
(2008) 05 SC CK 0171

In the Supreme Court Of India

Case No : Civil Appeal No. 3628 of 2008 (Arising out of SLP (C) No. 12616 of 2007) and Civil Appeal No. 3629 of 2008 (Arising out of SLP (C) No. 14427 of 2007)

Bakemans Industries Pvt. Ltd.

APPELLANT

Vs

New Cawnpore Flour Mills and Others

RESPONDENT

Date of Decision : 16-05-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, 9
Companies (Court) Rules, 1959 — Rule 293
Companies Act, 1956 — Section 2, 236, 391, 431, 433
State Financial Corporations Act, 1951 — Section 29, 31

Citation : AIR 2008 SC 2699 : (2008) AIRSCW 4507 : (2008) 6 ALLMR 463 : (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) 4 Supreme 581

Hon'ble Judges : V. S. Sirpurkar, J;S. B. Sinha, J

Bench : Division Bench

Advocate : P.V. Kapur and P.H. Parekh, Vikas Pahwa, Abhinit Das, Nitin, Chetna, Marie, Prem Malhotra and Rishi Malhotra, Ravindra Kumar, for the Appellant;

Final Decision : Allowed

Judgement

S.B. Sinha, J.—Leave granted in both the matters.

2. Whether power of a Company Court to sell the property of a company vis-a-vis the power of the Financial Corporation can be merged is the question involved in these appeals which arise out of the judgments and orders dated 2nd July, 2007 and 6th July, 2007 passed in Company Appeal No. 27 of 2004 and Company Appeal No.2 of 2007 respectively passed by the Division Benches of the Delhi High Court.

3. Certain basic facts are not in dispute which are as under:

SICOM Ltd. (SICOM in short) advanced a loan of Rs. 17 crores to the appellant (M/s. Bakemans Industries Pvt. Ltd.). It became a defaulter. SICOM issued a

notice u/s 29 of the State Financial Corporations Act (1951 Act in short) on 22nd January, 2003. Another notice was issued for taking over possession of the properties of the sister concern of the appellant, viz. Captain Hygiene Products Ltd. Appellant and its sister concern filed two writ petitions in the Punjab and Haryana High Court at Chandigarh. They were dismissed as withdrawn on 10th February, 2003.

4. 1st respondent and fourteen others filed fifteen applications before the Delhi High Court for winding up of the appellant-company. Notices were issued thereupon. SICOM issued a second notice u/s 29 of the 1951 Act on 6th June, 2003.

5. Indisputably the factory of the appellant was an ongoing concern. SICOM took over the possession of the appellant's factory at Patiala on 18th July, 2003. It was at that time in operation. It had finished bakery products which were perishable in nature. Allegedly the operations were shut down and the factory was locked.

6. We may notice here that different proceedings were initiated either at the instance of the appellant or at the instance of some of the respondents.

7. Appellant evidently took recourse to a proceeding which was unknown to law. A purported agreement was entered into by and between the appellant and one NRI Lead Bank. We are not aware as to what were the disputes about between them. The said purported disputes were referred to Arbitral Justice Tribunal of ADR Arbitration, a body said to have been recognized by the Government of India in terms of Section 21 of the Arbitration and Conciliation Act, 1996. A purported reference of disputes in terms of a purported arbitration agreement contained in a composite instrument dated 14th August, 2003 was referred on 16th August, 2003. It was accepted by the Tribunal on 18th August, 2003 and notices were issued. The majority of the Tribunal opined that there was no genuine arbitration agreement. The arbitration proceeding was closed on 23rd August, 2003.

8. A new set of Arbitrators was constituted by the Tribunal who rendered an award on 16th August, 2003 upon holding a day's sitting only opining that (i) taking over of the unit was illegal and (ii) a direction was issued to handover possession to Bakemans.

9. A purported execution petition was filed by NRI Lead Bank before the Delhi High Court seeking execution of a purported written agreement/settlement dated 16th August, 2003 passed by the Board of Conciliation in the said proceedings.

10. The execution petition was filed not only against the appellant and its sister concern, Captain Hygiene Products Pvt. Ltd. but also against SICOM. Industrial Development Bank of India, Industrial Finance Corporation of India, HUDF Bank, State Bank of Patiala, and Punjab State Industrial Development Corporation Ltd. were also impleaded as parties therein.

11. We shall deal with the factual matrix thereabout a little later.

12. However, in the meantime, another proceeding by way of an application u/s 9 of the Arbitration and Conciliation Act, 1996 was filed before the Tis Hazari Courts, Delhi. It was registered as Misc. Suit No. 139 of 2003. Inter alia, a prayer was made therein to appoint a receiver. However, it appears that another Bank initiated a proceeding before the Debt Recovery Tribunal for recovery of its dues. A Receiver was appointed by the said Tribunal in respect of the perishable goods on 1st September, 2003.

13. Possession of the said perishable goods lying in the factory was taken from SICOM. A spot report was prepared.

14. Appellant in the meantime relying on or on the basis of the said purported Award of the Board of Conciliation took forcible possession of the factory premises on 14th September, 2003.

15. SICOM filed an application in the said purported execution proceeding seeking for the following directions:

- i) to withdraw the proceeding before the learned Additional District Judge ;
- ii) to vacate and handover the premises ;
- iii) to grant prohibitory injunction ; and
- iv) to stay the operation of the Arbitration Award.

16. An order of status quo which had been passed earlier was directed to be maintained by the parties by the High Court on 15th September, 2003.

17. An application for modification of the order dated 15th September, 2003 was filed by SICOM on 16th September, 2003.

18. Appellant also filed an application for permission to sell all perishable goods lying in the factory. Allegedly, the Receiver was asked to sell the perishable goods.

