
(2003) 02 MAD CK 0017

In the Madras High Court

Case No : Company Application No's. 1418 to 1420 of 2001 in C.P. No. 145 of 1999

Mrs. Vasantha Ramanan

APPELLANT

Vs

Official Liquidator and Others

RESPONDENT

Date of Decision : 18-02-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 34, 5
Companies Act, 1956 — Section 441(2), 446(1)

Citation : (2003) 114 CompCas 747 : (2003) 47 SCL 710

Hon'ble Judges : D. Murugesan, J

Bench : Single Bench

Advocate : C. Harikrishnan, for C.S.K. Satish, for the Appellant; J. Nithyanandam, for K.M. Vijayan and V. Ramakrishnan and Ravikumar Paul for T.R. Ramkumar, for the Respondent

Judgement

D. Murugesan, J.—The applicant in all the three company applications is one Mrs. Vasantha Ramanan. The respondents in all the three

applications are common. In Company Application No. 1418 of 2001, the applicant has prayed for an order setting aside the award dated June

21, 2000, passed by Justice P. Baskaran, retired judge of this court, in the dispute between the second respondent, namely, M/s. First Garments

Manufacturing Company India (P.) Ltd., and the company in liquidation, namely, Bharath Tex Fashions Limited, on the ground that the same was

obtained by fraud, collusion and hence, not binding on the company or its shareholders and creditors.

2. In Company Application No. 1419 of 2001, the applicant has prayed for a direction to the second respondent to submit the statement of

accounts and accounts of the of the assets of the company in liquidation and the

use of the same belonging to the company from March 1, 1999, to August 17, 2001, when the official liquidator took possession of the factory of the company in liquidation,

3. In Company Application No. 1420 of 2001, the applicant has prayed for a direction to the second respondent to make good to the company in

liquidation the benefits derived by it from March 1, 1999, to August 17, 2001, on account of the use of the factory and assets of the company in liquidation.

4. The circumstances by which the above applications came to be filed are as follows :

M/s. Bharat Tex Fashions Limited (hereinafter referred to as the ""company"") was incorporated on July 23, 1996, by the third and fourth

respondents as promoters for the purpose of manufacture and export of garments. Though the company in liquidation commenced its production

during November, 1997, and showed a profit of Rs. 14.50 lakhs during the first year of operations, it declared a loss of Rs. 3.50 crores during the

year ended February 28, 1999, and more than fifty per cent. of the capital of the company was eroded. In view of the financial difficulties, the

company was unable to pay the outstanding dues to several creditors. One of the creditors by name M/s. Emery Worldwide India Private Limited,

New Delhi, issued a statutory notice to the company on February 2, 1999. Since the demand made in the statutory notice was not acceded-by the

company, M/s. Emery Worldwide India Private Limited presented a company petition in C. P. No. 145 of 1999 to this court on June 14, 1999,

and this court ordered notice regarding admission on June 18, "" 1999. While the said company petition was pending, the second respondent

entered into an agreement on February 5, 1999, with the company for financial assistance by way of payment of substantial portion of the raw

material cost, wages and statutory dues of the company from February, 1999, for over a sum of Rs. 537.74 lakhs. As the company had availed of

various facilities from Canara Bank, Chennai, the fifth respondent, it became a secured creditor of the company. The entire assets viz., land and

building, plant and machinery were given as security to the bank. A mortgage by deposit of title deeds was created in favour of the bank. All

