

(1974) 02 BOM CK 0003

In the Bombay High Court

Case No : O.S. Appeal No's. 110 and 111 of 1973 (Company Petition No. 114 of 1969)

Amba Tannin and Pharmaceuticals Ltd.

APPELLANT

Vs

Official Liquidator, High Court, Bombay and Others

United India Fire and General Insurance Co. Ltd. Vs Official
Liquidator, High Court, Bombay and Others

RESPONDENT

Date of Decision : 22-02-1974

Acts Referred:

Companies Act, 1956 — Section 24, 394, 397, 398, 433

Citation : (1975) 45 CompCas 457

Hon'ble Judges : R.M. Kantawala, C.J;G.C. Bharuka, J

Bench : Division Bench

Judgement

Kantawala, C.J.—These are appeals against the order of Kania J. sanctioning sale of the assets and properties of Vilas Udyog Private Ltd. (in liquidation) (hereinafter referred to as "the company") for a price of Rs. 39,57,755 in favour of Keshavlal G. Patel, respondent No. 3.

2. The facts giving rise to these appeals may be briefly stated : On August 18, 1969, Esso Standard Eastern Company filed a petition for winding up of the company. Before this petition was disposed of, on July 9, 1970 Esso Standard Eastern Company assigned its debt to Indento Private Ltd. respondent No. 2 herein, and respondent No. 2 was substituted as petitioning creditor in the winding-up petition on July 15, 1970. On or about November 24, 1971, Central Bank of India, respondent No. 4 herein, filed a civil suit being Suit No. 96 of 1971 in the court at Jamnagar against the company for enforcing an equitable mortgage created by the company in its favour. It was stated in the plaint that a sum of over Rs. 26 lakhs was due by the company to respondent No. 4 as on September 30. 1971. Ultimately, by an order passed by Nathwani J. on January 12, 1972, the company was ordered to be wound up and the official liquidator was appointed liquidator without security with all powers u/s 457 of the Companies Act, 1956 (hereinafter referred to as "the Act"), to be exercised by

him u/s 458 of the Act without sanction or intervention of the court save and except in case of sale of immovable property, if any, belonging to the company. After the order of winding up was passed several meetings were held before the official liquidator. On January 14, 1972, a meeting was held before the official liquidator when a director of the respondent No. 2 was present. Later on, on January 18, 1972, another meeting was held before the official liquidator. At this meeting, Inter alia, a director of the respondent No. 2 and advocate of the respondent No. 4 were present. The advocate of the respondent No. 4 informed the official liquidator about the security created by the company in favour of the respondent No. 4 and the suit filed in the court at Jamnagar against the company. A further meeting was held before the official liquidator on February 28, 1972, when Mr. K. M. Diwanji of Messrs. Ambubhai & Diwanji, attorneys of the respondent No. 4, was, inter alia, present. At this meeting the attorney of the respondent No. 4, inter alia, informed the official liquidator that the bank was desirous of continuing the suit since the directors and some other persons who were also the guarantors to the bank were parties to the said suit. Later on, on March 8, 1972, a meeting was held before the official liquidator, where, inter alia, the attorneys of the respondent No. 4 and the director of the respondent No. 2 were present. At this meeting the attorney of the bank informed the official liquidator that it had no objection if the properties of the company were taken possession of by the official liquidator and sold through him provided they were always kept informed about the proceedings regarding the same. A further meeting was held before the official liquidator on May 5, 1972, when, inter alia, the director of the respondent No. 2 and the attorneys of the bank were also present. At a meeting held before the official liquidator on June 24, 1972, the attorneys of the bank reaffirmed that the bank had no objection if the properties of the company were taken possession of by him and sold through him provided the bank was kept informed about the proceedings of the sale. At this meeting a director of respondent No. 2 was also present. On June 28, 1972, the official liquidator made a report to Vimadlal J., who was taking company matters. On this report the following directions were given by the learned judge :

A further report was submitted by the official liquidator to Vamdallal J. on April 25, 1973. On the said report directions were given by Vamdallal J. on June 16, 1973. The said directions are as under :

3. On July 7, 1973, a meeting was held before the official liquidator when, inter alia, the attorneys of respondent No. 4 were present. Nobody was present on behalf of respondent No. 2 at this meeting. At this meeting the question of revised draft terms and the conditions subject to which the properties of the company were to be sold was discussed. It was decided that the official liquidator should issue notices and advertise them in the various papers as per direction of the court inviting offers in respect of the properties to be sold. On July 23, 1973, inter alia, the advertisement appeared in the Times of India inviting offers in sealed covers for purchase of the company's right, title and interest in the land together with the building, plant and machinery belonging to the company

having mainly the following processing plants : 1. De Smet continuous solvent extraction plant with installment capacity of 200 tons per day. 2 Batch type refinery 15 tons per day capacity. 3. 40 tons per day capacity cotton seed crushing units, and 4. 9. Ross down Expeller Oil Mills and stores, spares, stock, etc., situate at Bardeshwar Road, Jamnagar, Saurashtra. It was also stated in the advertisement that the terms and conditions of sale, full particulars of land, building, plant and machinery, stores, etc., proposed to be sold can be inspected by the intending purchaser at the aforesaid address from August 3, 1973, to August, 8, 1973, during the hours specified therein. By this advertisement all offers as per the draft subjoined to the terms and conditions of sale were required to be dispatched so as to reach the official liquidator in sealed covers on or before August 17, 1973, by 3 p.m. It was said that the offers would be opened and considered by the official liquidator in his office in the presence of intending offers on August 18, 1973, at 12 noon. It was made clear in this advertisement that the official liquidator is not bound to accept the highest offer and that any offer accepted would be subject to the sanction of the Hon'ble High Court at Bombay. Pursuant to this advertisement offers were received by the official liquidator from 13 parties and the same were opened by him on August 18, 1973, at 12 noon in the presence of the attorneys of the bank and other intending purchasers, The minimum offer was from one Umedbhai Zaverbhai Patel in the sum of 14 lakhs. The highest offer was from respondent No. 3 in the sum of Rs. 37,57,755. It may incidentally be said that there were seven offers from different offertory wherein the price quoted exceeded Rs. 30 lakhs. The offer immediately below that of respondent. No. 3 was of Vijaya Durga Cotton Trading Co. Private Ltd. in the sum of Rs. 37,50,000. The original appellant, Amba Tannin & Pharmaceuticals Ltd., had made an offer of Rs. 35,13,000. On the same day, i.e. on August 18, 1973, Amba Tannin & Pharmaceuticals Ltd. through its attorney, Mr. D. H. Nanavati, wrote a letter to official liquidator, inter alia, stating that his clients thereby increased their offer of Rs. 35,13,000 to Rs. 38,13,000. By this letter the attorney also wanted to know whether his clients should forward to the official liquidator a draft for Rs. 30,000 being the 10% of the increased offer and stated that 10% of the original offer was already given to the official liquidator by a draft sent along with the original offer. The official liquidator replied to this letter on August 20, 1973. By his reply he stated that the revised offer of Rs. 38,13,000 given by Amba Tannin & Pharmaceuticals Ltd. could not be considered by him in view of the fact that pursuant to the offers invited by sealed tenders, the highest offer received by him was of Rs. 37,57,755 from respondent No. 3 The official liquidator, however, stated that when seeking directions of the court he would place the revised offer made by Amba Tannin & Pharmaceuticals Ltd. for appropriate directions. The official liquidator stated that the question of forwarding a draft of Rs. 30,000 did not arise. On August 21, 1973, a report was submitted by the official liquidator to the learned judge taking company matters for seeking directions. In this report the official liquidator, inter alia, referred to the 13 offers that were revived by him and opened in the presence of the attorneys of the bank and the intending

purchasers on August 18, 1973. He also stated that the highest offer received by him was from respondent No. 3 and the said offer was accepted by him subject to the sanction of the court with the consent of the attorneys of the bank. He recorded that the requisite deposit of Rs. 3,76,000 as required by the terms and conditions was made by respondent No. 3. He further said in this report that the highest offer being of respondent No. 3 he retained the earnest deposit of Rs. 3,76,000 of respondent No. 3 and returned the drafts of the other offertory after obtaining their signatures. In this report he also referred to the correspondence that was exchanged between the attorneys of Amba Tannin and Pharmaceuticals Ltd. after the opening of the tenders. By this report directions of the learned judge were sought on the following questions :

(a) Whether the official liquidator should accept the highest offer of Mr. Keshavlal Patel for Rs. 37,57,755 received by him by inviting sealed tenders and as per the terms and conditions of sale;

(b) If answer to prayer (a) above is in the affirmative whether the official liquidator should execute the conveyance of the properties in favour of the purchaser as per the terms and conditions of sale;

(c) If answer to prayer (a) above is in the negative and having regard to the revised offer of Shri D. H. Nanavati, Attorney for Amba Tannin & Pharmaceuticals Ltd., of Rs. 38,13,000 whether the official liquidator should call a meeting of the officers who had given offerers and take further offers from them by requesting them to bid among themselves.

4. This report was considered by Kania J. on a number of days and the hearing went on before him on a number of occasions. The matter was heard by Kania J. for the whole day on August 23 and 30, 1973, and September 3, 1973. Thereafter, it came up for hearing on September 5, 1973, On September 5, 1973, several counsel appeared for the different parties before the learned judge and the matter was part-heard. On September 6, 1973, the affidavit proposed to be tendered on behalf of respondent No.7 on September 5, 1973, was taken on record and liberty was given to the official liquidator to file an affidavit in reply. On the same day an affidavit was filed on behalf of respondent No. 3 and the same was taken on record. Further affidavits were filed thereafter and the matter was heard on September 12, 13, 19, 26, 27, October 3, 4, 9, 10, 11, and 12, 1973. Ultimately the judgment was delivered by the learned judge on November 5, 1973, Whereby he directed the official liquidator to accept the offer of respondent No. 3 for the sum of Rs. 39,57,755. During the course of hearing several parties appeared. Even the petitioners also appeared. The learned judge in his judgment has pointed out as regards the attitude adopted by the petitioners at different stages of the hearing of the matter. He has stated that the petitioners, who were creditors of the company, did not appear before him, when the hearing commenced. Thereafter, they appeared through their counsel and supported the contentions on behalf of Amba Tannin & Pharmaceuticals Ltd. After the hearing went on for some days they appeared through another counsel and

supported acceptance of the offer of respondent No. 3.

5. During the course of hearing before the learned judge, Amba Tannin & Pharmaceuticals Ltd. who by their letter dated August 18, 1973, increased the offer to the sum of Rs. 38,13,000, further increased their offer. On August 23, 1973, they increased their offer by a sum of Rs. 50,000 and ultimately on the same day increased the offer to the sum of RS. 42,13,000. It was thereafter that further hearing went on before the learned judge and ultimately by his judgment and order dated November 5, 1973, the learned judge directed that the offer of respondent No. 3 to purchase the property of the company for the sum of Rs. 39,57,755 should be accepted. It is against this judgment and order that the two appeals, namely, Appeal No. 110 of 1973 and No. 111 of 1973 are filed. Appeal No. 110 of 1973 is filed by Amba Tannin & Pharmaceuticals Ltd. who was one of the offers who increased the offer from time to time during the course of the hearing. The other appeal is filed by All India General Insurance Co. Ltd. claiming to be a creditor of the company who appeared at some stages while the report was being heard by the learned judge.

6. As the question involved in these two appeals is common, they are heard together and are disposed of by a common judgment and order.

7. It may incidentally be mentioned that by an order made by this court on December 21, 1973, Amba Tannin & Pharmaceuticals Ltd. was amalgamated with Polson Ltd. and all the assets, liabilities, etc., of the former were transferred to the latter. During the course of the hearing of these appeals on February 11, 1974, Polson Ltd. were permitted to be substituted in place of Amba Tannin & Pharmaceuticals Ltd. as appellants while in the other appeal, namely, Appeal No. 111 of 1973, United India Fire and General Insurance Co. Ltd. were permitted to be substituted for All India General Insurance Co. Ltd.

8. It is urged by Mr. Sorabjee on behalf of Polson Ltd. and by Mr. Chagla on behalf of the United India Fire and General Insurance Co. Ltd. that the method prescribed for sanction of sale of the property of a company in liquidation is by a summons for directions as required by rule 139 of the Companies (Court) Rules, 1956 (hereinafter referred to as "the Rules"); that rule 139 is mandatory; that it is a specific and express rule dealing with the matters referred to therein; that any other mode or method for seeking directions of the court in respect of matters referred to in the said rule is prohibited by necessary implication; that compliance with the provisions of rule 139 is a condition precedent for exercise of the power of sale of a company in liquidation; that, consequently, non-compliance with the provisions of rule 139 renders the order and the proceedings null and void. In support of this submission it was urged that when the rule prescribes a particular method, that is the only method to be followed and no other method can be adopted. They also submitted that whenever there is a general provision and a specific provision like the one contained in rule 139, the specific provision could alone be adopted and regard cannot be had to the procedure permitted by the general rule. Their further argument was that

statutory rules validly framed under the Act have the same effect for purpose of construction as well as obligation as if they were part of the Act and an act or order in breach of mandatory provisions of a rule which lays down conditions for exercise of statutory power is not a mere irregularity but an act or order without jurisdiction. They urged that while considering such a matter inconvenience or hardship or past practice is entirely irrelevant. Their submission further was that all the requirements of rule 139 were mandatory. Secondly, they submitted that the exercise of the power of either sanctioning or confirming a sale is a judicial power and not a mere ministerial power; that rule 139 is enacted for benefit of creditors and contributories as a whole and for the benefit of other persons who may be affected by any order passed thereon. Their submission is that this rule is for public benefit and must prevail. There can be no waiver or acquiescence or estoppel. Thirdly, they submitted that rule 139 on a true construction obliged the official liquidator to take out a summons for directions, inter alia, with regard to all or any of the powers conferred by section 457(1) of the Act including a power of sale and also u/s 460(4) of Act; that rule 139 contemplates a hearing to be given : (a) to the official liquidator; (b) to the petitioner on whose petition the winding up order was made; (c) any other person to whom notice is given by court; and (d) any other person to whom no notice has been given but who becomes aware of the proceeding and appears before the court in support of the point of view to grant or not to grant sanction. Fourthly, they submitted that section 457(1) does not mean any exception to the requirement of sanction depending upon the quantum or value of the property; that section 458 of the Act is a provision for carrying out matters in respect of which sanction is required u/s 457(1); that sanction referred to in section 457(1) of the Act read with rule 272 necessarily means previous sanctions; that when the official liquidator asks for permission to sell and seeks directions about the mode, advertisement, etc., for the purpose, that is a step for effective sale of property and the court at that stage is required to apply its mind and come to a judicial decision on the question whether there should or should not be a sale at all and, if so, what will be the method and procedure to be adopted for such a sale. At such a stage the court is, inter alia, required to consider whether the property of the company in liquidation should be sold as a whole or in lots; that whether it should be sold as a running concern or not or whether subject to any reserve bid; that whether valuation report should be obtained and whether the terms and conditions subject to which the sale is proposed to be held should be sanctioned. Their submission is that this judicial decision is to be arrived at objectively after considering points of view of all the parties referred to in rule 139. Lastly, they submitted that rule 272 enjoins confirmation of a sale after the sanction thereof; that there can be no sale of property of a company in liquidation without such sanction of court; that sanction of sale is distinct and separate from confirmation of sale; that sanction is the very initial step which the court takes in case of sale of property of a company in liquidation; that application for confirmation of a sale can only be made as prescribed by rule 139 read with section 457(1)(c) and section 460(4) of the Act.

