2016 (6) CTC 673

IN THE HIGH COURT OF MADRAS

Sanjay Kishan Kaul, C.J. & R. Mahadevan, J.

O.S.A. Nos.281 & 319 of 2009 & O.S.A. No.7 of 2010 & M.P. No.1 of 2014

23.11.2016

Al Rostamani International Exchange, rep. by its Head International Operations, Mr. V.V. Subramaniam, P.O. Box No.10072, Dubai, United Arab Emirates ***.....Appellant***

Vs.

The Official Liquidator, High Court, Madras as the Liquidator of M/s. SIV Industries Limited (in Liquidation), Kuralagam, 1st Floor, Esplanade, Chennai-600 008. **2.** Fairdeal Supplies Private Limited, rep. by its Director, Mahesh B. Gor, 4, BBD Bag (East), 5 Stephen House, 1st Floor, Kolkata-700 001. **3.** Power Engineering International FZCO, P.O. Box No.261851, Jebel Ali, Dubai, UAE. **4.** Kochupillai Thulasi Das, Passport No.Z1388507, "Sukritham" 20/10-2, CIT Road, Killippalayam, Karamana, Trivandrum District-695 002, Kerala. **5.** Ray Divakar, Passport No.E3754060 S/o. Kumaran Divakaran, Konnisseri, Kandathil, Kaithavana, Alleppey, Kerala. **6.** Santhakumariamma Thulasi Das, "Sukritham" 20/10-2, CIT Road, Killippalam, Karamana, Trivandrum District-695 002, Kerala. [*R3 to R6 impleaded as party Respondents vide Order of this Court dated 26.10.2009 made in M.P. No.2 of 2009*]. **7.** Asset Reconstruction Company (India) Limited, rep. by its Asst. Vice-President, The Ruby, 10th Floor, 29, Senapati Bapat Marg, Dadar (West), Mumbai-400 028 [*R7 impleaded as per the Order of this Court dated 30.3.2012 made in M.P. No.1 of 2011*] [*Respondents in O.S.A. No.281 of 2009*] **1.** The Official Liquidator, High Court, Madras as the Liquidator of SIV Industries Limited (in Liquidation), Kuralagam, 1st Floor, Esplanade, Chennai-600 008. **2.** Fairdeal Supplies Private Limited, rep. by its Director, Mahesh B. Gor, 4, BBD Bag (East), 5, Stephen House, 1st Floor, Kolkata-700 001. **3.** The Commissioner of Police, Chennai District, Egmore, Chennai-8 [*Respondents in O.S.A. No.319 of 2009*] **1.** Indian Bank, Asst. Recovery Management Branch, rep. by its Chief Manager, Mr. P. Andavan, 31, Veriety Hall Road, Coimbatore-641 001. **2.** The Official Liquidator, High Court, Madras as the Liquidator of SIV Industries Limited (In Liquidation) [*Respondents in O.S.A. No.7 of 2010*] ***.....Respondents***

Negotiable Instruments Act, 1881 (26 of 1881), Sections 2(d), 9 & 58 — Unlawful Instrument — Holder in due course — Application of Section 58 — Auction sale of Company property — Demand Drafts issued in favour of Official Liquidator — Cheques issued in favour of Appellant, an International Exchange in Abu Dhabi for obtaining said Demand Drafts, dishonoured — Official Liquidator at time of receipt of Demand Drafts, not aware of dishonour or of alleged deceit by R2 (successful bidder) — Consideration for accepting Demand Draft by Official Liquidator was the permission to participate in Auction and in case of successful bidding and payment, promise to handover possession of property — Official Liquidator, 'holder in due course' as contemplated in Section 9, against whom Section 58, *held,* would not be applicable.

Facts : SIV Industries directed to be wound up by Company Court. Properties of Company bought to sale by Official Liquidator. Bid of Third party purchaser, one Jalal Nasar, confirmed initially. Order of Company Court challenged before Division Bench. As Jalal Nasar failed to deposit EMD before scheduled date, R2, the second highest bidder was directed by High Court to deposit the entire EMD amount of ₹23.6 crores. R2 entered into an Assignment Agreement with M/s Power Engineering International Company (PEIC). PEIC obtained Demand Drafts from Appellant, stationed at Dubai, in favour of Official Liquidator-R1 by issuing a Cheque in Dirhams for a value equivalent to ₹23.60 crores. R1 encashed the Demand Drafts given by R2. Cheques issued by PEIC in favour of Appellant dishonoured. As EMD was duly paid by R2, direction issued to R2 for depositing entire sale consideration. Appellant on other hand filed Complaint with relation to dishonour of Cheque and also claimed ₹23.60 crores from R1. Appellant got himself impleaded before High Court. Court at Abu Dhabi issued an International Warrant of Arrest against Directors of PEIC for crime of dishonour of Cheques. As R2 failed to deposit the sale consideration within the due time, EMD paid was forfeited; Appellant was directed to work out remedy before Competent Court dealing with Company Petition. Appellant filed Application before Company Court seeking refund of ₹23.60, deposited by R2. Complaint against R2 and PEIC on allegation of cheating and conspiracy also filed by Appellant. R2's Application for purchase of property for a sum of ₹100 crores was dismissed by Company Court and the forfeited sums were directed to be paid to the Workman and Secured Creditor. Said order has been challenged in instant O.S.A.7 of 2010. Division Bench in another Appeal preferred by R2, issued direction for conducting a fresh Auction. Fresh Auction so conducted was unsuccessful. ARCIL pleaded that assets should be sold to R2 as their offer was higher. Offer of R2 to purchase the property for ₹101 crore accepted by Company Court. Company Court dismissed Application filed by Appellant seeking refund of money and Application seeking direction to Police to investigate on their Complaint. Aggrieved, instant Appeals have been preferred by Applicant in those Applications.

Held : Insofar as Section 58 of the Negotiable Instruments Act is concerned, learned Senior Counsel for the Appellant has contended that since the document is to be treated as an inland document and once a fraud has been played and an instrument has been obtained, the person, who has so obtained will have no valid title and hence, he cannot pass on better title, whereas, the learned Counsel for the First Respondent has countered the said contention that the last part of Section 58 protects the Official Liquidator as he is a holder in due course. *[Para 23]*

For better appreciation, it is useful to look into Section 58 of the N.I. Act, which reads as follows:

> "*58. Instrument obtained by unlawful means or for unlawful consideration.*— When a Negotiable Instrument has been lost, or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course."

A careful reading of the above Section prompts us to agree with the contention of the First Respondent. The Official Liquidator at the time of receipt of the Demand Drafts or at the time of depositing the same, was not aware of the deceit. *[Para 24]*

It is also relevant to refer to Section 2(d) of the Indian Contract Act, 1872, which defines "consideration" as under:

> "When, at the desire of the promisor, the promissee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

In the case on hand, the consideration for accepting Demand Draft by the Official Liquidator is the permission to participate in the Auction and in case of successful bidding and payment, the promise is to handover possession of the property. Therefore, the Official Liquidator, who received the Drafts from the Second Respondent is deemed to be "holder in due course" as contemplated under Section 9 of the Negotiable Instruments Act and therefore, Section 58, cannot be pressed into service by the Appellant. *[Para 25]*

Companies Act, 1956 (1 of 1956), Section 446(2) — Company Court — Winding-up proceedings — Incidental claims — Determination of — Limitations — Incidental claims to be decided by Company Court under Section 446(2) bound to relate to Winding-up proceedings — Term 'Company' employed in provision, *held,* only to mean 'Company in liquidation' — Dishonour of Cheques issued in favour of Appellant, an International Exchange, through which Demand Drafts were issued to Official Liquidator, would not be an 'incidental issue' for purpose of provision — No nexus between Appellant and Company in liquidation — Company Court exercising jurisdiction under Section 446(2), *held,* cannot act as a Writ Court or exercise inherent powers under Cr.P.C.

Upon careful consideration of the Judgments referred to above, Section 446(2) and the findings of the learned Single Judge, we agree with the decision of the learned Judge that in the Winding-up proceedings of a Company, claims by or against the Company can alone be decided. Third party claims against a bidder in the Auction cannot be decided by the Company Court. The power to decide on incidental claims must also be relating to the Winding-up proceedings. Just because, the Second Respondent is an Auction Purchaser, it cannot be said to be either the debtor or creditor of the Company, falling within the definition of "claim". The Word "Company" employed in Section 446(2) would mean only the Company in liquidation. The Section has been enacted to ensure complete justice in the course of Winding-up proceedings of the Company in liquidation. *[Para 13]*

Therefore, we come to an irresistible conclusion that the role of the Company Court, while dealing with the Winding-up proceedings, is restricted to claims by or against the Company in liquidation. In the present case, except for the fact that the Demand Drafts were issued in favour of the Official Liquidator, there is no nexus between the Appellant and the Company in liquidation. There is also no privity between the Appellant and the Second Respondent. The Company Court in the course of Winding-up proceedings cannot be converted as a Writ Court under Article 226 of the Constitution of India or exercise the inherent powers under the Criminal Procedure Code. *[Para 15]*

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Companies Act, 1956 (1 of 1956), Section 446(2) — Company Court — Winding-up proceedings — Plea of fraud — Determination of — Whether warranted — Winding-up of Company — Auction of Company property — R2 successful bidder — Assignment Agreement between R2 and Power Engineering International Company [PEIC] — PEIC on account of said Agreement obtained Demand Drafts by issuing Cheques in favour of Appellant, an International Exchange — Demand Drafts issued to Official Liquidator — Cheques issued to Appellant by PEIC dishonoured — Contention of Appellant that dishonour of Cheques amounting to fraud and collusion vitiating entire proceedings and no title would pass on to R2 — *Held,* no fraud played against Company Court in permitting R2 to deposit Demand Drafts — Terms and conditions of the Assignment Agreement between R2 and PEIC and the alleged illegality of procurement of Cheques by R2, issues to be determined by Civil Court — Plea of fraud, alleged by Appellant to be established before appropriate Court — Challenge by Appellant to participation of R2 in Auction proceedings, without *locus standi* — Company Court, under Section 446, empowered to decide claims against Company in liquidation — However, determination of Third party claims not within the jurisdiction of Company Court exercising power under Section 446.

