

(2007) 07 DEL CK 0100

In the Delhi High Court

Case No : Co. App. No. 27 of 2004 and CM No's. 10515-16 and 11617/04,
1549, 1550 and 5755/05, 11132/06 and 13858/07

Bakeman's Industries P. Limited

APPELLANT

Vs

New Cawnpore Flour Mills and Others

RESPONDENT

Date of Decision : 02-07-2007

Acts Referred:

Companies (Court) Rules, 1959 — Rule 273

Companies Act, 1956 — Section 233A, 235, 237, 243, 433

State Financial Corporations Act, 1951 — Section 29, 31, 46(B)

Citation : (2008) 3 CompLJ 38

Hon'ble Judges : Mukul Mudgal, J;Aruna Suresh, J

Bench : Division Bench

Advocate : P.V. Kapur and Vikas Pahwa, Abhinit Das, Chetna and Shubha Suresh, for the Appellant; Rajiv Shakdhar and Chinmoy Pradip Sharma and Ashish Garg for respondent No. 2, C.A. Sundram and P.C. Sen, for the Respondent

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, AIR 2008 SC

2699 : (2008) 144 CompCas 71 : (2008) 3 CompLJ 1 : (2008) 151 PLR 670 :
(2008) 9 SCALE 566 : (2008) 15 SCC 1 : (2008) 84 SCL

489 : (2008) AIRSCW 4507 : (2008) 4 Supreme 581

Mukul Mudgal, J.—This Company Appeal is directed against the orders dated 17th July 2004, 27th July 2004 and 30th July 2004 passed

by the Learned Company Judge by which the Learned Company Judge dismissed the application of the appellant company, M/S Bakemans

Industries Private Limited and accepted the bid of the respondent No. 4, Ceylon Biscuits Limited. The respondent No. 1 is the New Cawnpore

Floor Mills Pvt. Ltd., the Respondent No. 2 is the State Industrial and Investment Corporation of Maharashtra (hereinafter referred to as the SICOM) and the respondent No. 3 is the Official Liquidator, Govt. of India, Ministry of Finance and Company Affairs.

2. The brief facts of the case are as follows:

a) One NRI Lead Bank which purported to be a financier of the appellant company M/S Bakemans Industries Limited had obtained an award

against the appellant company. In order to enforce that award, Execution Petition No. 288/2003 was filed. The respondent No. 2, SICOM was

the judgment debtor No. 3 in the said execution proceedings. Before the said arbitral proceedings were initiated by the NRI lead Bank, the

respondent No. 2 SICOM Ltd. exercising its powers u/s 29 of the State Financial Corporation Act, 1951 (hereinafter referred to as the SFC Act)

had taken over the assets, namely, building, plant and machinery etc. of the respondent company and in the arbitral award it was directed that the

possession thereof should be handed back to the respondent company. Section 29 of the SFC Act reads as follows:

29. Rights of Financial Corporation in case of default

(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any

loan or advance or any Installment thereof (or in meeting its obligations in relation to any guarantee given by the Corporation) or otherwise fails to

comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the (right to take over the management

or possession or both of the industrial concern) as well as the (right to transfer by way of lease or sale) and realise the property pledged,

mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under Sub-section (1), shall vest in the transferee all

rights in or to the property transferred (as if the transfer) had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods

forming part of the security held by it as it had with respect to the original goods.

(4) (Where any action had been taken against an industrial concern) under the

provisions of Sub-section (1), all costs, (charges and expenses which in the opinion of the Financial Corporation have been properly incurred) by it (as incidental thereto) shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.)

(5) (Where the Financial Corporation has taken any action against an industrial concern) under the provisions of Sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of (the concern).

b) As the respondent No. 2, SICOM wanted to go ahead with the sale of the unit and it was objected to by NRI Lead Bank as well as the

appellant, this Court in execution proceedings passed orders from time to time. It would be appropriate to refer to some of these orders. On 16th

March 2004 the execution petition came up for hearing before a learned Single Judge of this Court on the original side. After hearing the

submissions of the parties, the executing Court gave a green signal for the sale of the properties. The relevant portion of the said order reads as

under:

However, in my considered opinion there cannot be any impediment in exercising the powers of selling the property through public auction in a

transparent manner in an open court instead of allowing the judgment debtor No. 3 to sell the property at its end without any supervision of the

Court. Since the court will be supervising the sale to find out the best suitable bid, I find no ground to stay the proceedings, which is initiated by this

Court.

On the said date the Court also noted that some bids had been received pursuant to orders passed earlier. These bids were from three parties. In

addition, M/s Ceylon Biscuits Ltd., which was also represented through counsel, showed its willingness to submit the bid and was allowed to do so

in order to have a better and a higher offer. One week's time was given to them to submit the bid. By the same order, the appellant company was

also given a chance to obtain other/better offers from any other bidder and it was made clear that in all the offers/bids, which were to be submitted

by any other bidder, the bidder shall have to comply with the formalities and terms that had been advertised on 23rd February 2004

(c) The matter was again taken up on 24th March 2004 when the Court found that M/s Ceylon Biscuits Ltd. had made an offer of Rs. 12.5 crores

and had deposited the earnest money of Rs. 25 lacs in dollars. There was another bidder, namely, M/s Longulf Trading (India) Pvt. Ltd. which had

submitted the bid of Rs. 11.7 crores. The three bids submitted earlier, note of which was taken in the order dated 16th March 2004, had given the

bid of Rs. 2 crores, 8 crores and 4.5 crores respectively. The bid of M/s Ceylon Biscuits Ltd. was, Therefore, the highest. However, before this

bid could be accepted it was pointed out by learned Counsel for the appellant company that the valuation of the plant and machinery as well as

land and building would be much higher than the one shown in the valuation report at Rs. 8,42,43,000/-. In view of this dispute about the valuation

raised by the appellant company, the court directed the respondent No. 2 SICOM Ltd. to get the entire assets re-evaluated by appointing an

approved valuer and submit a report to the Court before the next date. It was also directed that the necessary papers of the plant and the

machinery and other connected records shall be produced by the appellant before the approved valuer in order to assist him in evaluating the

property in question. It was also clarified that it would be open to the approved valuer to collect information in respect of various assets from other

sources as well such as the customs authorities, Director General Foreign Trade and such like authorities. The valuer was also directed to give

separate valuation report for the un-installed plant and machinery, if any, so as to enable this Court to ascertain the break- up value of various

plants and machineries to facilitate the process of sale by the Court.