It also directed the appellant to pay some amount to show its bona fide. Appellant furthermore filed an application for vacation of the order dated 15th/16th September, 2003. On 28th November, 2003 an assurance was also given to the Court that the appellant will come with a definite proposal for payment to the creditors. By an order dated 18th December, 2003 the High Court directed the appellant to deposit a sum of Rupees two crores failing which SICOM was given a liberty to proceed with the statutory remedies available to it under the Act for sale of the properties. An undertaking was given to the Court by the Managing Director of the appellant in the following terms:

Mr. Rajiv Kumar Gupta, Managing Director of judgment debtor No.1 and Director of judgment debtor No.2, who is present in Court, undertakes to the Court that on or before 7.2.2004, a sum of Rs. 2 crores would be deposited with judgment

debtor No.3, to be apportioned towards the liability of judgment debtor Nos.3,4 and 5. Judgment debtor Nos.1 and 2 shall also give a proposal for settlement, setting out a firm payment schedule for consideration of judgment debtor Nos.3, 4 and 5. In the event the payment of Rs. 2 crores is not made on the date stipulated, judgment debtor No.3 would be at liberty to avail of statutory remedies available at law for sale of the property.

Counsel for the parties also pray that the modalities of restoration of possession be got done under the supervision of officers of this Court, so as to avoid unseemly controversies and a clear account of the equipments, machinery and the assets, of which possession is taken over at the factory premises is available. Considering the quantum of work required, counsel for the parties pray that at least three Local Commissioners be appointed. Accordingly, I appoint Mr. D.K. Batra, Joint Registrar of this Court, Mr. S.P.Tara, Deputy Registrar of this Court and Mr. Anil Kumar Arora, Sr.Personal Assistant of this Court, as the Local Commissioners to visit the Factory Area, Village Rasulpur Saidan, Tehsil and District Patiala, State of Punjab. The Local Commissioners shall make a complete inventory of the equipment, machinery, assets, raw materials, finished, semi finished products, if any. The possession of factory and assets be handed over to the representatives of respondent No.3. Inventory be also got signed by the parties. The Local Commissioners may in their discretion also make any observation with regard to the condition or state of equipment, assets etc. The Local Commissioners to execute the commission on 23.12.2003 at 11.00 a.m. The fee of the Local Commissioners, Mr.D.K.Batra is fixed as Rs. 22,000, Mr.S.P.Tara is fixed as Rs. 20,000/- and Mr.Anil Kumar Arora is fixed as Rs. 18,000/- , exclusive of out of pocket, travel and lodging expenses.

Learned Counsel for judgment debtor Nos.1 and 2 submit that upon payment of Rs. 2 crores and a firm schedule being given for repayment, as acceptable to the financial institutions, the Court should grant repossession to judgment debtor No.2. This aspect would be considered upon the payment of Rs. 2 crores having been made and firm schedule for repayment having been given and accepted. Counsel for judgment debtor Nos.1 and 2 state that, in the meanwhile, they would not proceed further with the arbitration proceedings, initiated before the ADR, Arbitral Tribunal No.3. Mr. Arun Bhardwaj, counsel for judgment debtor No.1, further states that judgment debtor No.1 would not proceed with Suit No.139/2003, pending in the Court of Sh. S.K.Sarvaria, A.D.J., Delhi.

19. In the meantime, SICOM obtained a valuation report in respect of the factory form a Public Sector Organization known as Northern India Technical Consultancy Organization Ltd. (NITCOL). In the said proceeding, SICOM had also moved an application for direction to permit them to publish an advertisement for sale of the moveable properties of the appellant and to invite bids for sale.

20. We may now deal with the process of sale of assets of the company. The factory of the appellant was situated in village Rasulpur, District Patiala in the State of Punjab. The land measured 30,544 sq. yards. The building comprised of

three floors having RCC construction. There were plants and machineries. There was also unpacked material which had been imported from abroad. Pursuant to the permission granted by the Court to SICOM to make an advertisement, one was issued in Economic Times(All Editions), Business Standard (All Editions), Tribune (Chandigarh Edition) and Dainik Bhaskar (Chandigarh and Patiala Editions). As the appellant failed to deposit the said sum of Rupees two crores and never submitted the definite proposal in terms of the order dated 28th November, 2003, SICOM was given the liberty to proceed with the sale.

21. On or about 15th March, 2004, respondent No.4, Ceylon Biscuits Pvt. Ltd. filed an application seeking direction that they be also permitted to inspect the factory on the premise that they had held negotiations with the appellant for taking over the entire unit. Counsel who was representing the appellant also represented Ceylon Biscuits Pvt. Ltd.

22. A question was raised in regard to the jurisdiction of the executing court to proceed with the matter of sale of the properties. By reason of an order dated 16th March, 2004, the Court noticed the bids submitted by the ITC Limited and Britannia Industries Ltd. not only on the entire plant but also on item wise basis. The Court rejected the contention of the appellant both in regard to its jurisdiction as also its valuation report inter alia opining that it had failed to deposit a sum of Rupees two crores and submitted the repayment schedule in terms of its earlier order as such there was no other option but to proceed with the sale process.

In regard to the offer of M/s. Ceylon Biscuits Ltd. it was directed:

They shall file their bid positively before 23.3.2004. It is also made clear that if there could be any other interested bidder, he/it could submit a bid in accordance with the requirements, which shall be considered. It shall also be open to the judgment debtor Nos.1 and 2 to obtain other/better offers from any other bidder. It is made clear that in all the offers/bids which shall be submitted by any other bidder, the bidders shall have to comply with the formalities and the terms that have been advertised on 23.2.2004.