By relying on above Judgments, learned Senior Counsel for the Appellant has sought to contend that fraud and collusion vitiate entire proceedings and no valid title could be passed on. There is no doubt on the ratio lay down in the above Judgments. However, the factual matrix is different in each case and the element of fraud has to be established and linked to the person against whom the remedy is sought in appropriate proceedings before the jurisdictional Court. In the present case, as rightly held by the learned Single Judge, the allegations of fraud cannot be extended to the Official Liquidator. No fraud has been played against the Court in permitting the Second Respondent to deposit the Demand Drafts. The procurement of the Cheques by the Second Respondent cannot be termed as illegal or unlawful, unless established by appropriate Court. It is pertinent to mention here that the Demand Drafts were issued for huge sums, totalling to ₹23.60 Crores. The terms and conditions of the Contract between the Appellant and M/s. Power Engineering International Company have neither been placed before the learned Single Judge nor before this Court. The Company Court exercising its powers of Winding-up cannot be converted as an Execution Court of a Third party, unrelated to Winding-up proceedings. Therefore, we agree with the finding of the learned Single Judge that the plea of fraud has to be established before appropriate Court and the plea of equity would not apply. That apart, even if the plea of fraud is established, as held above the jurisdiction of the Company Court under Section 446 is limited, in the sense that it can pass any orders relating to claims by or against the Company, but cannot decide any Third party disputes. *[Para 18]*

The learned Senior Counsel for the Appellant further contended that fraud has been played upon the Court by permitting the Second Respondent, a disqualified entity to participate in the Auction. We do not agree with the said contention. Firstly, the Second Respondent was permitted to participate in the subsequent

Auction by the Division Bench in its Order dated 28.1.2009 and secondly, the Appellant will not have any *locus standi* to challenge the participation of the Second Respondent in Auction proceedings. The Special Leave Petition filed by the Second Respondent against the Order of Forfeiture was also pending before the Hon'ble Supreme Court till 12.8.2011, much after the assets were sold and possession was handed over to the Second Respondent. It is also pertinent to mention here that initially after the bid of ₹101 Crores, the Second Respondent deposited ₹55 Crores and took out an Application for removal of plant and machinery, which was refused by this Court in O.S.A. No.116/2009. However, the Apex Court, by its Order dated 21.8.2009 in SLP. No in 15389 of 2009, permitted the Appellant to remove the plant and machinery from the factory premises. The sale which has received the assent of the Apex Court, cannot be challenged again. It is not to be forgotten that the object of the Company Court would be to materialize the best price in the interest of the Company as well as that of the creditors. As also, the amount deposited by the Second Respondent earlier was already forfeited, which is in itself a penal action. Albeit, much water has flown subsequently, the possession of the property was handed over to the Second Respondent. Therefore, we reject the contention of the Appellant in this regard. *[Para 19]*

Doctrine of Tracing — Applicability of — Doctrine of Tracing can be invoked in cases when party, who holds money in trust, misuses same, irrespective of place or hands it is in — Demand Draft issued in favour of Official Liquidator — Cheques issued by Power Engineering International Company [PEIC], a Third party in favour of Appellant for obtaining said Demand Drafts dishonoured — Official Liquidator, *held,* a beneficiary but not a party to Contract between Appellant and PEIC — Authenticity of Assignment Agreement between PEIC and R2 (successful bidder) to be challenged in a Civil Court — Claim against PEIC not to be equated against Official Liquidator, to whom Drafts were presented by R2 — Doctrine of Tracing, inapplicable.

Though, the learned Senior Counsel for the Appellant has articulously illustrated the applicability of the Doctrine of Tracing to the case on hand by contending that the Demand Drafts can be traced to the First Respondent and then to the creditors and Workmen to whom, they were disbursed, we do not agree with the contents and the Judgments relied upon by the learned Senior Counsel for the Appellant, as rightly held by the learned Single Judge, are not applicable to the present facts of the case. It cannot be disputed that the party, who holds the money in trust, if he misuses the same, the doctrine can be invoked to trace the same, irrespective of the place or in the hands it is. However, in the case on hand, the Demand Draft was issued in favour of the Official Liquidator based on some arrangement with M/s. Power Engineering International Company. If that Company has not honored its commitment, the proper recourse would be to initiate Recovery proceedings. Also, the Official Liquidator, though a beneficiary is not a party to the Contract between the Appellant and M/s. Power Engineering International Company. The Cheque was handed over by the Second Respondent based on an Assignment Agreement dated 4.3.2008, the authenticity of which is disputed by the Appellant. When such being a case, the Appellant has to only invoke the Civil jurisdiction. The claim against M/s. Power Engineering International Company cannot be equated as against the Official Liquidator, to whom the Drafts were presented by the Second Respondent. *[Para 16]*

In the present case, the claim of tracing depends upon the claim of fraud in obtaining the Demand Drafts. *[Para 17]*

CASES REFERRED

A.G. Kidston & Co. Ltd. *v.* Seth Brothers, *AIR 1930 Cal 692* 4.10, 20
A.R. Sivaramakrishna Chettiar, In re., *1961 (74) LW 469 (DB)* 5.5, 10
Agip (Africa) Limited *v.* Barry Kingsley Jackson, *1990 EWCA Civ 2* 4.10
Ammonia Supplies Corporation (P) Ltd. *v.* Modern Plastic Containers Pvt. Ltd., *1999 (1) CTC 273 (SC)* 4.10, 9, 14
Banque Belge Pour L'Etranger *v.* Hambrouck, *[King's Bench Division 1919. B. 2351]* 4.10
Bhaurao Dagdu Paralkar *v.* State of Maharashtra, *AIR 2005 SC 3330* 4.10, 17
C. Somayya *v.* E.V. Chinniah Konar, *1976 (1) MLJ 336* 4.10, 20
Commnr. of Customs (Preventive) *v.* Aafloat Textiles, *2005 (7) SCC 605* 17
Foskett *v.* Mckeown, *[House of Lords] 2000 WL 571214* 4.10
Indian Express Newspapers (P) *v.* Union of India, etc. etc., *1986 (1) SCC 133* 17
Lipkin Gorman *v.* Karpnale Ltd., *[House of Lords] 1991 (3) WLR 10* 4.10
Madhukar Sadbha Shivarkar (Dead) by Legal Representatives *v.* State of Maharashtra, *2015 (6) SCC 557* 4.10, 17
National Insurance Company Ltd. *v.* Glaxo India Limited, *AIR 1999 Bom. 240* 4.10, 14
Ram Chandra Singh *v.* Savitri Devi, *2003 (8) SCC 319* 17
Sakiri Vasu *v.* State of Uttar Pradesh, *2008 (2) SCC 409* 5.5, 22
Shrisht Dhawan (Smt) *v.* Shaw Brothers, *1992 (1) SCC 534* 4.10
State of A.P. *v.* T. Suryachandra Rao, *2005 (6) SCC 149* 4.10, 17
State of Uttar Pradesh *v.* Ravindra Kumar Sharma, *2016 (1) LLN 276 (SC)* 4.10, 17
Sudarsan Chits (I) Limited. *v.* O. Sukumaran Pillai, *1984 (4) SCC 657* 4.10, 5.5, 9, 10, 14
Suganchand & Co. *v.* Brahmaya & Co., *1951 (64) LW 482 (DB)* 5.5, 27
The Public Passenger Service Limited *v.* K.A. Khader, *AIR 1966 SC 489* 4.10, 9, 10
Trilux Technologies Singapore Pvt. Limited *v.* Boon Technologies, rep. by its Manager Baskaran, *2004 (4) CTC 12* 4.10, 20, 21
V. Radhakrishnan *v.* P.R. Ramakrishnan, *1993 (78) Company Cases 694* 5.5, 10

Gopal Subramanian, Senior Counsel for Vinodkumar, Advocate for Appellant in O.S.A. No.281 of 2009 & 7 of 2010; Shivakumar, Advocate for Appellant in O.S.A. No.319 of 2009.

Ramakrishnan Viraraghavan for S.R. Sundar, Advocate for Respondent/Official Liquidator.