d) The matter was thereafter taken up on 5th April 2004, when the valuation report was placed before the Court as per which the total value of the

entire assets of the company were shown as approximately Rs. 10 crores. In view of the fresh valuation report, which was available with the

Court, it was deemed proper to give another opportunity to all the five bidders to submit their fresh bids making it clear that the same could be

submitted on or before 12th April 2004 and they would also be allowed to participate in the inter se bidding, if any, held amongst the parties on the next date. The matter was consequently adjourned to 19th April 2004

e) Before the execution application could be taken by the executing Court on 19th April 2004 a significant development took place in CP

204/2003. As many as 15 company petitions were filed u/s 433(e) and (f) read with Sections 434 and 439 of the Companies Act for winding up

of the respondent company which came up for hearing on 6th April, 2004 Section 433(e) and (f) and Sections 434 and 439 of the Companies Act

read as follows:

433. Circumstances in which company may be wound up by Tribunal. A company may be wound up by the Tribunal,-

(a) ...

(b) ...

(c) ...

(d) ...

(e) if the company is unable to pay its debts;

(f) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up;

(g) ...

(h) ...

(i) ...

Provided that the Tribunal shall make an order for winding up of a company under Clause (h) on application made by the Central Government or a

State Government]

434. Company when deemed unable to pay its debts.

(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding [one lakh rupees] then due, has served on the

company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to

pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable

satisfaction of the creditor;

(b) if execution or other process issued on a decree or order of [any Court or Tribunal] in favor of a creditor of the company is returned unsatisfied

in whole or in part; or

(c) if it is proved to the satisfaction of the [Tribunal] that the company is unable to pay its debts, and, in determining whether a company is unable

to pay its debts, the [Tribunal] shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in Clause (a) of Sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed

by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any

member of the firm.

Section 439. Provisions as to applications for winding up.

(1) An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this Section, -

(a) by the company; or

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or

(c) by any contributory or contributories; or

(d) by all or any of the parties specified in Clauses (a), (b) and (c), whether together or separately; or

(e) by the Registrar; or

(f) in a case falling u/s 243, by any person authorised by the Central Government in that behalf.

(2) A secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have been appointed in

respect of such and other like debentures, and the trustees for the holders of debentures, shall be deemed to be creditors within the meaning of

Clause (b) of Sub-section (1).

(3) A contributory shall be entitled to present a petition for winding up a company, notwithstanding that he may be the holder of fully paid-up

shares, or that the company may have no assets at all, or may have no surplus assets left for distribution among the shareholders after the

satisfaction of its liabilities.

(4) A contributory shall not be entitled to present a petition for winding up a company unless-

(a) either the number of members is reduced, in the case of a public company, below seven, and, in the case of a private company, below two; or

(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and

registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up, or have

devolved on him through the death of a former holder.

(5) Except, in the case where he is authorised in pursuance of Clause (f) of Sub-section (1), the Registrar shall be entitled to present a petition for

winding up a company only on the grounds specified in [clauses (b), (c), (d), (e) and (f)] of Section 433:

Provided that the Registrar shall not present a petition on the ground specified in Clause (e) aforesaid, unless it appears to him either from the

financial condition, of the company as disclosed in its balance sheet or from the report of [a special auditor appointed u/s 233A or an inspector]

appointed u/s 235 or 237, that the company is unable to pay its debts:

Provided further that the Registrar shall obtain the previous sanction of the Central Government to the presentation of the petition on any of the

grounds aforesaid.

(6) The Central Government shall not accord its sanction in pursuance of the foregoing proviso, unless the company has first been afforded an

opportunity of making its representations, if any.

(7) A petition for winding up a company on the ground specified in Clause (b) of Section 433 shall not be presented -

(a) except by the Registrar or by a contributory; or

(b) before the expiration of fourteen days after the last day on which the statutory meeting referred to in Clause (b) aforesaid ought to have been

held.

(8) Before a petition for winding up a company presented by a contingent or prospective creditor is admitted, the leave of the Court shall be

obtained for the admission of the petition and such leave shall not be granted -

(a) unless, in the opinion of the Court, there is a prima facie case for winding up the company; and

(b) until such security for costs has been given as the Court thinks reasonable.

After hearing the parties, the following order was passed on 6th April 2004:

From the averments made in the petition, accompanying documents and the supporting affidavit, show that the respondent company is unable to

pay its debts. Petition is admitted. Citation be issued in ""Economic Times"" (English) and ""Navbharat Times"" (Hindi) and in Delhi Gazette for the

next date of hearing. Looking into the nature of allegations, and particularly the conduct of the respondent Official Liquidator, attached to this

Court is appointed as Provisional Liquidator, who shall take over the assets, properties and books of accounts of the Respondent Company at the

earliest. Ex-Directors of the Respondent company are directed to appear in the Office of O.I. on 10.5.2004 at 11:00 am and file the statement of

affairs of the company.

f) The company petition was thus admitted and citations were directed to be published in the newspapers and the Court also appointed an Official

Liquidator attached to this Court as the Provisional Liquidator.