23. Ceylon Biscuits Pvt. Ltd. on or about 24th March, 2004 offered the bid price at Rs. 12.5 crores. It also deposited the earnest money of Rs. 25 lakhs. There was another bidder M/s. Longful Trading (India) Pvt. Ltd. who had made a bid of Rs. 11.7 crores. It had also deposited the earnest money of Rs. 25 lakhs. In regard to the valuation of the properties both in respect of the factory of the appellant as also its sister concern Captain Hygiene Products Pvt. Ltd. the Court noticed:

It is, however, pointed out by the counsel appearing for Bakemans Industries Pvt. Ltd. and Captain Hygiene Products Pvt. Ltd. that valuation of the said plant and machineries, and land and building would be much higher than what is shown in the valuation report. A valuation report is placed on record wherein it is stated that the realisable value of the aforesaid assets is Rs. 8,42,43,000/-. Counsel appearing for M/s. Bakemans Industries Pvt. Ltd., however, disputes the

aforesaid valuation. In order to ascertain the valuation of the aforesaid assets, it would be appropriate to pass an order directing for re- evaluation of the entire aforesaid assets of the said company. M/s. SICOM Ltd. is directed to get the entire assets re-evaluated by appointing an approved valuer. The said valuation report shall be submitted before the next date. The approved valuer shall visit the factory premises on March 29, 2004 at 11.00 A.M. when the representative of M/s. Bakemans Industries Pvt. Ltd. could also be present at the site for the purpose of assisting and giving appropriate guidance to the approved valuer in ascertaining real value of the assets. The necessary papers of the plant and machineries and other connected records shall be produced by M/s. Bakemans Industries Pvt. Ltd. before the approved valuer in order to assist him in evaluating the aforesaid property. It shall also be open for the approved valuer to collect informations in respect of various assets from other sources as well like custom authorities, Director General Foreign Trade and such like authorities. He shall also give a separate valuation report for un-installed plant and machinery, if any, so as to enable this Court to ascertain the break-up value of the various plants and machineries and to facilitate the process of sale by this Court.

It shall be open to any other willing purchasers also to submit their fresh bids, if so desired, on or before the next date.

24. Allegedly, the appellant filed an application before the Executing Court with a prayer to decide its jurisdiction at the first instance. It is stated at the Bar that neither there is any record in respect thereof in the High Court nor any order appears to have been passed thereon.

25. We may now notice the proceeding before the learned Company Judge.

26. The Company Applications were admitted by an order dated 6th April, 2004. A Provisional Liquidator was appointed. It was directed to take charge of the properties and books of accounts of the company. On an application made by SICOM, however, the learned Company Judge by order dated 16th April, 2004 directed that its possession may not be disturbed.

27. As the Provisional Liquidator had been appointed, the Executing Court transferred the petition to the Company Judge by an order dated 19th April, 2004.

28. Some correspondences appear to have passed between the Advocate of the appellant Official Liquidator and SICOM as regards the effect of the provisions of the Companies Act viz-a-viz Section 29 of 1951 Act.

29. Appellant, thereafter filed an application on 12th July, 2004 for restraining SICOM from taking any further action for the sale/auction of the properties and also asked for an order of status quo to be maintained by the parties. No order on the said application was, however, passed. In its order dated 17th July, 2004 the learned Company Judge observed that the offer of Ceylon Biscuits did not appear to be improper. However, appellant was given an opportunity to bring a

better offer. Second report of NITCON as regards valuation was also accepted.

30. Before the learned Company Judge a valuation report of a Chartered Accountant was submitted which was rejected stating that they were not the approved valuers and they had only taken into account the book value and not the market value of the assets.

31. The matter was posted for hearing on 22nd July, 2004. On that date, proceedings before the learned Company Judge were in two sessions - one before lunch and Anr. after lunch. Before recess, appellant was granted one more opportunity to bring any other bid and the judge adjourned the matter to 4th August, 2004. However, after recess on a purported request made by the learned Counsel for M/s. Ceylon Biscuits the case was preponed to 28th July, 2004. Learned Counsel for the appellant was not present, although it was mentioned that he had been informed. On the next date, i.e. 28th July, 2004 the Court recorded a statement that the respondent company was negotiating with some buyers. An affidavit of the prospective buyer and its Managing Director was directed to be filed in this behalf alongwith an undertaking to honour the bid quoted by the prospective buyer. The matter came up before the learned Company Judge on 30th July, 2004. A prayer for adjournment was made. An affidavit of the Ex-Managing Director of the appellant was filed. However, adjournment was refused. The affidavit was called from the registry and the matter was heard. The Court is said to have waited for the learned Counsel to appear till 4.00 O' clock and then took up the matter for hearing at 4.45 p.m. In its order the learned Company Judge noticed the earlier proceedings at some length. It was held:

No affidavit is filed of any prospective buyer. Affidavit of Managing Director of the respondent company is filed. It does not offer any bid of any buyer. On the contrary, what is stated is that the Managing Director has been able to tie up finances with the various associates 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 the court. It is also stated that the management and associates thereafter would be definitely for the welfare of all the financial institutions and workers and would be a far better than which is being offered by the bidder. This affidavit, obviously, is not in compliance with the directions contained in the earlier orders and Mr. Chhabra's own statement to the effect that the respondent company had negotiated with a buyer who was willing to offer more than the amount offered by M/s. Ceylon Biscuits Ltd. such attempt had been made earlier but failed. The arrangement offered in the affidavit does not inspire confidence and it is only a delaying tactic. He offer to deposit Rs. 50 lacs, in the first instance when the total liability of secured creditors itself is more than Rs. 50 crores, is a pittance. The respondent company has also not stated as to in what manner and within how much time it would be in a position to discharge the entire liability. It is also not stated as to from where it would generate the resources/finances for this purpose. It is, thus, clear that in spite of giving

various opportunities to the respondent company and its Managing Director the respondent company has not been able to produce better bid.