O.S.As. DISMISSED — NO COSTS — M.P. CLOSED

Prayer : *O.S.A. No.281 of 2009* filed under Order 36, Rule 1 of O.S. Rules r/w Clause 15 of the Letters Patent, against the Order passed by this Court in Company Application No.2296 of 2008 in C.P. No.17 of 2004, dated 17.7.2009.

O.S.A. No.319 of 2009 filed under Order 36, Rule 9 of O.S. Rules r/w Clause 15 of the Letters Patent, against the Judgment passed by this Court in Company Application No.141 of 2009 in C.P. No.17 of 2004, dated 17.7.2009.

O.S.A. No.7 of 2010 filed under Section 9 of the Companies Act, 1956 against the Order passed by this Court in Company Application No.1104 of 2008 in C.P. Nos.17 of 2004 & 107 of 2001, dated 23.12.2008.

Judgment Reserved on 26.9.2016 and Pronounced on 23.11.2016

JUDGMENT

R. Mahadevan, J.

1. The Appellant in all the Appeals is M/s. AL Rostamani International Exchange. The Original Side Appeal Nos.281 & 319 of 2009 are arising out of the Order dated 17.7.2009 passed by this Court in Company Application Nos.2296 of 2008 & 141 of 2009 respectively, whereas, the Original Side Appeal No.7 of 2010 is filed against the Order dated 23.12.2008 passed by this Court in Company Application No.1104 of 2008.

2. The brief facts common to all the Appeals are as follows:

2.1. The Company SIV Industries Ltd was directed to be wound up by the Company Court by its Order dated 25.8.2004. The Official Liquidator was directed to sell the properties of the Company in liquidation, so as to settle the claims against the Company. The land admeasuring about 260.89 acres together with building, plant and machinery was drawn for Auction sale. Initially, the bid of a Third party purchaser - Jalal Nasar was confirmed for ₹236 Crores and EMD of ₹10 Crores was deposited. The successful bidder was permitted to deposit the balance EMD of ₹13.60 Crores on or before 16.11.2007. The Applications for extension of time and for permission to inspect the premises were rejected on 23.11.2007, with a direction to forfeit the amount deposited and fresh Auction was ordered by the Company Court with participation from the Second Respondent, the second highest bidder and Maharashtra Steel Rolling Mills.

2.2. The Orders of the Company Court were challenged in O.S.A. Nos.381 to 383 of 2007 by Jalal Nasar and the Second Respondent. The Division Bench of this Court extended the time for Jalal Nasar to deposit ₹15 Crores by 15.2.2008 and the balance amount of ₹212.40 Crores by 15.4.2008. In case of default, the Second Respondent was directed to deposit ₹23.60 Crores within 15 days from the date of default by Jalal Nasar, which happened eventually. The Second Respondent, who was supposed to have deposited ₹23.6 Crores on or before 7.3.2008, sought extension, which was granted by this Court. Meanwhile, the Second Respondent and M/s. Power Engineering International Company entered into an Assignment Agreement. Pursuant to the same, M/s. Power Engineering International Company obtained Demand Drafts from the Appellant, stationed at Dubai, in favour of the First Respondent by issuing a Cheque in Dirhams for a value equivalent to ₹23.60 Crores. The Second Respondent handed over the Demand Drafts to the First Respondent, who encashed the same. In the meantime, the Cheques issued by Power Engineering International Company were dishonoured on 19.8.2008. Since the EMD was deposited, this Court by its Order dated

28.3.2008, allowed the Second Respondent to deposit ₹212.4 Crores on or before 15.4.2008.

2.3. While so, the Appellant lodged a Complaint with the Public Prosecutor, Abu Dhabi and also wrote a Letter to the First Respondent, claiming ₹23.60 Crores. Simultaneously, the Appellant approached this Court by filing Applications to grant leave, to implead itself and also for Injunction in O.S.A. No.383/2007. The leave was granted by this Court and the Appellant was impleaded. Further direction was given to the First Respondent to desist from disbursing any sums without prior permission of the Court. In the Complaint lodged against the Managing Director of M/s. Power Engineering International Company in Abu Dhabi, an *ex parte* Judgment was given convicting the Accused for three years on 22.4.2008. Since, the Second Respondent did not deposit the money within the time stipulated, this Court granted further 15 days by Order dated 13.6.2008 to the Second Respondent and Jalal Nasar to deposit the money. An international Warrant of Arrest was issued against K. Tulsidas and Roy Diwakaran for the crime of dishonour of Cheques.

2.4. As the amounts were not deposited within the extended time, Orders were passed forfeiting the sums already deposited on 28.8.2008 in the earlier Appeals and the Appellant was directed to work out their remedy before the Competent Court dealing with the Company Petitions. It was also held that the Order of Forfeiture would not stand in the way of the Appellant, if the Application taken out by it is considered favorably.

2.5. The Appellant subsequently moved the Company Court by filing C.A. No.2296 of 2008 seeking refund of ₹23.60 Crores, being the sum deposited by the Second Respondent. The Appellant also lodged a Complaint with the Commissioner of Police against the Second Respondent and M/s. Power Engineering International Company for conspiracy and cheating on 11.11.2008. The said Jalal Nasar unsuccessfully challenged the Order dated 28.8.2008 before the Hon'ble Supreme Court. The Second Respondent again approached the Company Court in C.A. No.2727 of 2008 to purchase the land and building for ₹100.15 Crores and also approached the Hon'ble Supreme Court against the Order dated 28.8.2008. The application filed by the Second Respondent was dismissed by the Company Court on 19.3.2008 and by Order dated 23.12.2008, out of the forfeited sums, dividend was directed to be paid to the Secured Creditor and the Workmen. The said Order is in challenge in O.S.A. No.7 of 2010. The Appellant filed C.A. No.141 of 2009 seeking a direction from the Company Court to the Police to investigate based on their Complaint.

2.6. In the meanwhile, the Appeal in O.S.A. No.12 of 2009 filed by the Second Respondent against the Order dated 19.3.2008 was allowed by the Division Bench of this Court with a direction to consider the Second Respondent's offer along with other offers or to conduct a fresh Auction on 28.1.2009. The fresh Auction was also unsuccessful. Asset Reconstruction Company (India) Limited (hereinafter referred to as 'ARCIL') pleaded the sale of the assets to the Second Respondent as their offer was higher. The Company Court accepted the offer of the Second Respondent to purchase the property for ₹101 Crores. Subsequently, by its Order dated 17.7.2009, the Company Court dismissed both the applications in C.A. Nos.2296 of 2008 & 141 of 2009. Aggrieved over the same, the present Appeals in O.S.A. Nos.281 & 319 of 2009 have been filed by the Applicant in those applications.

3. Events subsequent to the filing of the Appeals are as follows:

Along with the Appeals, the Appellant filed Miscellaneous Petitions to earmark and not to disburse ₹23.60 Crores and to implead M/s. Power Engineering International Company and others. By Order dated 26.10.2009, the impleading Petition was allowed and the other Application to earmark and refrain from disbursement was dismissed. Aggrieved against the same, the Appellant filed SLP. No.5149 of 2010. This Court extended the time for the Second Respondent to remit the amount with Interest on or before 29.4.2010. The amounts were deposited by seeking further extension and the property was also put into their possession. The amounts deposited by the Second Respondent were also disbursed. The SLP filed by the Second Respondent was dismissed on 12.8.2011 and the SLP filed by the Appellant was also dismissed on 26.8.2011 in the presence of ARCIL.

4. The contentions of the learned Senior Counsel for the Appellant are as under:

4.1. The learned Senior Counsel for the Appellant painstakingly illustrated the alleged illegalities committed by the Second Respondent in collusion with M/s. Power Engineering International Company. The learned Senior Counsel taking us through the documents and taking recourse to the Doctrine of Tracing, contended that the money deposited by the Second Respondent with the First Respondent is undoubtedly the very same money obtained from the Appellant and is nothing but proceeds of crime, which was obtained by playing fraud on the Appellant and therefore, ought to be returned to them. The learned Senior Counsel also contended that once the money could be traced, irrespective of the Authority or the custodian in same or different form is aware of the crime of procurement or not, would not be a matter and the Appellant would be entitled to refund of their money.

4.2. The learned Senior Counsel for the Appellant took us through the documents to demonstrate that since the consideration of the Demand Drafts were not passed on, no title was acquired by M/s. Power Engineering International Company and therefore, no valid title could be passed on to the holder in due course, *i.e.,* either to the First Respondent or the Second Respondent.

4.3. The learned Senior Counsel further submitted that since the communication against the dispute had reached the office of the Official Liquidator and the right of the Appellant was protected by the earlier Orders of the Division Bench, the Appellant is entitled to its money, despite disbursal.

4.4. The learned Senior Counsel assailed the order of the learned Single Judge by contending that the learned Judge erred in holding that the amount stood forfeited already, without considering that the Division Bench had clearly specified that the forfeiture would not stand as a bar in deciding the matter on merits and would be subject to the outcome of the application of the Appellant. Further, it is contended that since the Appellant is entitled to the money disbursed, the order of the learned Judge passed without Notice to the Appellant, which is under challenge in O.S.A. No.7 of 2010 is liable to be set aside.