9. Mr. Shah, on the other hand, on behalf of respondent No. 3, submitted that it is not competent for Amba Tannin & Pharmaceuticals Ltd. to file this appeal and the appeal instituted by them is, therefore, not maintainable. In the alternative, it was submitted that Polson Limited who are substituted in place of Amba Tannin & Pharmaceuticals Ltd. have no right to continue this appeal. So far as the other appeal is concerned, it is also submitted that the appeal by Amba Tannin & Pharmaceuticals Ltd. was not maintainable and as Polson Ltd. were not entitled to continue the appeal, any appeal by All India General Insurance Co. Ltd. was incompetent and the substituted appellants in Appeal No. 111 of 1973 were not entitled to pursue the appeal. On merits his submission was that rule 139 is not mandatory but is only directory; that if no prejudice is shown non-compliance with the procedure prescribed by the said rule or the provision thereof does not render the Act or the order null and void; that it is not obligatory for the official liquidator to proceed in a mode prescribed by rule 139 for matters referred to therein; that the object of rule 139 is to chalk out or fix a general programme; that in determining the question whether the rule is mandatory or directory it is necessary for the court to consider the real intention of the legislature and the rule-making authority; that the court should, inter alia, consider the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and above all, whether the object of the legislation will be defeated or furthered. It was said by him that the Act and the Rules provide for various safeguards so that a creditor or a contributory of a company in liquidation can keep himself informed about the affairs of the company in liquidation and the proceedings in connection therewith; that there are several provisions in the Act and the Rules which retain overriding power of control with the court; that rule 139 does not determine the rights but merely provides the frame work for further proceedings in the matter. His submission was that if regard be had to the language of rule 139 then only one summons for directions is contemplated thereby and that after the expiry of a period of 7 days from the date of the filing of the preliminary report, it is open to the official liquidator to approach the court for directions in respect of the matters prescribed in rule 139 without following the procedure thereby prescribed; that upon a true construction of section 457(1) of the Act the sanction of the court is not required in respect of every preliminary or ancillary step which may be required to be taken before a power enumerated in sub-section (1) of the said section can be exercised; that so far as clause (c) of sub-section (1) was concerned, his submission was that the necessity for sanction of the court can only arise whenever there is a contract of sale or a sale to be entered into by the official liquidator in respect of the properties, movable or immovable, of the company in liquidation. He further submitted that, if regard be had to be had to the scheme of the various rules, it

contains more than one provision which permits an official liquidator to approach the court for directions on various matters including those in respect of sanction of a sale by the court as required by section 457(1)(c) of the Act. His submission was that when more than one remedy or course is open, it will be open to the authority at its option to resort to any one or more of them simultaneously. It was urged that if rule 139 imposes a fetter of the type urged by Mr. Sorabjee then such fetter is not contemplated by the Act and to that extent rule 139 is bad or ultra vires that the considerations which should govern the court in sanctioning or refusing to sanction a sale are that it is necessary to gather the assets of the company to gather the assets of the company to distribute them equitably amongst creditors and if there is a surplus amongst the contributories of the company in liquidation; that in exercising the power of sanction or confirmation of sale, the court is exercising a judicial discretion and unless such discretion is exercised by overlooking any well-recognised judicial principle it will not be proper for the court of appeal to interfere with such exercise of discretion even though upon appreciation of facts it may be persuaded to take a view different from that taken by the trial court.

10. Mr. Bhabha who appeared on behalf of the official liquidator did not adopt any contentious attitude so far as the merits of sanctioning the sale in favour of one party or the other were concerned. He, however, submitted that rule 10 clothed the court with power to permit a procedure other than that prescribed by rule 139 in respect of matters referred to therein; that such permission may be granted generally to any class of cases or to any special cases; that in exercise of the power conferred by rule 10 it is open to the court to permit the official liquidator to adopt the practice and procedure followed by the court prior to the Rules coming into operation and that when such practice and procedure is permitted by the judge it is not obligatory upon the official liquidator to follow the procedure prescribed by rule 139. He adopted all the contentions of Mr. Shah as regards rule 139 being directory. He further submitted that by rule 9 inherent power of the court is expressly reserved and having regard to the ends of justice and the provisions of other rules it is always open to the court to permit an official liquidator to adopt a procedure other than the one stipulated by rule 139 in respect of the matters referred to therein. His submission was that the argument of Mr. Sorabjee and Mr. Chagla that a summons for directions as required by rule 139 is a condition precedent to the exercise of jurisdiction by the court is fallacious. At the most according to his submission non-compliance with the provisions of rule 139 is a mere irregularity in the exercise of jurisdiction and it does not affect the jurisdiction of the court; that so far as an official liquidator is concerned, he, inter alia, represents the company in liquidation and the body of its creditors.

11. Mr. Thakkar adopted the contentions urged by Mr. Shah on behalf of respondent No. 3 and he submitted that in the event of this court allowing any of these appeals, appropriate directions should be given by given by given by this court so that the interests of respondent No. 4 as a secured creditor may not be

adversely affected upon a subsequent sale of the assets of the company being sanctioned at a lesser price than the one offered by respondent No. 3.

12. On the basis of these contentions the arguments of Mr. Sorabjee and Mr. Chagla on behalf of the appellants in the two appeals are as follows : That the orders dated June 28, 1972, and June 16, 1973, passed by Vimadalal J. giving directions for sale and for subsequent proceedings and also the order dated November 5, 1973, of Kania J. confirming the sale in favour of respondent No. 3 are null and void on the followings grounds :

(a) All these three orders are passed without complying with the provisions of rule 139; and these orders are passed without giving an opportunity of being heard to the parties who may be adversely affected by these orders. In the alternative, their submission was that assuming that the orders dated June 28, 1972, and June 16, 1973, passed by Vimadalal J. are valid in law, still in any event the order dated November 5, 1973, passed by Kania J. confirming the sale in favour of respondent No. 3 is null and void, because the earlier order of Vimadalal J. dated June 16, 1973, has not been complied with inasmuch as the terms and conditions subject to which the sale was to take place were not approved by the court before holding the sale; that such sale had been held by the official liquidator contrary to the provisions of rule 273 as the terms and conditions have not been sanctioned or approved by the court as contemplated thereby; that there cannot be an exports facto approval to the terms and conditions subject to which offers for purchase of property of a company in liquidation are invited at the stage of confirmation of sale. In the further alternative their submission was that condition No. 12 of the terms and conditions subject to which the sale was held by the official liquidator had not been complied with, because, contrary to the provisions of the said conditions, the official liquidator erroneously accepted only one offer and all the other offers were rejected by him without being clothed with a power to do so and that he erroneously returned the earnest money deposited by the other offertory. That, upon a true construction of condition No. 12, it was obligatory upon the official liquidator to place all the offers before the court at the time of approaching the court for sanction or confirmation of the sale; that as the terms and conditions subject to which the sale was directed to be held were not approved before the offers were invited, the order sanctioning the sale in favour of the respondent No. 3 is illegal and void irrespective of any question of prejudice;

(b) That in passing the impugned order sanctioning the sale in favour of respondent No, 3 the learned judge failed to apply his mind to the question of adequacy of price;

(c) That, notwithstanding a substantial higher offer from Amba Tannin and Pharmaceuticals Ltd., the learned judge fettered his power or discretion;

(d) That in any event when respondent No. 3 was permitted to increase his offer to the sum of Rs. 39,57,755, the learned judge was bound to apply his mind and

take into consideration the higher offer made on behalf of Amba Tannin & Pharmaceuticals Ltd. in the sum of Rs. 43,13,000.

13. In substance his contention is that in confirming the sale in favour of respondent No. 3 for the price of Rs. 39,57,755, the learned judge without applying his mind to the adequacy of price sanctioned the sale of the assets of the company in liquidation at an inadequate price. In order to appreciate the contention of both the sides it is necessary to scrutinise the scheme of the Act and the Rules in so far as they relate to proceedings in winding up especially those relation to sanction or confirmation of sale of property of the company in liquidation. Section 433 of the Act enumerates the circumstances in which a company may be wound up by court. One of the grounds on which a winding up order can be made under this section is that the company is unable to pay its debts. Section 439 provides for a party by whom a petition for winding up may be presented. Under this section such a petition may be presented, inter alia, by a company, by any creditor or creditors, by any contributory or contributories or by the Registrar of Companies. The effect of a winding-up order is provided for in section 447. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if it had been made on the joint petition of a creditor and of a contributory. u/s 449 on a winding up order being made in respect of a company the official liquidator becomes the liquidator of the company. Section 455 provides for preliminary and other reports to be submitted by the official liquidator. Section 457 deals with powers of the liquidator and its provisions are as under :

"457. Powers of liquidator. - (1) The liquidator in a winding up by the court shall have power, with the sanction of the court, -

(a) to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels;

(d) to raise on the security of the assets of the company any money requisite;

(e) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(2) The liquidator in a winding up by the court shall have power -

(i) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;

(ia) to inspect the records and returns of the company on the files of the

Registrar without payment of any fees;

(ii) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(iii) to draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(iv) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself :

Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator-General;

(v) to appoint an agent to do any business which the liquidator is unable to do himself.

(3) The exercise by the liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court; and any creditor or contributory may apply to the court with respect to the exercise or proposed exercise of any of the powers conferred by this section."

Section 458 clothes the court with power by order to provide that the liquidator may exercise any of the powers referred to in sub-section (1) of section 457 without the sanction or intervention of the court, provided always that the exercise by the liquidator of such powers shall be subject to the control of the court. Section 460 requires the liquidator, subject to the provisions of the Act, in the administration of the assets of the company and the distribution thereof among its creditors, to have regard to any direction which may be given by resolution of the creditors or contributories at a general meeting or by the committee of inspection. Sub-section (4) of this section enables the liquidator to apply to the court in the manner prescribed, if any, for directions in relation to any particular matter arising in the winding up. Sub-section (6) permits a person aggrieved by any act or decision of the liquidator to apply to the court and the court may confirm, reverse or modify the act or decision complained of, and make such further order as it thinks just in the circumstances. Section 467 requires that as soon as may be after making a winding-up order, the court shall settle a list of contributories, with power to rectify the register of members in all

cases where a rectification is required in pursuance of the Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities. Section 643 clothes the Supreme Court with power to make rules after consulting the High Courts. Sub-section (3) of section 643 provides that until rules are made by the Supreme Court, all rules made by any High Court on the matters referred to in the section and in force at the commencement of the Act, shall continue to be in force in so far as they are not inconsistent with the provisions of the Act in that High Court and in courts subordinate thereto.

14. In exercise of the powers conferred by section 643 of the Act the Supreme Court after consulting the High Court has made the rules, i.e., the Companies (Court) Rules, 1959. These Rules came into force on October 1, 1959. The Rules are divided into various Parts. Part I deals with general rules. Part II deals with rules for proceedings in matters other than winding up. Part III deals with rules relating to winding up. Part IV and Part V deal with other matters with which we are not concerned. Amongst the general rules, the relevant rules for the present purpose are rule 6 dealing with practice and procedure of the court and provisions of the Code to apply, rule 9 dealing with inherent powers of court and rule 10 dealing with applications how made. Rules 6, 9, 10 and 33 dealing with validity of service and of proceedings are as under :

"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.

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.

10. Applications how made. - Unless otherwise provided by these Rules or permitted by the judge, all applications under the Act shall be made by a petition or by a judge's summons as hereinafter provided.

33. Validity of service and of proceedings. - No service under these Rules shall be deemed invalid by reason of any defect in the name or description of a person in the list of contributories or in the petition, summons, notice or other proceeding, provided that the court is satisfied that such service is in other respects sufficient; and no proceedings under the Act or these Rules shall be invalidated by reason of any formal defect or irregularity, unless the judge before whom the objection is taken is of the opinion that substantial injustice has been caused by such defect or irregularity and that the injustice cannot be remedied by an order of court."

Rules 135 to 139 relate to reports by the official liquidator u/s 455 and summons

for directions. Rule 139 is as under;

"139. Summons for directions to be taken out by official liquidator. - (1) As soon as practicable after the winding up order is made and in any event not later than 7 days after the filing of his preliminary report under sub-section (1) of section 455, the official liquidator shall take out a summons for directions with regard to the settlement of the list of contributories and the list of creditors and the exercise by the official liquidator of all or any of the powers u/s 457(1) and any other matters requiring directions of the court. Notice of the summons shall be given to the petitioner on whose petition the order for winding up was made. Upon the hearing of the summons, the court, after hearing the official liquidator and any other person appearing on notice or otherwise, may give such directions as it shall think fit in regard to the said matters, including the fixing of dates for the settlement of the list of contributories and for the filing of proofs by the creditors of the company in respect of their debts and their claims for priority if any u/s 530.

(2) Where the preliminary report of the official liquidator is not filed prior to the hearing of the summons and any of the matters in the summons cannot be properly or fully dealt with without a perusal of such report, the court may adjourn the hearing of any such matter or matters on the summons until after the submission of the preliminary report."

Rule 272 and rule 273 deal with sales by the official liquidator and they are as under :

"272. Sale to be subject to sanction and to confirmation by court. - Unless the court otherwise orders, no property belonging to a company which is being wound up by the court shall be sold by the official liquidator without the previous sanction of the court, and every sale shall be subject to confirmation by the court."

273. Procedure at sale. - Every sale shall be held by the official liquidator, or if the judge shall so direct, by an agent or an auctioneer approved by the court, and subject to such terms and conditions, if any, as may be approved by the court. All sales shall be made by public auction or by inviting sealed tenders or in such manner as the judge may direct."

