purview of the provisions of the Companies Act, 1956, and can be wound up by a court under the provisions thereof. These provisions relate to the companies which fall within the provisions of Part X of the Companies Act, 1956." The said part deals with winding up of the unregistered companies.

27. The learned judge thereafter referred to sections 582 and 584 of the Act and concluded that the above referred expression contained in clause (a) of section 390 was advisedly used so as to enable the unregistered companies or the foreign companies to be in a position to invoke the provisions of sections 391 and 393 of the Companies Act, 1956. I am in respectful agreement with the view taken by Mridul J. in this case. There appears to be a preponderance of judicial opinion on this aspect supporting the above referred interpretation of the

relevant provisions.

28. Learned counsel for the applicant then submitted that the impugned order is liable to be recalled on the ground that the applicant company had suppressed the fact of striking off the name of the British company from the register while seeking sanction of the court to the scheme of amalgamation on January 29, 1988. Learned counsel for the applicants submitted that if this court had been informed of the fact that the name of the British company was already struck off from the register by an order passed by the Registrar of Companies, U.K., on October 7, 1986, this court would not have passed an order sanctioning the scheme of amalgamation. On this aspect of the case, learned counsel for the applicants also submitted that the fact of restoration of the company to register by an order passed by the English court on July 5, 1995, was of no consequence. In the affidavit in reply filed on behalf of the petitioner it is stated that the petitioners did not have knowledge in respect of the order passed by the Registrar of Companies, U.K., striking off the name of the British company from the register at the material time and the petitioners discovered the said fact only in July, 1990. I have no hesitation in accepting this factual plea raised on behalf of the petitioner. The onus of proving fraud is on the applicant. The applicant has failed to prove the allegation of fraud.

29. Learned counsel for the petitioners also contended as under :

- (a) the applicants had no locus standi to file this application;
- (b) the applicants are estopped from making the application particularly as applicant No. 1 has taken benefit under the impugned order;
- (c) the application made was not bona fide as it was made to defeat the proceedings adopted/the proceedings taken u/s 630 of the Companies Act, 1956, at a late stage. It is not necessary to discuss any of these contentions since the application fails on the merits and there is no substance in any of the grounds of challenge.

30. Since the impugned order does not suffer from lack of jurisdiction and is not shown to be a nullity and since the allegations of fraud are not proved, the application fails on the merits. The application is dismissed. Having regard to the facts and circumstances of the case, there shall be no order as to costs. Application dismissed. No order as to costs.

31. Ad interim order passed by this court on March 27, 1995, to continue for a period of four weeks from today in order to enable the applicants to prefer an appeal against the order passed by the court today, if so advised. It is hereby clarified that the petitioners have opposed the application made by learned counsel for the applicants for continuation of the said order.

32. Learned counsel for the Registrar of Companies has submitted that there should be a finality in matters of this kind involving a large number of shareholders, creditors and members of the public, etc., and if the impugned

order is to be declared as a nullity at this late stage, public interest would suffer. Since the impugned order is not found to be nullity and is not found to suffer from any jurisdictional defect and since the allegations of fraud are not proved, it is not necessary to discuss any of the submissions made by learned counsel for the Registrar of Companies. The impugned order is valid and was passed in accordance with law.

33. Having regard to my findings on the merits of the application, I have not examined the pleas of limitation, laches or estoppel. It is not necessary to do so for the disposal of this application.

34. Issue of certified copy is expedited.