4.5. The learned Senior Counsel also pointed out to the terms and conditions of the Auction Notice dated 18.10.2007 and contended that a defaulter cannot participate in further Auction and despite the same, the Second Respondent, a disqualified entity was permitted to participate in further Auction without any objections by the First Respondent and was permitted to purchase the property at much lesser amount of ₹101 Crores. The act of furnishing money obtained by deceit and the acts of the First and Second Respondents amount to fraud on the Court and hence, the proceedings are vitiated.

4.6. The learned Senior Counsel for the Appellant further contended that that the First Respondent ought not to be permitted to unjustly enrich itself. He stressed that the Assignment Agreement between the Second Respondent and M/s. Power Engineering International Company as fabricated and a document created much later after the Judgment of the Division Bench in earlier round, only to defeat the rights of the Appellant.

4.7. The learned Senior Counsel also relied upon the conviction of the Managing Director of M/s. Power Engineering International Company, who had issued the dishonoured cheques in lieu of the Demand Drafts without any intention of honouring them. The learned Senior Counsel further

contended that the method of procurement of the Demand Drafts and the criminality has not been disputed.

4.8. Relying upon Section 446(2) of the Companies Act, learned Senior Counsel contended that the Company Court will have powers to adjudicate on the issue of refund based on the undisputed documents and Affidavits and issue directions to the Commissioner of Police to investigate based on the Complaint lodged by them.

4.9. It is contended that the learned Judge failed to see the Scope of Sections 11 & 12 of the Negotiable Instruments Act, 1881 (hereinafter shortly referred to as 'N.I. Act') which pave way to treat even foreign documents as inland documents, when the Demand Drafts are made payable in India or payable to a person in India and hence Section 58 of the Act ought to have been invoked to give effect into the Judgment of a Foreign Court and to return the amounts realized through Demand Drafts obtained by fraudulent means.

4.10. In support of his contentions, the learned Senior Counsel for the Appellant relied upon the following judgments:

(i) ***Banque Belge Pour L'Etranger v. Hambrouck and others,*** (King's Bench Division) (1919. B. 2351);

(ii) ***Foskett v. Mckeown and others,*** *[House of Lords]* 2000 WL 571214;

(iii) ***Lipkin Gorman v. Karpnale Ltd.,*** *[House of Lords]* 1991 (3) WLR 10 : 1991 (2) AC 548;

(iv) ***Agip (Africa) Limited v. Barry Kingsley Jackson,*** 1990 EWCA Civ 2 : (SC) 1990 WL 753428;

(v) ***Shrisht Dhawan (Smt) v. Shaw Brothers,*** 1992 (1) SCC 534;

(vi) ***State of A.P. and another v. T. Suryachandra Rao,*** 2005 (6) SCC 149 : AIR 2005 SC 3110;

(vii) ***Bhaurao Dagdu Paralkar v. State of Maharashtra and others,*** AIR 2005 SC 3330;

(viii) ***Madhukar Sadbha Shivarkar (Dead) by Legal Representatives v. State of Maharashtra and others,*** 2015 (6) SCC 557;

(ix) ***State of Uttar Pradesh and others v. Ravindra Kumar Sharma and others,*** 2016 (1) LLN 276 (SC) : 2016 (4) SCC 791;

(x) ***Sudarsan Chits (I) Limited. v. O. Sukumaran Pillai and others,*** 1984 (4) SCC 657;

(xi) ***Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd. and others,*** 1999 (1) CTC 273 (SC) : AIR 1998 SC 3153;

(xii) ***National Insurance Company Ltd. v. Glaxo India Limited,*** [Bombay High Court] AIR 1999 Bom. 240;

(xiii) ***The Public Passenger Service Limited v. K.A. Khader and two others,*** AIR 1966 SC 489;

(xiv) ***Trilux Technologies Singapore Pvt. Limited v. Boon Technologies rep. by its Manager Baskaran,*** [Madras High Court] 2004 (4) CTC 12;

(xv) ***A.G. Kidston & Co. Ltd. v. Seth Brothers,*** AIR 1930 Cal. 692 : I.L.R. (57) Calcutta Series, 730; and

(xvi) ***C. Somayya v. E.V. Chinniah Konar,*** [Madras High Court] 1976 (1) MLJ 336 : 1989 LW 128.

By contending so and placing reliance on the above Judgments, learned Senior Counsel for the Appellant sought the Appeals to be allowed with costs.

5. *Per contra*, the learned Counsel appearing for the First Respondent strenuously argued as follows:

5.1. The learned Counsel for the First Respondent has shielded the Orders of the learned Single Judge by contending that the scope of Section 446(2) of the Companies Act can be extended towards the affairs of the Company in Liquidation alone and the Court cannot go beyond the Winding-up proceedings and decide a lis between two private parties. He further contended that since the allegation of fraud is independent and not related to the Winding-up proceedings or since no fraud was committed on the Court, the learned Judge was right in rejecting contention of the Appellant. The learned Counsel also submitted that the Judgment of the learned Single Judge has to be read as a whole and it cannot be said that the Order of forfeiture is the basis for denial of the Application of the Appellant.

5.2. The learned Counsel for the First Respondent contended that the Order of Forfeiture was not challenged by the Appellant and the same has been confirmed by the Apex Court by dismissing the Appeal filed by the Second Respondent, in which the Appellant was a party. Therefore, the Appellant cannot make any claim towards ₹23.60 crores under any of the grounds.

5.3. The learned Counsel also contended that the Official Liquidator was not aware of the methods of obtaining the Demand Draft, as such, any

offence cannot be attributed to him, much less would be protected by the last part of Section 58 of N.I. Act, which protects the holder in due course as defined under Section 9 of N.I Act. It is also pointed out that the Demand Drafts were encashed much before the intimation from the Appellant. Therefore, the learned Judge was right in denying direction to investigate the case and the Appellant only will have to invoke the provisions of the Criminal Procedure Code.

5.4. The learned Counsel also contended that all along the Appellant was aware of the proceedings before the Company Court and his Applications were also pending, as such, he cannot plead ignorance about the Order of Disbursement dated 23.12.2008. Therefore, he sought for dismissal of all the Appeals.

5.5. To fortify the above contentions, the learned Counsel for the First Respondent placed reliance on the following Judgments:

(i) ***Sakiri Vasu v. State of Uttar Pradesh and others,*** 2008 (2) SCC 409;

(ii) ***Suganchand and Co. v. Brahmayya and Co. (Official Liquidators),*** 1951 (64) LW 482 (DB);

(iii) ***A.R. Sivaramakrishna Chettiar, In re.,*** 1961 (74) LW 469 (DB);

(iv) ***Sudarsan Chits (I) Limited. v. O. Sukumaran Pillai and others,*** 1984 (4) SCC 657; and

(v) ***V. Radhakrishnan and others v. P.R. Ramakrishnan and others,*** [Madras High Court] [1993 (78) Company Cases 694.

6. Heard all the Counsels extensively and perused the records.

7. There is no dispute with regard to the facts of the case and the subsequent events during the pendency of the present Appeals. Therefore, we need not go into the same.

8. Coming to the allegations raised on the side of the Appellant, we summarize it into the following folds:

(a) Jurisdiction of the Company Court;

(b) Doctrine of Tracing;

(c) Fraud played upon the Court;

(d) Scope and applicability of Section 58 of the Negotiable Instruments Act, 1881; and

(e) unjust enrichment.

Jurisdiction of the Company Court:

9. Relying upon Section 446(2) of the Companies Act, the learned Senior Counsel has sought to contend that the Company Court would have the jurisdiction to decide the claim of the Appellant and to give appropriate directions for investigation. To buttress his contention, he has placed reliance upon the following Judgments:

(i) In ***Sudarsan Chits (I) Limited v. O. Sukumaran Pillai and others,*** 1984 (4) SCC 657 (cited supra), at Para 11, the Hon'ble Supreme Court has held as under:

"Sub-section (2) of Section 446 confers jurisdiction on the Court which is Winding-up the Company to entertain and dispose of proceedings set out in Clauses (a) to (d). The expression "Court which is Winding-up the Company" will comprehend the Court before which a Winding-up Petition is pending or which has made an Order for Winding-up of the Company and further Winding-up proceedings are continued under its directions. Undoubtedly, looking to the language of Section 446(1) & (2) and its setting in Part VII which deals with Winding-up proceedings would clearly show that the jurisdiction of the Court to entertain and dispose of proceedings set out in sub-clauses (a) to (d) of sub-section (2) can be invoked in the Court, which is Winding-up the Company."