15. The first question that falls to be considered is whether in respect of an application by an official liquidator to sanction sale of the property of the company in liquidation, rule 139 is the only mode permissible and whether any other mode or method is thereby prohibited either by necessary implication or otherwise. For considering such a contention it should not be overlooked that Part I of the rules contains general rules which apply to all types of proceedings. Rule 10 prescribes the procedure for making applications. Ordinarily, under that rule, an application may be made by petition or judge's summons as provided in the later rule. But this mode of procedure is subject to an overriding provision, namely, "unless otherwise provided by these Rules or permitted by the judge".

The expression "unless otherwise provided by these Rules" connotes that if there is any specific rule prescribing a special procedure other than a petition or judge's summons, then such special procedure is required to be followed. The expression "unless otherwise permitted by the judge" clothes the judge with a power to permit an application to be made otherwise than by a petition or a judge's summons or by special procedure prescribed by any specific rule. It was urged by Mr. Sorabjee that the power conferred by this rule under the words "unless otherwise permitted by the judge" cannot be exercised when there is a specific express rule like rule 139 prescribing the procedure to be followed in respect of the matters referred to therein including those for exercise of powers u/s 457(1) of the Act. There is nothing in the language of rule 10 to warrant such a submission. The normal mode of making an application by a petition or a judge's summons is subject to two limitations : Whenever a special procedure other than a petition or a judge's summons is provided by a specific rule, that special procedure is to be followed. The other limitation is that whenever a procedure other than a petition or a judge's summons is permitted by the judge, then it is open to the party concerned including an official liquidator to adopt the procedure permitted by the judge. When a procedure permitted by the judge deals with a matter which is specifically dealt with by any special rule, then in such a case it will be open to the party concerned including the official liquidator to follow the other procedure specially prescribed by the rule or the procedure permitted to be followed by the judge. In exercise of the powers conferred by rule 10, it will be also permissible to the judge to allow the practice and the procedure of the court which was followed prior to this rule being made. There is nothing sacrosanct in rule 139 to indicate that it takes away from the judge the power to permit the procedure consistent with the practice and procedure earlier followed by the court before the Rules come into force. The provisions of rule 10 have to be read with rule 6 and if so read it will be open to a judge to permit an application to be made in consonance with the practice and procedure prevailing in the court and when such permission is granted it is neither obligatory upon the party concerned or the official liquidator to follow the procedure prescribed by rule 139 or to make an application by a petition or a judge's summons as normally required under rule 10.

16. It is not disputed by Mr. Sorabjee that prior to the rule coming into force it was the uniform and consistent practice of this court to approach the learned judge taking company matters to seek directions on a report by the official liquidator for an appropriate sanction as required by section 457(1) of the Act including the one relating to the power to sell the movable or immovable property of the company in liquidation. The argument of Mr. Sorabjee, however, was that merely because a judge has given directions on a liquidator's report in consonance with the earlier practice and procedure of the court it cannot be assumed that such mode of making application is permitted by the judge. The words "unless otherwise permitted by the judge", according to his submission, are not intended to confer on the judge an overriding power to get over the

mandatory mode statutorily prescribed by the other rule. In the alternative he submitted that the power that can be exercised by the judge under rule 10 cannot run counter to the substance of the requirements of the other rules; that it can permit a change of form but cannot permit a departure from the matter of substance; that in the further alternative he urged that the permission granted by rule 10 must be distinctly granted by the judge after applying his mind to the question whether in a given case the prescribed procedure is not to be followed but the procedure permitted by the judge is to be allowed. The first part of this submission is not warranted by the opening part of rule 10, namely, "Unless otherwise provided by these rules or permitted by the judge". The word "or" indicates that whenever there is a procedure permitted by the judge it will be open to a party to make an application in the manner specially prescribed by a rule or in a manner permitted by the judge. There is no limitation upon the power of the judge to permit a procedure simply because some other rule contains a special or express provision relating to a matter. Whenever a special procedure is prescribed by a rule and a different procedure is permitted by the judge, then either of the two procedures can be adopted by the party concerned.

17. Reliance was placed by Mr. Sorabjee upon the decision of the Gujarat High Court in *Colaba Land and Mills Co. Ltd. v. Vasant Investment Corporation Ltd.* The question that arose for consideration in that case was whether an application for compensation u/s 543 of the Act can be made as a part of a petition u/s 397 or section 398. Miabhoy J. took the view that proceedings u/s 543 should be by an independent and fresh application. In that case it was contended by one of the parties that even though, under the rules, an independent petition is required to be filed for a proceeding u/s 543 the court must exercise the jurisdiction vested in it under rule 10 which confers a jurisdiction upon the court to permit a person to present an application by a judge's summons in lieu of an application by petition. While considering this question Miabhoy J. observed that it is quite clear that the discretion vested under rule 10 aforesaid must be exercised on sound judicial principles and, having regard to the scheme of the Act and the rules, an application u/s 543 being an independent petition, the court will not be justified in lightly departing from the procedure laid down by the Rules unless there are very strong and cogent grounds in support of any such prayer. These observations of Miabhoy J. actually negative the contention which has been urged by Mr. Sorabjee for interpreting the expression "unless otherwise permitted by the judge". Even though a particular procedure is otherwise prescribed by a rule, the observations of Miabhoy J. clearly indicate that any other mode or procedure can be permitted by a judge in exercise of the power conferred by rule 10. There is no quarrel with the proposition that exercise of the power conferred by rule 10. There is no quarrel with the proposition that exercise of the power under rule 10 should be guided by sound judicial principles.

18. We will like to emphasise that it is an invariable practice followed by the official liquidator when he wants to approach the learned judge taking company matters for directions to circulate the official liquidator's report to the learned

judge on the previous day and it is on the following day that directions are sought. Thus when actual directions are given every learned judge taking company matters is fully conscious of the matters in respect of which directions are sought by the official liquidator and if ultimately he is satisfied that such directions should or ought to be given then he issues the directions. There is no warrant for taking a very rigid view that there must be a separate and distinct order from a judge who is assigned company matters stating that he permits directions to be sought on the official liquidator's report. Every judge before he gives his directions on such report applies his mind to all the questions including the fact whether such directions should be given on the report and if after such consideration directions are given it goes without saying that the learned judge has permitted the official liquidator to seek directions in the manner adopted by him, i.e., by submitting an official liquidator's report for directions. This being the position in law, having regard to the provisions of the Rules, specially rule 10 read with rules 6 and 139, even in respect of matters which are referred to in rule 139 it will be permissible to the official liquidator to approach the court for directions either in the manner prescribed by rule 139 or in any other manner if permitted by the judge taking company matters.

19. As the material question involved in these two appeals relates to question of sanctioning or confirming a sale by the official liquidator of the assets of the company in liquidation it will be necessary to determine the scope and effect of section 457 which deals with the powers of a liquidator. In respect of matters referred to in clauses (a) to (e) of sub-section (1) of that section the power therein referred to can only be exercised by the liquidator in winding up with the sanction of the court. The argument of Mr. Sorabjee is that upon a true interpretation of the provisions of section 457(1)(c) which deals with the power of sale of movable or immovable property of the company in liquidation the official liquidator must take directions of the court about various things like the mode of sale, advertisements, etc. He should also seek directions of the court whether there should be should not be a sale at all and if so, what should be the method adopted for such sale. Mr. Sorabjee went further and submitted that the directions of the learned judge are obligatory upon a true interpretation of that section even on a question like whether the properties or the assets of the company in liquidation should be sold as a whole or in lots; whether the business of the company should be sold as a running concern or not; whether the sale should be subject to a reserve bid; whether a valuation report should be obtained before even the sale is advertised and even the terms and conditions subject to which the offers are invited must be previously approved and sanctioned by the judge before even a public advertisement is issued. Such an argument, in our opinion, imposes fetters upon the powers of a liquidator u/s 457(1) which is not warranted by the language thereof. So far as the matters dealt with in sub-section (2) of that section are concerned, the liquidator has the power to do various things therein referred to even without approaching the court either for sanction or intervention. Sub-section (3) of that section always

retains the control of the court because it is expressly made clear in that sub-section that the exercise by the liquidator in a winding up by the court of the powers conferred by that section shall be subject to the control of the court; and any creditor or contributory may apply to the court with respect to the exercise or proposed exercise of any of the powers conferred by that section. In the present case though we are really concerned with the exercise of power under clause (c) of sub-section (1) which deals with liquidator's power to sell the movable or immovable property of a company in liquidation, we have to see the general scheme of all the clauses of sub-section (1). Clause (a) primarily deals with institution of or defending a suit, prosecution, or other legal proceedings, civil or criminal, in the name and on behalf of the company. If it was intended that any preliminary or ancillary steps, before the power therein referred to can be exercised, can only be taken after obtaining the sanction of the court, such a limitation ought to be specifically provided; otherwise, it will be within the power of the official liquidator to take all preliminary or ancillary steps before he institutes any proceeding either by way of a suit, prosecution or otherwise in any court, but such institution cannot be overlooked that there are several provisions in various statutes where even notice is required to be given in the prescribed form before a suit can be instituted against the Government or a public officer or a local or municipal body. Even before institution of a suit against a co-operative society notice to the Registrar of Co-operative Societies is necessary. If steps preliminary to or ancillary to the institution of a suit require sanction of the court, then it may very well be that even by the time the sanction is granted and actual steps are adopted for institution of the proceedings the remedy may get time-barred. The court should be slow to impose such a restriction unless the language of the section so warrants. In our opinion, it is only when the power is effectively exercised - a power of the type enumerated in clauses (a) to (e) of sub-section (1) of section 457 - that the question of sanction of the court arises and the liquidator cannot do such a thing or exercise such a power unless he obtains the previous sanction of the court. In the present case we are concerned with the power to sell the immovable property of the company. When an order for winding up was passed by Nathwani J., the learned judge (in view of the provisions of section 458) has given directions for exercise of the powers under clauses (a) to (e) of sub-section (1) of section 457, except in respect of power of sale of immovable property of the company in liquidation. Question then arises, when does the liquidator exercise the power to sell immovable or movable property of the company ? Does he effectively exercise that power at any stage before he enters into a binding agreement or a contract which may create mutual rights and obligations ? Either in respect of sale of immovable or movable property there may be either an outright sale or there may be an agreement to sell which at a later step results in a completed transaction of sale. If an outright sale is intended then naturally before such a sale can be effected by the liquidator sanction of the court is required. If it is intended to have an agreement to sell and later on to complete the sale then naturally since an agreement to sell creates mutual rights and obligations it is obligatory upon the liquidator to obtain

sanction of the court before such an agreement to sell is ever entered into either in respect of movable or immovable property of the company in liquidation. There is nothing in the language of section 457(1) to indicate that such sanction is required for all other preliminary or ancillary steps. It may very well be that the liquidator for his own protection may seek directions of the court, so that at a later stage he may not be held liable to misfeasance or for using the funds of the company in liquidation in a manner not warranted by the provisions of law, but such directions are obtained for his self-protection and they do not impose limitation on the interpretation of the provisions of section 457(1). Until the stage of creation of right or obligation arises in respect of a matter of sale there is no effective exercise of the power of sale by the official liquidator and it is only at that stage that the sanction is required of the court as prescribed by sub-section (1) of section 457, but such sanction is not called for in regard to all other preliminary or ancillary steps.

20. Reliance was placed by Mr. Sorabjee upon a decision of a single judge of this court in *Mulraj Virji v. Nairmal Pratapchand*. The court had occasion to construe the expression "power of sale" used in section 69(c) of the Transfer of Property Act, 1882, and it was held :

"The expression "power of sale" is a well-known expression in conveyancing. The words "power of sale", as used in section 69(c) of the Transfer of Property Act, 1882, refer to a clause to be expressly included in a deed of mortgage. They must, therefore, be understood to mean what is ordinarily known and understood in conveyancing by that expression.

A power of sale includes all steps which are necessary to be taken in that connection. In order to make the power bad, words must be pointed out in section 69 which render the whole power invalid according to law."

At page 894 the learned judge points out

"The words "power of sale" are not defined anywhere in the Act. If it is a technical expression it would not be improper for the court to find out its meaning as judicially interpreted The words "power of sale" used in sub-section (c) refer to a clause to be expressly included in the mortgage. They must be understood, therefore, to mean what is ordinarily known and understood in conveyancing by that expression A power of sale must include all steps which are necessary to be taken in that connection."

21. The observations in this judgment are not of assistance to the court in interpreting section 457(1) of the Act. What arose for consideration in *Mulraj Virji's* case was where a power of sale was conferred what should be done by such a person on whom such a power was conferred. We are not called upon to decide any such question. What we have to consider is when a fetter is imposed upon a power of the liquidator to exercise any of the powers specified in clauses (a) to (e) of sub-section (1) of section 457 of the Act, at what stage the sanction is required or becomes necessary. As we have stated above, for exercise of the

power of sale by the official liquidator the sanction becomes necessary before any contractual rights or obligations are created in either party and such sanction is not required for any other preliminary or ancillary step.

22. In the view that we have taken of the interpretation of rule 10 read with rule 6, it is not necessary for us to consider the elaborate arguments advanced by either side upon the scope, effect and ambit of rule 139. Rule 139 deals with summons for directions to be taken out by the official liquidator. The first part of sub-rule (1) deals with the time when such summons is normally required to be taken out by the official liquidator. What should be done by a liquidator when such a summons is taken out is specified thereafter and there are three essential ingredients which were strenuously referred to in the course of the arguments : (1) The official liquidator shall take out a summons for directions with regard to the diverse matters specified therein; (2) Notice shall be given to the petitioner on whose petition the order for winding up was made; (3) Directions can be given by the judge upon the hearing of the summons after hearing the official liquidator or any other person appearing on notice or otherwise. It was emphasised by Mr. Sorabjee and Mr. Chagla on behalf of the appellants that each one of the three ingredients is essential and non-compliance with any one of them will render the final order null and void. So far as the ingredients No. (2) and (3) above referred to are concerned, it is unnecessary for the purpose of the present case having regard to the facts thereof to express any opinion, whether even when rule 139 is to be complied with, the requirements thereof is obligatory or not. Ingredient No. (2) above referred to provides for notice to the petitioner. It was sought to be suggested that the underlying idea of such an ingredient is to give notice to the petitioning-creditor as representing the class of creditors. If regard be had to persons who are competent to make an application for winding up, such an argument cannot be accepted. u/s 439 of the Act not only a winding up petition can be presented by any creditor or creditors, or any contributory or contributories, but it can also be presented, inter alia, by the company or by the Registrar. Thus, the contention that the petitioner represents the body of creditors or even the body of contributories is not correct, because when a petition is presented by the company or by the Registrar, there is no question of any or them representing either the creditors or the contributories. But even in the present case it is unnecessary to consider this question in further detail. Whether notice was given or not to the petitioner on whose petition the order for winding up was made, is of academic consideration because the petitioner was present at the several meetings that were held before the official liquidator prior to the directions of the learned judge were sought in relation to matter of sale, and he was also represented by counsel at the time when the matter was heard by Kania J. before passing the order sanctioning the sale in favour of respondent No. 3. If the petitioner on whose petition the winding up order was made was present, then the question whether ingredient No. 2 is mandatory or not, calls for no consideration. Equally ingredient No. 3 above referred to does not call for consideration. Undoubtedly, the language of rule 139(1) connotes that directions

are to be given by the court after hearing the official liquidator or any other person appearing on notice for otherwise, but in the present case our attention has not been drawn by any of the parties to the fact that he would have appeared if a summons for directions had been taken out. All the persons who appeared before us as well as before the trial court were heard by the learned judge extensively and it will be academic for us to decide whether somebody else could have appeared or not. It is unnecessary for us to express any opinion on the question whether a decision given in breach of audi alteram partem rule is void or voidable, because it is well-settled as pointed out by Bhagwati C.J. in *East India Co. v. Official liquidator* :

"When we speak of voidness, we must remember that there is no such thing as voidness in the absolute sense. Voidness, like most legal concepts, is relative rather than absolute. The question always is, void against whom ? If an order is void only against a particular person, a third party cannot challenge its validity but the person against whom it is void can always set up its voidness in a collateral proceeding, for against him it is void ab initio and has never been of any effect : it has always been a nullity so far as he is concerned : vide the decision of the Privy Council in *Durayappah v. Feernando*. A decision given in breach of audi alteram partem would, therefore be void as against the party affected but it would be called as against the rest of the world."