g) On coming to know of the aforesaid order, the respondent No. 2, SICOM Ltd. moved CA 414/2004 in the company petition. Notice in the

said application was issued returnable on 31st August 2004 In the said application, the respondent No. 2 SICOM Ltd. prayed for a stay of the

application of the order dated 6th April 2004 appointing the Provisional Liquidator and directing him to take over the assets, properties and books

of accounts of the appellant company. It was pleaded that the respondent No. 2 SICOM Ltd. being a secured creditor was in possession of the

unit of Bakemans Industries Pvt. Ltd. situated at Patiala and, Therefore, the same should not be disturbed and the Provisional Liquidator be

directed not to take possession of the unit from the respondent No. 2, SICOM Ltd. The order was thereafter passed to the effect that possession

of the respondent No. 2, SICOM Ltd. of the factory and plant and machinery etc. shall not be disturbed.

h) When the execution application came up for hearing on 19th April 2004, the executing court was informed about the aforesaid developments in

the company petition. The execution petition, in these circumstances, was

transferred to the company Court. However, while transferring the execution petition in the order dated 19th April 2004 the Court made certain observations which are as follows:

It is an admitted position that M/s SICOM exercised the powers u/s 29 of the State Financial Corporation Act and took over possession of the factory premises of M/s Bakemans Industries Pvt. Ltd. and they continue to be in possession of the said premises. In order to recover the debts as owed to M/s SICOM and other creditors by M/s Bakemans Industries Pvt. Ltd., the process of sale was initiated by this Court. In view of the aforesaid order now passed by the learned Company Judge and since the Official Liquidator has been appointed as the Provisional Liquidator it will be necessary and appropriate to order for placing this matter also before the Hon"ble Company Judge to continue further proceedings in this case also. The matter, accordingly, is transferred to the learned Company Judge to continue the further proceedings and to pass appropriate orders in accordance with law.

At this stage, counsel appearing for M/s SICOM states that the power and right of M/s SICOM u/s 29 of the State Financial Corporation Act is an independent right which could be exercised by the said financial institution without any reference to the provisions of the Companies Act which is also so held in the decision of the Supreme Court in International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., . In this regard, reference may be made to paragraph 32 of the said judgment which states as follows:

We Therefore, hold as under:

1. The right unilaterally exercisable u/s 29 of the SFC Act is available against a debtor, if a company, only so long as there is no order of winding up.
2. SFCs cannot unilaterally act to realise the mortgaged properties without the consent of the official liquidator representing workmen for the pari passu charge in their favor under the proviso to Section 529 of the Companies Act, 1956.
3. If the official liquidator does not consent, SFCs have to move the company Court for appropriate directions to the official liquidator who is the pari passu charge holder on behalf of the workmen. In any event, the official

liquidator cannot act without seeking directions from the Company Court and under its supervision.

Right of financial corporation in respect of the factory premises shall be guided by Section 29 of the State Financial Corporation Act read with decision of the Supreme Court in International Coach Builders Ltd. (supra).

(i) When the matter was listed before the learned Company Judge, the counsel for the respondent No. 2 SICOM requested the Company Judge

to allow them to proceed with the auction. This was, however, not allowed by the learned Company Judge and the case was adjourned to 28th

July, 2004

(j) The appellant company served a notice on the respondents dated 1st July, 2004 in which it was stated that the appellant-Company has learnt

that the respondent No. 2, SICOM intended to sell the properties without seeking permission from the Court and without notice to the parties and

to the Custom's Department who had been served a notice by the court. Further, even the Official Liquidator served a notice on the respondent

No. 2, SICOM informing it not to take any action without their permission.

(k) In its reply to the notice of the appellant dated 1st July, 2004, the respondent No. 2 SICOM made no mention of any process of sale having

been initiated. On the contrary, it was stated that the respondent No. 2 SICOM possessed all the rights to sell the property.

(l) The appellant company moved an application under Rule 9 of the Company Court Rules wherein the appellant prayed for maintenance of status

quo and not allowing any action to be taken by the respondent No. 2 SICOM. The said application was disposed of by the learned Company

Judge by an order dated 17th July, 2004 Rule 9 of the Company Court Rules reads as follows:

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.

(m) On 27th July, 2004 the learned Company Judge granted one more opportunity to the appellant company to bring any other bidder and

adjourned the matter to 5th August, 2004 but on 27th July, 2004 the counsel for the appellant received a letter from Sh. Rajiv Shakdhar,

Advocate, informing the counsel for the appellant that the matter was mentioned by the counsel for Ceylon Biscuits Ltd. purported to be the

highest bidder and the matter had been listed for directions on 28th July, 2004

(n) On 28th July, 2004 the learned Company Judge was informed that the buyer and the Director of the Company who were present in the Court

had gone out of station to finalize the deals. The Court directed the matter to be listed on 30th July, 2004

(o) On 30th July, 2004 the affidavit of the Managing Director of the appellant was filed in this Court at about 4.00 p.m. The proxy counsel

requested the court that the counsel had gone out of the Court for some personal work and the matter should be taken on 5th August, 2004 but

the learned Company Judge called for the affidavit filed in the Registry, heard the matter and passed the impugned order by which he accepted the

bid of Ceylon Biscuits Ltd.

It is against this order dated 30th July 2004 and the orders dated 17th July 2004 and 27th July 2004 passed by the learned Company Judge that

the present appeal has been filed before this Court.