movables of the company were secured to the bank under hypothecation. The

charge in favour of the bank was registered with the Registrar of Companies. As the company could not repay its dues, the fifth respondent-bank insisted on additional security by way of guarantee. Hence, the second respondent and the company entered with a guarantee agreement on May 12, 1999. On the same day, the second respondent executed a guarantee in favour of the fifth respondent for repayment of money by the company to the fifth respondent-bank subject to a maximum of Rs. 7.90 crores. However, the company defaulted in payment to the second respondent and therefore, the second respondent filed an application in C. A. No. 1284 of 1999 on December 20, 1999, which was taken on file by this court on January 7, 2000, seeking permission to absorb the assets of the company towards full and final settlement of its dues amounting to Rs. 2.91 crores representing its secured credit out of a total financial assistance of Rs. 537.74 lakhs. While the said application was pending, the second respondent invoked the arbitration clause on April 1, 2000, as contained in the agreement dated February 5, 1999. Mr. Justice P. Baskaran, retired judge of this court, was appointed as a sole arbitrator. Along with the reference, the second respondent also filed a petition for interim custody of the properties of the company in liquidation. The terms of arbitration was ""in the matter of agreement of financial assistance dated February 5, 1999, and the guarantee agreement dated May 12, 1999, between the second respondent and the company in liquidation"". The company participated in the arbitration proceedings. The arbitrator by award dated June 21, 2000, declared that the second respondent was entitled to realise from the company in liquidation as an unsecured creditor a sum of Rs. 2,17,05,139.36 with interest thereon at 8 per cent. per annum from April 1, 2000, till payment; that the second respondent was entitled to realise from the company in liquidation as a secured creditor, Rs. 2,88,75,872 with interest thereon at 8 per cent. per annum from April 1, 2000, till payment; that the company should pay the second respondent the sum total of Rs. 5,05,81,011.36 with a charge on Schedules A and B properties, set out here-under, for the realisation of Rs. 2,88,75,872 with interest at 8 per cent. per annum from April 1, 2000; that a month's time from the date of the order was granted to the company to pay the award amount; that the company should pay the second respondent Rs. 21,500

towards costs of the arbitration as claimed by the second respondent in the bill of costs ; that in default of such payment within the stipulated time,

the second respondent be entitled to sell Schedules A and B properties set out in the claim petition and apply the sale proceeds (net of expenses)

towards the secured debt of Rs. 2,88,75,872 with interest at 8 per cent. per annum and pay the company the balance amount if any, and in the

event of the sale proceeds being insufficient for payment of the said amount, the second respondent be entitled to realise the balance from the

company in liquidation. It was also observed by the arbitrator that after the hearing of the case was over, the second respondent's counsel Mr. V.

Ramakrishnan put in a memo praying to order continuance of the interim custody of the schedule properties ordered by this Tribunal on May 17,

2000. Having regard to the stakes involved and also to the materials on record, the arbitrator directed the second respondent to continue in

possession and custody of the schedule properties till the enforcement of the award.

5. Since the company did not honour the award, the second respondent filed an execution petition under Order 39, Rule 1 of the Original Side

Rules read with Section 39 of the CPC in E. P. No. 236 of 2000 before this court on November 15, 2000, for transmission of the award to the

District Court, Chenglepet, for execution. By order dated November 24, 2000, the First Assistant Registrar of this court directed the transmission

of the award to the District Court, Chenglepet. While the petition was pending before the District Court, Chenglepet, this court on December 7,

2000, ordered winding up of the company. Hence, the second respondent filed C. A. No. 486 of 2001 before this court seeking to grant leave to

the second respondent to continue the execution proceedings against the company in liquidation before the District Court, Chenglepet, in

pursuance of the award dated June 21, 2000. This court by order dated June 6, 2001, directed the second respondent to hand over possession of

the assets of the company to the official liquidator and the official liquidator was also directed to take inventory of the articles of the company in

liquidation. After taking possession, the court also directed the official liquidator to file his report. The said order was taken on appeal by the

second respondent in O. S. A. No. 165 of 2001. The said appeal was disposed of holding that inasmuch as the winding up order had already

been passed, the official liquidator is the person entitled to be in charge of the assets of the company. Holding so, the Division Bench also directed

the official liquidator to take custody of the assets of the company, if not already taken. When Company Application No. 486 of 2001 was again

listed on February 18, 2002, this court rejected the same on the ground that the winding up proceedings are to be continued as per the directions

of the Division Bench. While the matter stood at that stage, the applicant in all the above applications has approached this court for the reliefs

detailed supra.