23. In view of the principle so laid down it is quite evident that neither any grievance can be made by the petitioner nor is any other grievance made by any other person who could have appeared before the learned judge before an order sanctioning the sale was passed by him. In fact, all the parties who have appeared before us during the course of the hearing of these appeals were heard by the learned judge before the order was passed and the question of the validity of his order being affected on the ground of ingredient No. 2 and/or ingredient No. 3 not having been complied with is purely academic.

24. The question then arises whether the taking out of a summons for directions as contemplated by rule 139(1) is a sine qua non for exercise of jurisdiction in respect of the various matters referred to in the said rule. It was urged by Mr. Sorabjee and Mr. Chagla on behalf of the appellants that when the law of the rule prescribes a particular method that is the only method and no other method can be adopted. Reliance was placed in support of this principle upon the decision in *Taylor v. Taylor*, where it is held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes are necessarily forbidden. This principle was followed by the Privy Council in the case of *Nazir Ahmad v. King Emperor* in relation to a question arising with regard to the method of recording a confession by an accused. Other decisions were also referred to by Mr. Sorabjee in support of the same principle is not absolute rule and it will not be attracted when more than one power is conferred. Reference could be made to the decision of the Supreme Court in *Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority, Aurangabad*.

It is there stated, after referring to Nazir Ahmad's case, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. But this principle can only where one power is given and has no application where more powers than one are conferred. If a statute contains Provisions giving more than one power, then the rule cannot be applied so as to take away the powers conferred by anyone of these provisions. In view of the interpretation placed by us on the provisions of rule 10 we have pointed out that the ordinary mode of making an application is by a petition or judge's summons as provided in the later rules. However, such ordinary mode is subject to limitation, namely, unless otherwise provided by any rule or unless otherwise permitted by the judge. This overriding provision contains two alternative provisions and when such is the case it will be open to the official liquidator to adopt of them. The doctrine laid down in Taylor's case cannot be attracted when more than one mode of exercise of powers are prescribed.

25. The argument of Mr. Sorabjee then was that when there is a specific provision it is the specific provision which must govern the case and not the general. Reliance was placed upon a decision of a Division Bench of this Court in *Bhana Makan v. Emperor*. That such a general rule principle to the maxim *expressio unius, exclusio alterius*. Dealing with this maxim Lopes L.J. points out in *Colquhoun v. Brooks* :

"It (the maxim) is often a valuable servant, but a dangerous master to fallow in the construction of statues or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application having, regard to the subject matter to which it is to be applied, leads to inconsistency or injustice."

26. So far as we are concerned there is no question of chosen between a specific or general provision. Rule 10 prescribes two independent modes by way of overriding procedure, namely, one provided by rules and the other permitted by the judge. So far as these two procedure are concerned, it is impossible to say that one is a specific and the other is a general provision. Both are parallel provisions and it is open to a party concerned including a liquidator to adopt either of them as may be permitted by the language of rule 10. Thus, the question of adopting procedure sanctioned by a specific provision does not arise in the present case.

27. The argument of Mr. Sorabjee and Mr. Chagla then was that as rule 139 (1) contemplates taking out of a summons for directions by the official liquidator in respect of the matters therein referred to, adoption of such more is obligatory.

28. The form of a summons for directions is given in Form No. 4 of the Rules. That form shows that the title is the normal title with reference to the company petition, the name of the party and the number of the application and the material part of the summons for directions is worded this way :

Summons for directions. - Let all parties concerned attend the sitting judge in

chambers on day, the day of 19, at O'Clock in the noon, on the hearing of an application by the above-named petitioner that a day may be fixed for the hearing of the petition above-mentioned for presented on the day of ... 19, and that directions may be given as to the advertisement of the petition and the persons (if any) on whom the petition is to be served."

29. There is nothing specific in this form which will persuade the court to take the view that this is an express and specific mode and if this is not adopted the jurisdiction of the court is taken away. The Act and the Rules contain various safeguards by which a creditor or a contributory of the company can keep himself informed about the affairs of the company in liquidation and the proceedings adopted in connection therewith. Section 461 makes provisions as regards the books to be maintained by the liquidator. Section 549 confers power of inspection of books and papers by creditors and contributories. Under that section at any time after the making of an order for the winding up of a company by or subject to the supervision of the court, any creditor or contributory of the company may, if the Supreme Court, by rules prescribed, so permit and in accordance with and subject to such rules but not further or otherwise, inspect the books and papers of the company. Rule 13 of the Rules enumerates the various types of registers which are to be kept. Among the registers so enumerated are : (1) company petitions register; (2) company applications register; (3) liquidations register; (4) company documents register; and (5) appearance book. In each one of the registers or books the various things enumerated in this rule are to be filled in. Rule 16 provides for inspection and copies of proceedings. It lays down :

"Save as otherwise provided in these rules, the rules of the court for the time being in force relating to search and to the certification and grant of copies, including the fees and charges payable for the same, shall apply to proceedings under the Act and these rules, as they apply to other proceedings in the court."

30. Thus not only power of inspection is conferred but even a power to take copies is conferred by this rule. Rule 136 permits inspection of statement of affairs and preliminary report., Rule 286 enumerates the registers and the book to be maintained by the official liquidator. Item 22 of sub-rule (1) thereof refers to a record book for each company in which shall be entered all minutes of proceedings and the resolutions passed at any meeting of the creditors or contributories or of the committee of inspection, the substance of all orders passed by the court in the liquidation proceedings and all such matters other than matters of account as may be necessary to furnish a correct view of the administration of the company's affairs. Rule 360 provides for inspection of file and under sub-rule (2) thereof :

"Save as otherwise provided by these rules, every contributory and every creditor whose claim or proof has been admitted, shall be entitled, on payment of the prescribed charge, at all reasonable times to inspect the file of proceedings

and to be furnished with copies and extracts from any document therein."

31. Apart from these provisions for maintenance of books, registers, etc., and inspection thereof and taking copies therefrom, the rules also contain elaborate provisions which permit a creditor or a contributory if he is so interested to remain present in court at the time of any proceedings. Rules 230 and 231 deal with attendance and appearance of creditors and contributories. Rule 230, *inter alia*, provides :

"Save as otherwise provided by these rules or by an order of court, every person for the time being on the list of contributories of the company and every creditor whose debt has been admitted by the official liquidator wholly or in part shall be at liberty at his own expense to attend the proceedings before the court or before the official liquidator and shall be entitled upon payment of the costs occasioned thereby to have notice of all such proceedings as he shall, by request in writing addressed to the official liquidator, desire to have notice of; but if the court shall be of opinion that the attendance of any such person has occasioned any additional costs which ought not be borne by the funds of the company, it may direct such costs or a gross sum in lieu thereof to be paid by such person and such person shall not be entitled to attend any further proceedings until he had paid the same."

32. Rule 231 empowers the court to appoint from time to time anyone or more of the creditors or contributories to represent before the court at the expense of the company all or any class of creditors or contributories upon any question or in relation to any proceedings before the court, any may remove any person so appointed. Rule 112, *inter alia*, empowers the court even at any time after passing of a winding-up order to give directions as to the person, if any, to whom notice shall be given of the further proceedings in the liquidation.

33. Apart from this, there are ample provisions in the Act and the Rules which retain overall control and supervision by the court. It is unnecessary to enumerate all these provisions but it will suffice for the present purpose if reference be made to the provisions of sub-section (3) of section 457 and (6) of section 460. Similar powers are also conferred by some of the rules.

34. It is not our intention to enumerate exhaustively all the factors which may be taken into account before a provision of a statute and a rule can be construed as mandatory or directory. By way of illustration reference may be made to the circumstances enumerated by Subba Rao J. in *State of Uttar Pradesh v. Babu Ram Upadhyaya*. It is there stated that when a state uses the word "shall", *prima facie* it is mandatory, but the court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the legislature, the court may consider, *inter alia*, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided,

the circumstance that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered. The object of provisions for winding up, it cannot be gainsaid, is to collect all the assets of the company in liquidation, to distribute them rateably amongst its secured creditors; thereafter, among those who are preferential creditors and, thereafter, among the unsecured creditors. If there is a surplus then they are to be rateably distributed amongst the contributories having regard to their respective rights. The Rules themselves provide for a contingency for non-compliance with the provisions. For this purpose, so far as the first ingredient of rule 139 is concerned, reference could be made to the latter part of rule 33. That rule lays down that no proceedings under the Act or these Rules shall be invalidated by reason of any formal defect or irregularity, unless the judge before whom the objection is taken is of the opinion that substantial injustice has been caused by such defect or irregularity and that the injustice cannot be remedied by an order of court. It was argued by Mr. Sorabjee that there is a substantial difference between directions given upon a report of an official liquidator and those given on a summons for directions. He submitted that an official liquidator's report cannot be inspected as of right nor a copy of it obtained as of right; that a summons for directions under rule 139 is entered in the register of company applications; that the proceedings on the official liquidator's report are not in public unlike proceedings under rule 139 and that in a proceeding on an official liquidator's report the parties affected have no right to be heard as in a proceeding under rule 139. If regard be had to the things enumerated by Mr. Sorabjee, then having regard to the facts of present case and the hearing that went on before Kania J. none of the grounds can prevail. Before sanctioning the sale in favour of the respondent No. 3 detailed arguments on the report of the official liquidator were heard by the learned judge for a number of days. Several counsel appeared with a view to present their respective points of view. Nobody has appeared in the course of the hearing of these appeals urging that as there was no summons for directions he could not appear. In fact all the parties who are appearing before us during the course of the hearing of these appeals did appear before the learned judge and presented their points of view. Even the petitioner appeared before the learned judge though his attitude before him was not uniform. When such is the procedure followed we fail to see that substantial injustice has been caused by seeking directions on the official liquidator's report rather than on a summons for directions. In fact, no specific injustice has been pointed out but some hypothetical grounds are suggested stating that if there was summons for directions somebody also could have appeared such as workers and/or Government representatives and could have presented their points of view. Such considerations, in our opinion, do not go automatically to vitiate the order unless the persons who are interested in raising these considerations appear before us and urge them before us. Thus, even the first ingredient of rule 139, even if it is not strictly complied with as required by

that rule, will merely be a formal defect which will not invalidate the final order passed, unless there is either substantial injustice caused or the injustice cannot be remedied by order of the court. These finding on the various facets of rule 139 are sufficient to dispose of the points of controversy in this appeal and it is unnecessary to express any opinion on the other contentions urged by either party qua the remaining features of rule 139.

35. Strong reliance was placed by Mr. Sorabjee upon two decisions of the Gujarat High Court. The first case referred to is O.J. Appeal No. 3 of 1968 (Ananta Mills Ltd. decided by Bakshi and Desai JJ. on 4th and 5th September 1968). Undoubtedly, questions similar to those urged before us arose for consideration before the Division Bench. In that case upon a report submitted by the official liquidator on March 5, 1968, directions were given regarding sale of the assets of the company, Later on, various other directions were taken from time to time and ultimately the final report was submitted by the official liquidator on June 6, 1968. Both these reports were considered by Diwan, J. (as he then was) and he, inter alia, directed the official liquidator to accept the highest offer of one Raojibhai Patel who had agreed to run the mills. That offer was accepted on the footing of "as-is-where-is" for a price of Rs. 17,51,000. One of the directions sought in this report was whether the official liquidator should take out a summons for directions for sanction of the High Court for accepting the highest offer or it may be dispensed with for the ends of justice. The learned judge directed that it was not necessary to take out a summons for directions for this purpose, and the summons may, therefore, be dispensed with. The petitioner on whose petition the company was ordered to be wound up went in appeal against this order passed by the learned judge. The Division Bench took the view that by the proceedings that were started by the liquidator, the property of the company was being disposed of the transferred to a third party and all the proceedings leading to a sale would require the application of the mind of the court and would affect substantially the rights of the parties; that when the liquidator approaches the court for starting proceedings for sale, the court may decide question on which it would permit the use of power to sell by the liquidator; the power to sell has thus been given by the section itself; but its use has been made subject to the sanction of the court; whenever, therefore, the liquidator intends to use his power to sell and approaches the court for that purpose, it would mean that he approaches the court with regard to a matter for the exercise of his powers and it is in this context that we have to see whether rule 139 would be applicable at such a stage. That rule specifically refers to the taking out of a summons and the issuance of a notice and the words "taking out a summons and the issuance of a notice" and "upon the hearing" in the rule make it amply clear that such orders are intended to be passed after a hearing., The matters included within the scope of the rule are such that while passing orders in regard to them, rights or interests of persons concerned and other similar questions of importance might have to be considered and it would be in consonance with the principles of justice that persons whose interests are likely to be affected should be heard before any

