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(2016) 07 DEL CK 0135

DELHI HIGH COURT

Case No: CO. APP. 16-17 of 2011, C.M. Nos. 6537 of 2011, 11771 of 2012 and 5412-5413 of 2013

Cheran Enterprises Pvt. Ltd. — APPELLANT

Vs

Data Access India Ltd. — RESPONDENT

Date of Decision: July 22, 2016

Acts Referred:

- Companies Act, 1956 - Section 433(e), Section 434

Citation: (2016) 199 CompCas 421

Hon'ble Judges: Mr. S. Ravindra Bhat and Ms. Deepa Sharma, JJ.

Bench: Division Bench

Advocate: Sh. Y.P. Narula, Senior Advocate with Sh. Aniruddha Choudhary, Advocate, for the Canara Bank; Sh. A.S. Chandhiok, Senior Advocate with Sh. Dhruv, Sh. Ritesh Kumar, Sh. Mayank Banniyal and Sh. Dipender Chauhan, Advocates, for the Appellant; Sh. Kanwal Chau

Final Decision: Dismissed

Judgement

Mr. S. Ravindra Bhat, J. - The present appeal is directed against a judgment of the Company Judge, dismissing two applications (CA Nos. 1459/2006 and 1061/2010). Those applications were filed by the appellant Cheran Enterprises Pvt. Ltd ("CEPL" hereafter) essentially to relieve it of the obligation to remit the said sum of Rs. 35,30,46,482/- (Rupees Thirty Five Crores Thirty Lakhs Forty Six Thousand Four Hundred Eighty Two Only) with ABN Amro in terms of a previous order and seek modification of that previous order.

2. The facts are that M/s. Pacific Convergence Corporation Ltd. had filed winding-up petition no. 292/2004 against M/s. Data Access India Ltd. (hereafter "DAIL") under Section 433(e) read with 434 of the Companies Act ("the Act") to pay the debt due. The Petition was admitted by Order/Judgment dated 18th November, 2005 and the Official Liquidator attached to the Court was appointed as the Provisional

Liquidator. The order held DAIL had lost its substratum and it would be just and equitable to wind it up, as it was not engaging in any business activity and there was no prospect of revival.

3. One Siddhartha Ray, his group of companies and SPIL initially promoted DAIL. Its share holding pattern underwent a change later. This is evidenced in the Minutes of meeting, reflecting record of negotiations and decisions, dated 25th February, 2004 and letter dated 26th February, 2004; as well as the Shareholders'' Agreement dated 26th August, 2004. These were signed between (i) CHPL (ii) KCP Associates Holdings Pvt. Ltd (hereinafter referred to as "KCPAHPL", for short) (iii) SPIL (iv) Pacific Net Invest Ltd (v) DAIL (vi) Mr. Sidhartha Ray and (vii) Stracon (India) Ltd. Mr. Sidhartha Ray, DAIL''s promoter divested his stakes in it in favour of new investors. The shareholding pattern of DAIL thereafter is reflected in the following table:

Pacific Convergence (Mauritius) Ltd.	23.40%
SPA Enterprises Ltd.	13.75%
Pacific Net Invest Ltd.	51.00%
Employees and Associates	0.84%
Cheran Holdings Pvt. Ltd.	11.01%
TOTAL :	100.00%

4. Canara Bank had financed DAIL''s business in consortium with Syndicate Bank and was its secured creditor. DAIL had executed a Deed of Hypothecation dated 15th April, 2004 in favour of Canara Bank; It owed about Rs. 92 crores to Canara Bank and about Rs. 17 crores to Syndicate Bank. Canara Bank initiated proceedings before the Debts Recovery Tribunal. It also claimed lien over all of DAIL''s book debts. In terms of the loan, DAIL had to maintain account and deposit debt payments in DAIL''s account in Canara Bank. DAIL was granted permission to open an account with ABN Amro Bank, Chennai (hereafter "ABN Amro") for the limited purpose of receiving investors'' money. Account No. 1130826 was opened and an amount of US $17 million was received on 18th August, 2004 in that account from Data Access America Inc. (hereinafter referred to as "DAAI", for short) a 100% subsidiary of DAIL. Canara Bank alleged that this amount was paid by DAAI on account of debt due to DAIL, which is charged/hypothecated with it (the Bank) and was contrary to the understanding permitting bank account opening with ABN Amro for the limited purpose of receiving investors'' money. Indisputably, DAAI was liable to pay and was indebted to DAIL on account of services rendered.