3. The learned Senior Counsel for the appellant, Sh. P.V. Kapur submitted as follows:

(a) The sale u/s 29 of the SFC Act by the respondent No. 2 SICOM was illegal and erroneous because when the sale was made the appellant

company was in liquidation and the Official Liquidator was appointed as the Provisional Liquidator making his involvement mandatory. The Official

Liquidator was not involved in the entire process of sale, a fact that has been admitted by the counsel for the Official Liquidator during the course

of hearing on 22nd February, 2000. Mr. Luthra, the learned Counsel made a statement that the old had never been involved in the process and

that the old would support a fresh auction which may be carried out. Thus, the non involvement of the Official Liquidator is against the position of

law laid down by the Hon"ble Supreme Court in the following cases:

i) Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, Thus, on the authorities what emerges is that once a

winding up proceeding has commenced and the liquidator is put in charge of the assets of the company being wound up, the distribution of the

proceeds of the sale of the assets held at the instance of the financial institutions

coming under the Recovery of Debts Act or of financial corporations coming under the SFC Act, can only be with the association of the Official Liquidator and under the supervision of the company court. The right of a financial institution or of the Recovery Tribunal or that of a financial corporation or the Court which has been approached u/s 31 of the SFC Act to sell the assets may not be taken away, but the same stands restricted by Page 1045 the requirement of the Official Liquidator being associated with it, giving the company court the right to ensure that the distribution of the assets in terms of Section 529A of the Companies Act takes place. In the case on hand, admittedly, the appellants have not set in motion, any proceeding under the SFC Act. What we have is only a liquidation proceeding pending and the secured creditors, the financial corporations approaching the company court for permission to stand outside the winding up and to sell the properties of the company-in-liquidation. The company court has rightly directed that the sale be held in association with the Official Liquidator representing the workmen and that the proceeds will be held by the Official Liquidator until they are distributed in terms of Section 529A of the Companies Act under its supervision. The directions thus, made, clearly are consistent with the provisions of the relevant Acts and the views expressed by this Court in the decisions referred to above. In this situation, we find no reason to interfere with the decision of the High Court. We clarify that there is no inconsistency between the decisions in Allahabad Bank v. Canara Bank and Anr. (supra) and in International Coach Builders Limited v. Karnataka State Financial Corporation (supra) in respect of the applicability of Sections 529 and 529A of the Companies Act in the matter of distribution among the creditors. The right to sell under the SFC Act or under the Recovery of Debts Act by a creditor coming within those Acts and standing outside the winding up, is different from the distribution of the proceeds of the sale of the security and the distribution in a case where the debtor is a company in the process of being wound up, can only be in terms of Section 529A read with Section 529 of the Companies Act. After all, the liquidator represents the entire body of creditors and also holds a right on behalf of the workers to have a distribution pari passu with the secured creditors and the duty for further distribution of the proceeds on

the basis of the preferences contained in Section 530 of the Companies Act under the directions of the company court. In other words, the distribution of the sale proceeds under the direction of the company court is his responsibility. To ensure the proper working out of the scheme of distribution, it is necessary to associate the Official Liquidator with the process of sale so that he can ensure, in the light of the directions of the company court, that a proper price is fetched for the assets of the company in liquidation. It was in that context that the rights of the Official Liquidator were discussed in *International Coach Builders Limited (supra)*. The Debt Recovery Tribunal and the District court entertaining an application u/s 31 of the SFC Act should issue notice to the liquidator and hear him before ordering a sale, as the representative of the creditors in general.

ii) *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.,*

22. Since the Official Liquidator is in the position of a co-mortgagee, the SFCs cannot act independently or by ignoring him for enforcing the

security. It is established law that in case of co-mortgagees, all of them should join in the suit for enforcing the security, but if some of them refuse

to join, they have to be included as defendants, not merely as *Performa* parties, but as necessary parties inasmuch as the mortgage right vests in

them along with the plaintiffs- mortgagees. (See in this connection the judgment of the Privy Council in *Sunitibala Debi v. Dharae Sundari Debi* AIR

1919 PC 24. The same principle would be substantially true and applicable in the case of a mortgagee and a *pari passu* charge-holder over the

same security for Realizing the security. The realization of the security can only be done by both the charge-holders joining and Realizing the

security simultaneously. If a sale takes place, it can only be simultaneously for recovery of the claim of all *pari passu* charge-holders and sale

proceeds are required to be divided proportionately in the same proportion as their dues.

(b) The learned Company Judge, by not following the guidelines regarding the procedure to be adopted while conducting the public auction and

accepting the sale of property as contemplated by respondent No. 2 SICOM u/s 29 has acted contrary to the mandate of the Supreme Court. The

respondent No. 2 SICOM deliberately published smallest possible advertisement

with limited circulation without giving the reserve price and other details of the property. Further, the reserve price was conspicuously absent in the advertisement which is mandatory as per the position of law as laid down by the Supreme Court, since the non fixing of the reserve price detracts the prospective buyers from buying the property.

(c) The advertisement published by the respondent No. 2 SICOM should have been in the format provided to this Hon"ble Court during the course of the arguments. The size of the advertisement provided in the leading newspaper like Times of India is eight times the size of the advertisement published in the present case. The latest advertisement given by the old in another case clearly mentions the minute description of the property, the reserved price, date of instruction, earnest money etc.

(d) The learned Company Judge was not justified in rejecting the valuation report filed by the appellant company and accepting the valuation of NITCON which conducted the valuation at the instance of the respondent No. 2, SICOM. The difference between the two valuations was more than 60 crores. Further, the valuation which was done at the instance of M/s. Ceylon Biscuits Pvt. Ltd., the auction purchaser also shows that the value of the property was worth about 77 crores, a fact which has not been denied by M/s. Ceylon Biscuits Pvt. Ltd.

(e) The learned Company Judge has overlooked the orders passed by the Execution Court dated 23rd April, 2004, 5th April, 2004 and 19th April, 2004 wherein it was specifically mentioned that a fresh valuation be done by an independent valuer, fresh bids were to be called and then inter se bidding to be done between the bidders. The intention of the execution court in getting the fresh valuation done by the independent valuer by the aforesaid orders was defeated when the respondent No. 2, SICOM got the property revalued from the same valuer i.e. NITCON. Since NITCON could not have given a higher valuation than already given as it would have affected their credibility since their first valuation was as low as Rs. 8.65 crores.