(ii) The Apex Court in Paras 21 to 24 of the Judgment reported in ***Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd and others,*** 1999 (1) CTC 273 (SC) : AIR 1998 SC 3153 (cited supra), has observed as follows:

"*21.* Before we come back to Section 155, since Appellant also submitted the Company Judge should himself decide the relief under Section 446(2) having exclusive jurisdiction instead of sending it to the Civil Court. For this it is necessary to refer to the short background of Section 446. Earlier under Section 171 of the Indian Companies Act, 1913 there was no similar provision as Section 446(2). It only provided no Suits or proceedings pending could proceed nor fresh Suit could be filed without leave of the Court. This provision was re-enacted with little modifications in Section 446(1). After Winding-up order a Company may have many subsisting claims and in order to recover it, he may have to file Suits. It is to avoid this eventuality for a long arduous procedure before the Civil Court the jurisdiction of the Company Judge was enlarged even to entertain such Petition for recovering the claims of the Company. The purpose of various amendments brought in the Companies Act is to centralise as far as possible all proceedings to the Court created under this act for adjudication of various claims. It is in this background Section 446(2) was brought in, based on the recommendation of Company Law Committee Report through an amendment of the Companies (Amendment) Act, 1969. In this background the Sudarshan *Chit (I) Ltd.* (supra) holds:

"Sub-section (2) of Section 446 confers jurisdiction on the Court, which is Winding-up the Company to entertain and dispose of proceedings set out in clauses (a) to (d). The expression "Court which is Winding-up the Company" will comprehend the Court before which a Winding-up Petition is pending or

which has made an Order for Winding-up of the Company and further Winding-up proceedings are continued under its directions. Undoubtedly, a look at the language of Section 446(1) & (2) and its setting in Part VII, which deals with Winding-up proceedings, would clearly show that the jurisdiction of the Court to entertain and dispose of proceedings set out in sub-clauses (a) to (d) of sub-section (2) can be invoked in the Court which is Winding-up the Company."

22. The Appellate Bench in this case held since Winding-up proceeding in respect of the Appellant-Company is no more pending and there is no Court which could be said to be the Court of Winding-up of the Company thus the Claim Petition on behalf of the Company which is not being wound-up is not contemplated under Section 446(2). This decision and decision in *Canara Bank* (supra) rejected the restricted meaning given by the High Court of the expression "Court which is Winding-up the Company". Hence to this extent there could be no doubt, a Company under liquidation falling under Section 446(2), the Company Judge alone would have exclusive jurisdiction to decide matter covered by it.

23. Now reverting to the submission to read definition of 'Court' as defined under Section 2(11) read with Section 10 with the word 'Court' used under Section 155, whether it would result into any different interpretation to lend support to the submission of learned Counsel for the Appellant ? Submission of learned Counsel for the Appellant ? Submission is the word 'Court' under Section 155 would only mean Company Judge and he alone would have exclusive jurisdiction while exercising powers under this Section, hence any direction to seek leave of the Court under Section 446(2) for filling Suit cannot be sustained.

24. First the scope of Sections 155 & 446 to be understood to be entirely in different fields. Section 155 deals with power of the Court to rectify Register of Members maintained by a Company. Section 441 deals with commencement of winding-up by the Court. Section 442, deals with the power of the Court to stay or restrain proceedings against the Company, at any stage after the Petition for Winding-up is filed but before a Winding-up Order is made. A creditor or a Company may apply to the Court having jurisdiction to wind-up the Company to restrain all further proceedings in any Suits or proceedings against the Company. Section 443 deals with powers of Court to hear such petition, Section 444 entrusts the Court after the Winding-up Order to communicate the same to the Official Liquidator. Section 445, directs that a copy of the Winding-up Order to be filed with the Registrar. Then comes Section 446. Sub-section (1) is after Winding-up Order has been passed or the Official Liquidator has been appointed, it puts an embargo on any Suit to be instituted or if pending against the Company on that date to be proceeded with except with the leave of the Court. Use of the words, "no Suit... shall be commenced .... proceeded with..... except by leave of the Court....." spells out that the jurisdiction of the Civil Court is not ousted to adjudicate matter between the parties but embargo is to be controlled at the discretion of the Company Judge, depending on the facts of each case. Then comes Section 446(2) under which the Court is invested with the

jurisdiction to entertain or dispose of any Suit or proceeding by or against the Company. So Section 446 deals with cases of the Company under Winding-up while Section 155 deals with both classes of Companies one under Winding-up and other not under winding-up."

(iii) The Bombay High Court in the Judgment reported in ***Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd and others,*** 1999 (1) CTC 273 (SC) (cited supra) at Para 5, while considering the scope of Sections 155 & 446 has after considering the Judgment of the Apex Court in ***Ammonia Supplies Corporation case*** observed as under:

"It is, therefore now clear from the Judgment of the Apex Court in *A.S. Corporation (P) Ltd.* (supra), the Apex Court has held that in so far as the matters of rectification are concerned, it is the Company Court alone which would have jurisdiction. If issues which have to be answered are not peripheral to rectification but issues regarding title, etc. then such other issues will have to be decided by the Civil Court. The Apex Court has now recognised that it is the Company Court which would be the Court of exclusive jurisdiction in so far as rectification is concerned. However, if issues arise, whether the Applicant is the owner of the shares; whether there is fraud or forgery in holding the shares or the very title to the shares, then such issues will be beyond the jurisdiction of the Company Court and will have to be decided by the Civil Court. To that extent, the Judgment of the Full Bench of the Delhi High Court where it held that there is a jurisdiction in the Company Court to relegate the parties to a Suit has been departed from. The earlier Judgment of the Apex Court in the case of *Public Passenger Service Ltd.* will have to be read in the context of the observations of the Apex Court in the case of *A.S. Corporation (P) Ltd.* (supra)."

(iv) In Para 9 of the Judgment reported in ***The Public Passenger Service Limited v. K.A. Khader and two others,*** AIR 1966 SC 489 (cited supra), the Hon'ble Supreme Court has observed hereunder:

"Counsel for the Appellant contended that the relief under Section 155 is discretionary, and the Court should have refused relief in the exercise of its discretion. Now, where by reason of its complexity or otherwise the matter can more conveniently be decided in a Suit, the Court may refuse relief under Section 155 and relegate the parties to a Suit. But the point as to the invalidity of the Notice dated January 20, 1957, could well be decided summarily and the Courts below rightly decided to give relief in the exercise of the discretionary jurisdiction under Section 155. Having found that the Notice was defective and the forfeiture was invalid, the Court could not arbitrarily refuse relief to the Respondents."

10. Resisting such contention advanced on the side of the Appellant, the learned Counsel for the First Respondent has contended that the Company Court cannot travel beyond the Winding-up proceedings and decide claims by or against the Company wound up. To strengthen his contention, he has relied on the following Judgments:

(i) In the decision reported in ***A.R. Sivaramakrishna Chettiar, In re.,*** 1961 (74) LW 469 (DB), (cited supra), it has been held as follows:

"Having this rule in mind, we shall now examine the language of Section 45-B. The object of the legislature in enacting this provision was to confer exclusive jurisdiction upon the High Court engaged in the Winding-up of the Banking Company in respect of certain proceedings which but for such provision could not be entertained by that Court. In indicating the class of such proceedings the legislature adopted the method of a classification into four categories. The first two categories come under claims made by or against a Banking Company which is being wound up. The third category relates to cases of priority arising during the Winding-up proceeding. Such question may be as between the Banking Company in its capacity as a creditor and a Third party. The last category relates to questions whether of law or of fact, which relate to or arise in the course of a Winding-up of a Banking Company. In our view the only permissible course of construction of the last class is to read in juxtaposition with the three other preceding classes of cases. Though the expression question of law or fact which may relate to the Winding-up of a Banking Company is very wide in its signification, it must be understood with reference to its local colour or context. Read in this manner, the question of law or fact, which could be said to relate to the Winding-up of a Banking Company must be a question in the nature of a claim made by a Bank or against a Bank, or in the nature of a priority arising during the course of Winding-up or related to the Winding-up proceeding as affecting any of the assets held by the Banking Company in liquidation. Viewed in this manner the only conclusion possible seems to be that a question relating to the insolvency of a debtor of a Banking Company in liquidation does not relate to the Winding-up of that Company."

(ii) The Hon'ble Supreme Court in the Judgment reported in ***Sudarsan Chits (I) Limited. v. O. Sukumaran Pillai and others,*** 1984 (4) SCC 657 (cited supra), has observed thus:

"Before we advert to the question of construction of Section 446(2)(b), it would be advantageous to notice the historical evolution of the provision as well as its present setting. Section 171 of the Indian Companies Act, 1913, the predecessor of Section 446(1), did not contain any provision similar or identical to that of Section 446(2). Section 171 only provided for stay of Suits and proceedings pending at the commencement of Winding-up proceeding, and embargo against the commencement of any Suit or other legal proceedings against the Company except by the leave of the Court. This provision with little modification is re-enacted in Section 446(1). There was no specific provision conferring jurisdiction on the Court Winding-up the Company analogous to the one conferred by Section 446(2). Sub-section (2) was introduced to enlarge the jurisdiction of the Court Winding-up the Company so as to facilitate the disposal of Winding-up proceedings. The provision so enacted probably did not meet with the requirement with the result that the committee appointed for examining comprehensive amendments to the Companies Act in its report recommended that "a Suit by or against a Company in Winding-up should, notwithstanding any provision in law for the time being, be instituted in the Court in which the

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winding-up proceedings are pending." (*See* Para 207, of the Company Law Committee Report). To give effect to these recommendations, sub-section (2) was suitably amended to bring it to its present form by the Companies (Amendment) Act, 1960. The Committee noticed that on a winding-up order being made and the Official Liquidator being appointed a Liquidator of the Company, he has to take into his custody Company property as required by Section 456. Section 457 confers power on him to institute or defend any Suit, prosecution, or other Legal proceedings, Civil or Criminal, in the name and on behalf of the Company. Power is conferred upon him to sell the properties, both movable and immovable of the Company, and to realise the assets of the Company and. this was to be done for the purpose of distributing the assets of the Company amongst the Claimants. Now, at a stage when a Winding-up Order is made, the Company, may as well have subsisting claims and to realise these claims, the Liquidator will have to file Suits. To avoid this eventuality and to keep all incidental proceedings in Winding-up before the Court which is Winding-up the Company, its jurisdiction was enlarged to entertain a Petition, amongst others, for recovering the claims of the Company. In the absence of a provision like Section 446(2) under the repealed Indian Companies Act, 1913, the Official Liquidator in order to realise and recover the claims and subsisting debts owed to the Company had the unenviable fate of filing Suits. These Suits, as is not unknown, dragged on through the Trial Court and Courts of Appeal resulting not only in multiplicity of proceedings but in holding up the progress of the winding-up proceedings. To save the Company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding-up proceedings, Parliament devised a cheap and summary remedy by conferring jurisdiction on the Court winding-up the Company to entertain Petitions in respect of claims for and against the Company. This was the object behind enacting Section 446(2) and, therefore, it must receive such construction at the hands of the Court as would advance the object and at any rate not thwart it."

