IDBI BANK LIMITED THROUGH DGM (LEGAL) A

v.

THE OFFICIAL LIQUIDATOR, OFFICE OF THE OFFICIAL LIQUIDATOR OF COMPANIES & ANR.

(Special Leave Petition (Civil) No. 33825 of 2009) B

OCTOBER 17, 2019

[MOHAN M. SHANTANAGOUDAR AND AJAY RASTOGI, JJ.]

Company (Court) Rules, 1959: rr.96, 99, 24 and 101 – Winding up petitions, advertisement – Mandatory requirement – Held: The advertisement of a winding up petition is mandatory – However, if the petitioning creditor fails to advertise the petition within the prescribed time, r.101 accords discretion to the court to substitute such petitioning creditor with another creditor or contributory, if latter is capable and desirous of prosecuting the winding up petition – In the instant case, no such advertisement was made – No other creditor or contributory expressed willingness to prosecute the original winding up petition – At the same time, as noted by the Division Bench of High Court, there were other unsatisfied secured creditors of KOFL who were not given the option to step into the shoes of the petitioning creditor in terms of r.101 – Given the absence of a specific provision mandating that the petition only be advertised by petitioning creditor, the Company Court has the discretion to direct the publishing of an advertisement to secure the interest of other creditors – In such situations, the winding up proceedings cannot be dismissed, as it would frustrate the very objective of securing the interest of all creditors – Clearly, the submission for the Petitioner that the winding up petition deserves to be dismissed as all creditors of KOFL have been satisfied is belied by the existence of the proceedings before the DRT – The records showed that the settlement of dues was only with respect to the unsecured creditors of KOFL, which was carried out pursuant to the orders issued by the Company Judge – Therefore, given that the secured creditors of KOFL have still not been satisfied and are bound to be affected by any order dismissing the winding up proceeding, the Company Court is directed to issue appropriate directions to the Official Liquidator for publishing the advertisement of the proceedings in accordance with law. C D E F G H

Companies Act, 1956: ss.293, 531 – Whether the agreement to sell executed by KOFL in favour of petitioner amounted to fraudulent preference and consequently whether the petitioner has a right to seek the execution of sale deed in its favour – Held: s.531 is a provision that deals with the effect of winding up of a company on its antecedent transactions – It provides that a transfer or any other act done in relation to the property of a company within a period of six months before the commencement of its winding up ("twilight period") shall be deemed to be a fraudulent preference of its creditors and accordingly be invalid – In the instant case, s.531 should be read in conjunction with s.293, which stipulates that the sale of the whole, or substantially the whole of the property of a public company requires the consent of its general meeting – s.531 provides that any act relating to the property of a company may qualify as a fraudulent preference if two conditions are met – First, the dominant motive in the mind of the company (as represented by its directors or general body of shareholders) should be to prefer a particular creditor – Second, the said act must be undertaken during the period of six months preceding the filing of the winding up petition of the company – While the first requirement ensures that the dominant intention to defraud creditors is detected, the second ensures that there is a level of commercial certainty and finality of transactions for those interacting with the company – s.293(1) requires the consent of the general meeting of a company in case of a sale or disposition of the whole or substantial whole of its property – s.293(1) is applicable to the instant case in view of the categorical finding by both the Courts below that the subject property is the only immovable property of KOFL – Notably, no approval from the general meeting of KOFL was obtained – There was only a Board resolution permitting Respondent No.1 to execute agreements of sale and other documents for the purpose of selling the subject property – In the absence of the requisite approval from the general meeting, the instant application for execution of a sale deed cannot be allowed as doing so would be allowing the Petitioner to sidestep the mandatory requirements of s.293(1) – A bare reading of s.531 shows that in addition to any transfer of property, it covers "any other act relating to the property" – These terms indicate that s.531 is comprehensive and includes indirect transactions within its scope – The Petitioner is not precluded from benefiting from s.531 on account of non-fulfilment of the six-month condition – Therefore,

the agreement to sell cannot be termed as a fraudulent preference under s.531.

Transfer of property: It is well-settled that the sale of an immovable property can only be effectuated through a sale deed and an agreement to sell does not transfer any right, title or interest in the immovable property.

Dismissing the Special Leave Petitions, the Court

HELD: 1. From a reading of Rules 96, 99, and 24, it is clear that the advertisement of a winding up petition is mandatory. In the event that the petitioning creditor fails to advertise the petition within the prescribed time, Rule 101 accords the Court with the discretion to substitute such petitioning creditor with another creditor or contributory, if the latter is capable and desirous of prosecuting the winding up petition. The winding up proceedings are proceedings in rem and have an impact on the rights of people, in general. In a situation where the petitioning creditor fails to advertise the petition and no other creditor or contributory comes forward to prosecute it, Rule 101 should not be read in a manner that absolutely bars the continuation of a winding up petition. This is particularly so when there are unsatisfied creditors who should have been given an opportunity to prosecute the petition, but were deprived of the same due to the failure to advertise. Indeed, Rule 101 is only limited to instances where the *petitioning creditor* fails to advertise the petition. However, there is nothing in the language of Rules 24, 96, or 99 to indicate that only such *petitioning creditor* can advertise the petition. Given the absence of a specific provision mandating that the petition only be advertised by petitioning creditor, Company Court has the discretion to direct the publishing of an advertisement to secure the interest of other creditors. In such situations, the winding up proceedings cannot be dismissed, as it would frustrate the very objective of securing the interest of all creditors. [Para 8, 11.3] [561-B; 562-G-H; 563-A-C]