orders were passed on matters in which they are likely to be concerned. In cases, for example, where it is proposed to grant permission to sell the property of the company, several questions might arise which the court might be required to consider whether the property should be sold wholly or in part, whether the property should be leased out or used or dealt with in any other manner, whether the sanction to sell should be general or restrictive. On all these and several other questions including the value and the price of the assets, it would be necessary for the court to apply its mind. The exercise of powers mentioned in sub-section (1) of section 457 by the liquidator would be such a matter and, in such cases, it has been thought proper to make a specific rule to take out summons for directions and to issue a notice to the petitioning creditor so that a hearing to the persons concerned may be given before it and the parties may be enabled to place their points of view before the court. Matters which involve disposal of properties and the exercise of the powers of the liquidator to sell such properties and on which directions from the court are sought would require an application of its mind by the court and the assistance of the concerned parties while the court is considering such a question would be not only helpful but as required by the rule indispensable. That it cannot, therefore, reasonably be said, that while applying for permissions to sell, the liquidator was not taking any step for the exercise of his powers and was not seeking directions of the court within the meaning of rule 139. When the liquidator asks for permission to sell, he is no doubt taking a step towards the exercise of his power and it cannot be said that it is the order or sanction of the court which gives him the power and that, therefore, rule 139 would not come into play. In such a case, therefore, the provisions of rule 139 would be attracted and it would be necessary to take out summons for directions and to issue a notice to the petitioning creditor; that at the time when a report of the official liquidator for exercise of the power of sale could be considered by the court, it would be the appropriate time for those who are concerned with the sale of the property to suggest such facts as would be material and helpful in determining the conditions to be inserted in the advertisement for sale, whether an off-set price should be fixed before issuing the advertisement and how the machinery of the mills should be sold. It is at this time that it could have been suggested that instead of issuing an advertisement and inviting offers, a sale by public auction or by other method would be more beneficial and convenient or that the sale should or should not have been for selling the mill as a running concern or that the mills should be sold as a scrap. It would have also been appropriate for the persons concerned to object at this stage to the very proposal for sale and before a decision issuing the advertisement was reached, these and many other important facts could have been placed before the court in the context of the report made by the liquidator. Such facts require consideration before a step is taken towards the sale of property and such considerations supply the data for evolving an objective standard for deciding how the liquidator should be directed to initiate the proceedings of sale. The consideration of these factors by an objective standard would result in a judicial order and the mere fact that directions for the issuance of an

advertisement were sought would not by itself be sufficient to make it an order of an incidental or administrative nature; that simply because sanction or confirmation of the sale is necessary even after the offers were received, it could not be said that what the liquidator was doing could not be considered as a step towards the sale of property and that he was not seeking directions from the court in respect of a matter which involved a decision by the court to permit the liquidator to start proceedings for sale. In view of these findings the Division Bench took the view that when the liquidator filed his report on March 5, 1968, seeking directions from the court, the provisions of rule 139 were attracted and it was necessary that a summons for directions was taken out and a notice was issued to the petitioning creditor. The Division Bench further took the view that whenever directions for exercise of the powers of sale by the liquidator are to be given, not only by the report of the liquidator all the material facts should be placed before the court for consideration, but summons for directions should be taken out and a notice should be issued to the petitioning-creditor. It was as a result of this finding that the earlier orders passed by the company judge on the two reports of the official liquidator were set aside. This decision of the Division Bench in *Ananta Mills* case was later on followed by another Division Bench in *East India Co. v. Official Liquidator*. It may be stated that both in *Ananta Mills* case as well as in *East India Co.*'s case the aggrieved party was the petitioner on whose petitions the respective companies were ordered to be wound up and in the latter case several arguments were advanced on behalf of a party in whose favour the sale was sanctioned but the said arguments, though regarded as valid, were not considered by the court in view of the earlier decision of the Division Bench in *Ananta Mills* case. In *East India Co.*'s case, on behalf of the party in whose favour the sale was sanctioned, it was contended that rule 139 is not applicable in such a case and it was not necessary for the official liquidator to take out a summons for directions under this rule if he wants to sell any property of the company in exercise of his power u/s 457, sub-section (1), clause (c); that the occasion to exercise the power of sale may arise at any point of time in winding-up proceedings and if rule 139 were construed to mean that, whenever the official liquidator wants to sell any property of the company he must come under rule 139, that would make nonsense of the provisions in the opening part of the rule which says that a summons for directions shall be taken out by the official liquidator "as soon as practicable after the winding-up order is made and, in any event, not later than seven days after filing his preliminary report under sub-section (1) of section 455". How can this prescription of the opening part of the rule fit in where the official liquidator proposes to sell any property of the company, say the three or four years after the winding-up order is made ?; that the summons for directions contemplated in rule 139 is a summons which is required to be taken out by the official liquidator without unreasonable delay in order that the court should have complete seizing of the winding-up proceeding and the programme of winding-up may be chalked out at the earliest so as to expedite the winding up proceedings and avoid unnecessary delay; that rule 139 does not contemplate summons for directions to be taken out from time to time in the

course of winding up whenever the official liquidator wants to exercise any of his powers u/s 457, sub-section (1), or requires directions of the court on any matter arising in the winding up. After enumerating these contentions the Division bench pointed out that they might have required serious consideration, if the construction of the rule were *res integra*, but in view of the decision of the Division bench in the earlier case, *Ananta Mill's* case, none of these contentions were considered by the Division Bench.

36. It should not be overlooked that the decision in *East India Co.'s* case has been given because the Division Bench was bound by the earlier decision and the various contentions which required consideration if the matter were *res integra* were not considered in view of an earlier binding decision. In neither of these cases was the mind applied nor the attention of the court was focused upon the provisions of rule 10 read with rule 6 and as no contention on the basis of these rules was urged before the court, the court had no occasion to consider the same. We have pointed out that rule 10 is one of the general rules which appears in part I of the Rules and that applies to all the subsequent proceedings to be adopted in the remaining Parts. Upon a proper construction of rule 10 it is permissible to an official liquidator either to adopt the procedure of summons for directions as directed by rule 139 or to adopt a procedure that may be permitted by a judge. Such procedure permitted by a judge may be consistent with the earlier practice and procedure of the court and even directions for matters referred to in rule 139 can be given on the official liquidator's report if the learned judge so permits. With respect, we are unable to agree with the view that has been taken by the Division Bench in *Ananta Mills* case, as important aspects of the matters in question were not considered and even the contentions that were urged in the latter case were not advanced before the earlier Division Bench. Both in *Ananta Mills* case as well as in *East India Co.'s* case, the aggrieved party who preferred the petition was the petitioner on whose petition the company was ordered to be wound up. That is not the position in the present case. In the present case the petitioner had appeared before the trial court when the matter was considered *in extenso* on the liquidator's report for sanctioning the sale of the company's assets. With respect, we are also unable to agree with the interpretation put by the Division Bench in *Ananta Mills'* case on the scope and ambit of section 457(1).

37. This takes us to the other contention which has been urged by Mr. Sorabjee and Mr. Chagla on behalf of the appellants. The argument was that by the order dated June 16, 1973, *Vimadalal J.*, *inter alia*, directed that the official liquidator should sell the factory and the other properties of the company in liquidation by inviting sealed tenders, by issuing advertisements subject to the terms and conditions to be approved by the court. In view of this order the argument was that it was obligatory upon the official liquidator to have the terms and conditions subject to which the tenders were invited, approved by the court before even public advertisement was issued. As such terms and conditions were not approved by the court before tenders were invited the whole of the sale is

thereby vitiated. A reference was also made to the provisions of rule 273 where it is, inter alia, provided that every sale shall be held by the official liquidator subject to such terms and conditions, if any, as may be approved by the court. In view of the order passed by Vimadalal J. and the provisions of rule 273, the argument was that there cannot be an exports facto approval of the terms and conditions subject to which the tenders were invited at a stage when the order sanctioning or confirming the sale is passed by the court. If regard be had to what happened before the learned judge passed the order confirming the sale in favour of the respondent No. 3 such a contention cannot be accepted. It is undoubtedly true that the earlier order passed by Vimadalal J., dated June 16, 1973, requires that the terms and conditions subject to which offers were invited should be first approved and thereafter a public advertisement should appear in the newspapers for receipt of offers. For one reason or the other that provision of the order was not complied with and a public advertisement was issued and 13 offers were received from the various offertory. However, before the sale was sanctioned in favour of the respondent No. 3, the attention of Kania J. was directly focused on this point, namely, the terms and conditions subject to which the sale was to be held pursuant to the directions of Vimadalal J. were not approved by the court. However, before passing the order sanctioning the sale he scrutinised the terms and conditions and nothing was brought to his notice which indicated that there was something unusual, irregular or informal about it. In that view of the matter even before passing the order of sanction the learned judge has expressly approved all the terms and conditions subject to which tenders were submitted by the various parties. In our opinion, failure to obtain the previous sanction or approval of the court to the terms and conditions subject to which offers were invited was a mere irregularity which upon the facts of the present case has not resulted in any substantial injustice. In fact, the irregularity was capable of being remedied by the learned judge which he did by expressly granting his approval to the terms and conditions subject to which offers were made by the various offertory. There is no merit in the contention of Mr. Sorabjee that there cannot be an exports facto approval of the terms and conditions at the stage of final sanction or confirmation by the court.

38. The argument of Mr. Sorabjee and Mr. Chagla then was that condition No. 12 made it obligatory upon the official liquidator to place all the offers that were received by him for consideration of the court; that in the present case the official liquidator accepted the offer of respondent No. 3 subject to confirmation by the court and rejected the other offers and returned even the 10% earnest amounts that were deposited by them; that such action on the part of the official liquidator vitiated the proceedings. We fail to see how any default or irregularity on the part of the official liquidator in carrying out his duties enjoined by the terms and conditions could affect the right of the highest offeror if otherwise he was justified in having the sale in his favour sanctioned by the court. It is undoubtedly true that term and condition No. 11, subject to which the offers were invited, specifically provided that the vendor, i.e., the official

liquidator, does not bind himself to accept the highest or any other offer. The term and condition No. 12 is as follows :

"12. After receiving tenders duly filled in as hereinabove stated, the vendor will obtain directions of the company judge of this hon"ble court as to whose offer he should accept. On the vendor being authorized by the hon"ble the High Court of Judicature at Bombay to accept the offer of the purchaser, the vendor will give to the purchaser notice of such acceptance at the address given in his tender by a letter addressed to the purchaser and posted under certificate of posting obtained from any post office in Bombay and the same shall be conclusive proof of service upon such purchaser."

39. Having regard to these terms and conditions it was not contemplated that the official liquidator should accept the offer of any tenderer. In fact, the scheme of the terms and conditions was that all the offers were to be placed before the learned judge and directions were to be sought from him as regards with particular offer ought to be accepted. Non-compliance with the procedure prescribed by these terms and conditions is merely an irregularity which cannot, in our opinion, affect the right of the highest tenderer if otherwise his offer is likely to be sanctioned by the court. Any non-compliance on the part of the official liquidator with the provisions of term and condition No. 12 cannot, therefore, affect the rights of the respondent No. 3, if otherwise his offer was such which the court would sanction.

40. Lastly, it was urged that in passing the impugned order sanctioning the sale in favour of respondent No. 3, the learned judge failed to apply his mind to the question of adequacy of the price offered by respondent No. 3; that he failed to apply his mind to a substantially higher offer and fettered his power of discretion simply because such an offer was made after the tenders were opened in the presence of all the parties; that, in any event, he permitted respondent No. 3 to increase his offer from Rs. 37,57,755 to Rs. 39,57,755; that both prior thereto as well as immediately thereafter, there were much higher offers made by Amba Tannin and Pharmaceuticals Ltd. That on August 23, 1973, Amba tannin & Pharmaceuticals Ltd. had increased the offer to the sum of Rs. 42,13,000, and that when respondent No. 3 was permitted to increase his offer to the sum of Rs. 39,57,755, they further increased their offer to the sum of Rs. 43,13,000. The argument was that, having regard to the facts and circumstances of the case, there was clear material before the court that the price at which the assets of the company were proposed to be purchased by respondent No. 3 was inadequate and it was obligatory upon the learned judge to sanction the sale in favour of Amba Tannin & Pharmaceuticals Ltd.

41. There is no controversy that, pursuant to the public advertisement, 13 offers were received by the official liquidator and the same were opened by him in his office in the presence, inter alia, of the intending purchasers on August 18, 1973. The highest offer was that of respondent No. 3 in the sum of 37,57,755. The offer just below that of respondent No. 3 was of Vijaya Durga Cotton Trading Co.

Private Ltd. in the sum of Rs. 37,50,000 while the offer of Amba tannin & Pharmaceuticals Ltd. was in the sum of Rs. 35,13,000. After the offers were opened by the official liquidator in the presence of the parties and in the presence of the attorneys of the bank, the attorney of Amba Tannin & Pharmaceuticals Ltd. wrote a letter on August 18, 1973, i.e., the date on which the offers were opened, increasing their offer of Rs. 35,13,000 to the sum of Rs. 38,13,000. That letter was replied to by the official liquidator on August 20, 1973. He stated that the revised offer could not be considered by him; however, he would place the said offer before the court for appropriate directions when he approached the court for sanction. When the report was submitted by the official liquidator for directions on August 23, 1973, he has specifically referred to this revised offer of Amba Tannin & Pharmaceuticals Ltd. and has, inter alia, sought directions of the court qua that offer. This matter was heard before Kania J. for a number of days and on the very first day of hearing, i.e., on August 23, 1973, the counsel for Amba Tannin & Pharmaceuticals Ltd. first increased his offer by a further amount of Rs. 50,000 and, thereafter, increased his offer to the sum of Rs. 42,13,000. At the stage of the final order being passed by the learned judge the offer was further increased to the sum or Rs. 43,13,000.

42. The essential object of winding up proceedings is to collect the assets of the company in liquidation, to distribute them first amongst secured creditors, then amongst preferential creditors and then amongst unsecured creditors. If there is a surplus it has to be distributed amongst the contributories having regard to their respective rights. Under the scheme of the Act there is no provision for vesting the assets of the company in liquidation in the official liquidator but it could be so done by a vesting order u/s 24 of the English Companies Act, 1948. It is, however, abundantly clear that a liquidator stands undoubtedly in a fiduciary position towards the company. He has often been described as a statutory trustee. The assets of a company in liquidation are endorsed as a trust in the sense that the liquidator acts as an agent of the company, an officer of the court under the directions of the court for the benefit of all persons interested in winding up in due course of administration. In Halsbury's Laws of England, volume 6, 3rd edition, paragraph 1140, at page 581, while dealing with the status of a liquidator, it is thus observed :

"Since, in a winding up, the assets of the company are to be collected and applied in discharge of its liabilities, its property is in the nature of trust property, affected with an obligation to be dealt with by the liquidator in a particular way, and this trust is constituted for the benefit of all the creditors. But the liquidator is not a trustee, in the strict sense of being a trustee, for each creditor or contributory of the company."

43. So also in Modern Company Law by Gower, 3rd edition, at page 654, it is stated that the liquidator has several statutory duties imposed on him and he is in a fiduciary relationship not only to the company but also to the creditors as a body though not to individual creditors.