(iii) A Division Bench of this Court in the decision reported in ***V. Radhakrishnan and others v. P.R. Ramakrishnan and others,*** [Madras High Court] 1993 (78) Company Cases 694 (cited supra), has held thus:

"....Sub-section (2) of Section 446 confers or creates a special jurisdiction in the Court, which is Winding-up the Company. This jurisdiction the Court Winding-up the Company gets notwithstanding anything contained in any other law for the time being in force in respect of the matters enumerated in Clauses (a), (b), (c) & (d). Clause (a) says that the Court which is Winding-up the Company shall have jurisdiction to entertain or dispose of any Suit or proceeding by or against the Company..... If a Suit or proceeding by or against the Company or a claim made by or against the Company or any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the Winding-up of the Company, shall lie in the Court which is Winding-up the Company, it is obvious that any person, who has got a right to represent the Company or who has a claim against the Company can apply to the Court, which is Winding-up the Company, and the Court may entertain thus any

dispute with respect to the property or assets of the Company and dispose of the proceeding in accordance with law."

11. Before appreciating the contentions raised on either side, it is noteworthy to refer to the relevant provisions under Section 446(2) of the Companies Act, 1956, which reads as follows:

"The Court which is Winding-up the Company shall, notwithstanding anything contained in any other law for the time being, in force, have jurisdiction to entertain, or dispose of:

(a) any Suit or proceeding by or against the Company;

(b) any claim made by or against the Company (including claims by or against any of its branches in India);

(c) any Application made under Section 391 by or in respect of the Company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the Winding-up of the Company;

whether such Suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such Application has been made or is made before or after the Order for the Winding-up of the Company, or before or after the commencement of the Companies (Amendment) Act, 1960."

12. It is relevant to point out at this juncture that the power and scope of Section 446(2) has not been raised before the learned Single Judge. However, the learned Single Judge has considered the inherent powers of the Court under the Rules and has held in his Order dated 17.7.2009, which reads as follows:

"*37.* By virtue of Rule 6 of the Companies (Court) Rules, 1959, enables the applicability of Civil Procedure Code and by virtue of the inherent powers conferred on the Applicant as per Rules 6 & 9 *viz.*,—

"*Rule 6. Practice and Procedure of the Court and provisions of the Code to apply.*— Save as provided by the Act or by these Rules the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these Rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the Court."

"*Rule 9. Inherent Powers of Court.*— Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such Orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

38. It is true that this Court is empowered to pass Orders even by moulding the prayer, since the power under Rule 9 is akin to Section 151 of Civil Procedure Code. But, such power is to be restricted only to Company Court proceedings and not otherwise. The claim of the Applicant for the refund of the amount

forfeited in favour of Official Liquidator is not on the basis of participation of Applicant-Company in the Company Court proceedings, and the claim is made totally based on the grounds which are extraneous to the Company Court proceedings. Merely because the forfeited Demand Drafts were issued by the Applicant-Company which were presented before this Court by a participant in the Auction, it does not mean that the drawer Bank *viz.,* the Applicant-Company has played any role in the Company Court proceedings. The inherent powers are to be used only for the purpose of rendering substantial justice, and while dealing with an issue and a matter which is not connected with the Company Court proceedings, the Company Court is not empowered to use the inherent powers, especially in the facts and circumstances of the case where there is absolutely no evidence of fraud having been played on the Court and there is absolutely nothing to presume any fraud especially in the context of the provisions of the Negotiable Instruments Act,1881. Therefore, the contention of the learned Senior Counsel for the Applicant to mould the relief for rendering justice is not tenable."

13. Upon careful consideration of the Judgments referred to above, Section 446(2) and the findings of the learned Single Judge, we agree with the decision of the learned Judge that in the Winding-up proceedings of a Company, claims by or against the Company can alone be decided. Third party claims against a bidder in the Auction cannot be decided by the Company Court. The power to decide on incidental claims must also be relating to the Winding-up proceedings. Just because, the Second Respondent is an Auction Purchaser, it cannot be said to be either the debtor or creditor of the Company, falling within the definition of "claim". The Word "Company" employed in Section 446(2) would mean only the Company in liquidation. The Section has been enacted to ensure complete justice in the course of Winding-up proceedings of the Company in liquidation.

14. Insofar as the Judgments relied on by either side are concerned, in ***Sudarsan Chits (I) Limited v. O. Sukumaran Pillai and others,*** 1984 (4) SCC 657 (cited supra), cited by both the Counsels, the Hon'ble Supreme Court clearly lays down the proposition that the claims can only be relating to the Company under liquidation. The other decisions relied upon by the Counsel for the First Respondent also lay down the same ratio. Regarding the Judgments cited on the side of the Appellant *i.e.,* ***Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd. and others,*** 1999 (1) CTC 273 (SC) : AIR 1998 SC 3153; ***National Insurance Company Ltd. v. Glaxo India Limited,*** [Bombay High Court] AIR 1999 Bom. 240; and ***The Public Passenger Service Limited. v. K.A. Khader and two others,*** AIR 1966 SC 489 (cited supra), they all deal with the scope and power of the Court under Section 155 and not under 446. The observation of the Apex Court in Para 34 of the Judgment reported in ***Ammonia Supplies***

Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd. and others, 1999 (1) CTC 273 (SC) : AIR 1998 SC 3153 (cited supra), cannot be the "ratio", but can only be an "obiter" in the peculiar and differential facts of the case, as the Apex Court itself has recorded that it is dealing only with Section 155. Also, the powers of the Court under Section 155 and procurement of shares pending Winding-up proceedings, only came up for adjudication. Therefore, the above Judgments will not come to the aid of the Appellant. Insofar as ***Dr. Mahesh Bhatra's case*** is concerned, it is in fact against the Appellant. In that case, the Company Law Board has held that the disputed questions cannot be decided under Summary jurisdiction.

15. Therefore, we come to an irresistible conclusion that the role of the Company Court, while dealing with the Winding-up proceedings, is restricted to claims by or against the Company in liquidation. In the present case, except for the fact that the Demand Drafts were issued in favour of the Official Liquidator, there is no nexus between the Appellant and the Company in liquidation. There is also no privity between the Appellant and the Second Respondent. The Company Court in the course of Winding-up proceedings cannot be converted as a Writ Court under Article 226 of the Constitution of India or exercise the inherent powers under the Criminal Procedure Code.

Doctrine of Tracing and Plea of Fraud:

16. Though, the learned Senior Counsel for the Appellant has articulously illustrated the applicability of the Doctrine of Tracing to the case on hand by contending that the Demand Drafts can be traced to the First Respondent and then to the creditors and Workmen to whom, they were disbursed, we do not agree with the contents and the Judgments relied upon by the learned Senior Counsel for the Appellant, as rightly held by the learned Single Judge, are not applicable to the present facts of the case. It cannot be disputed that the party, who holds the money in trust, if he misuses the same, the doctrine can be invoked to trace the same, irrespective of the place or in the hands it is. However, in the case on hand, the Demand Draft was issued in favour of the Official Liquidator based on some arrangement with M/s. Power Engineering International Company. If that Company has not honored its commitment, the proper recourse would be to initiate Recovery proceedings. Also, the Official Liquidator, though a beneficiary is not a party to the Contract between the Appellant and M/s. Power Engineering International Company. The Cheque was handed over by the Second Respondent based on an Assignment Agreement dated 4.3.2008, the authenticity of which is disputed by the Appellant. When such being a case, the Appellant has to only invoke the Civil jurisdiction. The claim against M/s. Power Engineering

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International Company cannot be equated as against the Official Liquidator, to whom the Drafts were presented by the Second Respondent.