(f) The failure on the part of the appellant not to bring a higher bidder cannot be accepted as a reason for accepting a grossly undervalued bid of one of the bidders. The existence of three different valuation reports ranging from Rs. 10-80 crores obtained from three different parties clearly

establish that the valuation of the property done by the respondent No. 2, SICOM Ltd. is not correct and proper. Even if the Circle rates of the

concerned area is taken into account, the value of the land alone would be much more than 12.5 crores, i.e. the price at which the whole property

(land, building, plant and machinery) was sold.

(g) The learned Company Judge on 17th July, 2004 ought to have re-auctioned the property after getting fresh valuation done through the Official

Liquidator for fixing up the reserve price. The learned Company Judge should have got the property re-auctioned as per the law laid down by the

Hon'ble Supreme Court in Rajasthan Financial Corporation v. Official Liquidator (supra).

(h) The learned Company Court erred in not appointing an independent valuer since there were conflicting valuation reports of different values.

(i) The learned Company Judge overlooked the conspiracy between the respondent No. 2, SICOM and Ceylon Biscuits. M/s. Ceylon Biscuits

was introduced by the appellant company after the execution of the memorandum of understanding for taking over the entire unit of the company

including all the liabilities.

(j) As per the position of law laid down by the Hon'ble Supreme Court in the case of the Union Bank of India Vs. Official Liquidator H.C. of

Calcutta and Others, the court is under an obligation to act in the interest of the creditors and in Allahabad Bank etc. etc. Vs. Bengal Paper Mills

Co. Ltd. and Others, , it was held that fixing of the reserve price by the Court was mandatory.

i) In Union bank of India v. Official Liquidator H.C. of Calcutta (supra) the Hon'ble Supreme Court held as follows:

10. At the outset, we would state that in proceedings for winding up of the Company under liquidator, the Court acts as a custodian for the interest

of the company and the creditors. Therefore, before sanctioning the sale of its assets, the Court is required to exercise judicial discretion to see that

properties are sold at a reasonable price. For deciding what would be reasonable price, valuation report of an expert is must. Not only that, it is

the duty of the Court to disclose the said valuation report to the secured creditors and other interested persons including the offerers. Further, it is

the duty of the Court to apply its mind to the valuation report for verifying

whether the report indicates reasonable market value of the property to be auctioned even if objections are not raised.

ii) In Allahabad Bank and Ors. v. Bengal Paper Mills Co. Ltd. (supra), the Hon''ble Supreme Court held as follows:

13. It is to be noted that no reserve price for the sale was fixed. Why this should have been so is not understood, particularly having regard to the

fact that a valuer had been appointed of the assets and properties and a report obtained. The valuation report was not disclosed. The order of the

learned Single Judge does not set out what the valuation of the property that was sold was. It does not even state that, in view of that valuation, the

offer of Rs. 2 crores made by the second respondent was a fair and adequate price. Further, the learned Single Judge did not notice what the

Division Bench did, namely,

The Company had 15.2.73 acres of leasehold land. This was not taken into consideration by the valuer on the ground that the lease period was

only up to 14th October, 1992. The valuer has not indicated whether he had examined the lease deed or whether there was any renewal Clause in

the lease agreement". The valuation was, Therefore, itself suspect.

22. In Navalkha and Sons Vs. Ramanuja Das and Others, this Court quoted Rule 273 of Companies (Court) Rules, 1959, thus : 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. It then said:

The principles which should govern confirmation of sales are well-established. Where the acceptance of the offer by the Commissioners 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 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 would not be proper exercise of judicial discretion. In *Gordhan Das Chuni Lal v. T. Sriman Kanthimathinatha Pillai*

AIR (1921) Mad. 286 , it was observed that where the property is authorised to be sold by private contract or otherwise it is the duty of the

Court to satisfy itself that the price fixed is the best that could be expected to be offered. That is because the Court is the custodian of the interests

of the Company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion

regard being had to the interests of the Company and its creditors as well. This principle was followed in *Ratnasami Pillai Vs. Sabapathy Pillai* and

Others, and *S. Soundararajan and Others Vs. Khaka Mahomed Ismail Saheb of Messrs. Roshan and Co., In A. Subbaraya Mudaliar Vs. K.*

Sundararajan, (Joint Receiver) and Others, it was pointed out that the condition of confirmation by the Court being a safeguard against the

property being sold at an inadequate price, it will be not only proper but necessary that the Court in exercising the discretion which it undoubtedly

has of accepting or refusing the highest bid at the auction held 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.

4. The learned Senior Counsel for the respondent Sh. Sundaram submitted as under:

(a) The Orders dated 17th July 2004, 27th July 2005 and 30th July 2005 passed by the learned Company Judge make it clear that in spite of the

numerous opportunities granted to the appellant to bring a prospective buyer who was willing to offer an amount higher than what had been offered

by the highest bidder M/s Ceylon Biscuits Ltd., i.e., Rs. 12.5 crores, it had failed to do so. Thus, there was no infirmity or illegality in the said

orders.

(b) The appellants have preferred an appeal being EFA (OS) No. 08/2004 against the order of the learned Single Judge dated 16th March 2004

in Execution Petition No. 288/2003 in which the jurisdiction of the learned Single Judge was challenged on the ground that since the property of

the appellant company was situated in Patiala, this Court did not have the jurisdiction to entertain the Execution Petition. The said appeal was

dismissed by this Court by its order dated 23rd March 2004 Thereafter the

appellant company participated in the sale proceedings on various occasions and sought permission from this Court to bring a buyer who was willing to offer an amount higher than that offered by M/s Ceylon

Biscuits Ltd. Thus, the appellant company having acquiesced to the jurisdiction of this Court cannot challenge the same.

(c) The learned Counsel for the appellant company gave an undertaking before the learned Company Judge on 27th July 2004 that if by the next

date the appellant company was unable to bring any higher bid it will have no objection if the bid of M/s Ceylon Biscuits Ltd. was accepted. On

30th July 2004 the learned Single Judge accepted the bid of M/s Ceylon Biscuits Ltd. pursuant to the failure of the appellant to bring a buyer

willing to offer a higher bid and till the submission of the bids this exercise was done entirely under the supervision of the Court, i.e., by the learned

Single Judge of this Court sitting as the Executing Court in Execution Petition.