44. The principles which should govern the exercise of discretion by a court while sanctioning sale of property of a company in liquidation are well settled. In *Shankarlal Aggarwala v. Shankarlal Poddar*, the question that arose for consideration before the Supreme Court was whether an order sanctioning sale of the property of a company in liquidation under the provisions of the Companies Act, 1913, was an administrative or a judicial order. While considering this question the Supreme Court points out :

"An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely a ministerial order, for before confirming the sale the court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realization "

45. The same principle was reiterated in later decision of the Supreme Court in *Navalkha v. Ramanuja Das*. It is pointed out :

"The principles which should govern confirmation of sales are well-established. Where the acceptance of the offer by the Commissioner is subject to confirmation of the court the offerer does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the court operates as a safeguard against the property being sold at an inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the court is satisfied about the adequacy of the price the act of confirmation of the sale could not be a proper exercise of judicial discretion."

46. In view of this settled position in law, the question that arises for consideration of the court is whether the price offered by respondent No. 3 is adequate. In the balance-sheet of the company for the period ending October 31, 1971, the entire fixed assets of the company were shown as worth Rs. 19,23,399 and the current assets such as stock of stores, spare parts, etc., were shown as worth Rs. 3,42,421.52. In the affidavit filed by respondent No. 3, affirmed on August 30, 1973, he has stated that prior to the company being ordered to be wound up, the company in liquidation had entered into an agreement for sale on October 3, 1969, with one Ramnikala J. Kothari for the sale of the said property for a lump sum of Rs. 19,24,000. The said Kothari paid Rs. 2,25,000, as and by way of earnest money, but this sale could not materialise. He has also refereed to another offer to purchase by one Valjibhai Patel. Though the precise date on which this offer was made does not appear to have been stated in the affidavit, according to respondent No. 3, Valjibhai Patel made an offer for purchase of the assets of the company for Rs. 22,00,000 but even the said transaction was not finalised. In the statement of affairs which was filed after the order of winding up

on October 21, 1972, the assets of the company were valued at Rs. 36 lakhs and odd. The assets pledged or mortgaged with the Central Bank of India were valued at Rs. 22,15,658. Keshvlal Patel in his affidavit has also stated that the company in liquidation received an offer for Rs. 24 lakhs from Kusum Products Ltd. but the said sale was not finalised. However, precise information about the time when this offer was received is not stated in the affidavit. The learned judge while considering the question of adequacy of price has not placed any reliance upon the valuation made in the balance-sheet for the period ending October 31, 1971, or the valuation made in the statement of affairs filed on October 21, 1972. The learned judge has taken the view that the figures therein mentioned are not a very reliable guide regarding the correct market value of the assets concerned but he has, however, observed that they do give some indication as to what would be the adequate price for the same. It appears that there was a valuation report obtained by the official liquidator before he submitted his report for sanctioning the sale of the assets of the company. The learned judge has not placed any reliance upon this valuation report on the ground that the amount at which the property is valued in the valuation report is very much lower than the offers received by the official liquidator. Thus, from these observations in the judgment, it is clear that the learned judge has neither placed any reliance upon the valuation made in the balance-sheet nor on the valuation made in the statement of affairs nor in the valuation report. The learned judge, however, was persuaded to take the view that the offers received by the company before it was ordered to be wound up and subsequently received by the company including the one referred to in the affidavit of respondent No. 3 and those received pursuant to public advertisement do furnish some guidance as to what would be an adequate price regarding the assets of the company. After taking these factors into account the learned judge took the view that the amount offered by respondent No. 3 constituted an adequate price for the assets sold to him and it was on this footing that the learned judge was persuaded to pass an order for sanctioning the sale in favour of respondent No. 3. The learned judge has clearly stated in his judgment that having regard to the facts and merits of the case he would have accepted the offer of respondent No. 3 in the sum of Rs. 37,57,755 notwithstanding higher offers being made from time to time by Amba Tannin & Pharmaceuticals Ltd. He has also stated in his judgment that at his suggestion the counsel for respondent No. 3 agreed to increase the offer to the sum of Rs. 38,57,755 even though his earlier offer of Rs. 37,57,755 was liable to be accepted. The learned judge has also observed in his judgment that after the tenders were opened by the official liquidator Amba Tannin & Pharmaceuticals Ltd. first raised the offer only to the sum of Rs. 38,13,000 and after the matter reached hearing on August 23, 1973, they initially raised the offer by a further sum of Rs. 50,000 and later on the same day to the sum of Rs. 42,13,000. In the opinion of the learned judge, as no other offeror had come forward to make a higher offer, he considered that the material before him indicated that the offer made by respondent No. 3 was for an adequate price. So far as the final offer of Rs. 43,13,000 made by Amba Tannin & Pharmaceuticals Ltd. is concerned, he

stated that the question of consideration of the offer did not arise at all.

47. It was urged by Mr. Shah on behalf of the respondent No. 3 that a question whether a particular price is adequate price or not is a question of exercise of judicial discretion and unless the trial court in exercising its judicial discretion has overlooked any well-settled principle of law the court of appeal ought to be slow to interfere with the exercise of such a discretion even though upon appreciation of facts and circumstances of the case it may take a different view. Undoubtedly, while sanctioning or confirming a sale u/s 457(1) read with rule 272 and rule 273 exercise of discretion is vested in the court, but the question whether a price is adequate or not is always a question of fact and if the material on record is not a safe guide to come to a reliable conclusion that the highest offer received represents the adequate price the court is not bound to sanction the sale in favour of the person who made the highest offer. While considering the question of adequacy of price the mere fact that one of the parties who earlier made an offer at a lower price is prepared to increase the price is not sufficient to come to the conclusion that the price originally regard by the court as adequate should not be accepted and the sale should not be confirmed in favour of the party making such an offer. Under rule 273 a sale of the assets of a company can be made either by public auction or by inviting sealed tenders or in such manner as the judge may direct. In the present case the earlier directions given by the learned judge, Vimadlal J., by his order dated June 28, 1973, are not precise and, therefore, by his subsequent order dated June 16, 1973, he gave specific directions that the sale should be held by the official liquidator by inviting sealed tenders by public advertisement subject to the terms and conditions to be approved by the court.

48. On the question of confirmation of a sale a number of cases have been cited on either side. Our attention has been drawn to two decisions of the Madras High Court reported in the same volume, namely, AIR 1940 Mad. First is the decision in Soundararajan v. Mahomed Ismail. The Division Bench of the court has taken the view that the fact that the sale is subject to the confirmation of the court does not mean that the court shall refuse to accept the highest bid because at a later stage some one else is willing to pay more. The condition is only a safeguard against irregularity or fraud in connection with the sale and against property being sold at an inadequate price and an auction-purchaser making an adequate bid and complying with all the requirements of the court and there being no irregularity or fraud is entitled to have the sale confirmed even though, at a later stage, some other person is willing to pay more. The question in this case arose in respect of a sale of property in a partition suit. The reserve bid was fixed at Rs. 1,10,000. The sale was by public auction and opportunity was given to bid not only to their members of the family but also to outsiders. The respondent who was an outsider gave a bid for Rs. 1,12,500 and the property was eventually knocked down to him. The condition of sale required that the sale should be confirmed by the court. The commissioner who conducted the sale reported the result to the court and the sale came before Gentle J. for

confirmation on April 7, 1938. On that day the appellant No. 1 who was a member of the family informed the court that he would like to have the property for himself as it had been in his family for a long time. The learned judge having inquired whether he was prepared to offer more, the matter was adjourned to April 11 when the appellant informed the court that he was prepared to offer Rs. 1,15,000. The respondent whose offer was accepted by the Commissioner subject to the confirmation of the court naturally objected to the matter being responded and he pointed out that he was the highest bidder at the public auction and that he had complied with all the conditions of sale, including the payment of a deposit of Rs. 28,000. It was contended on his behalf that it would not be proper in the circumstances of the case for the court to reopen the matter. The learned judge accepted the respondent's contention and confirmed the sale. The order of confirmation was affirmed by the court of appeal and the appeal against the order of confirmation at the instance of the member of the family was dismissed. The appeal court pointed out that the respondent having exceeded the reserve price agreed upon by the parties it could not be said to be inadequate and the respondent having made an adequate bid and having complied with all the requirements of the court and there being no irregularity he was entitled to have the sale confirmed.

49. The other case in the same volume is that of Rowthmall Neopani v. Nagarmall Madan Gopal. This was a case of a confirmation of a sale by the court of the property of a company in liquidation. The Division Bench has taken the view :

"One of the principal functions of the liquidator is to discharge the debts of the company. For that purpose he may have to sell the company's property, and he can do this with the sanction of the court. It follows that any sales or contracts of sale effected by the liquidator in pursuance of the court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the court. Hence, where the district court has given the official liquidator a general permission to sell the properties (provided that a certain price was obtained) and has expressly sanctioned the contract of sale entered into by the official liquidator for a sum considerably in excess of the stipulated price, the court cannot revoke its own sanction so to nullify the contract of sale."

50. The facts of the case show that on February 15, 1938, the district judge gave permission to the official liquidator to sell the entire property of the company in liquidation. The permission was coupled with a condition that the sale should be for not less than Rs. 80,000. On January 19, 1939, the official liquidator entered into a contract of sale of the property to one Rowthmall Neopani for Rs. 95,000. On January 23, 1939, the district judge approved of this contract of sale and permitted the official liquidator to compromise two suits in which the company was concerned as plaintiff in the first and defendant in the second. In pursuance of the orders of the district judge the official liquidator compromised both those suits and decrees were passed by the subordinate judge of Guntur in terms of

the razinamas. On January 27, 1939, on N. Madan Gopal, who had been one of the creditors on whose petition the winding up order was made, made an application contending that the contract of sale said to have been entered into by the official liquidator with Rowthmall Neopani might be set aside cancelling, if necessary, the order passed by the learned district judge. On January 31, 1939, one Parripati who claimed to be a shareholder of the company in liquidation made an application in the district court praying that the earlier order passed on January 23, 1939, sanctioning the sale was ex parte and might be set aside and fresh orders passed. The learned district judge allowed both these application and decreed that the permission granted by the court on January 23, 1939, for the compromise of the two suits and for the sale of the mill properties be revoked and the official liquidator was directed to hold a fresh sale of the properties by public auction as early as possible after giving due notice in the public press. Against the orders in both the applications Rowthmall in whose favour the sale was sanctioned by the learned district judge preferred appeals and they came up for consideration before the Division Bench. On behalf of the appellant it was urged that as the order passed by the learned district judge was acted upon by compromising the two suits, it was not open to the district judge to revoke the permission earlier granted. This contention was accepted by the Division Bench. The Division Bench pointed out that the district judge could of course have revoked his sanction if he had done so before the official liquidator had acted upon it, but if once the official liquidator has acted upon it, has compromised the suits and has obtained decreed in terms of the compromises, they were entirely unable to see how the district judge could have power to revoke it. Even on merits the order of the district judge was treated by the appeal court as wrong. Stodart J., who delivered a separate judgment agreeing with the decision of Burn J., has pointed out in his judgment that in his opinion any sales or contracts of sales effected by the liquidator in pursuance of the court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the court. "I say so for reasons which I think are obvious. If the liquidator's proceedings are merely provisional and subject to the subsequent confirmation of the court he will not be able to dispose of the property to the best advantage." In both these decisions of the Madras High Court reported in AIR 1940 Mad. the sale was sanctioned either by the Commissioner or by the district judge after complying with the earlier directions. In the first case, there was a reserve bid fixed which directed the Commissioner not to sell the property at a lesser price than the specified amount. He entered into a contract of sale to sell the property at an amount exceeding the reserve bid as directed by the court. In the other case, even the matter went further, viz., that not only the sale was sanctioned by the district judge but the order made by him was acted upon and suits were permitted to be compromised to which the company in liquidation was a party. Undoubtedly, both the decisions show that if the earlier sale is for an adequate price the mere fact that at a later stage a higher price is offered by a party will not be a ground to revoke the sanction and set aside the sale. Besides these two decisions of the Madras High

Court our attention has been drawn to a number of other decisions of the Madras High Court and other High Courts by Mr. Sorabjee and he has contended that if before any contractual or legal obligation is entered into by an officer conducting a sale or even if before any moral obligation is made by an officer conducting a sale, any higher offer is received by the officer conducting the sale, then it is indeed his duty to consider this offer and in the absence of cogent and reasonable ground he should not decline to consider this offer simply because it is made at a later stage. The first case that he referred to was that of Gordhan Das Chuni Lal Dakuwala v. Kantimathinatha Pillai. In this case, during the course of the winding up proceedings the official liquidator wrote to the district judge intimating that he had received an offer of Rs. 5 1/2 lakhs for the mills as they stood and he recommended its acceptance. After a personal interview with the official liquidator the same day the district judge passed an order permitting the official liquidator to sell at the price offered conditionally on the offeror giving a valid cheque for Rs. 50,000 by the 21st. The purport of the order was communicated to the appellant verbally on the same day and later on formal communication in writing was made by the official liquidator. The cheque for Rs. 50,000 was handed over to the official liquidator on the 20th. A further cheque for Rs. 4,10,000 was given to him on the 24th and paid into court in discharge of the mortgage decree. The balance was paid on or before the 28th. On March 2, 1920, the respondent No. 1, the former manger of the company, presented a petition in the district court objecting to the sale to the appellant as being for an inadequate price, putting forward an offer from one Ranchod Lal Amratlal for Rs. 7,01,000 and asking that the later should be accepted, or the property sold by auction. The district judge was satisfied about the bona fides of the offer made by Ranchod Lal and ultimately on April 14, 1920, he passed an order cancelling the sale to the appellant and directing sale by auction. It was against this order that the appellant who had made an earlier offer of Rs. 5 1/2 lakhs and who had paid the price as required, preferred the appeal. As regards the earlier order passed by the learned district judge the court of appeal observed that, in effect, it sanctioned the sale of property without due consideration or notice to the owners or persons interested therein for a price which, in the light of information then available, must be held to be very inadequate. The appeal court regarded the offer of Ranchod Lal as genuine as he actually paid a cheque for the amount into court and intimated to the court that it might be taken as his first bid in the event of an auction. This offer of Ranchod Lal was comparatively much higher than the price paid by the appellant. The Division Bench points out that, while considering the question of granting sanction to a sale either by auction or by private contract, judicial discretion has to be exercised having regard to the interest of the company and its creditors. Wherever property is authorised to be sold by private contract, it is the duty of the court to satisfy itself that the price fixed is the best that could in human probability be expected to be offered. Unless satisfied of this, the only safe and proper course is an auction sale. It is further pointed out by the Division Bench that the original order passed by the district judge was an injudicious one and one which was calculated to inflict

injury to the extent of at least Rs. 2 lakhs on the company and its creditors. Thus, even though an earlier offer was accepted by the official liquidator with the permission of the district judge, the appeal court was persuaded to take the view that, as the price was inadequate, it was open to accept a higher offer received at a later stage.