17. In the present case, the claim of tracing depends upon the claim of fraud in obtaining the Demand Drafts. The learned Senior Counsel for the Appellant has placed reliance on the following decisions in support of his plea regarding fraud:

(i) In the Judgment reported in ***Madhukar Sadbha Shivarkar (Dead) by Legal Representatives v. State of Maharashtra and others,*** 2015 (6) SCC 557 (cited supra), the Hon'ble Supreme Court has held as follows:

"*27.* The plea urged on behalf of the State Government and the *de facto* Complainant owners, at whose instance the orders are passed by the State Government on the alleged ground of fraud played by the declarants upon the Tahsildar and Appellate Authorities to get the illegal Orders obtained by them to come out from the clutches of the land ceiling provisions of the Act by creating the Revenue records, which is the fraudulent act on their part which unravels everything and therefore, the question of limitation under the provisions to exercise power by the State Government does not arise at all. For this purpose, the Deputy Commissioner of Pune Division was appointed as the Enquiry Officer to hold such an Enquiry to enquire into the matter and submit his Report for consideration of the Government to take further action in the matter. The legal contentions urged by Mr. Naphade, in justification of the impugned Judgment and order *prima facie* at this stage, we are satisfied that the allegation of fraud in relation to getting the land holdings of the villages referred to supra by the declarants on the alleged ground of destroying original Revenue records and fabricating Revenue records to show that there are 384 SUB-LEASES of the land involved in the proceedings to retain the surplus land illegally as alleged, to the extent of more than 3000 acres of land and the orders are obtained unlawfully by the declarants in the land ceiling limits will be nullity in the eye of law though such orders have attained finality, if it is found in the enquiry by the Enquiry Officer that they are tainted with fraud, the same can be interfered with by the State Government and its officers to pass appropriate Orders. The Landowners are also aggrieved parties to agitate their rights to get the orders which are obtained by the declarants as they are vitiated in law on account of nullity is the tenable submission and the same is well founded and therefore, we accept the submission to justify the impugned Judgment and order of the Division Bench of the High Court.

28. The legal submissions made by the learned Senior Counsel on behalf of the Appellants that the State Government has no power either under Section 45(2) or under Section 14(4) of the Act to appoint an Enquiry Officer to enquire into the land holdings of the villages referred to therein are untenable contentions of the Appellants, which have been rightly rebutted by the learned Senior Counsel Mr. Shekhar Naphade by urging an alternative legal plea that the power exercised by the State Government to pass the Orders impugned in the Writ Petitions is traceable to its executive power under Article 162 of the Constitution of India.

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Hence, the same shall be accepted by us and the said provision is extracted hereunder:

"*162. Extent of executive power of State.*— Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or Authorities thereof."

(ii) The Hon'ble Supreme Court in the Judgment reported in ***Bhaurao Dagdu Paralkar v. State of Maharashtra and others,*** AIR 2005 SC 3330 (cited supra), has observed as follows:

"*12.* In *Shrisht Dhawan v. Shaw Bros,* 1992 (1) SCC 534, it was observed as follows:

"Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Camus, who exulted in his ability to, 'wing me into the easy hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In *Webster's Third New International Dictionary* "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In *Black's Legal Dictionary*, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In *Concise Oxford Dictionary*, it has been defined as Criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to *Halsbury's Laws of England,* a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as an act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case *i.e. Derry and ors. v. Peek,* 1886-1990 All ER 1 what constitutes "fraud" was described thus: (*All ER p. 22 B-C*)

"Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false."

But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in *Khawaja v. Secretary of State for Home Deptt.,* 1983 (1) All ER 765, that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation of Statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a Statute.

"If a Statute has been passed for some one particular purpose, a Court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or *mala fide* exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in Public Law or Administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an Order from an Authority or Tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which the power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. "In a Contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain. In Public Law the duty is not to deceive. (See *Shrisht Dhawan v. Shaw Brothers,* 1992 (1) SCC 534).

(iii) In the decision reported in ***State of Uttar Pradesh and others v. Ravindra Kumar Sharma and others,*** 2016 (1) LLN 276 (SC) (cited supra), the Apex Court has following the ratio laid down in ***Indian Express Newspapers (P) v. Union of India and others, etc. etc.,*** 1986 (1) SCC 133; ***Commnr. of Customs (Preventive) v. Aafloat Textiles,*** 2005 (7) SCC 605; and ***Ram Chandra Singh v. Savitri Devi and ors.,*** 2003 (8) SCC 319, emphasized that any benefit or Order obtained by fraud, collusion and conspiracy would vitiate the entire proceedings and such benefit has to stripped.

(iv) In the decision reported in ***State of A.P. & anr. v. T. Suryachandra Rao,*** 2005 (6) SCC 149 : AIR 2005 SC 3110 (cited supra), it has been observed as follows:

"*10.* "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to

the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on Court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction *void ab initio*. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any Equitable Doctrine including *res judicata*. (See *Ram Chandra Singh v. Savitri Devi and ors.*, 2003 (8) SCC 319)."

18. By relying on above Judgments, learned Senior Counsel for the Appellant has sought to contend that fraud and collusion vitiate entire proceedings and no valid title could be passed on. There is no doubt on the ratio lay down in the above Judgments. However, the factual matrix is different in each case and the element of fraud has to be established and linked to the person against whom the remedy is sought in appropriate proceedings before the jurisdictional Court. In the present case, as rightly held by the learned Single Judge, the allegations of fraud cannot be extended to the Official Liquidator. No fraud has been played against the Court in permitting the Second Respondent to deposit the Demand Drafts. The procurement of the Cheques by the Second Respondent cannot be termed as illegal or unlawful, unless established by appropriate Court. It is pertinent to mention here that the Demand Drafts were issued for huge sums, totalling to ₹23.60 Crores. The terms and conditions of the Contract between the Appellant and M/s. Power Engineering International Company have neither been placed before the learned Single Judge nor before this Court. The Company Court exercising its powers of Winding-up cannot be converted as an Execution Court of a Third party, unrelated to Winding-up proceedings. Therefore, we agree with the finding of the learned Single Judge that the plea of fraud has to be established before appropriate Court and the plea of equity would not apply. That apart, even if the plea of fraud is established, as held above the jurisdiction of the Company Court under Section 446 is limited, in the sense that it can pass any orders relating to claims by or against the Company, but cannot decide any Third party disputes.

19. The learned Senior Counsel for the Appellant further contended that fraud has been played upon the Court by permitting the Second Respondent, a disqualified entity to participate in the Auction. We do not agree with the said contention. Firstly, the Second Respondent was permitted to participate

in the subsequent Auction by the Division Bench in its Order dated 28.1.2009 and secondly, the Appellant will not have any *locus standi* to challenge the participation of the Second Respondent in Auction proceedings. The Special Leave Petition filed by the Second Respondent against the Order of Forfeiture was also pending before the Hon'ble Supreme Court till 12.8.2011, much after the assets were sold and possession was handed over to the Second Respondent. It is also pertinent to mention here that initially after the bid of ₹101 Crores, the Second Respondent deposited ₹55 Crores and took out an Application for removal of plant and machinery, which was refused by this Court in O.S.A. No.116/2009. However, the Apex Court, by its Order dated 21.8.2009 in SLP. No in 15389 of 2009, permitted the Appellant to remove the plant and machinery from the factory premises. The sale which has received the assent of the Apex Court, cannot be challenged again. It is not to be forgotten that the object of the Company Court would be to materialize the best price in the interest of the Company as well as that of the creditors. As also, the amount deposited by the Second Respondent earlier was already forfeited, which is in itself a penal action. Albeit, much water has flown subsequently, the possession of the property was handed over to the Second Respondent. Therefore, we reject the contention of the Appellant in this regard.

Scope and applicability of Section 58 of N.I. Act:

20. The learned Senior Counsel for the Appellant has sought to contend that no title would pass on if a Negotiable Instrument has been obtained by playing fraud as per Section 58. It has also been contended that if the document is payable in India or if the beneficiary is in India, then as per Sections 11 & 12, it is to be treated as Inland transaction and therefore, it was contended that the learned Judge erred in holding that the Negotiable Instruments Act, cannot be made applicable to a foreign Instruments, by relying upon the following Judgments:

(i) In the Judgment reported in ***Trilux Technologies Singapore Pvt. Limited v. Boon Technologies, rep. by its Manager Baskaran,*** [Madras High Court] 2004 (4) CTC 12 (cited supra), at Para 10, this Court has held as follows:

"*10.* Though the two Cheques, subject matter of the case were drawn by A1-Company by using the Cheques of their account at a Bank in Singapore, it is pertinent to note that the Complainant has no such account in the said Bank or in any other Bank in Singapore. The amount is payable in the place where the Complainant-Company is situate *i.e.,* at Madras and that is why the Respondent-Complainant has presented the Cheques for collection at a Bank at Madras. If the contention of the Petitioners-Accused that Courts in India will have no jurisdiction on the dishonour of Cheques issued by a foreign Bank is accepted,

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then no Company in India can enter into Contracts with Foreign Companies and receive payments for the works executed by the Indian Companies on the Orders of the Foreign Companies. If the Petitioners contention is accepted, it will result in calamity and chaos for all the Indian Companies which will be deprived of their hard earned money on a technical question of law which is not in existence. Sections 136 & 137 are sufficient safeguards for the Companies in India to proceed against the foreign companies if any Negotiable Instrument is made, drawn, accepted or indorsed outside India, but in accordance with law of India they are liable to be paid in India, and if those instruments are dishonoured, there is no bar for prosecution of the drawer of the Cheques in India. Therefore, the contention of the Petitioners-Accused fail and the Criminal Original Petition is dismissed."