6. According to Mr. C. Harikrishnan, learned senior counsel for the applicant, the challenge to the award is mainly on the ground that when the

winding up proceedings were pending, not only the company in liquidation but also the second respondent who was before the court even when

winding up order was passed are not entitled to subject themselves to the arbitration proceedings and consequently the award passed by the

arbitrator is liable to be set aside. Further, the award was obtained by fraud and collusion.

7. The question that arises for consideration based upon the pleadings is as to whether a company facing winding up proceedings or a company

which is also before the court in winding up proceedings, is entitled to subject themselves to arbitration and whether the award passed by the

arbitrator and the consequential execution proceedings would be hit by Sections 441(2) and 446(1) of the Companies Act, 1956.

8. The facts that are not disputed are as follows : M/s. Bharat Tex Fashions Limited, the company in liquidation was facing winding up proceedings

before this court from the date when the petition for winding up was presented on June 14, 1999. Notice was ordered by this court in the said

petition on June 18, 1999. Prior to the filing of the petition, the petitioner in C. P. No. 145 of 1999, issued statutory notice to the company in

liquidation with demand for repayment of the dues on February 2, 1999. It is equally not in dispute that subsequent to the said notice but before

the presentation of the petition, the company entered into the financial agreement with the second respondent on February 5, 1999. The guarantee

agreement was also entered on May 12, 1999. It is also not in dispute that after the petition was presented to this court on June 14, 1999, the

second respondent invoked the arbitration clause on April 1, 2000, and the arbitrator was appointed. An award was also passed on June 21,

2000, and the company in liquidation was ordered to be wound up on December 7, 2000. On the above factual averments, it must be now seen

as to whether the award passed after the presentation of the petition but before the order of winding up is sustainable in law.

9. Section 441 of the Companies Act, 1956, which is relevant for the case reads as under :

(1) Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for

voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless

the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have

been validly taken.

(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for

winding up.

10. The words employed in Sub-section (2) of Section 441 are explicit and clear without any ambiguity. In terms of the express provision, the

winding up shall relate back to the date of presentation of the petition and the winding up of the company shall be deemed to commence from the

date of presentation of the petition for winding up and not from the date of the order, though the process of winding up takes effect from the date

of the order.

11. Yet another Section 446(1) of the Companies Act, 1956, which is relevant for the case reads as under :

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 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.

12. In terms of the above section, no suit or other legal proceedings if pending at the date of winding up order shall be proceeded with against the

company except by leave of court This section imposes a restriction for

institution of a suit or legal proceedings to be commenced after the appointment of a provisional liquidator on winding up order was made. The only embargo for institution of a suit or other legal proceedings or to continue the pending proceedings is only to obtain the leave of the court. The question on the facts of the present case is as to whether the leave of the court should be obtained before the parties refer the dispute to the arbitrator. The terms of Section 446(1) are clear inasmuch as the leave of the court is necessary only after a winding up order is made or the official liquidator is appointed as provisional liquidator. It is therefore reasonable to hold that in the absence of either an order of winding up or appointment of the official liquidator as provisional liquidator, the provision does not require a person or a company to seek the leave of the court to initiate or continue suit or other legal proceedings. In this context, it is to be seen that though the company petition was presented on June 14, 1999, and the order of winding up was made on December 7, 2000, the arbitrator was appointed on April 1, 2000, and the final award was passed on June 21, 2000. The question of obtaining leave by the company or the second respondent to refer the dispute to arbitrator in the given facts of the case does not arise. The issue does not stop with that as the second respondent initiated further legal proceedings in pursuance of the award. The second respondent filed E. P. No. 236 of 2000 under Order 39, Rule 1 of the Original Side Rules read with Section 39 of the CPC for transmission of the award to the District Court, Chenglepet for execution. Though the second respondent claimed that this court by order dated November 24, 2000, ordered transmission, it is to be now considered whether the said order is referable to the leave granted by this court u/s 446(1) of the Companies Act. The petition was filed ""in the matter of award of the Mr. Justice P. Baskaran, retired judge of this court, dated June 21, 2000"", and not ""in the matter of the Companies Act, 1956, and in the matter of M/s. Bharath Tex Fashions Limited (in liquidation)"". The petition was only listed before the First Assistant Registrar of this court, who by order dated November 24, 2000, directed the transmission to the District Court, Chenglepet. Section 446 refers to obtaining leave from the court even for continuation of the legal proceedings after the winding up order is passed. The words ""other legal proceedings"" employed in Section