(d) Rule 9 of the Company Court Rules provides for the inherent powers of the Court. Thus, the learned Company Judge well within its powers to

accept the bids of the Ceylon Biscuits Ltd. and confirm the sale of the appellant's factory situated at Patiala.

(e) The respondent exercised its powers u/s 29 of the SFCA pursuant to which it is in possession of the unit of appellant situated at Factory Area,

village Rasulpur Saidan, Tehsil and District Patiala, Punjab. Thus, the respondent is empowered to sell the assets of the appellant. However, even

though the respondent was empowered to conduct the sale of the assets of the appellant on its own was conducted under the supervision of this

Court so that there was complete transparency in the process of sale. This fact has also been recorded in the order of this Court dated 16th March

2004 The relevant portion of the said order reads as follows:

There cannot be any impediment in exercising the powers of selling the property through public auction in a transparent manner in an open Court

instead of allowing the judgment Debtor No. 3 to sell the property at its end without any supervision of the Court. Since the Court will be

supervising the sale to find out the best suitable bid, I find no ground to stay the proceedings, which is initiated by this Court.

(f) Section 446(1) of the Companies Act, 1956 provides for exclusion proceedings commenced against the company after the winding up order is

passed. Section 446(1) of the Companies Act, 1956 reads as follows:

Suits stayed on winding up order - (1) When a winding up order has been made or the Official Liquidator has been appointed as provisional

liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against

the company, except by leave of the [Tribunal] and subject to such terms as the [Tribunal] may impose.

Thus, in the instant case, since no winding up order has been passed till date, the observations made by the learned Single Judge on the original

side in his order dated 19th April 2004 cannot be held illegal. Further, the learned Single Judge on the original side did not proceed with the matter

on 19th April 2004 and after he was apprised of the order dated 6th April 2004 had transferred the matter to the Company Court.

(g) In International Coach Builders" case (supra) it was held that the power and right u/s 29 of the SFCA is an independent right which can be

exercise without any reference to the Companies Act. Moreover, the SFCA is a special Act and by virtue of Section 46(B) of SFCA which

contains the non- obstinate clause which overrides the provisions of the Companies Act.

(h) The property was correctly valued at Rs. 10 crores. The earlier assets of the companies had been valued at Rs. 8,42,43,000/- and since the

appellant company had contended that the valuation was on the lowest side the learned Single Judge by an order dated 24th March 2004 directed

the respondents to get the entire assets revaluated by appointed by appointing an approved valuer. Therefore, a fresh valuation of the assets was

carried out by the Mr. J. S. Lamba, Senior Consultant, North Indian Technical Consultancy Organization Ltd. and a fresh valuation report valuing

entire assets at Rs. 10 crores which was specifically noted in the order dated 5th April 2004 in the presence of the counsel for the appellant. The

valuation submitted by the appellant by one Sh. Harjinder Kohli and Associates, which valued the property at Rs. 78,13,51,000/- was clearly a

procured document and hence could not have been relied upon. The said Chartered Accountant have themselves admitted that they are not a firm

of approved Chartered Valuers and hence they were not the technical persons who could claim any expertise in evaluating the appellant"s unit.

Further, even if according to the appellant the property was being sold for a sum below its actual value, it was open to the appellant to bring a

bidder who could offer a more than 12.5 crores.

(i) The appellant company moved an Execution Application No. 699/2003 for modification of the order dated 15-16th September, 2003 by which

this Court directed the parties to maintain status quo, notice on the said application was issued by this Court on 4th October, 2003 and the

appellant company was directed to deposit some amount to demonstrate its bonafide. But when the matter came up for the hearing on 28th

November, 2003 before this Court the counsel for the appellant company stated that the said proposal will be accompanied with the sum of Rs. 2

crores to demonstrate appellant's bonafide.

(j) On 18th December, 2003 this Court inter alias held that the status quo deserves to be restored. The statements of the Managing Director of the

Appellant and Director of Captain Hygiene Products Ltd. that it will deposit Rs. 2 crores on or before 7th February 2004 was also recorded. It

was also recorded that the Judgment Debtor No. 1 and Judgment Debtor No. 2 shall submit a proposal for settlement setting out a payment due to

the Judgment Debtor Nos. 2,3,4 and 5 and also held that if the payment of Rs. 2 crores was not made by the stipulated date, the respondent No.

2 SICOM will be at liberty to avail the statutory remedy available in law for the sale of the property. On failure of the appellant to deposit of Rs. 2

crores the respondent published an advertisement for sale of appellant unit at Patiala in various newspapers. On 9th February 2004 the learned

Single Judge granted a last opportunity, i.e., four weeks time to the Judgment Debtor Nos. 1 and 2 to comply with its order dated 19th December,

2003 and he further observed that in failure to comply with the directions as stated in the said order would result in the sale of factory premises

being proceeded with on the next date. The respondent was also directed by the Court to bring the bids received against the advertisement to the

Court so that the same could be open in the presence of the parties. It was further held that if necessary the assets shall be sold by inter se bidding

in order to get the best price available for the assets of the company.

(k) On 16th March 2004 the learned Single Judge opened the bids received by the respondent No. 2 SICOM and after considering the bids

received he accorded time to M/s Ceylon Biscuits Ltd. and other interested parties to participate in the bids. M/s Ceylon Biscuits Ltd. was also

permitted to inspect the appellant unit at Patiala with advanced intimation to the respondent No. 2 SICOM.