Property in question, which is subject matter of sale, has been valued at Rs. 10 crores. Bid of Rs. 12.50 crores of M/s. Ceylon Biscuits Ltd. is, therefore, reasonable more particularly when other bidders whose bids were not only lesser have already withdrawn from the bidding process, this bid is hereby accepted.

Let balance payment be made by the successful bidder strictly in terms with the bidding conditions and the amount would be deposited in the court. The amount so deposited should be kept in FDR initially for a period of six months.

32. An intra-court appeal was preferred against the orders dated 17th July, 2004, 27th July, 2004 and 30th July, 2004. The matter was listed on 26th August, 2004. Before the appellate court also an offer was made by the appellant to bring a higher offer of Rs. 15 crores. Pursuant to an order made in this regard, a sum of Rs. 50 lakhs was directed to be deposited. The Division Bench also directed maintenance of status quo in the meantime.

33. In the meantime, SICOM and Ceylon Biscuits both filed applications for possession of the factory to be handed over. Such permission was granted on 13th October, 2004.

34. Various applications were filed before the Division Bench and/or this Court. Except noticing that in the meantime another valuation report was filed on 21st November, 2006 in regard to the intangible assets of the company as being Rs. 35.88 cores which had been sold by SICOM in favour of Ceylon Biscuits for a sum of Rs. 10 crores, we need not take note of any other fact. By reason of the impugned judgment dated 2nd July, 2007 the Letters Patent Appeal preferred by the appellant was dismissed and by an order dated 6th July, 2007 the sale certificate was directed to be issued to M/s. Ceylon Biscuits.

It is these orders which are in question before us.

35. Mr. Kapur, the learned senior counsel appearing on behalf of the appellant inter alia would submit:

i) The learned Company Judge while proceeding to direct sale committed a serious illegality in not directing a fresh valuation of the assets of the company and upon taking into consideration the interest of other creditors as also that SICOM itself before accepting the offer of M/s. Ceylon Biscuits.

ii) When a Provisional Liquidator was appointed, his involvement in the process of sale was imperative in character.

iii) Provisions of Sections 441, 456, 450 and 457 read with Rule 293 of the Companies Act show that the involvement of Official Liquidator was absolutely mandatory and the Court could not, in the name of supervision over the sale, substitute itself in the place of the Official Liquidator.

iv) The learned Company Judge completely disregarded the law laid down by this Court in a series of decisions in each and every respect concerning the sale of the assets of a company, in so far as:

a) it did not issue any fresh advertisement ;

b) the advertisement issued being in small print and no guidelines having been issued, the same was irrelevant;

c) the Company Court did not fix any reserve price ;

d) the Company Court did not make any attempt to secure the best possible market price which was its duty to do for the sake of the general body of creditors including workmen and other secured creditors.

v) The Company Court on the one hand appointed an independent valuer for valuing appellant's intangible assets; on the other it simply relied upon two valuation reports made by NITCON without application of mind about its correctness or otherwise.

vi) SICOM's action is mala fide as even it should not have been averse to the process of sale of the factory of the appellant at a higher price, particularly when a memorandum of agreement entered into by and between the appellant and Ceylon Biscuits show that the actual value of the factory was very high as per the Ceylon Biscuits' own valuation report dated 9th September, 2005.

vii) The learned Company Judge as also the Division Bench of the High Court proceeded to determine the entire dispute only on the conduct of the appellant both in respect of obtaining the Award of the Board of Conciliators as also its failure to secure a better price and not on the basis of the legal principles involved in sale of assets of the company in liquidation.

viii) As the Company was an ongoing concern, the Company Judge without involving the Official Liquidator committed a serious error in directing sale of the assets of the company at an early stage of the winding up proceeding without applying its mind that a Scheme for revival of the Company was possible to be filed in terms of Section 391 of the Companies Act.

36. Mr. Rajiv Shakhder, learned senior counsel appearing on behalf of SICOM, on the other hand, urged:

i) SICOM had never been averse to obtaining any higher price as would appear from the proceedings before the High Court both in Execution Proceeding as also the Winding-up Proceeding.

ii) SICOM had all along exercised its right to sell the mortgaged assets in exercise of its statutory powers u/s 29 of the 1951 Act which being in consonance with the principles and guidelines laid by this Court, could not have been interfered with.

iii) The appellant having questioned the action of SICOM in invoking its statutory

powers u/s 29 of 1951 Act by filing two writ applications and having withdrawn the same, it was entitled to take possession of the properties which it did on 18th July, 2003.

iv) The appellant with a view to get back the possession of the factory forged a settlement agreement to deceive SICOM in purported execution of the award of the Board of Arbitration.

v) It took recourse to adventurous litigations not only by getting the aforementioned case filed but also filing an application u/s 9 of the Arbitration and Conciliation Act, 1996 with a view to get a Receiver appointed, although it did not succeed in that attempt.

vi) It is not correct to contend that a Receiver was appointed by the Court in the Arbitration proceeding but the Receiver was appointed by Debt Recovery Tribunal in respect of perishable articles only.

vii) The Executing Court at the initial stage and subsequently the learned Company Judge, merely supervised the sale with a view to bring about transparency in the entire process.