2. Due to the lack of adequate advertisement of the winding up petitions, it appears that the secured creditors of KOFL were constrained to approach the DRT for recovery of their dues by filing O.A. Further, upon learning of the decision of the Company Judge dismissing the winding up petition, one of the secured

creditors (SBI) also approached the DRT to secure its interest. Based on this, the DRT had directed that the amount to be returned to KOFL be attached so that the banks have an opportunity to recover their dues from KOFL. This clearly goes on to show that the secured creditors of KOFL were relevant stakeholders who were affected by the non-advertising of the winding up petition. They should have been called upon to indicate whether they would want to step into the shoes of the petitioning creditors as per Rule 101. The records show that the settlement of dues has only been with respect to the unsecured creditors of KOFL, which was carried out pursuant to the orders issued by the Company Judge. This is supported by the fact that the advertisement dated 24.08.2005 issued by KOFL inviting claims from recoveries made by its Administrator, was only limited to the depositors or unsecured creditors of the company. Therefore, given that the secured creditors of KOFL have still not been satisfied and are bound to be affected by any order dismissing the winding up proceeding, the decision of the Division Bench reviving C.P. No. 179 of 2001 is upheld and the Company Court is directed to issue appropriate directions to the Official Liquidator for publishing the advertisement of the proceedings in accordance with law. The other winding up petition, C.P. No. 180 of 2001 filed by the wife of Respondent No. 3 continues to remain on record, as the impugned proceedings pertain to C.A. No. 734 of 2011, which was filed in C.P. No. 179 of 2001 only. The impugned judgment and decree does not contain any direction qua C.P. No. 180 of 2001, which shall therefore remain unaffected. [Paras 11.4-11.7] [563-D-H; 564-A-C]

3. Section 531 is a provision that deals with the effect of winding up of a company on its antecedent transactions. It provides that a transfer or any other act done in relation to the property of a company within a period of six months before the commencement of its winding up ("twilight period") shall be deemed to be a fraudulent preference of its creditors and accordingly be invalid. For the purpose of the present case, Section 531 should be read in conjunction with Section 293, which stipulates that the sale of the whole, or substantially the whole of the property of a public company requires the consent of its general meeting. It is also well-settled that the *sale* of an immovable property can only be effectuated through a *sale deed*

and an agreement to sell does not transfer any right, title or interest in the immovable property. Section 293(1) is applicable to the present case in view of the categorical finding by both the Courts below that the subject property is the only immovable property of KOFL. Notably, no approval from the general meeting of KOFL has been obtained. There is only a Board resolution dated 31.03.1999 permitting Respondent No. 1 to execute agreements of sale and other documents for the purpose of selling the subject property. In the absence of the requisite approval from the general meeting, the instant application for *execution of a sale deed* cannot be allowed as doing so would be allowing the Petitioner to sidestep the mandatory requirements of Section 293(1). Therefore, C.A. No. 1208 of 2002 deserves to be dismissed on this ground alone. [Para 14, 17.1] [565-B-C; 566-F-H; 567-A-B]

Suraj Lamp & Industries (P) Ltd. (2) v. State of Haryana, **(2012) 1 SCC 656 : [2011] 11 SCR 848 ;** *Bank of India v. Abhay D. Narottam*, **(2005) 11 SCC 520 – relied on**

4. The agreement cannot be termed as a fraudulent preference under Section 531. Under Indian company law, Section 531 of the 1956 Act (now Section 328 of the Companies Act, 2013) is the cornerstone provision that lays down the requirements for a transaction to amount to a fraudulent preference. Framed along the lines of Section 320 of the English Companies Act of 1948, it provides that any act relating to the property of a company may qualify as a fraudulent preference if two conditions are met. *First*, the dominant motive in the mind of the company (as represented by its directors or general body of shareholders) should be to prefer a particular creditor. Second, the said act must be undertaken during the period of six months preceding the filing of the winding up petition of the company. While the first requirement ensures that the dominant intention to defraud creditors is detected, the second ensures that there is a level of commercial certainty and finality of transactions for those interacting with the company. [Para 17.2] [567-C-E]

Jayanthi Bai v. Popular Bank Ltd., **AIR 1966 Ker 296;** *Official Liquidator, Victor Chit Fund (P.) Ltd. v. Kanhiya Lal & Ors.,* **(1972) 42 Com Cas 196 (Del) – approved**