51. In *Ratnasami Pillai v. Sabapathy Pillai* the question of validity of a sale by a receiver came up for consideration. It is held that, where an auction is held without any reservation, ordinarily an implied condition will be understood that the highest bid will be accepted but that rule does not hold good in the case of a sale by a court officer under the directions of the court. When a court sale takes place, the sale in favour of a particular individual not complete unless and until it receives the confirmation of the court. It is the acceptance of the court that constitutes the contract. When the person asserts that the court officer had power to bind the court by his acceptance of bid, he must prove his contention. The mere fact that in the published condition of sale there is no statement to the effect that it is subject to the confirmation of the court cannot be treated as implying that the court had renounced its power of confirming the sale before it could take effect. In court sales, it is acceptance by the court that constitutes the contract. The person who asserts that the court officer had power to bind the court by his acceptance of a bid must prove it. The court had ample authority as no contract had been concluded and the trial court's order directing a resale was held to be within its powers.

52. In *Chidambaram Chettiar v. Official Receiver*, a question of sale of a company in winding up by the official receiver came up for consideration. In that case, in pursuance of an order in the winding-up proceedings to sell the business as a going concern the official receiver caused an advertisement to be published in the newspapers inviting tenders for the purchase of the business. The advertisement directed that the tenders should be sent to him by registered post so as to reach him on or before a certain date. It was not, however, stated that the highest tender would be accepted and there was no reserve price fixed. A's bid was the highest. The official receiver asked for an order from the court for directions as regards the offers submitted by A and others. The official receiver also reported that others had expressed their willingness to raise their offers. The court directed that a week's further time should be given for the receipt of fresh offers or for increase of offers already made. It also directed that the offers should be made in sealed covers addressed to the official receiver and that they should be opened in court. It was held that there was no question of confirmation of a sale as a no sale had taken place. Other persons were entitled to make a further offer in the circumstances and hence the court's order would stand. The earlier decision of the Madras High Court in *Soundararajan v. Mahomed Ismail* was cited but was distinguished.

53. The next decision relied upon by Mr. Sorabjee is in the case of *Subbaraya Mudaliar v. Sundararajan*. The Division Bench in this case has taken the view that

merely by reason of the fact that a person was the highest bidder at the auction sale conducted by the receiver under orders of court, the person does not obtain any enforceable right to the property sold at the auction. The condition as regards confirmation of the court is a safeguard against property being sold at an inadequate price. It will, therefore, be not only proper but necessary that the court in exercising the discretion which it undoubtedly has of accepting or refusing to accept the highest bid at the auction in pursuance of its orders, should see that the price fetched at the auction is an adequate price, even though there is no suggestion of irregularity or fraud. A sale conducted by an officer of court would become a farce if the court is obliged to accept the highest bid at such a sale, though the court is convinced that the bid does not represent adequately the real price of the property. This was a question of sale of a property by the court receiver during the pendency of a suit. Directions were given by the trial court to obtain offers for purchase of the printing press as a going concern so that the court might be in a position to decide whether the press should be sold at a public sale or at a sale confined to the parties. As no satisfactory offers were obtained the trial court decided that the press should be sold as a going concern by the joint receiver at a public sale. The parties to the suit were given liberty to bid at the sale on the same terms as other bidders. The sale was to be effected after wide publicity. After giving such publicity the joint receiver conducted the sale on March 25, 1951. There were 12 bidders. In the course of the bidding the 1st defendant gave some bid. The plaintiff who was present did not give any bid. One Subbaraya was the highest bidder, his bid being for Rs. 31,200. The joint receiver knocked down the sale in his favour and received Rs. 8,100, being the 25% of the bid in cash. It was one of the conditions of sale that it will be subject to the confirmation of the court. When the joint receiver submitted a report to the court for confirmation of the sale in favour of the highest bidder the plaintiff complained that the highest bid offered at the auction was inadequate and she herself offered Rs. 35,000. The purchaser protested against any attempt to reopen the bidding. The court, however, taking into account the offer of the plaintiff to purchase the press for Rs. 35,000 adjourned the matter to a date on which the learned judge conducted, as it were, an auction between the parties to find out the highest price which would be offered for the property. Eventually, the plaintiff made the highest offer of Rs. 42,000. It was contended before the learned judge on behalf of the auction-purchaser that as there was no irregularity in the conduct of the sale, the court should not set aside the entire auction proceedings being conducted by the joint receiver under orders of the court, and the highest bid which he made should be accepted by the court and the sale concluded in his favour. This contention of the auction-purchaser was not accepted. He took the view that the price fetched at the auction sale was not adequate. He did not accept the contention that the court could not refuse to confine the sale to the highest bidder merely on the ground of apparent inadequacy of price. The learned judge saw no justification for refusing to accept the offer of the plaintiff for Rs. 42,000. The plaintiff was directed to deposit the sum of Rs. 10,000 before a particular date and the balance within 15 days

thereafter. Other appropriate directions were also given. It is against this order that the auction-purchaser preferred the appeal before the Division Bench. It was conceded by the counsel on behalf of the auction-purchaser that merely by reason of the fact that the appellant was the highest bidder at the auction sale conducted by the joint receiver under orders of court, the appellant did not obtain any enforceable right to the property sold at the auction. The appeal of the auction-purchaser was dismissed by the Division Bench observing that a sale conducted by an officer of court would equally become a farce if the court is obliged to accept the highest bid at such a sale, though the court is convinced that the bid does not represent adequately the real price of the property.

54. Reference is made by Mr. Sorabjee to an unreported decision of this court in First Appeal No. 152 of 1970, decided by a Division Bench on 7th and 8th February, 1972, to which I was a party. This case relates to a question of sale under the provision of the Maharashtra State Financial Corporation Act, 1951, and this court set aside the sale that was confirmed by the district judge on the ground that he failed to discharge the elementary duty of the court to see that the property was sold for an adequate price and it was a material irregularity in the conduct of the sale. Reference is also made by Mr. Sorabjee to another unreported decision of this court in Special Civil application No. 1184 of 1972, decided on August 25, 1972, to which I also was a party. This was a case of sanction of a sale by the Charity Commissioner of the property of a public trust. It is, inter alia, observed that the trustees of a public trust while considering the question of sale of a property belonging to the public trust and the Charity Commissioner while recording his sanction for such sale are in duty bound to consider all the factors which are for the welfare of the trust. The welfare of the trust does not require that, if any moral commitment is made to any person, then one should back out of such a commitment, but if before any moral commitment is made in favour of any offeror fresh offer is received which shows that the person is prepared to pay a higher price, then it will indeed be the duty of the trustees and also of the Charity Commissioner to consider such an offer before deciding the question of sale of the property or granting sanction to such sale.

55. If regard be had to the terms and conditions subject to which offers were invited by public advertisement, it is quite apparent that the official liquidator had not clothed himself with power to accept the highest bid or even sanction a sale subject to confirmation by the court. As pointed out above, condition No. 11 expressly stated that the vendor, i.e., the official liquidator, does not bind himself to accept the highest or any other offer. Under condition No. 12 it was the duty of the official liquidator after receiving tenders to obtain directions of the company judge as to whose offer he should accept. On the official liquidator being authorised by the court to accept the offer of the purchaser, the official liquidator will give to the purchaser notice of such acceptance at the address given in his tender by a letter addressed to the purchaser and posted under certificate of posting obtained from any post office in Bombay and the same shall be

conclusive proof of service upon such purchaser. Along with the tender the tenderer was required to deposit 10% as earnest money and with 15 days of the posting of the letter by the official liquidator the purchaser was to pay to the official liquidator 25% of the purchase price after giving credit to the 10% paid as earnest money. The balance of the purchase price was to be paid within one month from the date of the last payment. Having regard to these terms and conditions there was not even an assurance to any offeror that simply because the offer of any particular individual is highest it is likely to be accepted. In fact, if regard be had to the terms and conditions subject to which offers were invited, it was obligatory upon the official liquidator to place all the offers received by him before the learned company judge and he ought to have followed his directions thereon. His action in accepting the offer of respondent No. 3 subject to sanction by the court and in returning the earnest amounts paid by the other offeror was not justified having regard to the terms and conditions. Thus, when on August 21, 1973, the official liquidator made his report to the learned company judge and when it was first considered by the learned judge on August 23, 1973, having regard to the terms and conditions subject to which the offers were invited, the official liquidator was not even entitled to enter into any moral commitments, much less contractual or legal obligations, in favour of any offeror simply because the price offered by him appeared to be the highest price offered by offeror. The question as to adequacy of price was entirely for consideration of the learned judge. The learned judge was persuaded to take the view that the price offered by respondent No. 3 is adequate having regard to the various amounts offered by the various offeror and the price offered at the earlier attempts at sale before the company was ordered to be wound up and thereafter. If the valuation report that was obtained by the official liquidator was discarded by the learned judge on the ground that it was not reliable, it is difficult to see how the various offers received by the company before it was wound up and, thereafter, by the official liquidator either pursuant to public advertisement or otherwise, themselves were sufficient to indicate that the highest price offered represented the adequate price. As appears from the affidavit of respondent No. 3, on October 3, 1969, one Ramniklal Kothari offered to purchase the assets of the company for Rs. 19,25,000. He has also referred to the offer made by one Valjibhai Patel for Rs. 22,00,000, though it is not clear from the averments in the affidavit as regards the time when this offer was made. He also referred to the offer received by the company in liquidation for Rs. 24,00,000 from Kusum Products Ltd. These three offers received at different times referred to in the affidavit of respondent No. 3 show that there is substantial difference between the price offered by each one of the offeror from time to time. Pursuant to the public advertisement as directed by Vimadlal J., 13 offers were received by the official liquidator which were opened by August 18, 1973. Even a mere glance at the amounts quoted by the various offeror will indicate that it will be highly unsafe to consider an amount offered by an offeror as a sufficient guide to rely upon for determining the question of adequacy of price. The minimum offer was made by one Umedbhai Jhaverbhai Patel for Rs. 14 lakhs while the highest offer

was made by the respondent No. 3 for Rs. 37,57,755. The next highest was that of Vijaya Durga Cotton Trading Co. Ltd. for the sum of Rs. 37,50,000. Thus, the difference between the price offered by the respondent No. 3 and that offered by Vijaya Durga Cotton Trading Co. Ltd. was very narrow, namely, only a sum of Rs. 7,755.

56. The tenders were opened on August 18, 1973, by the official liquidator and he submitted the report for consideration of the learned judge. The report was first taken up for consideration on August 23, 1973. Apart from the intermediary offer made by Amba Tannin & Pharmaceuticals Ltd., the counsel for the company on August 23, 1973, ultimately increased the offer to the sum of Rs. 42,13,000. Mr. Shah, on behalf of the respondent No. 3, has in our opinion, rightly commented upon the conduct of Amba Tannin & Pharmaceuticals Ltd. He pointed out that that company, when it submitted its tender pursuant to the public advertisement, made an offer for Rs. 35,13,000 and it is only after it found that that offer was not likely to be accepted, it, from time to time, went on increasing the offer. Even the attitude adopted by it before the trial court was that, as a larger offer was made by it, that offer should be accepted. Undoubtedly, the offer made by Amba Tannin & Pharmaceuticals Ltd. and the subsequent increase from time to time in the amount of the offer really indicates that the initial attempt was to secure the property at a lesser price but, when it was found that that was not possible, higher offers were made from time to time at a later stage. Simply because there is a higher offer, this court will not be entitled to refuse to sanction or confirm a sale if the price offered as a result of following the procedure directed by the court is fair and adequate. We are not concerned in this case really with the conduct of Amba Tannin & Pharmaceuticals Ltd. We are primarily concerned in a matter of this nature with the interest of creditors and contributories who are vitally interested persons in the assets of the company in liquidation. If upon the material before the court it appears that the price offered by the respondent No. 3 is not adequate, then simply because the conduct adopted by Amba Tannin & Pharmaceuticals Ltd. was such as does not commend itself to this court, will not deter us from protecting the interest of the creditors and contributories of the company in liquidation. In our opinion, an offer made after public advertisement by itself cannot always be regarded as a reliable guide as indicating the adequate price. It is not unknown that even when a public auction is held after due and proper advertisement there are several bidders but the bids offered are so inadequate that the property is withdrawn from sale. So a mere offer by itself should not be regarded as indicative of an adequate price. Further, it should not be overlooked that within a short space of 5 or 6 days Amba Tannin & Pharmaceuticals Ltd. increased its offer to such an amount that it came to a little more than about 4 1/2 lakhs of rupees than the price initially offered by the respondent No. 3. Undoubtedly, the learned judge considered that, having regard to the various offers received from time to time, the price offered by the respondent No. 3, pursuant to the public advertisement was adequate and even if the respondent No. 3 was not willing to increase the offer he was inclined

to accept the same. However, at the suggestion of the learned judge, respondent No. 3 increased the offer by a further sum of Rs. 2 lakhs. On that occasion Amba Tannin & Pharmaceuticals Ltd. increased the offer by a further amount of Rs. 1 lakh. Thus, bearing all these factors in mind, such as the negligible difference between the price offered by the highest offeror and the next best and the higher offers from time to time made by one of the offertory, it is not possible for us to take the view that the price of Rs. 37,57,755 initially offered by the respondent No. 3 pursuant to the public advertisement represented the adequate price of the assets of the company in liquidation. Though the attempt of Amba Tannin & Pharmaceuticals Ltd. was to secure the property for itself, at an increased offer made, it is not possible for us to accede to any such request and, in fact, no attempt has been made by Mr. Sorabjee to induce us to adopt that course. On the material on record, in our opinion, the initial offer of Rs. 37,57,755 or even the increased amount of Rs. 39,57,755 does not represent adequate price of the assets of the company in liquidation. Rules 273 contemplates more modes than one for sale of the assets of a company in liquidation. Undoubtedly, the mode permitted by *Vimadalal J.* was one of the modes prescribed by that rule. However, if at the stage of sanctioning a sale the court feels that an adequate price is not realised for the assets of the company, notwithstanding due and adequate publicity, it is indeed the duty of the court to even direct adoption of another mode permitted by that rule by which the assets of the company in liquidation ought to be sold. The learned judge, in our opinion, should have considered whether, in view of the slight and negligible difference between the highest two offers, i.e., the highest and the next best, and the increase in the offer made by Amba Tannin & Pharmaceuticals Ltd., the adequate market value of the property of the company in liquidation can be realised by public auction. One of the objects of confirmation of a sale is to see that proper and adequate price for the assets of the company in liquidation is realised and if such price cannot be realised in one of the modes permitted by the rule, the court is under a duty to consider whether such price can be realised by adopting any other mode permitted by that rule. In our opinion, the learned judge ought not to have accepted the offer of the respondent No. 3 and sanctioned the sale in his favour as neither the sum of Rs. 37,57,755 nor Rs. 39,57,755 can be regarded as an adequate price of the assets of the company in liquidation having regard to the various circumstances pointed out above.