viii) That when a sale is held by a Financial Institution in terms of Section 29 of the 1951 Act, opportunities are granted to the debtors to purchase the property at the price for which the sale had been held or to bring a higher offer.

ix) With a view to satisfy the set norms, the High Court not only permitted Ceylon Biscuits and Anr. to take part in the bidding process but also gave opportunities after opportunities to the appellant to bring a better offer which it failing and/or neglected to comply with.

x) Appellant having undertaken to pay a sum of Rupees two crores and having failed to comply with the same, it was not entitled to raise any objection in regard to the legality or otherwise of the sale, particularly when it was on their suggestions, other bidders were permitted to bid and the said bids were opened in the Court itself.

xi) The advertisement issued by SICOM was in accordance with the usual practice and it is not correct to contend that no guideline was issued or bidders were not permitted to bid (in accordance with the norms).

xii) NITCON is a Public Sector Organization with which SITCOM has no concern, thus it would not be correct to contend that the second valuation report should not have been obtained by it, particularly when the said valuation was in relation to the uninstalled machinery lying at the factory premises in respect whereof the appellant moved the learned Company Judge.

37. Mr. Sundaram, learned Counsel appearing on behalf of respondent No.4 (Ceylon Biscuits), would submit:

i) SICOM had all along exercised its powers u/s 29 of the 1951 Act and the Court

merely supervised exercise of such powers and in that view of the matter the appellant has not been prejudiced at all inasmuch as the same merely provided for additional safeguard for fetching a proper price for the assets.

ii) In view of the decision of this Court in Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, the involvement of the Official Liquidator is necessary only to sell the assets of the company in liquidation and as no winding up order has been passed, involvement of Official Liquidator was not necessary.

iii) The Company Court exercised its jurisdiction in terms of Rule 293 of the Company Court Rules which permitted it to sell the assets itself or through an agent.

iv) If the learned Company Judge thought that SICOM should act as an agent, no illegality can be set to have been committed by reason thereof.

v) Respondent No.4 being a bona fide purchaser, pursuant to an offer, it would be highly prejudiced if the auction sale is set aside at this stage.

38. The core issues which arise for our consideration in view of the rival contentions of the leaned counsel are:

1) Whether in the facts and circumstances of the case the Executing Court and consequently the Company Judge could have supervised the purported sale of the assets of the appellant on behalf of SICOM having regard to the provisions of Section 29 of the 1951 Act?

2) Whether in a case of this nature and particularly having regard to the fact that SICOM submitted itself to the jurisdiction of the executing court and company court, can now turn around and contend that in effect and substance it had exercised its statutory powers u/s 29 of the Act and allowed the same only to be supervised by the learned Company Judge?

3) Whether the statutory powers of a Financial Corporation as envisaged u/s 29 of the 1951 Act would prevail over the proceedings before a Company Judge in a winding up proceeding?

4) Whether involvement of the Official Liquidator in the facts and circumstances of the case and particularly in view of the fact that Official Liquidator brought to the court's notice claims of other creditors, the Company Judge ought to have dealt with the same in the manner laid down in the Companies Act and/or the Rules framed thereunder and/or the decision of this Court?

5) Whether the High Court while exercising its powers u/s 433 of the Companies Act read with other provisions could ignore the claims of the other creditors, and in particular the workmen, having regard to the provisions of Section 529A thereof.

6) Whether the High Court while exercising its jurisdiction both in the execution

proceeding as also winding up proceeding can, in the fact situation obtaining herein, be said to have adopted a fair procedure.

7) Whether in any event the High Court could have ignored the legal requirements as regards the conduct of sale of the assets of the appellant only on the basis of : (1) wrongful conduct on the part of the appellant in obtaining an award from the Conciliation Tribunal; and (2) its failure to bring a better offer from another bidder.

39. The 1951 Act indisputably is a special statute. If a financial corporation intends to exercise a statutory power u/s 29 of the 1951 Act, the same will prevail over the general powers of the Company Judge under the Companies Act.

40. There cannot be any doubt whatsoever that the proceedings u/s 29 of the 1951 Act would prevail over a winding up proceeding before a Company Judge in view of the decision of this Court in *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, wherein it has been held:

26. We do not really see a conflict between Section 29 of the SFC Act and the Companies Act at all, since the rights u/s 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in *A.P. State Financial Corpn.* case. This Court pointed out therein that Section 29 of the SFC Act cannot override the provisions of Sections 529(1) and 529A of the Companies Act, 1956, inasmuch as SFCs cannot exercise the right u/s 29 ignoring a *pari passu* charge of the workmen....

The view taken therein was reiterated by a three-Judge Bench of this Court in *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, wherein it was stated:

18. In the light of the discussion as above, we think it proper to sum up the legal position thus:

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company- in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application u/s 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting u/s 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as

regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation.

[See also ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others,

But, in this case, the sale in favour of Ceylon Biscuits Pvt. Ltd. having not taken place in terms of Section 29 of the 1951 Act, the said question cannot have any application whatsoever.

It is, however, a case where the learned Company Judge was not authorized to exercise its power u/s 29 of the 1951 Act. It purported to exercise its power only under the Companies Act. SICOM submitted itself to its jurisdiction. It allowed the Company Judge to conduct the sale. The sale that was conducted was purported to be in terms of the Companies Act. We have noticed hereinbefore that when a provisional liquidator was appointed, the High Court instead of exercising its writ jurisdiction referred the matter to the Company Judge. It was the Company Judge, therefore, who proceeded in the matter. The Company Judge could exercise its jurisdiction only in terms of the Companies Act and not in terms of Section 29 of the 1951 Act. If it did not have the power under the 1951 Act, any decision purported to have been taken by it would be a nullity. SICOM indisputably has a statutory power but it could waive the same. It preferred the conduct of the auction at the hands of the Company Judge in stead and place of carrying on the same by itself. It submitted itself to the jurisdiction of the Company Judge. Not only it took part in the proceedings without any demur whatsoever, it actively participated therein. It is only at its instance that the bid was held. The other bidders were also brought in.