5. The said US $17 million, deposited in ABN Amro on 18th August, 2004, was converted into Rs. 78.45 crores. The next date, i.e. 19th August, 2004 that amount,

i.e. Rs. 78.45 crores was transferred to the account of CHPL in ABN Amro. Instantaneously, CHPL transferred Rs. 35,30,46,482.68/- to CEPL which too had an account in ABN Amro, Rs. 18,05,00,000/- was transferred to KCPAHPL in ABN Amro and on 28th October, 2004, Rs. 25,00,00,000/- was transferred to SPIL in their account in ABN Amro. On 13th November, 2004, Canara Bank required ABN Amro to remit the amounts received in the account of DAIL. On 16th November, 2004 Canara Bank was informed about the transfer of the funds to several accounts and that only Rs. 48,000/- was available in DAIL''s account. Immediately thereafter, Canara Bank issued notices dated 17/18th November 2004 to DAIL and ABN Amro. DAIL replied on 19th November, 2004 through DUA Associates, not denying receipt of the said money. ABN Amro did not reveal details of the accounts to which the amounts were transferred. In these circumstances, Canara Bank filed C.A. No. 1409/2004. By order dated 25.11.2004, in C.A. No. 1409/2004 the respondent company (DAIL) was "restrained from dealing with the amount received from Data Access America in bank account No.1130826 of respondent company maintained by ABN Amro Bank Chennai or any other account of the associates or agents of the respondent company in the aforesaid branch or any other branch office of ABN Amro Bank in India."ABN Amro was directed, additionally to furnish complete particulars of remittances received from DAAI. In another application, (C.A. No.1582/2004) the Court noticed, by order dated 17.12.2004, that the -

"Income-Tax authorities have confirmed that a sum of Rs. 78.45 crores was credited to the account of the respondent company with ABN Amro Bank in account No. 1014374 on 19th August 2004 and on the same date Rs. 78.45 crores was transferred to account No. 1103945 of M/s. Cheran Holdings Pvt. Ltd. maintained with ABN Amro Bank, Chennai. It is also disclosed that from account No.1103945 of M/s. Cheran Holdings Pvt. Ltd. amounts were further transferred in the following manner:

(a) On 19.8.2004, Rs. 35,30,46,482/- to Account No.922322 of M/s. Cheran Enterprises with ABN Amro Bank.

(b) On 19.8.2004 Rs. 18,05,00,000/- to Account No.94444 of M/s. KCP Associates Holdings with ABN Amro Bank.

(c) On 28.10.2004, Rs. 25,00,00,000/- to Account No. 912277 of Sporting Pastime India Ltd with ABN Amro Bank.

(d) From the account No.994444 of M/s. KCP Associates Holdings, a sum of Rs. 18.03 crores was transferred to Syndicate Bank, Delhi-A/c. KCP on 20.8.2004.

From the aforesaid averment it is prima facie established that attempt is made by the respondent to transfer these funds to other accounts so as to go out of the reach of the petitioner or the Canara Bank. ABN Amro Bank, Chennai and Syndicate Bank, Delhi would ensure that minimum balance, as mentioned in sub-paras (a), (c) and (d) is maintained in those accounts, namely, in account No. 922322 of M/s.

Cheran Enterprises - Rs. 35,30,482/- (sic); in account No. 912277 of Sporting Pastime India Ltd - Rs. 25 crores and in account of KCP Associates Holding with Syndicate Bank, Delhi - 18.05 crores. As the applicant is not aware of the branch office of Syndicate Bank where this account is maintained, the order shall be served upon the zonal office of Syndicate Bank at Delhi.

Notice for 7th January, 2005, dasti through counsel.

Copy of the order be also given dasti under the signatures of the Court Master."

6. Odyssey thereafter preferred CA 35/2005 alleging that it had advanced US $17 million to DAAI subject to the condition that the amount would be further lent to DAIL on two conditions, namely, rollover of all loans and bank guarantees with Canara Bank and Syndicate Bank for a period of at least 12 months and secondly, reinstatement of all points of interconnect with BSNL and extension by BSNL of all outstanding dues. According to Odyssey, as these conditions were not satisfied, the money did not belong to DAIL or DAAI and Canara Bank had/has no right receive it. CA no.36/2005 was filed by CHPL for modification of the stay order dated 17th December, 2004. CA 288/2005 was filed by SPIL for vacation of the stay order dated 17th December, 2004 on various grounds including rights of these companies to appropriate the said amounts deposited in their bank account. Hamblin Watsa Investment Council Ltd filed CA 677/2005, for vacation of the stay order dated 17th December 2004 attaching US $17 million. It was alleged that they had acted as investment advisers of Odyssey.