446 include in its ambit the execution proceedings also. Hence, it is incumbent on the part of either the second respondent or the company to

obtain leave to continue the execution proceedings. No application u/s 446(1) seeking leave of the court to pursue the execution proceedings was

filed at the initial stage. The order of the First Assistant Registrar dated November 24, 2000, was made by exercising the power under Order 39,

Rule 1 of the Original Side Rules read with Section 39 of the CPC in the matter of arbitration proceedings. The power u/s 446(1) should be

exercised only by the company court, as that court alone is vested with the exclusive power either to grant or to refuse leave to commence the suit

or other legal proceedings or to continue pending suit or other legal proceedings after the order of winding up is made or the official liquidator is

appointed. In the absence of such leave, the order of the First Assistant Registrar dated November 24, 2000, transmitting the execution petition to

the District Court, Chenglepet, will have no assistance to the second respondent to contend the compliance with Section 446(1) of the Act. That is

how the second respondent came up with another application in C. A. No. 486 of 2001 seeking for a direction to grant leave to continue the

execution proceedings. When the said application was heard on June 6, 2001, the company court observed as follows :

The attitude of the applicant-company in continuing in possession of the property of the company even after the order of winding up is not

appreciated at all. The official liquidator is directed to take charge of the assets of the company immediately and adjudicate the claim of the

applicant as regards its claim that it is a secured creditor. I have already held that even assuming that the applicant is a secured creditor, it is not

open to the applicant to be in possession of the property when the property belongs to the company in liquidation. The secured creditor may have

charge over the assets of the company, but that will not enable the applicant-company to be in possession of all the assets of the company in

liquidation. The applicant in C. A. No. 486 of 2001 is, therefore, directed to hand over possession of the assets of the company. The official

liquidator after taking possession of the property is also directed to take inventory of the articles of the company in liquidation.

With the above direction, C. A. No. 486 of 2001 is adjourned by two weeks to enable the applicant to produce necessary documents to the

official liquidator to adjudicate on the claim of the applicant-company that it is a secured creditor. The official liquidator is directed to take charge

of the assets of the company in liquidation and the applicant is also directed to hand over possession of the assets to the official liquidator

immediately. It is made clear that if there is any resistance by the applicant or any one else from taking possession of the property, the local police

is directed to render all assistance to the official liquidator. The official liquidator is directed to file his report also within a week.

13. The said order was challenged by the second respondent in O. S. A. No. 165 of 2001. This court disposed of the said appeal on August 1,

2001, and the relevant paragraphs are as follows :

Having regard to the fact that winding up order has already been passed and the official liquidator is the person who is entitled to be in charge of

the company's assets, the liquidator shall take custody of the company's assets, if not already done. However, he shall permit the appellant to

appoint and maintain security guards in and around the factory at the cost of the appellant to ensure the safety of the property.

Learned counsel for the impleading applicants submits that the status of the appellant as a secured creditor and even its status as a creditor is a

matter of dispute. That is a matter which the learned company judge will decide at the appropriate time. We make it clear that the further

proceedings in the winding up are to be continued and that the assets which admittedly belong to the company be brought to sale expeditiously.

Before the sale proceeds are distributed, questions regarding the appellant's status as a creditor as also its claim that it is a secured creditor shall

be determined by the company court. The appeal is disposed of accordingly.