5. The Division Bench has entirely ignored the second requirement under Section 531. Solely based on an examination of factors indicating a dominant motive of the management of KOFL to benefit the Petitioner, it went on to hold that the agreement to sell constitutes a fraudulent preference. In doing so, it has failed to appreciate that the said agreement was executed on 17.02.2000, while the winding up petitions were filed on 02.07.2001, signifying that there was a gap of over sixteen months between the two events, as opposed to the six-month period contemplated under Section 531. Similarly, it failed to consider that even the transfer of possession of the subject property occurred on 06.11.2000, which was also before the six-month period preceding the filing of the winding up petition. Clearly then, the Division Bench has erred in ignoring the time limit stipulated under Section 531 and holding that the transaction qualifies as a fraudulent preference. The same cannot be disregarded as it is crucial for ensuring commercial certainty for parties transacting with a company. Section 531 is comprehensive and includes indirect transactions within its scope. Thus, the Petitioner is not precluded from benefiting from Section 531 on account of non-fulfilment of the six-month condition. Therefore, the agreement to sell dated 17.02.2000 cannot be termed as a fraudulent preference under Section 531. [Paras 17.3-17.5] [567-F-H; 568-A-D]

Manik Ratan Guin & Ors. v. Prokash Chandra Chattopadhyay, **(1953-54) 58 CWN 545 (Cal);** *National Conduits (P) Ltd. v. S.S. Arora*, **AIR 1968 SC 279 : [1968] SCR 430;** *Lt. Col. RK Saxena v. Imperial Forestry Corporation*, **2001 CLC 1746 –relied on**

Case Law Reference

[1968] SCR 430	**relied on**	**Para 11.1**
[2011] 11 SCR 848	**relied on**	**Para 17.1**
(2005) 11 SCC 520	**relied on**	**Para 17.1**

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 33825 of 2009.

From the Judgment and Order dated 17.08.2009 of the High Court of Judicature at Madras in O.S.A. No. 284 of 2003.

With

S.L.P. (Civil) No. 5143 of 2018.

R. P. Bhat, Sr. Adv., Ms. Madhu S., Sumit Gupta, Ms. Subhashree Mohapatra, Siddharth Raj Agarwal, Ms. Astha Tyagi, Advs. for the Petitioner.

Sriram Parakkat, B. Ragunath, P. Arun Kumar, Vijay Kumar, K. K. Mani, Ms. T. Archana, Advs. for the Respondents.

The Judgment of the Court was delivered by

MOHAN M. SHANTANAGOUDAR, J.

1. The instant SLPs have been preferred by IDBI Bank (erstwhile United Western Bank) (*hereinafter* "the Petitioner") against the judgments dated 17.08.2009 and 28.07.2017 passed by the High Court of Judicature at Madras in O.S.A. No. 284 of 2003 and O.S.A. No. 396 of 2013 respectively, which relate to Company Petition (C.P.) No. 179 of 2001. Vide the impugned judgments, the High Court dismissed an application seeking the execution of a sale deed in favour of the Petitioner by one Kothari Orient Finance Limited (*hereinafter* "KOFL") and also revived the winding up proceedings initiated against KOFL.

2. The factual background to the instant petitions is as follows:

2.1 On 20.03.1992, KOFL availed a working capital loan of Rs. 55 lakhs from the erstwhile United Western Bank (now taken over by the Petitioner). As on 31.03.1999, the amount owed was Rs.60.55 lakhs. KOFL defaulted on the same. Consequently, it proposed a one-time settlement to the Petitioner for repayment of its dues. Towards this end, KOFL offered to sell its property – Office Space Nos. 102 and 103, 1st Floor, Prestige Point, admeasuring 2056.89 sq. ft. and situated at No. 33, Haddows Road, Nungambakkam, Chennai [*hereinafter* "the subject property"].

2.2 Pursuant to the same, KOFL and the Petitioner executed an agreement to sell dated 17.02.2000 with respect to the subject property for a consideration of Rs.1.05 crores. According to this agreement, the Petitioner paid Rs. 41 lakhs as advance and the balance of Rs. 64 lakhs was to be paid at the time of the completion of the sale transaction. This was done in pursuance of the authority vested with Mr. Pradeep D. Kothari (Director of KOFL and Respondent No. 1 in SLP No. 5143/ 2018, *hereinafter* "Respondent No. 1") by the resolution dated 31.03.1999 passed by the Board of Directors of KOFL, giving him the

A right to execute agreement(s) of sale for the said property to improve the liquidity of the company.

2.3 It is important to note that on 18.04.2000, in accordance with the provisions of the Income Tax Act, 1961, a 'No Objection Certificate' was issued by the income tax authorities for the sale of the subject B property for a consideration of Rs.1.05 crores. Later, vide letter dated 06.11.2000, possession of the property was also handed over to the Petitioner by KOFL.

2.4 Issues surfaced when two company petitions were filed on 02.07.2001, being C.P. No. 179 of 2001 and C.P. No. 180 of 2001 by one C Mr. S. Ramaiah (Respondent No. 3 in S.L.P. (Civil) No. 33825/2009) and his wife respectively. Having deposited monies with KOFL, which had been defaulted upon, they preferred these company petitions under Section 433(e) and (f) and Section 434 of the Companies Act, 1956 (*hereinafter* "the 1956 Act") seeking the winding up of KOFL and the repayment of their dues (*hereinafter* "winding up petitions"). When D these petitions came up before the learned Company Judge on 05.12.2001, it was observed that the liabilities of KOFL (including outstanding secured loans) were more than the assets. Consequently, the petitions were admitted and directions were issued for appointment of an Administrator and a Provisional Liquidator for KOFL. In addition to this, directions were also issued for publishing the company petitions in an English and E Tamil daily, as well as in the Government Gazette.