7. Canara Bank contended to the contrary. Its stand was reproduced in paras 63- 66 of the judgment dated 18th November, 2005. It stated that the consortium of banks had to receive substantial amounts, on 9th July, 2004. DAIL informed it (the Bank) by a letter stating that it was arranging a sum of Rs. 75 crores to Rs. 125 from an investor in order to augment the working capital and improve the cash flow. Later, by letter dated 23rd July, 2004 the company requested the bank to open a no lien escrow account in the name of the company for repayment of proposed loan of Rs. 75 crores to the investors in 60 monthly instalments. The Bank accepted this request and opened an escrow account in the name of the company on 24th July 2004. The Bank received two letters dated 12.08.2014, from Mr. Ray and Mr. R. Karunanidhi and other signed by Mr. K.C. Palaniswamy concerning investors'' fund of Rs. 75 crores. These showed that KCPAHL and CHPL were the notified investors and the amount receivable from M/s DAAI on account of services rendered had no connection with them. This was followed by letter dated 18th August, 2004 from DAIL seeking permission for opening a current account with ABN AMRO Bank, Chennai to facilitate the smooth transfer of funds in the minimum possible time. It was also mentioned that the funds need to be transferred immediately to the bank. These investors, viz. CHPL and KCPL apparently had an account with ABN Amro, Chennai and that the money was to be transferred from one account to the other in the same branch. This letter did not indicate that the investor''s monies were to be

received from a foreign party in foreign exchange by the company. The letter dated 18th August, 2004 only disclosed that the transaction was within India; there was no indication or mention of foreign exchange remittance by any foreign company. It is clear from the letter that permission was sought for depositing the investor'' money with Canara Bank (and for which escrow account was opened by the bank). That permission for opening of the account was granted. On 26.08.2004, a shareholder''s agreement was signed by the concerned parties-however, the Bank was not consulted and had no role to play in the signing of the said earlier Agreement or the agreement of 26th August, 2004. This Agreement was given to the Bank sometime in October, 2004 and as per Clause 8 of the said Agreement the investor was to bring in the sum of Rs. 75 crore on certain express conditions.

8. The court''s order observed that the Share Holder''s Agreement, showed :

"that as on 26th August, 2004, the investor''s money had not been received by the Respondent Company. Thereafter, on 7th September, 2004 a consortium meeting was held in which Mr. Siddharth Ray and Mr. K.C. Palanisami participated on behalf of the Respondent Company. In the said meeting also, it was represented by the said persons that the investor''s money of Rs. 75 crore was yet to come. In fact, the consortium''s views recorded in the minutes of the said meeting stated as under:

"The Company officials shall arrange for infusion of Rs. 75 crore by the investors money to set right the irregularities."

65. As a follow up of the consortium meeting of 7th September, 2004, Canara Bank received letters dated 16th September, 2004, 17th September, 2004 and 21st September, 2004 and in the said letters also there is no mention of the receipt of any loan amount of Rs. 75 crore from the investors. Infact, in para 2 of the letter dated 21/7/2004, the Bank was informed that a sum of Rs. 83.81 crore is due from Data Access America to the Respondent Company as on 31/8/2004, which was not correct and was contrary to remittance of 17 Millions USD by Data Access America to Data Access India Ltd. on 19/8/2004 along with a swift message that the said payment was on account of the outstanding liability towards services rendered. It is relevant to mention that during this period i.e. in November, 2004, the Bank received copies of the letters addressed by the Chairman of the Respondent Company to Enforcement Directorate and to the Revenue Authorities, stating therein that the new management had fraudulently transferred funds of ''DAIL'' to their own Companies. The said letter also mentioned that the amount of 17 Million US Dollars received in the account of DAIL with ABN AMRO Bank, Chennai were receivables to be deposited with Canara Bank. In fact, after receiving the amount of 17 Million US Dollars on 19.8.2004, ABN AMRO Bank filed the Inward Remittance Certificate with the Reserve Bank of India the same day, i.e. on 19.8.2004, declaring that the remittance was received on the account of the respondent Company against outstanding bills of services rendered.

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66. In the present case, no permission of RBI has been obtained by any party. In case the company was to receive any loan in foreign exchange from abroad, prior permission of the RBI was required. It is, therefore, the case of the Bank that the entire story of the Respondent Company that the said amount of 17 Million US Dollars was received as loan by the Respondent Company from its 100% subsidiary is false. In fact, as per the letter dated 18.8.2004, written by the Respondent Company, seeking no objection from the Bank for opening a current account with ABN AMRO Bank, Chennai, the investor was to infuse funds in to the Respondent Company by transferring amount in Indian Rupees from its account with ABN AMRO Bank, Chennai to the account of the Respondent Company in Indian Rupees. The investor was ''CHPL'' and ''K.C.P.'' and not ''DAA''. The swift message of ''DAA'' received with the remittance of 17 Million US Dollars cannot be changed. The Respondent Company has fabricated the story of unsecured loan by ''CHPL'' to ''DAIL'' through ''DAA''. The said story is neither plausible nor possible. "

The court then concluded its prima facie determination:

"69. No doubt the company has tried to give its own version and hue to the entire transaction and dubbing the receipt of funds in the company''s account as an error. However, the admitted facts are :

(a) The amount was received in the account of the company maintained with ABN AMRO Bank.