14. On a combined reading of the orders of the company court and the Division Bench in the appeal, it is clear that after the winding up order was

passed, the official liquidator is the person entitled to be in charge of the assets of the company. In fact, the Division Bench has directed the

liquidator to take custody of the company's assets, if not already taken. The said finding has become final as far as the second respondent and the

company in liquidation are concerned. The submission of the learned senior counsel for the second respondent placing heavy reliance on paragraph

3 of the above order is that the issue was not conclusively decided by the

Division Bench, as the status of the second respondent as a creditor was directed to be adjudicated before the company court only. For the purpose of disposal of these applications, the status of the second respondent as creditor is not that much relevant, as the question posed before this court is as to whether the second respondent can proceed further against the company in liquidation in pursuance of the award. As already noted, the finding on this aspect by the Division Bench has become final. The Division Bench has categorically held that once the winding up order was passed, the official liquidator is entitled to be in charge of the company's assets. In fact the Division Bench has directed the official liquidator to take possession of the assets, if not already taken and in pursuance of the said direction, the official liquidator has taken possession of all assets of the company. It is, therefore, not now open to the second respondent to seek for continuance of the custody of the assets of the company in liquidation in terms of the arbitration award. In fact, such a specific request made by the second respondent was rejected both by the company court as affirmed by the Division Bench. The above orders of both the company court and the Division Bench were also on the basis that there was no leave obtained by the second respondent to proceed further with the execution proceedings after the order of winding up was made. In the absence of leave, the question of pursuing the award in execution proceedings does not arise.

15. Mr. K.M. Vijayan, learned senior counsel for the second respondent would challenge the power of this court to set aside an arbitration award made under the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act"). It is his contention that the said Act governs the field of arbitration and is a special enactment. The Companies Act, 1956, is a general enactment. He would further contend that it is well settled law that the special enactment shall exclude the general enactment. In such event, the company court would have no jurisdiction to set aside the award passed by the arbitrator exercising the powers under the special enactment. Mr. Ravikumar Paul, learned counsel for the third respondent would support the arguments of Mr. K.M. Vijayan, learned senior counsel in all aspects. In addition to the same, he would submit that there is no fraud or collusion by the parties to arbitration

proceedings. He would further submit that not even an allegation is made in the affidavits filed in support of the applications.

16. The Companies Act, 1956, is a self-contained code relating to companies, their incorporation, working and winding up. Of course, the Companies Act is a general enactment. The object of the Companies Act is to consolidate and amend the law relating to companies and certain other associations. Chapter II of Part VII relates to winding up by the court. Section 433 of the Act relates to the circumstances in which the company may be wound up by the court. Section 439 relates to the provisions of the applications for winding up. Under the said section, an application for winding up shall be presented only to the company court. Section 441 relates to the commencement of winding up by the court. Section 442 relates to the power of the company court to stay or restrain proceedings against company. Section 446 relates to the suits staying on winding up order. Section 447 relates to the effect of winding up order whereby it is made clear that an order of winding up of a company shall operate in favour of all the creditors and of all the arbitrators of the company as if it had been made on the joint petition of the creditor and of an arbitrator. Section 448 relates to the appointment of official liquidator by the company court. All these provisions would go to show that the power to order winding up and stay of suits pending winding up proceedings as well the grant of leave either to commence the suit or other legal proceedings or to continue the pending suits or other legal proceedings after the orders of winding up shall exclusively vest with the company court. The question of exercising such power for ordering winding up is not traceable to the arbitrator acting under the provisions of the Arbitration Act.