Genesis of S.L.P. (Civil) No. 33825 of 2009

2.5 In April 2002, the Petitioner filed Company Application (C.A.) No. 1208 of 2002 in the aforesaid winding up petition being C.P. No. 179 F of 2001, seeking a direction to the Administrator to execute a sale deed in its favour for the subject property, as per Section 536(2) of the 1956 Act.

2.6 Vide order dated 21.04.2003, the learned Company Judge dismissed this application on the ground that the agreement to sell amounted to a fraudulent preference in favour of the Petitioner, as it G ignored other similarly placed creditors. The appeal preferred by the Petitioner was numbered as O.S.A. No. 284 of 2003. On 17.08.2009, it was dismissed on the basis that the agreement to sell suffered from legal infirmities and was a fraudulent preference. This order passed by the Division Bench has been impugned in the instant S.L.P. filed by the H Petitioner before this Court.

Interim Proceedings

2.7 In the interim, Mr. Pradeep D. Kothari (Respondent No. 1) filed C.A. Nos. 2482-2485 of 2007, seeking permission to pay amounts due to the unsecured creditors of KOFL out of his own personal funds. By order dated 09.10.2007, the learned Company Judge disposed of these applications, directing Respondent No. 1 to deposit Rs. 4.69 crores with the Administrator towards full and final settlement of the dues of the unsecured creditors of KOFL. It was also directed that remaining amount (if any) should be refunded back to him after payment to the depositors.

2.8 On 23.06.2009, based on a perusal of the interim and final report filed by the Administrator, the learned Company Judge noted that 6,464 out of the total 10,968 depositors (unsecured creditors) of KOFL had been paid by the Administrator to the extent of 20% and 30% of the funds had been brought in by the Director. For the remaining 4,504 depositors, it was observed that the entire claims of about Rs. 5.87 crores had been settled by Respondent No. 1 privately. Since part of the amount due to them was covered by recoveries made from debtors of KOFL, an amount of Rs. 1.95 crores remained out of the Rs. 4.69 crores deposited by Respondent No. 1. Consequently, this amount was directed to be refunded back to him. Vide this order, the learned Company Judge also discharged the Administrator on the basis that his primary obligation of redemption of dues of unsecured creditors had been fulfilled.

2.9 Against this backdrop, the original Company Petitions came up for hearing before the Company Court on 21.06.2010. Notice was issued to the petitioning creditor, S. Ramaiah, who is arraigned as Respondent No. 3 herein.

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2.10 On 03.03.2011, the Petitioner filed another company application, C.A. No. 734 of 2011 in C.P. No. 179 of 2001 seeking the discharge of the Official Liquidator, who was acting as the Provisional Liquidator of KOFL (Respondent No. 2 in the SLPs before us). This application was made on the ground that there were no other claims left to be settled against the company, and therefore, the services of the Official Liquidator were no longer required. The application was opposed by Respondent No. 1 on the ground that it would prejudice other creditors of the company and was a *mala fide* attempt by the Petitioner to grab the subject property. Meanwhile, the Official Liquidator filed a report on

A 16.01.2013 seeking permission to advertise and invite claims from unsettled creditors of KOFL, if any.

2.11 By order dated 04.10.2013, the learned Company Judge allowed the application and discharged the liquidator in view of the fact that unsecured creditors of KOFL had been settled. Further, given the lack of adequate advertising of the winding up petition, and the unwillingness of any other creditor or contributory of KOFL to prosecute the petition in terms of Rule 101 of the Companies (Court) Rules, 1959 (*hereinafter* "1959 Rules"), the original winding up petition, C.P. No. 179 of 2001, was dismissed. The Official Liquidator was directed to return investments worth Rs. 1.27 crores which were lying with him, back to KOFL after deducing administrative expenses incurred by him.

2.12 Soon after this order, one of the secured creditors of KOFL, State Bank of India (*hereinafter* "SBI") approached the Debts Recovery Tribunal, Chennai (*hereinafter* "DRT") for securing its interest and sought an injunction restraining the Official Liquidator from refunding the sum of Rs. 1.27 crores to KOFL. By order dated 13.12.2013, the DRT ordered that the said sum be attached once it is transferred to KOFL, so that the banks can recover their dues from the company.

2.13 In the interim, Respondent No. 1 filed an appeal against the order of the Company Court dismissing the winding up petition. By order dated 28.07.2017, a Division Bench of the High Court revived the winding up proceedings on the basis that it would be unjust and inequitable to wind up the company only for the reason that no other creditor or contributory was willing to prosecute the winding up petition. Taking note of the secured creditors of KOFL who had still not been satisfied and had consequently approached the DRT, C.P. No. 179 of 2001 was revived and the Official Liquidator was directed to continue the winding up proceedings under the supervision of the Company Judge. This order of the Division Bench in O.S.A. No. 396 of 2013 has been impugned in the aforementioned S.L.P. (Civil) No. 5143 of 2018 filed by the Petitioner before this Court.