(b) The amount was received through its subsidiary Data Access America Inc. Whether it was a loan given by Odyssey Re, that too with conditions, is a matter which needs a thorough probe. It is also possible that as Data Access America has to make substantial payments to the company, it borrowed the money from the said parties for making payment to the company.

(c) Although it is alleged that the money was to be given by way of loan by CHPL/Odyssey with certain conditions, even when this money was received on 18th August, 2004, the correspondence on record which is highlighted by the bank shows that much after this date also there were discussions about the investors infusing Rs. 75 crores indicating that such a money has yet to come.

(d) This can be inferred from the shareholder''s agreement dated 26th August, 2004, consortium meeting dated 7th September, 2004 and follow up letters dated 16th, 17th and 21st September, 2004 received by the bank. Even in reply dated 19th November, 2004 counsel for company M/s Dua Associates did not refute the allegation of the bank that money was received from Data Access America Inc. in the account of the company.

(e) Although as per the representations made, investors were to infuse Rs. 75 crores, money received is US $ 17 million i.e. Rs. 78.45 crores.

(f) After receiving the amount, the ABN AMRO filed inward remittance certificate with RBI on 19th August, 2004 i.e. the same date declaring that the remittance was received in the account of the company against the outstanding bills of services rendered.

(g) No permission of RBI has been obtained by any party for lending foreign exchange to an Indian company."

The Court noticed Canara Bank''s plea that Rs. 78.45 crores was held by DAIL as trust and such trust money cannot be intermingled with debt amounts but rather should be maintained separately. The Court also relied on several decisions in this regard, New Bank of India v. Pearey Lal (1962) 32 Comp Cas 91, **Barclay Bank v. Quistclose Investments Ltd. (1968) 3 All.E.R. 651**, **P.V. Narain v. Aaron Spinning and Weaving Mill Ltd. (1961) 31 Comp Cas 261** and **Official Liquidator v. Chandranarayan (1973) 43 Comp Cas 245.** The court accordingly confirmed the interim order of 17.12.2004 and directed that :-

"the amount which has been transferred from ABN AMRO Account No.1014374 of the company to CHPL and other companies shall be remitted back by those parties to the account of the company maintained with ABN AMRO Bank.

Needful in this respect shall be done within two weeks. After receiving this amount the ABN AMRO Bank shall remit this amount to Canara bank. It is because of the admitted liability of the bank and charge of the bank over this money. Furthermore, in case it is found ultimately that the money is to be refunded to Odyssey Re. etc., appropriate orders can be passed directing Canara Bank to refund the amount and the bank has sufficient means to carry out such directions. Appropriate orders shall be passed in the company petition as to how this amount is to be dealt with depending on the nature of the final orders passed in the company petition."

9. The above judgment of the Company Judge-dated 18th November, 2005 was matter of appeal by CHPL, KCPAHPL and SPIL. These appeals have been dismissed by order dated 20.11.2009 by the Division Bench. While dismissing the appeals filed by CHPL and SPIL, the challenge to the prima facie findings recorded by the Company Judge in the Order dated 18th November, 2005 as incorrect was rejected. The request of the appellants that the contempt proceedings should be kept in abeyance too was rejected. It was stated before the Division Bench that KCPAHPL had transferred Rs. 18.03 lakhs to Syndicate Bank and the Income Tax Department had appropriated Rs. 17,40,29,511/- and Rs. 7,59,70,489/- on 23rd February, 2005 and 19th August, 2005 respectively from SPIL''s account. Both these contentions too were rejected. These directions attained finality.

10. After noticing all the above sequence of events and orders, the Company Judge, by the impugned order, refused to entertain and consider the claim for modification of the previous orders in the two applications CA Nos. 1459/2006 and 1061/2010 and accordingly dismissed them. It was observed that:

"18. Order/Judgment dated 18th November, 2005 was made subject matter of appeal by CHPL, KCPAHPL and SPIL. These appeals have been dismissed vide order dated 20th November, 2009 by the Division Bench. While dismissing the appeals filed by CHPL and SPIL, the Division Bench specifically noticed the contention raised and challenge to the prima facie findings recorded by the Company Judge in the Order dated 18th November, 2005 as incorrect and one that required interference. The said contentions were rejected. The request of the appellants therein that the contempt proceedings should be kept in abeyance was also rejected. Before the appellate court, it was stated that KCPAHPL had transferred 18.03 lacs to Syndicate Bank and the Income Tax Department had appropriated 17,40,29,511/- and 7,59,70,489/- on 23rd February, 2005 and 19th August, 2005 respectively from the account of SPIL. Both these contentions did not find favour with the Division Bench and were rejected. Accordingly, the directions given by the learned single Judge quoted above in paras 70 to 72 of the Order/Judgment dated 18th November, 2005 have become final and have to be complied with. In these circumstances, I do not see any reason why I should entertain and consider the applications for modification of the Order/Judgment dated 18th November, 2005 which has attained finality. The prayer made for modification of the interim order dated 12th November, 2004 passed on an application is misconceived as the said Order has merged in the Order/Judgment dated 18th November, 2005.