(ii) In ***A.G. Kidston & Co. Ltd. v. Seth Brothers,*** AIR 1930 Cal 692, it has been observed thus:

"Section 11, defines an inland instrument as a Note, Bill or Cheque drawn or made in British India and made payable in or drawn upon any person resident in British India. That should be read thus: (1) a Note, etc., drawn or made in British India and made payable in British India, or (2) a Note, etc., drawn upon any person resident in British India. In the latter case, it is immaterial where the Promissory Note, Bill etc. is drawn..... If a bill is drawn upon a resident in British India, it still remains an inland Bill wherever it may have been drawn."

(iii) The observation made in the Judgment reported in ***C. Somayya v. E.V. ChinniahKonar,*** 1976 (1) MLJ 336 (cited supra), reads as follows:

"*6.* Mr. K. Gopalachari, the learned Counsel for the Respondent, in meeting this contention, submits that no doubt the two findings of Mr. Alagiriswami, J., extracted above, are not factually correct. But if a look at the Suit Promissory Note is made, it will clearly go to show that it is only an "inland instrument" within the meaning of Section 11 of the Negotiable Instruments Act. The preamble of the Promissory Note recites that both the parties are only temporarily residing in Singapore. The Tamil portion, for proper appreciation, is as follows:

"சுபகிருது வருடம் ஐப்பசி மாதம் 6-ந் தேதி, ஆ. 22.10.1962 திருச்சி ஜில்லா திருமயம் தாலுகாஇ பில்லமங்கலத்திலிருந்து தற்சமயம் சிங்கப்பூர் 116 ஊரில் சையிடுடிரைவிலிருக்கும் ராம.ராமகோனார் அவர்களுக்கு, இராமநாதபுரம் ஜில்லா திருப்பத்தூர் தாலுகாஇ தேவரம்பூரிலிருந்து தற்சமயம் சிங்கப்பூர் 116 ஊரில் சையிடுடிரைவிலிருக்கும் சி.சோமய்யா எழுதிக் கொடுத்த பிராமிஸ்ஸரி நோட்....."

Section 11, clearly lays down that if a Promissory Note is drawn upon any person resident in India, it shall be deemed to be an "inland instrument". The decision in *A.G. Kidston& Co. Ltd. v. Seth Brothers,* I.L.R.57 Cal.730 is also relied on for this submission. I think that the learned Counsel for the Respondent is correct in his submission. The Promissory Note, undoubtedly, recites that both parties belong to India and temporarily are in Singapore. That being so, this is an instrument drawn on a person resident in India and it is an inland instrument. So, whatever incorrect statements that are found in the Judgment of Mr.

Alagiriswami, J., cannot, in any manner, prejudice the case of the Appellant since I come to the conclusion that this is an "inland instrument" and the decision quoted above, *viz., A.G. Kidston& Co. Limited. v. Seth Brothers* fully supports the Respondent."

21. Though we agree to a limited extent that the document is an inland document, the answer regarding applicability of the provisions is found in the Judgment reported in ***Trilux Technologies Singapore Pvt. Limited v. Boon Technologies, rep. by its Manager Baskaran,*** [Madras High Court] 2004 (4) CTC 12 (cited supra), relied upon by the Appellant. It is clear from the above Judgment, in case of an instrument is construed to be an Inland instrument, then proceedings under the N.I. Act can be initiated in India. However, that does not imply that the Company Court can be invoked and direction can be sought to Police Authority. It is only the appropriate Court under the relevant provisions of law as contemplated under the Criminal Procedure Code.

22. At this juncture, it is relevant to refer to the Judgment in ***Sakiri Vasu v. State of Uttar Pradesh and others,*** 2008 (2) SCC 409 (cited supra), relied upon by the learned Counsel for the First Respondent. In that Judgment, the Hon'ble Supreme Court has observed as follows:

"If a person has a grievance that the Police Station is not registering his FIR under Section 154, Cr.P.C., then he can approach the Superintendent of Police under Section 154(3), Cr.P.C., by an Application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not. registered, Or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an Application under Section 156(3), Cr.P.C., before the learned Magistrate concerned. If such an Application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation."

23. Insofar as Section 58 of the Negotiable Instruments Act is concerned, learned Senior Counsel for the Appellant has contended that since the document is to be treated as an inland document and once a fraud has been played and an instrument has been obtained, the person, who has so obtained will have no valid title and hence, he cannot pass on better title, whereas, the learned Counsel for the First Respondent has countered the said contention that the last part of Section 58 protects the Official Liquidator as he is a holder in due course.

24. For better appreciation, it is useful to look into Section 58 of the N.I. Act, which reads as follows:

> "*58. Instrument obtained by unlawful means or for unlawful consideration.*— When a Negotiable Instrument has been lost, or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course."

A careful reading of the above Section prompts us to agree with the contention of the First Respondent. The Official Liquidator at the time of receipt of the Demand Drafts or at the time of depositing the same, was not aware of the deceit.

25. It is also relevant to refer to Section 2(d) of the Indian Contract Act, 1872, which defines "consideration" as under:

> "When, at the desire of the promisor, the promissee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

In the case on hand, the consideration for accepting Demand Draft by the Official Liquidator is the permission to participate in the Auction and in case of successful bidding and payment, the promise is to handover possession of the property. Therefore, the Official Liquidator, who received the Drafts from the Second Respondent is deemed to be "holder in due course" as contemplated under Section 9 of the Negotiable Instruments Act and therefore, Section 58, cannot be pressed into service by the Appellant.

26. While dealing with the applicability of Section 58 and the rights of the First Respondent, the learned Single Judge in Paragraphs 23 to 33 of his Order, dated 17.7.2009, has elaborately dealt with the issue.

27. In addition to that, the Division Bench of this Court in ***Suganchand & Co. v Brahmaya & Co.,*** 1951 (64) LW 482 (DB), has held as follows:

> "The law relating to Demand Drafts does not present any great difficulty. It is only the application of the law to the particular facts of each of these eases which causes some difficulty. A demand draft is, of course, a bill of exchange drawn by a Bank on another Bank, or by itself on its own branch, and is a negotiable instrument not offending the Proper Currency Act or the Reserve Bank Act. It is very nearly allied to a Cheque, the difference between it and a Cheque consisting largely in two facts. Firstly, it cart be drawn only by a Bank on another Bank, and not by a private individual as in the case of Cheques. Secondly, it cannot so easily be countermanded as a Cheque, either by the person purchasing it, as by the drawer of a Cheque, or by the Bank to which it is presented. In *Malik Barkat*

Ali v. Imperial Bank of India, AIR 1945 Lah. 213, a Bench of the Lahore High Court has summed up this aspect neatly as follows:

> "Ordinarily, a Bank cannot stop payment of a draft unless there is some doubt as to the identity of the person presorting it as being or properly representing the person in whose favour it is drawn. This appears from *Sheldon's Practice and Law of Banking*, 1931, page 1155. The position of a Bank in respect of its own draft is not quite the same as its position in regard to Cheques drawn on it. Since it is taken on commitments of its own in favour of a third parson at the instance of the purchaser....On the other hand, it does not appear that the purchaser is entitled to ask the issuing Bank to stop payment on other grounds such as matters relating to the contd. duration in respect of which the Draft has been issued at his instance, for, this would often put the Bank in an impossible position, as when the purchaser of the Draft is dissatisfied with some bargain which he has made with the person in whose favour the draft has been issued."

28. We are completely in agreement with the learned Single Judge in rejecting the Application in C.A. No.141 of 2009 and inapplicability of Section 58. At the cost of repetition, the allegation of fraud as against a Third party to the Winding-up proceedings, who has entered into an Agreement with a participant in the Auction proceedings, would have to be proved in a separate independent proceedings. Therefore, it is open to the Appellant to initiate appropriate proceedings.

Unjust enrichment:

29. Regarding the allegation of unjust enrichment, as rightly held by the learned Single Judge, the forfeiture would not amount to unjust enrichment and the plea of equity cannot be invoked in contractual matters. As held above, there is no privity between the Appellant and the First Respondent. In the instant case, the forfeiture was ordered by the Division Bench only after granting extension on several times. The SLP filed by the Second Respondent was also dismissed by the Apex Court in the presence of the Appellant. Therefore, the issue cannot be again agitated before this Court.

30. Insofar as O.S.A. No.7 of 2010 is concerned, by the time Orders were passed on 23.12.2008 for disbursement, the Appellant had already participated in Appeals and also filed C.A. No.2296 of 2008. Therefore, he cannot plead ignorance of the fact. Further, during the pendency of the Appeal in O.S.A. No.281 of 2009, similar relief in the nature of earmarking and desisting from disbursement of amounts was sought for in M.P. No.1 of 2009, which was dismissed and was unsuccessfully challenged by the Appellant before the Apex Court as well. In view of the same, we are not inclined to grant any relief in this Appeal.

31. In the result, all the Original Side Appeals fail and they are dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.