It is, therefore, not a case where the learned Company Judge had no jurisdiction to exercise supervision of sale of the assets of the appellant on behalf of SICOM in terms of the provisions of Section 29 of the 1951 Act or otherwise. Respondents even never insisted to get the question of jurisdiction determined as a preliminary issue, although raised by it specifically. It, thus, for all intent and purport waived its right.

41. It is in the aforementioned situation, we must consider the question as to whether in the facts and circumstances of this case, the involvement of official liquidator was imperative.

42. The official liquidator brought to the court's notice the claims of the other creditors. The Company Judge having been exercising its jurisdiction u/s 433 of

the Companies Act was, thus, under a statutory obligation to consider the cases of all creditors of the Company simultaneously. For the said purpose, the learned Company Judge was bound to follow the provisions of the Companies Act and/ or the Company Court Rules. The jurisdiction of a Company Court extends only to those matters which are specified in the Companies Act and apart therefrom it had no jurisdiction. It also has a duty to see that the claims of all creditors be dealt with, particularly having regard to the provisions of Section 529A of the Companies Act. We are informed that the workers had also filed their claims. Their claims having regard to a series of decisions of this Court could not have been ignored. [See Allahabad Bank Vs. Canara Bank and Another, and Andhra Bank Vs. Official Liquidator and Another,

43. The claim of the workmen having regard to the special provision as contained in Section 529A of the Companies Act is *pari passu* to the secured creditors of the Company. Clause (11) of Section 2 of the Companies Act, 1956 provides for the definition of 'the court'. In A. Ramaiya, 16th Edn. 2004, the learned author opines that the jurisdiction of a companies court extends only to those matters which are specified in the Act and apart from those matters it has no jurisdiction.

44. The matter might have been otherwise if SICOM had remained outside the winding up proceedings. If it attained, disposal of the assets of the Company would be subject to *pari passu* claim of unpaid workmen in terms of Section 529A of the Companies Act.

45. The sale has been effected by the court treating SICOM as an agent. Factually the court did not do so. Even otherwise, it is impermissible. It exercised its own jurisdiction. It was bound to do so. There cannot be any doubt whatsoever that in the matter of control over the assets of a company in liquidation, the courts exercise a wide jurisdiction. It may not only take recourse to the sale of the assets of the company whether before or after it is wound up, but also would be entitled to, nay obligated to, if the situation so warrants to attempt to rehabilitate the company itself.

While doing so, it exercises its *parens patriae* power. It safeguards not only the interest of the mortgages, but also the interest of the mortgagor. It has a statutory obligation to safeguard the interest of the workmen as also other non-secured creditors.

It is one thing to say as to how the assets shall be distributed but it is another thing to say that while exercising the power to cause the sale of the assets of the company, it would ignore the statutory provision. It must, while exercising its power, take into consideration all relevant factors. The mode and manner as to how a sale would be conducted is one thing but it is another thing that before putting the assets of the company to sale, the court will undertake certain obligations which are inherent in exercise of its jurisdiction under the provisions of the Companies Act.

46. We will assume that the court could appoint SICOM as an agent but apart

from the fact that it, in fact, did not do so, we are inclined to hold that the stand of the learned Counsel is mutually destructive. On the one hand, it is stated that SICOM was exercising its statutory power to cause sale of the assets of the mortgagor through the agency of the court but it is also contended that the sale was affected by the court through SICOM. Such a contradictory or inconsistent stand, in our opinion, is impermissible in law.

47. In NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another, this Court opined:

The Company Judge moreover will have to bear in mind the provisions contained in Section 529A of the Companies Act in terms whereof the dues of the workman and the debts due to the secured creditors to the extent such debts rank in Clause (c) of the proviso appended to Sub-section (1) of Section 529 *pari passu* therewith and shall have a priority over all other debts.

In A.P. State Financial Corporation Vs. Official Liquidator, , this Court held:

Under the proviso to Sub-section (I) of Section 529, the liquidator shall be entitled to represent the workmen and force the above *pari passu* charge. Therefore, the Company Court was fully justified in imposing above conditions to enable the Official Liquidator to discharge his function properly under supervision of the Company Court as the new Section 529A of the Companies Act confers upon a Company Court a duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with provisions of the above Section. The Legislature has amended the Companies Act in 1985 with a social purpose viz. to protect dues of the workmen. If conditions are not imposed to protect the right of the workmen there is every possibility that secured creditor may frustrate the above *pari passu* right of the workmen.

At this stage we may also notice a decision of Three- Judge Bench of this Court in Andhra Bank (*supra*) wherein this Court had to consider the correctness of the decision in Allahabad Bank (*supra*). The questions therein, *inter alia*, to be decided were:

Whether after a winding-up order is passed u/s 446(1) of the Companies Act or a provisional liquidator is appointed, whether the Company Court can stay proceedings under the RDB Act, transfer them to itself and also decide questions of liability, execution and priority u/s 446(2) and (3) read with Sections 529, 529A and 530 etc. of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal ?