On the other hand, the Arbitration Act is a special enactment providing for settlement of disputes between the parties. The object of the Arbitration Act is to consolidate and amend the law relating to domestic arbitration, international, commercial arbitration and enforcement of foreign arbitral award as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Section 2(1)(b) defines an arbitration agreement"" as an agreement referred to in Section 7. Section 7 refers to an arbitration agreement as meaning an agreement by parties to submit to arbitration all or certain disputes which have arisen or which may

arise between them in respect of a defined legal relationship whether contractual or not. Section 2(1)(h) defines a "party" as meaning a party to an arbitration agreement. Section 8 relates to the power of the parties to refer the dispute for arbitration. Section 34 refers to the applications for setting aside arbitral award at the instance of the party. The provisions of the Arbitration Act, though a special enactment, deal only in respect of settlement of disputes or for passing awards strictly in consonance with the terms of the arbitration agreement. Such dispute could be referred only by the parties to the agreement and not by any other third party. Even u/s 34 of the Arbitration Act, only a party to the arbitration agreement and a party to the arbitration award can file an application to set aside the arbitration award and that too only on conditions enumerated u/s 34(2) of the Act. There is no provision under the Arbitration Act for ordering winding up of a company. Coming to the Companies Act, a petition for winding up may be filed by the company on its own or by an aggrieved creditor. When such a petition is pending, even a creditor who is otherwise aggrieved and who is not before this court can also approach the court as an intervenor. The provisions of the Companies Act do not prevent an intervenor to assist the court though not permitted to implead third party. Here is a case where the applicant is not a party to the arbitration proceedings. Under the provisions of the Arbitration and Conciliation Act, a third party is not entitled to challenge the award under the provisions of the said Act. The grievance of the applicant is that when the winding up proceedings are pending and the facts are known to both the company in liquidation and the second respondent, referring the matter to an arbitrator would be hit by Section 446(1) of the Act as admittedly, the second respondent before initiating arbitration proceedings did not obtain the sanction of this court. When the Companies Act is a self-contained code, more particularly, the provisions are very explicit and clear as to the transactions made and as to the suit or legal proceedings commenced or pending when the company petition is pending, this court would have jurisdiction to declare such actions are void as they are hit by Section 446(1) of the Companies Act. It is the further contention of the learned senior counsel for the second respondent that in view of Section 5 of the Arbitration Act, no judicial authority shall intervene in the matters

governed in Part I of the Arbitration and Conciliation Act and hence, the company court would have no jurisdiction to intervene and set aside the arbitration award. The said argument is also totally misconceived as this court has already found that the provisions of the Arbitration Act are mainly procedural and govern the arbitration proceedings initiated between the party to an arbitration agreement and right of third parties to such arbitration agreement to question the same on the ground that the proceedings are initiated without leave of the company court u/s 446(1) of the Companies Act is not affected. Hence, Section 5 of the Arbitration Act shall not in any way override the provisions of the Companies Act relating to the winding up proceedings. In so far as the winding up proceedings are concerned, the relevant provisions of the Companies Act shall prevail even over by the subsequent special enactment namely, Arbitration and Conciliation Act in the absence of any power conferred on the arbitrator to wind up a company. Power to order winding up and also to pass consequential orders as enumerated u/s 446(1) shall exclusively vest only with the company court. In such event, the company court while exercising power u/s 446(1) shall have the power to declare the arbitration proceedings as void in the event, such proceedings are initiated without the leave of the court. In this context, it would be relevant to note that legal proceedings as contemplated u/s 446(1) shall include in its ambit the arbitration proceedings and the consequential execution proceedings initiated by the second respondent.

17. The learned senior counsel for the second respondent would rely upon the judgment of the apex court in A.S. Nizar Ahmed and Co. Ltd. v. Collector of Vellore District [2002] 39 SCL 842 (Mad) and contend that in between two special enactments, the latter will prevail over the former. E. Padmanabhan J., while considering the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, and the Environment Protection Act, has held that the latter enactment shall prevail. The said judgment arose entirely under a different set of facts and the specific powers conferred on the respective authorities. The question argued was as to whether award of compensation ordered by the authority against the company under the Environment (Protection) Act can be deprived in view of the pendency of the proceedings before the