3. In view of this factual background, two issues arise for consideration before this Court:

First, whether the winding up proceedings against KOFL should be revived.

Second, in the event that the proceedings should be revived, can a sale deed be executed based on the agreement to sell dated 17.02.2000 entered into by the Petitioner and KOFL.

4. Learned Senior Counsel for the Petitioner argued that the winding up petition deserves to be dismissed, as all the creditors of KOFL have now been satisfied in accordance with the orders of the Company Judge and there are no other proceedings pending against KOFL before any fora. Further, since no creditor had challenged the order of the Company Court dismissing the winding up proceedings, it was submitted that the proceedings do not merit revival at this stage. As regards the execution of a sale deed, learned Senior Counsel refuted the finding that the agreement to sell amounts to a fraudulent preference. Relying on the provisions of Section 531 of the 1956 Act, he argued that the agreement to sell cannot be deemed as a fraudulent preference as the agreement to sell was not executed within the six-month period preceding the filing of the winding up petition. In addition to this, he also adverted to the lack of any fraudulent intention underlying the transaction and drew support from the No Objection Certificate issued by the Income Tax authorities to argue that the sale was not undervalued. Lastly, it was submitted that Section 293(1) of the 1956 Act is inapplicable to the present case, as the subject property does not form the whole or substantial whole of the property owned by KOFL. Thus, he stated that the approval of the Board of Directors vide resolution dated 31.03.1999 was sufficient, and no approval from the general meeting was required.

5. Per contra, learned Counsel for Respondent No. 2 (Official Liquidator) submitted that the winding up proceedings were correctly revived, as there are several secured creditors of KOFL that have still not been satisfied. He also argued that the subject property is the only property of KOFL and cannot be transferred without the approval of the general meeting in terms of Section 293(1) of the 1956 Act. With respect to the agreement to sell, it was submitted that it is a fraudulent preference in favour of the Petitioner. To substantiate this, he relied on the provisions of the agreement which state that the remaining consideration of Rs.64 lakhs would be paid only at the time of registration of the property. In light of this, he submitted that the adjustment of the said amount was not contemplated in the agreement and by doing so, the clause itself has been rendered redundant.

6. We have considered the arguments advanced by both sides and perused the material on record. Since the issue of fraudulent preference hinges on the survival of the winding up petition, we shall first proceed to examine whether the Division Bench was correct in reviving the winding up proceedings.

A ***Revival of the winding up petition***

7. From a bare perusal of the decision of the Division Bench, it is evident that the requirements governing the advertisement of winding up petitions under the 1959 Rules are crucial for the determination of this issue. It would therefore be useful to note the relevant rules, which
B are reproduced hereunder:

"**R.96. Admission of petition and directions as to advertisement -** Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom
C copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition.

R.99: Advertisement of petition - Subject to any directions of the Court, the petition shall be advertised within the time and in
D the manner provided by rule 24 of these rules. The advertisement shall be in Form No. 48.

R.24: Advertisement of petition -

(1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these rules otherwise provide, be
E advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union

F Territory concerned, as may be fixed by the Judge.

R.101: Substitution of creditor or contributory for original petitioner -

Where a petitioner – … (2) fails to advertise his petition within the time prescribed by these rules or by order of Court or such extended time as the Court may allow …

(4) if appearing, does not apply for an order in terms of the prayer of his petition, or, where in the opinion of the Court there is other sufficient cause for an order being made under this rule, the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who, in the opinion of the Court, would

have a right to present a petition, and who is desirous of prosecuting the petition."

8. The above rules find mention in the part relating to winding up petitions under the 1959 Rules. They lay down the procedure for instituting a winding up action. From a reading of Rules 96, 99, and 24, it is clear that the advertisement of a winding up petition is mandatory. In the event that the petitioning creditor fails to advertise the petition within the prescribed time, Rule 101 accords the Court with the discretion to substitute such petitioning creditor with another creditor or contributory, if the latter is capable and desirous of prosecuting the winding up petition.

9. In the instant case, while dealing with C.A. No. 734 of 2011 in C.P. No. 179 of 2001 seeking discharge of the Official Liquidator, the learned Company Judge observed that the mandatory procedure for advertising a winding petition, as stipulated under Rules 95, 96, 99, and 24 of the 1959 Rules had not been complied with. While looking into the implications of the failure to advertise, the learned Company Judge adverted to Rule 101, which allows for substitution of the petitioning creditor. However, since it was found that no other creditor had expressed the desire to prosecute the original petition, C.P. No. 179 of 2001 was dismissed. It was observed that such dismissal would not prejudice the creditors as more than 10,000 unsecured creditors of KOFL had been settled in the last 12 years after being given adequate notice, and even the secured creditors would not be prejudiced, as they would still be free to pursue their claims before the DRT.