This Court after referring to the provisions of Section 529 and 529A stated the law in the following terms:

In terms of the aforementioned provisions, the secured creditors have two options (i) they may desire to go before the Company Judge; or (ii) they may stand outside the winding up proceedings. The secured creditors of the second category, however, would come within the purview of Section 529A(1)(b) read

with proviso (c) appended to Section 529(1). The 'workmen's portion' as contained in proviso (c) of Sub-section (3) of Section 529 in relation to the security of any secured creditor means the amount which bears to the value of the security in the same proportion as the amount of the workmen's dues bears to the aggregate of (a) workmen's due, and (b) the amount of the debts due to all the creditors.

Thus, the High Court could not have disregarded the pari passu charge of the workmen upon the company's assets.

48. The role of the official liquidator in a situation of this nature assumes great importance.

49. Chapter II of the 1956 Act deals with winding up of a company by the court. Section 433 provides for winding up, inter alia, by two modes. One, if the company has by special resolution resolved that it should be wound up by the court; or (2) if the company is unable to pay its debts.

An application for winding up is to be filed in terms of Section 431 of the Act. Section 441 provides that winding up of a company by the court shall be deemed to commence at the time of presentation of petition for winding up. The provision has since been omitted by Companies (Amendment) Act, 2002. Section 442 provides for the power of the court to stay or restrain proceedings against the company, Section 443 envisages power of the court on hearing petition. Section 446 provides for stay of all suits shall. Sub-section (3) of Section 446 reads as under:

Section 446. Suits stayed on winding up order.--

(1) ...

(2) ...

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

50. The Executive Court being a co-ordinate court (as the Execution Petition was filed in the High Court itself) transferred the same to the Company Judge having regard to the fact that a provisional liquidator was appointed. Sub-section (4) of Section 446, therefore, has no application as the proceedings before the Executing Court was not a matter which came up in appeal from a judgment and order of another court. Section 447 provides for the effect of winding up order.

51. Section 448 provides for appointment of 'official liquidator'. An official liquidator would be a liquidator on a winding up order being made in respect of a company. Section 450 provides for appointment and powers of provisional liquidator; Sub-sections (1), (2) and (3) whereof read as under:

Section 450--Appointment and powers of provisional liquidator--(1) At any time after the presentation of a winding up petition and before the making of a winding up order, the¹ [Tribunal] may appoint the Official Liquidator to be liquidator provisionally.

(2) Before appointing a provisional Liquidator, the Tribunal shall give notice to the company and give a reasonable opportunity to it to make its representations, if any, unless, for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice.

(3) Where a provisional liquidator is appointed by the Tribunal, the Tribunal may limit and restrict his powers by the order appointing him or by a subsequent order, but otherwise he shall have the same powers as a liquidator.

52. Section 456 envisages that when a winding up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator, as the case may be, shall take into his custody nay his control of the property, effects and actionable claims to which the company is or appears to be entitled. It is true that the court had not permitted the provisional liquidator to take over the assets. It protected the possession of SICOM. But the same by itself would not mean that the provisional liquidator was denied from performing its other functions.

Section 457 provides for the powers of liquidator. It is in two parts, one which had to be exercised with the sanction of the tribunal and the other which had to be exercised by itself. A liquidator, in terms of Clauses (c) and (ca) is entitled to sell the moveable and Immovable property. Exercise of such jurisdiction by a provisional liquidator, therefore, shall not be denuded of his powers only because it did not obtain possession of the properties. Section 529 of the Act which occurs in Chapter V provides for application of insolvency rules in winding up proceeding of the insolvent companies.

Section 529A expressly saves the rights of the workmen. It contains a non obstante clause. A statutory parri passu charge is created in support of the dues of the workmen being equivalent to the dues of a secured creditor for the purpose enforcing the insolvency rules as contained in Clause (c) of Sub-section (1) of Section 529.

Section 538 of the Companies Act provides for offences by officers of companies in liquidation.

53. The rights, jurisdiction and powers of the provisional liquidator may not be the same as that of an official liquidator.

But in a case of this nature, only because the financial institution stands outside the winding up proceedings, would it mean that the court shall, for all intent and purport, ignore its officer and concentrate on the interest of the financial institution alone? Can it be said that supervision of the court is necessary only in a post winding scenario and not prior to it? The question which should be

addressed, in our opinion, by the Company Court is that the ultimate interest of both secured and non- secured creditors must be kept in mind. Should Court have exercised its jurisdiction for directing the sale of the prime property and, in fact, the essence of the assets of the appellant at the initial stage. The answer, in our opinion, should be rendered in the negative.

54. The Chancery Division in *Re. Dry Docks Corporation of London* 1888 (39) Chancery Division 88, wherein Fry J. held

But then there are circumstances which, in my opinion, vary the rights of the parties. On the 8th of March a provisional liquidator had been appointed. Now the provisional liquidator's appointment is not only provisional, but contingent in this sense, that it operates to protect the property for an equal distribution only in the event of an order for compulsory winding-up being made; and if no such order be made, then his appointment ought not to interfere with the rights of third persons. He was in the position of a receiver, whose appointment might interfere with the rights of third persons. Now with regard to that, the practice of the Court is perfectly plain, as was stated by Lord Truro, in the case of *Russell v. East Anglian Railway Company* (1), in very clear terms. He said : "I apprehend then it may be taken as a rule that, though this Court may have issued a process or have made an order which may interfere with the supposed rights and interests of other parties not parties to the cause, it is always competent for such parties to make an application to the Court for relief; and it is not to be presumed or doubted, but that justice will be duly administered to them on that application.

55. The courts in India have to keep in mind different considerations. The concept of right of property which was existing in 19th Century in England would not stand the test of the act and the interpretation it deserves keeping in view the object and purport of the 1956 Act. In India, the Company Courts have a statutory duty to protect and rights of workmen keeping in view the parri passu charge created in their favour in terms of Section 529A of the Act. Power and functions of a provisional liquidator subject to the limitations imposed by the court are the same as that of an official liquidator.