(l) In view of the fact that the company judge has not passed a winding up order and the respondent had called upon the bidder whose bids had

already been received to join the process of sale which was once again taken up by the respondent No. 2. Therefore, the Court found that none of

the bidders were interested to raise their bids and also that the appellant had failed to bring a buyer willing to offer a higher bid. The learned

Company Judge by his order dated 30th July 2004 confirmed the sale to the highest bidder, i.e., M/s Ceylon Biscuits Ltd. Thus, there is no

illegality or infirmity in the order of the learned Company Judge in the order dated 30th July 2004

(m) The appellant had challenged the jurisdiction of the learned Single Judge on the ground that the assets of the appellant were situated at Patiala.

However, the said appeal was dismissed by the division bench of this Court by an order dated 23rd March 2004 with the liberty to make its

submission before the Learned Single Judge including those relating to jurisdiction. Thereafter, consequent to the order dated 6th April 2004

admitting the winding up petition, the execution petition was transferred before the Learned Company Judge who was within his jurisdiction to pass

the order confirming the sale in favor of the highest bidder.

5. After considering the submissions and the arguments of the learned Counsel for both the parties we are of the view that the learned Single Judge

on 17th July, 2004 found that the respondent No. 2, SICOM Ltd. had not initiated the sale on its own and the bids were received in the Court and

a transparent method was adopted and this was all done under the supervisions of the learned Single Judge. Five bidders were asked to submit

their bids. Even after the revaluation a fresh chance was given to all the five bidders. The appellant was also given another chance to bring a

buyer/bidder having a better and higher offer. The learned Single Judge has also held that the same was done under the supervision of the Court

though the Judge was sitting in the executing Court and thereafter the proceedings were transferred to the learned Company Judge.

6. Further, even though the respondent No. 2 SICOM had accepted the bid, all which was required to be done by the Court, the acceptance was

taken to be subject to the order of the Company Judge and the Company Judge could proceed in the matter and decide whether such a bid was

being accepted or not. Thereafter, the learned Single Judge proceeded to consider the bid of the M/s Ceylon Biscuits Ltd. Out of the five

remaining bidders M/s Longulf Trading (India) Pvt. Ltd. had withdrawn the bid and other three bidders did not respond. Thus, only the bid of Rs.

12.5 crores of M/s Ceylon Biscuits Ltd was available and naturally the question of inter se bid could not arise and the decision was required to be

taken on the basis of available bids.

7. The learned Single Judge in the order dated 17th July, 2004 also considered the issue of valuation. Earlier the property was valued at Rs.

8,42,43,000/- and the appellant company having objected to the valuation, the Court had directed re-valuation of the property through an

approved valuer. The appellant company was also allowed to participate in the proceedings with a direction to produce the relevant records.

Consequently, the senior Consultant of North India Technical Consultancy Organization Ltd., a joint venture of IDBI, IFCI, ICICI and State

Financial Institutions and banks was appointed as valuer who submitted a fresh valuation report valuing the entire assets as worth Rs. 10 crores.

This valuation was specifically noted in the order dated 5th April, 2004 and the learned Counsel for the appellant company was also present on

that date. In view of this valuation, even fresh bids were invited and public notice was issued by the respondent No. 2, SICOM Ltd. The valuation

of Sh. Harjinder Kohli and Associates propounded by the appellant company was not accepted by the learned Company Judge as it was done on

the basis of documents/records and information produced before them and they had taken into account only the book value of the assets and not

the market value. It was also found that said Sh. Harjinder Kohli and Associates were not the firm of approved Chartered valuers having any

expertise in evaluating the plant and machinery or for the land and the building.

8. Therefore, in these circumstances, the proposal of Ceylon Biscuits Ltd. of Rs. 12.5 crores was found to be much more than the valuation of Rs.

10 crores estimated by the approved valuer. However, even at that stage on 17th

July, 2004, the appellant company was given a chance to bring to Court an higher offer. Even though the chance granted on 16th March, 2004 was not availed of by the appellant company to bring forward any buyer, the learned company Judge nevertheless in the interest of justice still gave yet another opportunity to the appellant to bring a better offer by 27th July, 2004 and mandated that the offer of the buyer should be a firm offer complying with the conditions given in the order dated 9th February, 2004 and it should be accompanied by a pay order representing at least 10% of the bid amount. Upon such an offer with the aforesaid deposit being made, the offer sought to be brought by the appellant was to be considered. It was also observed on 17th July, 2007 that in the event of such an offer not being produced, the offer of M/s Ceylon Biscuits Ltd. would be accepted with appropriate orders regarding the sale proceedings. The matter was thereafter listed on 27th July, 2004 when it was recorded that the appellant company was negotiating the sale with some buyer and a last opportunity was sought and it was also stated by the learned Counsel for the appellant company that if a higher bid is not brought by the appellant company, the appellant company will have no objection if the bid of the Ceylon Biscuits was accepted. Accordingly, the matter was directed to be listed on 4th August, 2004 and thereafter matter was directed to be listed on 28th July, 2004, in view of the difficulty expressed by the learned Counsel for the Ceylon Biscuits Ltd. On 28th July, 2004, the following order was passed : ""In view of the order passed on 27th July, 2004 , this matter was taken up for hearing today. Mr. Ashok Chhabra, learned Counsel appearing on behalf of the respondent company submitted the purported difficulty expressed by the Ceylon Biscuits Ltd is stated orally with no particulars or affidavit in this behalf. Let an affidavit by duly authorised representative of the Ceylon Biscuits Ltd be filed during the course of the day with an advance copy to the Learned Counsel for SICOM Ltd. as well as respondent Company. It was stated by Mr. Ashok Chhabra, Advocate that respondent company is negotiating the sale with some buyers. Let an affidavit of prospective buyers as well as Ex-Managing Director of the respondent company be filed in this behalf stating the terms of the bid which the prospective buyers proposed to give with an advance copy to the Learned Counsel for SICOM