19. It is apparent from the facts stated above that CEPL, SPIL and KCPAHPL and CHPL have been all dragging, prolonging the matter and trying to stall the implementation of the directions given in paras 70 to 72 in the Order/Judgment dated 18th November, 2005. In terms of the directions issued in the said Order/Judgment, money i.e. 78.45 crores must come into the bank account in Canara Bank. Inspite of more than five years, this has not happened. The said companies cannot be permitted and allowed to stall compliance of the directions issued and must abide by the said Order/Judgment.

11. The Company Judge noticed that the previous judgment dated 18th November, 2005 referred to Section 531 of the Act and the principle of trust. He also referred to the principle of "tracing" and the observations of the House of Lords in its decision, **Lipkin Gorman v. Karpnale (1992) 4 All.ER 512.** The impugned judgment also cites restitution and the decisions reported as Orton v. Butler (1822) 5 B. & Ald. 652, Foster v. Green (1862) 7 H. & N. 881; **Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943] A.C. 32**; Hudson v. Robinson 1816 (4) MNS 475; Bainbrigge v. Browne (1881) 18 Ch.D. 188; the decision of High Court of Australia in **Black v. S. Freeman and Company 1910 (12) C.L.R. 105**; **Banque Beige Pour I''Etranger v. Hambrouck (1921) 1 K.B. 321**, among several others, to support the "tracing" theory and the principle of restitution, where amounts are stolen or embezzled. In the said decision, it was held, that the law of restitution is not based upon implied or quasi contract theories but based upon the principle that unjust enrichment must be restituted. The Company Judge then held:

"29. Benefits acquired by fraud, breach of confidence, breach of fiduciary relationships or by other wrong doings therefore do not get benefit under the defence of change of position. Further change of position as a defence has to be causally linked to the receipt that makes it inequitable for the recipient to make restitution. Mere fact that the recipient has spend the money whole or in part, does not make it inequitable because expenditure might have been incurred by him in any event in ordinary course of things. But a bonafide recipient is entitled to establish the defence that he had increased his outgoings as a result of the receipt. [See, para 168, Halsbury''s Law of England, Vol. 40(1), 4th Edition]

30. As noticed above, in the present case, serious allegations have been made and as recorded in the Order/Judgment dated 18th November, 2005, these allegations have been found to be prima facie correct. Several aspects have been noticed and doubts about the bonafides of the transactions relating transfer of money from the account with ABN Amro Bank have been noticed. The said observations and findings have been upheld by the Division bench in appeal. As observed above, it is apparent that there is consorted and a deliberate desire is to stall and not comply with the Order/Judgment dated 18th November, 2005. Even after more than five years, the directions given in the said Order/Judgment have not been complied with. In this connection, it is noticed that CEPL is a joint venture of O.R.E. Holdings Ltd, CG Holdings Pvt Ltd and Mr. Nandakumar Athappan who hold 45%, 45% and 10% shares respectively. It appears that after filing of the present petition, Mr. Nandakumar Athappan and Mr. K.C. Palanisamy have also developed some differences. Numerous litigations have come up and have been filed by several parties to keep control and retain hold of the money. It is stated on behalf of Mr. K.C. Palanisamy that CEPL is the holding company of Cheran Properties Pvt. Ltd. which in turn is a holding company of SPIL. Similarly, CHPL is a subsidiary of CEPL and KCPAHL is a subsidiary of CHPL. Prima facie, it does appear that all the companies were fully aware and conscious of the transfer of the money in ABN Amro Bank and the claim of Canara Bank.

31. C.P.No. 65/2005 has been filed by the CHPL represented by Mr. K.C. Palanisamy under 397, 398, 402 and 403 of the Act on account of certain purported acts of oppression and mis-management in affairs of CEPL and other respondent. C.P.No. 76/2005 has been filed by the O.R.E. Holdings Pvt. Ltd. under section 397, 398, 402 and 403 of the Act on account of certain purported acts of oppression and mismanagement indulged by Mr. K.C. Palnisamy in affairs of CEPL. In these petitions interim order were passed by Company Law Board (CLB, for short) on 13th August, 2008 i.e. after the order dated 18th November, 2005 passed by the Company Court. Neither Canara Bank nor DAIL is a party in the said proceedings. It is pointed that applications filed by the Canara Bank to be impleaded as a party in C.P. No. 65/2005 & C.P. No. 76/2005 was dismissed by the CLB vide order dated 18th July, 2007. Aforesaid orders do not affect and negate the effect of the order dated 18th November, 2005, which has been upheld by the Division Bench vide order dated

20th November, 2009. The findings and observations made in the order dated 13th August, 2008 passed by CLB do not operate as res judicata, viz., Canara Bank or DIAL. The findings and observations therein will be examined and considered while deciding inter se the rights between the parties to the CLB litigations but cannot be ground to not to comply with the order dated 18th November, 2005.