10. As noted supra, a Division Bench of the High Court set aside the order of the Company Court in appeal. While it was observed that the winding up petitions had not been advertised by the petitioning creditor in accordance with the 1959 Rules, it was held that it would be unjust and inequitable to wind up the company only for this reason, as there were several secured creditors (including SBI) who had still not been satisfied and had consequently approached the DRT. It was observed that before dismissing the winding up petition, all the secured creditors to whom KOFL owed money, should have been called by the Official Liquidator to inquire whether they wanted to step into the shoes of the original petitioner. Taking a broad interpretation of Rule 101, the Division Bench held that the Rule cannot be read as an absolute bar on the continuation of winding up proceedings, where the petitioning creditor fails to advertise the petition. Adverting to the inherent powers vested with the Company Court under Rule 9 and given the absence of a specific

A provision mandating that the advertisement shall only be published by the petitioning creditor, the Division Bench observed that the Company Court has the discretion to direct the provisional liquidator to publish the advertisement, where the situation so demands. In view of this, C.P. No. 179 of 2001 was revived and the Official Liquidator was directed to continue the winding up proceedings.

B

11. Upon examining the relevant rules and the decisions rendered by the learned Company Judge and the Division Bench, we are inclined to agree with the view taken by the latter.

11.1 By order dated 05.12.2001, the learned Company Judge had C directed the publication of C.P. No. 179 of 2001 in an English and Tamil daily as well as the Government Gazette. However, despite this order, no such advertisement was made. To this extent, we agree with the Division Bench that there has been a violation of the advertisement requirements under Rules 96, 99 and 24, which are mandatory in nature [*see* ***National Conduits (P) Ltd.*** **v.** ***S.S. Arora***, AIR 1968 SC 279; ***Lt. Col. RK Saxena*** **v.** ***Imperial Forestry Corporation***, 2001 CLC 1746].

D

11.2 Given this failure to advertise, the option of substitution provided in Rule 101 becomes relevant. In this respect, both the Courts below have found that no other creditor or contributory expressed willingness to prosecute the original winding up petition. At the same E time, as noted by the Division Bench, there are other unsatisfied secured creditors of KOFL who were not given the option to step into the shoes of the petitioning creditor in terms of Rule 101.

11.3 Against this backdrop, the crucial question that arises for our consideration is whether a winding up petition can be dismissed solely F on the ground of lack of a prosecuting creditor under Rule 101, or whether the Company Court has the power to direct the publication of an advertisement by the Liquidator of the company, especially in cases where other unsatisfied creditors still remain. For answering this question, it is important to bear in mind that winding up proceedings are proceedings in rem and have an impact on the rights of people, in general. Thus, it is G mandatory to advertise such proceedings, so as to ensure that they receive the widest possible publicity and all relevant stakeholders have adequate notice. This implies that in a situation where the petitioning creditor fails to advertise the petition and no other creditor or contributory comes forward to prosecute it, Rule 101 should not be read in a manner that H absolutely bars the continuation of a winding up petition. This is particularly

so when there are unsatisfied creditors who should have been given an opportunity to prosecute the petition, but were deprived of the same due to the failure to advertise. Indeed, Rule 101 is only limited to instances where the *petitioning creditor* fails to advertise the petition. However, there is nothing in the language of Rules 24, 96, or 99 to indicate that only such *petitioning creditor* can advertise the petition. In our considered opinion, given the absence of a specific provision mandating that the petition only be advertised by petitioning creditor, the Company Court has the discretion to direct the publishing of an advertisement to secure the interest of other creditors. In such situations, the winding up proceedings cannot be dismissed, as it would frustrate the very objective of securing the interest of all creditors.

11.4 In light of this discussion, we find that it would be unjust to dismiss the winding up petition in the instant case solely on the ground that there is no other person willing to substitute the original creditor in terms of Rule 101. Here, due to the lack of adequate advertisement of the winding up petitions, it appears that the secured creditors of KOFL were constrained to approach the DRT for recovery of their dues by filing O.A. Nos. 139 of 2001, 978 of 2000; and 14 of 2002. Further, upon learning of the decision of the Company Judge dated 04.10.2013 dismissing the winding up petition, one of the secured creditors (SBI) also approached the DRT to secure its interest. Based on this, vide order dated 13.12.2013, the DRT had directed that the amount to be returned to KOFL be attached so that the banks have an opportunity to recover their dues from KOFL. This clearly goes on to show that the secured creditors of KOFL were relevant stakeholders who were affected by the non-advertising of the winding up petition. They should have been called upon to indicate whether they would want to step into the shoes of the petitioning creditors as per Rule 101.

11.5 Clearly, the submission of the learned Senior Counsel for the Petitioner that the winding up petition deserves to be dismissed as all creditors of KOFL have been satisfied is belied by the existence of the proceedings before the DRT. The records show that the settlement of dues has only been with respect to the unsecured creditors of KOFL, which was carried out pursuant to the orders issued by the Company Judge. This is supported by the fact that the advertisement dated 24.08.2005 issued by KOFL inviting claims from recoveries made by its Administrator, was only limited to the depositors or unsecured creditors of the company.