Ltd. and Ceylon Biscuits Ltd. the affidavit should also contain an undertaking that the bid quoted, if accepted, would be honoured by the

prospective buyers. ON giving such an affidavit, the prospective buyers would be given time to submit firm bid along with the earnest money by

5th August, 2004

Let this matter was listed for directions on 30th July, 2004 at 2.00 p.m. This led to the impugned order of the learned Company Judge dated 30th

July, 2004 After enumerating the history of the sale, the learned Company Judge noted the order dated 17th July, 2004 and found that no

prospective buyer had filed an affidavit nor was deposit of 10% of the bid amount made. Only an affidavit of the Managing Director of the

appellant company was filed who did not state any offer or any bid of any buyer or indeed name a buyer and the Managing Director had merely

stated that he had been able to tie up finances and the first installment would be received on or before 5th August, 2004 on which date a pay order

of Rs. 50 lacs shall be produced in Court and this offer would be definitely for the welfare of all the financial institutions and workers. The learned

company Judge found that the arrangement offered in the affidavit did not inspire confidence and was only a delaying tactic and that only an offer to

deposit Rs. 50 lacs against the current liability of more than Rs. 50 crores and it was also not stated as to what manner and within how much time

the company will be in a position to discharge its liability. The learned company Judge also noted that the affidavit did not disclose the source of

finances. The learned Company Judge, Therefore, rightly concluded that in spite of giving various opportunities to the appellant company and its

Managing Director, they have been unable to produce a better bid. The learned Company Judge found that the property which was valued at Rs.

10 crores by the approved valuer eventually led to an offer of Rs. 12.5 crores when other bidders whose bids were lesser withdrew from the

bidding process. Accordingly, the Bid of M/s Ceylon Biscuits Ltd was accepted. It is this acceptance of offer of Rs. 12.5 crores which has been

challenged in this appeal.

9. Before we go into the judgments cited by the learned Counsel for the appellant, a perusal of the sequence of events reflected by the orders of

the learned Company Judge show that the learned Company Judge had made

every effort to accommodate the possibility of the appellant company producing the better and a higher offer. We cannot also loose sight of the fact that the learned Counsel for the appellant had also stated on 27th July, 2004 that in case a higher offer is not brought by the appellant, the appellant company shall have no objection to the acceptance of the offer made by M/s Ceylon Ltd. Indisputably, the appellant has not brought a higher offer and the affidavit of Managing Director filed has been rightly found by the learned Company Judge to be merely a part of the delaying tactics adopted by the appellant company. The Company Judge has also rightly found that the entire exercise of the sale was conducted under the aegis of this Court whether as an Executing Court or as a Company Judge and every effort was made to accommodate the possibility of a higher offer being secured by the Company or otherwise. A higher offer not having been brought before the learned Company Judge by the appellant company, clearly indicates that the appeal is merely in continuation of such efforts of the company facing winding up and sale of its assets to delay the proceedings by repeatedly asking for opportunities to bring a higher offer. We have noticed that on 24th March, 2004, 19th April, 2004, 17th July, 2004 and 28th July, 2004, the learned Company Judge accommodated the appellant company and had even found that till the last date 30th July 2004 when the impugned order was passed that no firm offer was made by the appellant company and it merely offered to deposit sum of Rs. 50 lacs without naming the source of such funds. In our view the appellant not having brought a higher offer in spite of repeated opportunities, the plea about under valuation lacks bonafides and consequently merits rejection.

10. The learned senior counsel for the appellant has relied upon the position of law laid down by the Hon"ble Supreme Court in Union Bank of India's case(supra) to submit that the Court acts as a custodian for the interest of the company and the creditors. Therefore, before sanctioning the sale of its assets, the Court is required to exercise judicial discretion to see that properties are sold at a reasonable price and for deciding what would be reasonable price, valuation report of an expert is must. In the instant case, it is clear that the learned Company judge has acted in the manner befitting its position as the custodian of the interests of the creditors and

that of the Company by giving another chance to the appellant to bring a higher bid and to get the assets revalued again. Such an opportunity was spurred by the appellant. The learned senior counsel further relied upon the position of law laid down by the Hon''ble supreme Court in Allahabad Bank and Others v. Bengal Paper Mills Co. Ltd. (supra), to submit that the Learned company judge should have fixed a reserve price for the assets. But in our view, the act of fixing the reserve price was peculiar to the facts of the said case. Further, in the said case the Hon''ble Supreme Court relied upon the position of the law laid down in the case of Navalkha and Sons Vs. Ramanuja Das and Others, wherein it was held that 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 and unless the court is satisfied about the adequacy of the price, the act of confirmation of the sale would not be a proper exercise of judicial discretion. Thus, keeping in view of the position of law laid down in the Navlakha''s case (supra) we are of the view that the as mentioned above, the learned Company Judge acted in the best manner possible to safeguard the interest of the appellant.

11. The learned Counsel for the appellant has also relied upon the position of law laid down by the learned Supreme Court in Rajasthan Financial Services Case (supra) and International Coach Builders Ltd. (supra) to submit that once the order of winding up has commenced the distribution of sale proceedings should be under the supervision of the official liquidator and the supervision of the Company Court. However, the position of law laid down in Rajasthan Financial Services Case (supra) case and International Coach Builders case (supra) are not applicable in the instant case since the order of winding up was not passed in the present case and both the above judgments are based on the premise of a situation pertaining post winding up. The order dated 17th July, 2004 does not show the presence of the Official Liquidator during the Court proceedings though his counsel Sh. S.K. Luthra did contend that though he was present, his appearance was not recorded. Further, the said case also lays down that the distribution of the proceeds of the sale of the assets should be inter alias held under the supervision of the Company Court which was done in this case.

12. Accordingly, we find no infirmity in the order of the learned Company Judge in approving the sale of the assets to the M/s Ceylon Biscuits Ltd.

In this view of the matter, the appeal is dismissed with no order as to costs and all interim orders stand vacated.

All pending applications also stand disposed of accordingly.