32. W.P. No. 32444-50 of 2006 has been filed by CEPL in the Madras High Court against the Income Tax Department. Interim application has been made in said writ petitions for directing the Income Tax Authorities to place the amount appropriated in a fixed deposit with a nationalised bank and restraining Income Tax Authorities from making any refund to Mr. K.C. Palainsamy and CHPL. The Madras High Court has passed an interim order dated 23rd November, 2006 directing the Income Tax Authorities not to refund the amounts till further orders.

33. By interim order dated 26th September, 2006 in C.A.No. 1156/2006 this Court has directed that in case Income Tax Authorities releases payment of Rs. 32,43,31,290/- to CHPL, the same after deposit will not be withdrawn and the said company will maintain minimum of balance equal to amount received. This order is subject to order of Madras High Court. The said restriction was placed on account of principle of comity between Courts. The said interim direction shall continue till further order.

34. Canara Bank may have filed an application for being impleaded as a party in W.P.No. 32444-50 of 2006 before the Madras High Court and these applications may be dismissed, but this is inconsequential and immaterial as far as the order dated 18th November, 2005 is concerned. Similarly the fact that Canara Bank has abandoned or waived their rights or the Supreme Court has dismissed Special Leave Petition against order dated 24th April 2008 for impleadment does not negate, eclipse or obliterate the order dated 18th November, 2005. It may be again noted that the Division Bench has upheld order dated 18th November, 2005 in their judgment dated 20th November, 2009. The interim order passed by Madras High Court and the order dated 24th April, 2008 dismissing the applications of Canara Bank, are earlier in time. It is not possible to accept the contention that the appellants in Company Appeals 3 & 4 of 2006 were unaware of these orders of the Madras High Court.

35. Order dated 21st January, 2009 passed in Crl. O.P. No. 1137/2009 initiated by Nandakumar Athappan against State Bank of India, Erode Branch including directions therein are not binding on Canara Bank and this court and do not justify recall of order dated 18th November, 2005 which is earlier in point of time. Canara Bank and DIAL the company under provisional liquidation are not parties to the said litigation. The order of criminal court dated 21st January, 2009 again is prior in point of time i.e. before the Company Appeals 3 & 4 of 2006 filed by CHPL and SPIL were dismissed on 29th November, 2009.

36. Keeping in view the aforesaid facts, the following directions are issued:-

(1) All bank accounts and deposits of CEPL, CHPL, SPIL and KCPAHPL are hereby attached. No payments will be made from the said bank accounts except with the permission of the Company Court. The aforementioned companies are also restrained from selling, disposing of or creating third party interest in respect of movable and immovable assets.

(2) Managing Director/principal officer of CEPL, CHPL, SPIL and KCPAHPL will file affidavits in the Court within fifteen days furnishing the following details:

(a) Account numbers and details of the banks including details of fixed deposits and other deposits.

(b) Details of movable and immovable assets including shares.

(c) Names and addresses of the directors.

37. CEPL, Mr. K.C. Palaniswamy and CHPL will file copy of this order before the Madras High Court. Copy of this order will be also brought to the notice and filed with the Company Law Board by the parties appearing before the Company Law Board.

38. Mr. Nandkumar Athappan will be present in the Court on the next date of hearing.

39. The aforesaid attachment orders and restrain order shall be withdrawn on deposit of 78,45,50,000/- with the Canara Bank in terms of the order dated 18th November, 2005. The said amount must be deposited immediately in terms of the said order and latest by or before 31st March, 2011. The attachment orders in respect of the bank accounts and fixed deposits or other deposits will not come in the way of depositing payments. In case deposit is not made by 31st March, 2011, the parties concerned will be liable to pay interest @ 15% per annum with effect from the date of passing of this order. The question of payment of interest for past period is for the time being left open.

List on 5th April, 2011.

CA Nos. 1459/2006 and 1061/2010:

Applications CA Nos. 1459/2006 and 1061/2010 filed by CEPL are dismissed in praesenti and at this stage. The contentions raised and not decided in the present order are left open and will be decided after the money is deposited with Canara Bank in accordance with the order dated 18th November, 2005."