BIFR and more particularly, Section 22 of the said Act. The learned judge has in fact found that the award of compensation was ordered under the Environment (Protection) Act to poor agricultural farmers and resident of the locality who were deprived of their livelihood due to pollution of soil as the company let out chemicals. The latter enactment is a special enactment to provide compensation to those affected due to pollution and hence, the latter enactment shall override the provisions and prevail over the earlier enactment, namely, the Sick Industrial Companies (Special Provisions) Act, though both the enactments are special enactments. The learned judge also on the facts found that the amount of compensation awarded was not included by the company in the schedule of payments before the BIFR. In fact, the said judgment supports the plea of the applicant rather the plea of the second respondent. Though the Arbitration Act is latter in the point of time and a special enactment, in the absence of provision to order winding up, the latter enactment shall not override the earlier enactment in so far as the power of winding up and to pass consequential orders are concerned, though the earlier enactment is a general enactment.

18. The judgment in Indian Bank Vs. The Official Liquidator, Chemmeens Exports (P) Ltd. and Others, ; relied upon by the learned senior counsel

for the second respondent relates to a case where the apex court was considering the scope and power u/s 446 of the Companies Act to declare a decree of a competent civil court is void. The apex court was considering a decree passed by the civil court creating a charge on the properties of

a company u/s 125 of the Act. When the winding up proceedings were pending, Indian Bank which advanced the loan to the company in

liquidation filed a petition before the company court seeking leave to file a suit for recovery of certain debt due to it from the company in

liquidation, Such permission was granted and on the basis of permission the suit was filed which was decreed after the official liquidator filed his

written statement and contested the suit and no appeal was filed by the official liquidator against the said decree. On the contrary, the official

liquidator filed an application u/s 446(2) read with Section 125 of the Companies Act, to declare the decree void and inoperative. Only under the

said circumstances, the apex court rejected the application filed by the official liquidator.

19. Coming to the facts of the present case, an agreement for financial assistance was entered by the company in liquidation on February 5, 1999, after the statutory notice was issued by the petitioner in C. P. No. 145 of 1999 on February 2, 1999. The arbitrator was appointed only after the company court had taken cognisance of the company petition on June 14, 1999, as the arbitrator was appointed only on April 1, 2000. It must be also noted that the second respondent even before referring the matter to the arbitrator approached this court by filing C. A. No. 1284 of 2000 seeking for permission to absorb the assets of the company in liquidation in full and final settlement of its dues and the second respondent was fully aware of the pendency of the winding up proceedings. The award was passed on June 21, 2000, of course, before the order of winding up was made on December 7, 2000. There was no hurdle for the second respondent till that stage the hurdle arose due to the subsequent action of the second respondent, which is worth mentioning. After the award was passed, the second respondent approached this court with E. P. No. 236 of 2000 for transmission of the award to the District Court, Chenglepet, for execution, which was ordered by the First Assistant Registrar on November 24, 2000, and not by the company court. However/after the winding up was ordered on December 7, 2000, the second respondent very rightly again approached this court under Sections 446(2), 536(2) and 537(1) of the Companies Act, 1956, read with Rules 11(6) and 117 of the Companies (Court) Rules, 1959, for grant of leave to continue the execution proceedings in pursuance of the award dated June 21, 2000. The said request was negatived by both the company court and the Division Bench leaving the second respondent without any leave to continue the execution proceedings.

20. An analysis of the various provisions of the Companies Act, Arbitration Act as well as the judgments referred to by the learned senior counsel for the second respondent, the following conclusions on the legal preposition could be arrived at :

(1) In terms of Section 441(2), the winding up proceedings shall relate back to the date of presentation of the petition and the winding up of the company shall be deemed to commence from the date of presentation of petition for winding up and not from the date of the order, though the

process of winding up takes effect from the date of the order.

(2) u/s 446(1), after the winding up order is made or the official liquidator is appointed as provisional liquidator, no suit or other legal proceedings

shall be commenced or no pending suit or other legal proceedings shall be continued without leave of the court.

(3) As a necessary corollary, the question of obtaining leave to institute a suit or other legal proceedings or to continue pending suit or other legal

proceedings before the order of winding up or appointment of provisional liquidator does not arise.