57. Mr. Thakkar who appeared on behalf of the bank submitted that there will never be any guarantee that, in the event of the property and assets of the company in liquidation being resold, they will even realise the price of Rs. 39,57,755, for which the sale is sanctioned in favour of the respondent No. 3. Ordinarily, such a consideration will be irrelevant if the court is satisfied that the price at which the sale is sanctioned by the court is inadequate having regard to the market value of the assets to be sold, but to obviate any difficulty in this case *Polson Limited* who are substituted as the appellants in Appeal No. 110 of 1973 and *Jagdish J. Kapadia*, a director of that company, have through their

counsel, Mrs. Sohini Nanavati, given an undertaking to the court as under :

(1) Polson Ltd. (with whom Amba Tannin & Pharmaceuticals Ltd., is amalgamated by an order dated 21st December, 1973, in the Bombay High Court Company Petition No. 396 of 1973) and Jagdish J. Kapadia, a director of Polson Ltd., hereby undertake to this hon"ble court that the offer made by the said Amba Tannin & Pharmaceuticals Ltd., by its tender dated 17th August, 1973, addressed to the official liquidator increased in court on 23rd August 1973, and recorded by a letter dated 24th August, 1973, from D. H. Nanavati, solicitor to the official liquidator, High Court, Bombay, and further increased in court to Rs. 43,13,000, on 6th November, 1973, will be kept open by Polson Ltd., till a fresh auction sale is held;

(2) Polson Ltd., and Jagdish J. Kapadia, a director of Polson Ltd., hereby undertake to this hon"ble court that at any auction sale that may be held as aforesaid pursuant to the directions of the court in respect of the assets of Vilas Udyog Ltd. (in liquidation) comprised in the terms and conditions exhibited to the official liquidator's report dated 21st August, 1973, free from mortgage or security claimed by Central Bank of India, Polson Ltd. undertake to make a minimum bid to purchase the said assets for a price of Rs. 43,13,000;

(3) Polson Ltd. hereby undertakes to this hon"ble court that the amount of Rs. 4,21,300, deposited with the official liquidator by Amba Tannin & Pharmaceuticals Ltd., which now belongs to Polson Ltd., will continue to remain deposited with the official liquidator and will be dealt with as provided in clause (4) and/or clause (6) below. The official liquidator shall invest the said amount of Rs. 4,21,300, in fixed deposit in a nationalised bank;

(4) Polson Ltd. further undertakes to this hon"ble court that in the event of Polson Ltd. not complying with the terms of either of the undertakings mentioned in clauses (1) and (2) above, the said deposit of Rs. 4,21,300 together with interest accrued thereon will be forfeited by the official liquidator of Vilas Udyog Ltd. In the event of Polson Ltd. carrying out the terms and conditions of the undertakings mentioned in clauses (1) and (2) above, the said deposit of Rs. 4,21,300 together with interest accrued thereon will be returned to Polson Ltd., or will be appropriated towards the deposit and/or purchase price in the event of Polson Ltd. becoming purchaser of the assets of Vilas Udyog Ltd. at the subsequent auction;

(5) Polson Ltd. further undertakes to this hon"ble court and agrees with the Central Bank of India that in the event of Polson Ltd. not complying with the provisions contained in the undertakings mentioned in clause (1) and/or clause (2) above or in the event of Polson Ltd. becoming purchaser of the aforesaid assets of Vilas Udyog Ltd. as a result of subsequent auction sale and failing to complete the sale, Polson Ltd. undertakes to pay to the Central Bank of India as and by way of damages the shortfall, if any, towards the secured claim of the Central Bank of India and the net sale proceeds realised in respect in respect of

the aforesaid assets of Vilas Udyog Ltd.

(6) Polson Ltd. further undertakes to this honourable court and agrees with the official liquidator that in the event of Polson Ltd. not complying with the provisions contained in the undertakings mentioned in clause (1) and/or clause (2) above or in the event of Polson Ltd. becoming purchaser of the aforesaid assets of Vilas Udyog Ltd. as a result of subsequent auction sale and failing to complete the sale, Polson Ltd. undertake to pay the official liquidator the shortfall if any between the sum of Rs. 43,13,000 and the net sale proceeds realised from the said auction sale provided that in computing the shortfall credit will be taken for the amount paid or payable to the Central Bank of India as provided in clause (5) above and the amount of Rs. 4,21,300 and interest accrued thereon mentioned in clause (3) above;

(7) Polson Ltd. further undertakes to this honourable court to pass the necessary resolution of the board of directors to give effect to all the aforesaid undertakings.

In our opinion, these undertakings given by Polson Ltd. and Jagdish J. Kapadia, a director of the company, are reasonable safeguards for any apprehension entertained by the bank that in the event of a resale the price realised may be less than the amount for which the sale is sanctioned in favour of respondent No. 3 by the learned judge.

58. As we have disposed of the appeals on merits it is necessary for us to deal with the preliminary contention urged by Mr. Shah against the maintainability of both the appeals.

So far as Appeal No. 110 of 1973 is concerned, it is urged that that appeal is not maintainable on account of the following four grounds :

(1) Amba Tannin & Pharmaceuticals Ltd. is not a competent appellant to prefer an appeal against the order passed by Kania J.;

(2) Polson Ltd. has no right to continue the appeal which was instituted by Amba Tannin & Pharmaceuticals Ltd.;

(3) Under the scheme of amalgamation of Polson Ltd. and Amba Tannin & Pharmaceuticals Ltd. sanctioned by this court by its order dated December 21, 1973, the "appointed day" was defined as October 1, 1972. That accordingly any offer made by Amba Tannin & Pharmaceuticals Ltd. thereafter cannot be regarded as a valid offer either by the said company or on behalf of Polson Ltd.; and

(4) No offer has been made by Polson Ltd. similar to the one made by Amba Tannin & Pharmaceuticals Ltd. and Polson Ltd. during the course of hearing before Kania J.

59. It was also urged that by reason of these very grounds the Appeal No. 111 of 1973 is also not maintainable. In our opinion, the grounds urged against the maintainability of these appeals are clearly unsustainable. Amba Tannin &

Pharmaceuticals Ltd. was one of the parties which submitted an offer pursuant to a public advertisement. It appeared during the hearing of the report before Kania J. for confirmation of sale in favour of respondent No. 3 that both before and during the consideration of the said report it increased its offer from time to time. It, inter alia, contended that the price offered by respondent No. 3 was inadequate. In view of the well-settled position as a result of more than one decision of the Supreme Court it cannot be disputed that one of the essential things to which the mind would be applied at the stage of confirmation of a sale by the court in liquidation proceedings is that the question as to adequacy of price is always a relevant factor. If any one of the parties wants to contend that the highest price offered was not adequate, but that contention is not accepted by the learned judge, it will be open to such party to prefer an appeal. It is not the case of Mr. Shah that having regard to the provisions of section 483 of the Act the order passed by Kania J. is not an appealable order. Under the scheme of amalgamation of Amba Tannin & Pharmaceuticals Ltd. and Polson Limited sanctioned by this court by its order dated December 21, 1973, with effect from October 1, 1973, the entire undertaking of Amba Tannin & Pharmaceuticals Ltd. including all its properties, movable and immovable, and assets of whatever kind, nature, sort or description, such as industrial and other licences and quota rights, trade marks and other industrial property rights, leases, tenancy rights and all other interests, rights or powers of whatsoever kind, nature, sort or description (all of which undertaking, property, assets, rights and powers are hereinafter for brevity's sake collectively referred to as the "undertaking") shall, without any further act or deed, be and stand transferred to and vested in Polson Ltd. pursuant to section 394 of the Companies Act, 1956. Under clause 3 of the scheme, all proceedings by or against Amba Tannin & Pharmaceuticals Ltd. pending at the effective date as defined in clause 18 thereof and relating to the undertaking, its liabilities, obligations and duties shall be continued and enforced by or against Polson Ltd., as the case may be. Clauses 6, 18 and 19 of the scheme read as under :

"6. With effect from the appointed day, Amba Tannin & Pharmaceuticals Ltd. shall be deemed to have been carrying on and to be carrying on all its business and activities for and on account of Polson Ltd. until the effective date as defined in clause 18 hereof."

"18. In the event of the necessary orders specified in clause 16 hereof not being made before 30th September, 1973, or such extended date as may be agreed upon between Amba Tannin & Pharmaceuticals Ltd. (by its directors) and Polson Ltd. (by its directors), this scheme shall become null and void."

"19. This scheme, although operative from the appointed day, shall take effect finally upon and from the date on which the necessary order specified in clause 16 hereof are made by the High Court of Bombay, and such date shall be the effective date for the purposes of this scheme."

60. To this company petition both Polson Ltd, and Amba Tannin &

Pharmaceuticals Ltd. were party petitioners. The scheme was ultimately sanctioned by the court by its order dated December 21, 1973. The result of that order is that by operation of law an amalgamation is effected as contemplated by the terms and conditions of the scheme. It was urged by Mr. Shah that only property rights and interest are transferred. In our opinion, if regard be had to the wide and extensive words used in clause 5 of the scheme the expression "all other interests, rights or powers of whatsoever kind, nature, sort or description" are general words of very extensive amplitude and their meaning and effect is not possible to be curtailed even by invoking the principles of ejusdem generis. Undoubtedly, the appointed day in the scheme was defined as October 1, 1972, but clause 6 of the scheme provides that whatever has been done by Amba Tannin & Pharmaceuticals Ltd. for carrying on its business and activities with effect from the appointed day shall be deemed to have been done for and on account of Polson Ltd. until the effective date as defined in clause 18 of the scheme. Thus, even though the tenders were submitted in August, 1973, and the subsequent offers were made by Amba Tannin & Pharmaceuticals Ltd. increasing the amount of its offer from time to time having regard to the provisions of clause 6 all such acts and deeds including tenders and offers have to be regarded as being done for and on account of Polson Ltd. The effect of the provisions of clauses 18 and 19 of the scheme is that since upon a joint application of both Polson Ltd. and Amba Tannin & Pharmaceuticals Ltd. an order of amalgamation has been passed by this court on December 21, 1973, the effective date referred to in the various clauses of the scheme is extended to the date of the said order. Thus, if regard be had to these and the other provisions of the scheme, it is quite apparent that none of the contentions urged by Mr. Shah against the maintainability of the appeal either by Amba Tannin & Pharmaceuticals Ltd. or of continuing the appeal by Polson Ltd. can be regarded as well-founded and no independent ground is urged why Appeal No. 111 of 1973 is not maintainable. In our opinion, there is no merit in the preliminary contention urged by Mr. Shah as regards the maintainability of the appeals.

61. In the result, both the appeals are allowed and the order passed by Kania J. confirming the sale of the assets of the company in liquidation in favour of respondent No. 3 for the price of Rs. 39,57,755 is set aside. The official liquidator is hereby directed to refund the respondent No. 3 the amount that has been deposited by him together with interest accrued thereon, either pursuant to the offer or as a result of the sanction of his offer by the court. We further hereby direct that the official liquidator will hereafter sell the assets of Vilas Udyog Ltd. in liquidation, comprised in the terms and conditions, being exhibit A to the official liquidator's report dated August 21, 1973, free from mortgage or security claimed by the Central Bank of India by public auction through auctioneers, Messrs. Bennet & Co. We further direct that the official liquidator will suitably modify the terms and conditions subject to which the sale of the assets should be held by public auction pursuant to this order and get the said terms and conditions duly approved of by the learned judge taking company matters within

a period of three weeks from the date of our signing the judgment. After the terms and conditions modified by the official liquidator are approved of by the learned judge taking company matters, advertisement shall be published in the same newspapers as were directed by Vimadalal J. by his order dated June 28, 1972, on the official liquidator's report. The public auction through the auctioneers, Messrs. Bennet and Co., will be held after the expiry of the period of six weeks from the date of such public advertisement in the newspapers. The official liquidator shall be at liberty to apply from time to time to the learned judge taking company matters for all other directions which are required by him for carrying out these directions under these orders or for such further directions as may be given by the learned judge. The official liquidator is hereby directed that, if he approaches the court later on for sanction of a sale in favour of any party, then he will give notice to the respondent No. 2 on whose petition the company was ordered to be wound up before any directions are sought from the learned judge for sanctioning or confirming the sale. The official liquidator is hereby directed to invest the sum of Rs. 4,21,300 deemed to have been deposited by Polson Ltd. with a nationalised bank at least till date of sanction of the sale by the learned judge taking company matters. Parties will be at liberty to apply for such further and other directions as may be necessary.

62. So far as the costs are concerned, the appellants have partly succeeded and partly failed. Mr. Shah, on behalf of the respondent No. 3, submitted that a major part of the arguments were devoted for the contentions raised as regard the effect and scope of rule 139 of the Companies (Court) Rules, 1959, issued by the Supreme Court and on that question the appellants have failed. He also pointed out that the arguments on the question of adequacy of price were for a much shorter duration compared to the other points and at least two-thirds of the costs of these appeals should be ordered to be paid by the appellants. It is undoubtedly true that a major part of the hearing was devoted in urging the rival contentions regarding the effect and scope of rule 139. It was a point of law which arose for the first time for consideration in this court; more so, after the Gujarat High Court was persuaded to take a particular view. Having regard to the decision of the Gujarat High Court, the position in law can be regarded as a little uncertain. Thus, looking to all the facts and circumstances of the case, we feel that the justice of the case requires that the appellants and respondent No. 3 will bear their respective costs both before the trial court and of the appeals before us. So far as the official liquidator is concerned, his costs of the trial court as well as of the appeal court will come out of the assets of the company in liquidation. As regards the rest of the parties there will be no order as to costs. Liberty to the two appellants to withdraw the sum of Rs. 500 deposited towards costs in each of the appeals. So far as the withdrawal of the deposit is concerned, Prothonotary to act on the minutes of this order. The Taxing Master is hereby directed under rule 600 of the High Court Rules, Original Side, to allow as instructions charges a sum not exceeding Rs. 2,000 of, in his opinion, the attorneys are so entitled to.