12. It is contended by CEPL, the appellant that the Company Judge failed to address the basic facts relating to the filing of applications by it. In this context, pointed reference is made to writ petitions (W.P.(C) 3244-50/2006) before the Madras High Court, against appropriation of Rs. 32,43,31,290/- by the income Tax authorities

from CEPL''s funds. It was contended that Canara Bank tried to thwart CEPL''s legal recourse, by filing CA 1233/2006 before this Court. This court''s orders were made subject to the orders of the Madras High Court, in the pending writ petition. Canara Bank, thus foiled in its attempt, sought impleadment in the writ petition before Madras High Court. Upon failing in that attempt, it moved the Supreme Court (SLP 16264-70/2008), which was rejected on 14.12.2009. It was stated that Canara Bank filed another impleadment application and the Madras High Court was seized of the issue whether the amount was to be handed over to the Canara Bank, the Income Tax department, CG Holdings, or CEPL. These facts were disclosed and urged. However, the Company Judge erroneously did not consider their significance in relation to the two applications preferred by the CEPL.

13. Likewise, it was urged that the Company Judge erroneously overlooked the significance of the leave granted by the Supreme Court, to seek review of the order whereby Canara Bank had persuaded the issuance of a direction to State Bank, Erode, to deposit Rs. 18.14 crores in CA 688/2010. SLP 14368/2010 was preferred against that order, which was disposed of by order dated 13.05.2010 where the Supreme Court granted liberty to CEPL, the appellant, to seek modification of the said order in CA 688/2010 dated 20.04.2010.

14. It is urged that the impugned judgment failed to consider that on 01.07.2004, K.C. Palaniswamy, without authorisation of CEPL''s directors, had transferred Rs. 35,30,46,482 to CHPL, entirely controlled by him. CHPL returned the said amount to CEPL on 19.08.2004. Similarly, the observations of the Company Law Board dated 13.08.2004 in proceedings under Section 397, effectively indicted Palaniswamy. Counsel argued that the observations of the said Board were wrongly and erroneously held not to constitute res judicata by the Company Judge. It is argued that the said Shri Palaniswamy abused his fiduciary position in transferring the amount to CHPL and consequently CEPL cannot be made accountable to Canara Bank for that purpose. It is also urged that the claim in Canara Bank''s application is really in the nature of a garnishee proceeding. Since the appellant, CEPL is not DIAL''s debtor, no directions could have been made against it.

15. Learned senior counsel for the appellant referred to the letter addressed to the income tax authorities dated 05.02.2005 which clearly stated how Palaniswamy, anticipating the approval of CEPL, diverted Rs. 33 crores to acquire shares. This was not approved by CEPL. The observations and findings of the Commissioner (Appeals), Income Tax, in his order, dated 08-09-2006 were all relied upon. The following observations of the Company Law Board, in its order dated 13th August, 2008, are relied upon:

"the admission of KCP made before the Income Tax authority, which is found reflected in the assessment order dated 23-02-2005 in the matter of SPIL would show that KCP had transferred in anticipation of the approval of the Board of CEPL, a sum of Rs. 33 crores as capital advance to CHPL, which was paid to DAIL and that

CEPL Board had subsequently disapproved the said transfer of funds to CHPL for investing in DAIL. It is rather evident from the communication of KCP dated 05-02-2005 addressed to the Income Tax Authority that the investment made in DAIL does not enjoy the authority of the Board of CEPL. It is therefore, far from doubt that the investment made by CEPL in DAIL is without any authority of the Board of CEPL. Nevertheless it is required to be examined whether ORE or R. Athappan or OARC is blameless.."

16. Lastly, a letter dated 25th November, 2004 written by ABN Amro to the Reserve Bank of India (RBI) explaining the conditions of remittance of Rs. 35 crores (US $17 million) was relied upon. It was contended, based on that letter, that the remitter, DAAI had received amounts by Odyssey, which had required retention of funds by CHPL subject to certain conditions, i.e. rescheduling of dues to Canara Bank and Syndicate Bank and reinstatement of all points by BSNL and agreement with it for rescheduling outstanding amounts due over the next 12 months. These conditions were not complied and, therefore, Odyssey recalled the amounts. ABN Amro, therefore, had sought guidance from RBI to remit the amounts to DAIL in its letter dated 16.09.2004. These according to the appellant clearly revealed that Canara Bank could not claim any part of those amounts, as they belonged to some other concern.

17. The respondents including Canara Bank argue that this court should not disturb the observations and findings of the learned Single Judge. Counsel referred to the pleadings in the previous applications which were the subject matter of the order dated 18th November 2005 and urged that all that is being said here now was contended before the Company Judge in those proceedings, (CA 287/2005). There is absolutely no change of circumstances, emphasised counsel, necessitating intervention with the impugned judgment.