(4) When suits or other legal proceedings including arbitration proceedings and execution proceedings are initiated or continued without leave of

the court, the company court would have jurisdiction to declare the arbitration award or execution proceeding void.

(5) After the winding up order is made, the official liquidator is alone entitled to take charge of the assets of the company and no other person

though entitled under an award or subsequent execution proceedings.

21. On the above settled legal principles, let me now consider the applicability of those principles to the facts of the present case. C. A. No. 1418

of 2001 is filed to set aside the award of the arbitrator. I am unable to agree with the said request, as the appointment of the arbitrator and the

passing of final award were prior to the winding up order and for such proceedings, no leave of the court is necessary. Further, the award of the

arbitrator is sought to be set aside on the ground of fraud and collusion. A reading of the award would show that arbitration proceedings were

contested by the company in liquidation and officers of the bank were examined both on behalf of the second respondent and the company in

liquidation. The award was passed on the merits. Hence, I do not find any fraud or collusion either on the part of the second respondent or on the

part of the company in liquidation except the fact that the reference as to the dispute was made to the arbitrator and the award was passed pending

company petition for winding up. In such event, this court cannot hold that the initiation of the arbitration proceedings and the consequential passing

of the award are hit by Section 446(1) of the Act. However, there is another hurdle for the second respondent to cross. After the award was

passed on June 21, 2000, the second respondent in fact filed C. A. No. 486 of

2001 seeking permission of the company court to proceed with the execution proceedings in pursuance of the award, which was rejected by the learned single judge. The appeal filed by the second respondent was also rejected by the Division Bench and those orders have become final. Admittedly, no leave has been granted and in the absence of leave u/s 446(1) of the Act, all further proceedings pursuant to the award shall be declared to be void. Hence, the second respondent is disentitled from having the benefit of the award to take custody of the assets of the company and consequently, continuance of the execution proceedings without there being no leave is impermissible, and the same is therefore held to be void.

22. It was next contended by the learned senior counsel for the second respondent that u/s 34(3) of the Arbitration and Conciliation Act, an application for setting aside should be made within a period of three months from the date of receipt of the copy of the award. In the present case, the award was passed on June 21, 2000, and the application to set aside was filed only during December, 2001, nearly after 18 months and hence, it is barred by limitation. The said contention is totally misconceived. The question of limitation for filing application to set aside an award passed is applicable only to the parties to the arbitration proceedings and when an application is filed invoking the provisions of "the Arbitration Act". In my considered view, question of limitation prescribed u/s 34 of the Arbitration Act does not apply to an application filed before the company court by a person who is not a party to the arbitration proceedings on the ground that the company in liquidation has gone before an arbitrator pending winding up proceedings and such proceedings are hit by Section 446(1) of the Act. Hence, the said contention as to the limitation has to be rejected. Since all these applications are disposed of for the reasons stated above, it is unnecessary to deal with the submissions made by the learned senior counsel for the second respondent placing reliance on Section 125 of the Companies Act.

23. For all the above reasons, C. A. No. 1418 of 2001 is allowed only to the extent indicated above by declaring that all further proceedings pursuant to the award are void and cannot be continued and the second respondent is not entitled to the benefit of the award by executing the same. In view of the said finding, the official liquidator appointed by this court as

provisional liquidator is entitled to take charge of the entire assets of the company in liquidation and whatever the claim of the second respondent has against the company could be made only to the official liquidator. The said claim may also be based upon the award of the arbitrator dated June 21, 2000.

24. Consequently, C. A. No. 1419 of 2001 is disposed of with a direction to the second respondent to file the statement of accounts and accounts

of the assets of the company for the period from March 1, 1999, to August 17, 2001, to the official liquidator within a period of four weeks from

the date of receipt of a copy of this order, and the official liquidator is directed to adjudicate the said claim. The relief sought for in G A. No. 1420

of 2001 for making good of the benefits derived by the second respondent shall be subject to the adjudication by the official liquidator on the

statement of accounts filed by the second respondent. With the above direction, C. A. No. 1420 of 2001 is also disposed of.