A 11.6 Therefore, given that the secured creditors of KOFL have still not been satisfied and are bound to be affected by any order dismissing the winding up proceeding, we uphold the decision of the Division Bench reviving C.P. No. 179 of 2001, and direct the Company Court to issue appropriate directions to the Official Liquidator for publishing the advertisement of the proceedings in accordance with law.

B 11.7 We hasten to add here that the other winding up petition, C.P. No. 180 of 2001 filed by the wife of Respondent No. 3 continues to remain on record, as the impugned proceedings pertain to C.A. No. 734 of 2011, which was filed in C.P. No. 179 of 2001 only. The impugned judgment and decree does not contain any direction qua C.P. No. 180 of C 2001, which shall therefore remain unaffected.

12. In light of the finding that the revival of the winding up petition by the Division Bench was correct, we will now turn to examine whether the agreement to sell executed by KOFL in favour of the Petitioner amounts to a fraudulent preference, and consequently, whether the D Petitioner has a right to seek the execution of a sale deed in its favour.

Execution of sale deed

13. Before delving into the merits of this issue, it would be useful to refer to the relevant provisions of the 1956 Act:

E "**S.531: Fraudulent preference -**

(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, F taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly. G

S.293: Restrictions on powers of Board -

(1) The Board of directors of a public company, or of a private company which is a subsidiary of a public company, shall not, except with the consent of such public company or subsidiary in H general meeting,-

(a) sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the company, or where the company owns more than one undertaking, of the whole, or substantially the whole, of any such undertaking".

(emphasis supplied)

14. Section 531 is a provision that deals with the effect of winding up of a company on its antecedent transactions. It provides that a transfer or any other act done in relation to the property of a company within a period of six months before the commencement of its winding up (*hereinafter* "twilight period") shall be deemed to be a fraudulent preference of its creditors and accordingly be invalid. For the purpose of the present case, Section 531 should be read in conjunction with Section 293, which stipulates that the sale of the whole, or substantially the whole of the property of a public company requires the consent of its general meeting.

15. Here, while dealing with Company Application (C.A.) No. 1208 of 2002 filed by the Petitioner for execution of a sale deed, the learned Company Judge dismissed the same on the ground that the agreement to sell dated 17.02.2000 was a collusive transaction between the Petitioner and the management of KOFL. It was observed that KOFL was in financial distress even at the time that the agreement to sell was entered into, and owed over Rs.5 crores to its other secured creditors. Given the existence of such secured and other unsecured creditors, the transfer of the subject property in favour of the Petitioner (which was found to be the prime property of the company) was held to be a fraudulent preference. Further, it was observed that the Petitioner would not have any priority over the general body of creditors merely because possession of the property had been handed over to it. It was also held that the Petitioner could not claim to be a bona fide purchaser who was unaware of the financial crunch of KOFL, as it had access to the annual report of KOFL for the year 1999-2000, which revealed the company's poor financial condition.

16. As noted supra, the Division Bench affirmed the order of the Company Court in appeal on the basis that it would be unjust to allow the sale transaction, especially since the property in question was the only and prime immovable asset of KOFL and was to meet the demands of several secured and unsecured creditors. In light of this, it was held that the Board resolution dated 31.03.1999 was insufficient and a resolution of the general meeting of KOFL approving the sale transaction was

A necessary, as required under Section 293(1). The Division Bench further held that the Petitioner only had an agreement to sell in its favour, which did not accord it with any rights by itself. Moreover, since the agreement to sell provided that the possession of the property be delivered to the vendee only at the time of completion of the transaction (which would be the time of registration of the sale deed), it was observed that the
B transfer of possession on 06.11.2000 reflected the intention of the management of KOFL to met out preferential treatment to the Petitioner. Lastly, it was held that the Petitioner could not claim exclusion from Section 531 on the basis that the agreement to sell had been entered into before the six-month twilight period. This was done because the Division
C Bench read Section 531 as relating to "transfers" of property only, and accordingly held the agreement to sell in question is different from a "transfer" which only occurs through a sale deed in terms of Section 54 of the Transfer of Property Act, 1882. Thus, the Division Bench ruled that the Petitioner could not benefit from Section 531, even though the agreement to sell had been executed almost sixteen months before the
D winding up petitions were filed.

17. Upon examining the relevant rules and the decisions rendered by the learned Company Judge and the Division Bench, we agree with the conclusion of the Division Bench that C.A. No. 1208 of 2002 filed by the Petitioner for execution of a sale deed in its favour is liable to be
E dismissed. This is primarily because the requirements of Section 293(1) of the 1956 Act have not been met.