18. It is urged that the materials on record show that Mr. Palaniswamy managed and controlled DAIL at the time. M/s Pacific Netinvest owned 51% of its shares; SPA Enterprises owned 12.5% (it is owned by Mr. Siddhartha Ray, the second joint MD of DAIL). CHPL owns 12.12% shares in DAIL. Pacific Netinvest, in turn is substantially owned to the extent of 76% by Mr. Palaniswamy''s CHPL and 24% with KCP Associate Holdings. The funds received from DAAI (the subsidiary of DAIL) were illegally diverted to CEPL. Learned counsel submits that DAAI''s remittance to ABN Amro-particularly the instructions, clearly state that the amount of US $17 million, was paid into DAIL''s account "towards outstanding Bills for services rendered". In the circumstances, the impugned judgment was justified in law.

Analysis and Conclusions

19. It is evident from the factual discussion that DAIL was directed to be wound-up and a Provisional Liquidator appointed to take charge of its affairs.Canara Bank is admittedly a substantial creditor of the company under liquidation. It sought

directions for deposit of Rs. 78,45,50,000/- being the equivalent of US $17 million received from DAIL''s fully owned subsidiary, i.e DAAI. The amount was received in an account with ABN Amro. The account opening was expressly authorised by Canara Bank (the secured creditor) to receive investor''s amounts. This was presumably to permit DAIL to receive investor''s monies. However, the remittance made by DAAI was towards amounts payable to it. This Court took notice of these facts and was of the view that the Bank was justified in insisting that the said sum of Rs. 78,45,50,000/- should be paid back into DAIL''s account.

20. At the outset, this court notices that the entire basis of the fresh applications moved before the Company Court is the Income tax proceeding and to a certain extent company proceedings, before the Company Law Board. Here, it can be seen that the order of the income tax authorities, dated 05.02.2005 - which had recorded Palaniswamy''s statement, was available at that time. The case made out for variation of the orders is that on 1st July 2004, Palaniswamy transferred Rs. 35,30,46,482.68 unauthorizedly from CEPL to CHPL and further that the transfer to CEPL, of the amounts received (US $17 million) was in reversal of this unauthorized earlier transfer. Now, this Court is un-persuaded by the appellant''s submissions. That there were income tax proceedings, or that subsequently orders were made in Company Law Board proceedings, in no way substantiate the appellant''s arguments. Had CEPL so wished, the order of the income tax authorities could have been brought to the notice of the court the court in fact made its order in the earlier round, on 18.11.2005. The income tax authorities'' order noticing the statement of Palaniswamy is dated 05.02.2005. Obviously, the appellant felt that this was not relevant at the time. Nor is there any averment in the two applications that the said statement, or the proceedings and orders of the income tax authorities are of such significance as to require a fresh look at the matter. The same can be said of the Company Law Board proceedings.

21. It is extremely important to notice here, that in the previous proceedings, the learned Company Judge had noted that a letter of 21.07.2004, of DAIL had informed that a sum of Rs. 83.81 crores was payable to it by DAAI. The Division Bench''s appellate order, dismissing the challenge to the earlier judgment (dated 18.11.2005) notes this:

"5. The learned Company Judge has duly adverted to applications filed by CHPL, KCP Associates Holdings Pvt. Ltd., SPIL as well as other enterprises. The learned Company Judge has noted that pursuant to the Consortium Meeting held on 7.9.2004, Canara Bank received letters dated 16.9.2004, 17.9.2004 and 21.9.2004, none of which made any mention of receipt of loan of US$ 17 million (Rupees 75,00,00,000/-) from investors. On the contrary, the letter dated 21.7.2004 informed that a sum of Rupees 83.81 crores is due from Data Access America to DAIL as on 31.8.2004."

These, in the opinion of the Court, are incontrovertible facts; they were noted in the earlier proceedings. No attempt has been made in the present proceeding to show how the materials now being relied upon so substantially undermine the findings in the previous orders as to justify a modification of those directions. The letters are part of the record; ABN Amro''s explanation is of no consequence, given that DAAI had remitted the amount towards services rendered.

22. In the opinion of this Court, the learned Single Judge cannot be faulted for refusing to vary the directions in the previous order, because the materials - i.e. income tax orders, unrelated Company Law Board proceedings, etc. do not show that the basis or substratum of the previous judgment has eroded. The Company Law Board proceedings do not concern the viability of DAIL; they relate to the management of other companies and the alleged misfeasance of individuals including Palaniswamy; he appears to have been incarcerated for some time. The orders made in criminal proceedings, similarly reflect the merits of the contentions made there. Their relevance in determining whether the amounts received in DAIL''s no lien escrow account, which was permitted with the secured creditor''s permission (on the representation that it would be used to receive investor''s contributions) from its subsidiary for services rendered are not really so. As noticed earlier, all indications are to the contrary. The explanation now sought to be given, i.e. that Odyssey made over the amounts to DAAI, as part of a conditional loan, do not detract from the inferences justifiably forming the basis of the previous judgment of 18.11.2005.

23. For the above reasons, this court is of the opinion that there is no merit in the appeal. It is accordingly dismissed, without order as to costs.