17.1 As stated supra, Section 293(1) requires the consent of the general meeting of a company in case of a *sale* or *disposition* of the whole or substantial whole of its property. It is also well-settled that the
F *sale* of an immovable property can only be effectuated through a *sale deed* and an agreement to sell does not transfer any right, title or interest in the immovable property [*see* ***Suraj Lamp & Industries (P) Ltd. (2)* v. *State of Haryana,*** (2012) 1 SCC 656; ***Bank of India* v. *Abhay D. Narottam***, (2005) 11 SCC 520]. Given that C.A. No. 1208 of 2002 seeks *execution of a sale deed* in favour of the Petitioner based on a prior
G agreement to sell, the approval of the general meeting of the company in terms of Section 293(1) becomes relevant. Contrary to the submission made by the learned Senior Counsel for the Petitioner, this provision is applicable to the present case in view of the categorical finding by both the Courts below that the subject property is the only immovable property of KOFL. Notably, no approval from the general meeting of KOFL has
H been obtained. There is only a Board resolution dated 31.03.1999

permitting Respondent No. 1 to execute agreements of sale and other documents for the purpose of selling the subject property. In the absence of the requisite approval from the general meeting, the instant application for *execution of a sale deed* cannot be allowed as doing so would be allowing the Petitioner to sidestep the mandatory requirements of Section 293(1). Therefore, in our considered opinion, C.A. No. 1208 of 2002 deserves to be dismissed on this ground alone.

17.2 Be that as it may, in light of the contentions raised by both the parties on whether the agreement to sell in question amounts to a fraudulent preference, we consider it necessary to address the same. We differ with the Division Bench inasmuch as the said agreement cannot be termed as a fraudulent preference under Section 531. Under Indian company law, Section 531 of the 1956 Act (now Section 328 of the Companies Act, 2013) is the cornerstone provision that lays down the requirements for a transaction to amount to a fraudulent preference. Framed along the lines of Section 320 of the English Companies Act of 1948, it provides that any act relating to the property of a company may qualify as a fraudulent preference if two conditions are met. *First*, the dominant motive in the mind of the company (as represented by its directors or general body of shareholders) should be to prefer a particular creditor [*see* ***Jayanthi Bai* v. *Popular Bank Ltd.***, AIR 1966 Ker 296; ***Official Liquidator, Victor Chit Fund (P.) Ltd.* v. *Kanhiya Lal & Ors.,*** (1972) 42 ComCas 196 (Del)]. *Second*, the said act must be undertaken during the period of six months preceding the filing of the winding up petition of the company. While the first requirement ensures that the dominant intention to defraud creditors is detected, the second ensures that there is a level of commercial certainty and finality of transactions for those interacting with the company.

17.3 In light of this, when we look to the facts of the instant case, it appears that the Division Bench has entirely ignored the second requirement under Section 531. Solely based on an examination of factors indicating a dominant motive of the management of KOFL to benefit the Petitioner, it went on to hold that the agreement to sell constitutes a fraudulent preference. In doing so, it has failed to appreciate that the said agreement was executed on 17.02.2000, while the winding up petitions were filed on 02.07.2001, signifying that there was a gap of over sixteen months between the two events, as opposed to the six-month period contemplated under Section 531. Similarly, it failed to consider that even the transfer of possession of the subject property occurred on 06.11.2000, which was also before the six-month period

A preceding the filing of the winding up petition. Clearly then, the Division Bench has erred in ignoring the time limit stipulated under Section 531 and holding that the transaction qualifies as a fraudulent preference. As noted supra, the same cannot be disregarded as it is crucial for ensuring commercial certainty for parties transacting with a company.

B 17.4 Further, we differ with the reasoning of the Division Bench that the Petitioner cannot avail benefit of Section 531 as the agreement to sell does not amount to a "transfer". A bare reading of the provision shows that in addition to any transfer of property, it covers "*any other act relating to the property*". These terms indicate that Section 531 is comprehensive and includes indirect transactions within its scope [*see* C ***Manik Ratan Guin & Ors.*** **v.** ***Prokash Chandra Chattopadhyay***, (1953-54) 58 CWN 545 (Cal)]. Thus, the Petitioner is not precluded from benefiting from Section 531 on account of non-fulfilment of the six-month condition.

17.5 Therefore, it is evident that the agreement to sell dated D 17.02.2000 cannot be termed as a fraudulent preference under Section 531.

18. At this juncture, we would re-emphasize that our finding on fraudulent preference does not affect our conclusion that C.A. No. 1208 of 2002 is liable to be dismissed, as the non-compliance with Section E 293(1) cannot be ignored. However, given our decision in support of revival of the winding up proceedings, we observe that *even if* the infirmity with respect to Section 293 is subsequently removed by KOFL, any execution of a sale deed in favour of the Petitioner in the future will be subject to the outcome of the winding up proceedings.

19. In view of the foregoing discussion, we uphold the decision of F the Division Bench of the High Court of Judicature at Madras dated 28.07.2017 in O.S.A. No. 396 of 2013, reviving the winding up proceedings in C.P. No. 179 of 2001. SLP (Civil) No. 5143 of 2018 preferred before this Court is dismissed accordingly.

As regards the impugned judgment of the Division Bench dated G 17.08.2009 in O.S.A. No. 284 of 2003, we uphold the dismissal of C.A. No. 1208 of 2002 seeking the execution of a sale deed in favour of the Petitioner. SLP (Civil) No. 33825 of 2009 preferred before this Court is dismissed accordingly.

Devika Gujral SLP dismissed.