56. It is furthermore not a case where the rights of third persons were involved. We have held hereinbefore that SICOM failed to keep itself outside the winding up proceedings. It has become a party to it and, thus, when a sale is held by a Company Judge, it should not keep a provisional liquidator out of its purview. It may be true that the provisional liquidator could not sell the property without the sanction of the court, but then feed back of the provisional liquidator by the Company Court was necessary for the purpose of having a complete picture before it.

The official liquidator has informed us that about 373 claims have been filed. The amount of claim is about 100 crores; amongst the claimants, there are banks in whose favour also deeds of mortgages have been executed. Provident Fund dues

and other dues of statutory claims are also subject matter of the claim petition. They also have a priority. The claim of the provident fund is on behalf of the workmen. For scrutiny of the said claims, a Committee has been constituted and we had been informed that except the properties which have been sold in liquidation, there is hardly any other asset upon which the creditors can back upon for the purpose of realization of their dues.

57. It is true that in a liquidation petition, secured creditors ought to be differently treated. A third party who has an independent right would not be affected by reason thereof. Ordinarily, even the statutory power of the said financial corporation would also not be affected.

58. We, however, are not in a position to agree with the submissions of Mr. Sundaram that provisional liquidators have no statutory powers in relation to affecting sale of a moveable or Immovable property. Indisputably, it is subject to the direction of the court but, as indicated hereinbefore, the Court while undergoing the process of winding up and, in any event, resorting to sale of the assets of the company under winding up proceeding could not have ignored the involvement of the provisional liquidator for any purpose whatsoever.

At the cost of repetition, it is reiterated that the discretion of the court for selecting the mode and manner of sale has nothing to do with the process required to be gone into for the said purpose.

It must have before it all these facts and figures so as to enable it to pass a final order one way or the other. In so doing, the court must keep in mind that it is not only determining an issue by and between the mortgagor and one mortgagee only but could also be determining the issue between a debtor and a vast number of creditors; whether secured or non-secured.

The ratio of the decision of the Madras High Court in *Sri Chamundi Theatre Mysore Talkies Ltd. Vs. S. Chandrasekara Rao*, whereupon reliance has been placed by Mr. Sundaram may be noticed. In that case, an advocate was appointed as a provisional liquidator. The distinction between appointment of an official liquidator as a provisional liquidator and an advocate as a provisional liquidator must be viewed differently. When an official liquidator is appointed as a provisional liquidator, the purpose is that he must become aware of all the processes of winding up leading to exercise of his statutory power, if ultimately the courts find it just and equitable to direct the winding up of a company. In that case, the application for winding up was not pressed by the petitioner-creditor.

Provisional liquidator, however, was directed to continue unless he hands over the charge to the Managing Director to be elected in terms of the order passed by the learned Company Judge. The provisional liquidator, in view of the orders of the court, ceased to be in judicial control or statutory control over the properties of the company. Interpretation of Section 450 as opined by the learned judges of the Madras High Court must be viewed from the

aforementioned factual matrix in mind.

It is not the law nor has such a proposition been canvassed before us that the properties vested in the provisional liquidator, as was the submission in that case. But then, however, the learned judges opined that the appointment and power of a provisional liquidator is controlled by the instrument which appoints him and that his office is not in equation to that of an official liquidator, the same, however, would not mean that even when there does not exist such limitation, the services of provisional liquidator shall not be resorted to.

59. Strong reliance has been placed on in *Re A.I. Levy (Holdings) Ltd.* 1964 (1) Chancery Division 19].

60. We may at this stage notice the statutory provisions as regards the provisional liquidator in the United Kingdom. The Insolvency Act, 1986 governs the winding up proceedings in England & Wales.

Briefly stated the scheme of the said Act is as under:

The expression "office-holder" is defined in Section 234(1). It means the administrator, the administrative receiver, the liquidator or the provisional liquidator, as the case may be. For the purposes of Section 236 the expression includes, in the case of a company which is being wound up by the court in England and Wales, the official receiver, whether or not he is the liquidator.

Under the heading "The liquidator's functions" Section 143 of the Insolvency Act describes the general functions of the liquidator in a winding up by the court as follows:

General functions in winding up by the court

(1) The functions of the liquidator of a company which is being wound up by the court are to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it.

(2) It is the duty of the liquidator of a company which is being wound up by the court in England and Wales, if he is not the official receiver-

(a) to furnish the official receiver with such information,

(b) to produce to the official receiver, and permit inspection by the official receiver of, such books, papers and other records, and

(c) to give the official receiver such other assistance, as the official receiver may reasonably require for the purposes of carrying out his functions in relation to the winding up.

In *Official Receiver (Appellant) v. Wadge Rapps & Hunt (a firm) and Anr.* and two other actions [2003] UKHL 49, the question which was to be decided by the House of Lords was whether the official receiver can have recourse to the powers

conferred by Section 236 of the Insolvency Act 1986 ("the Insolvency Act") for the sole purpose of obtaining evidence for use in disqualification proceedings against a former director.

Observing the functions of the liquidator vis-à-vis disqualification proceedings envisaged under the Section 236 of the Act, Lord Millett opined:

The first of these strands proceeds from the premise that the powers conferred by Section 236 are conferred on a liquidator "for the better discharge of his functions in the winding up". These words are not derived from the express terms of the section but are evidently considered to be implicit in it. The unspoken assumption is that a liquidator's "functions in the winding up" are limited to the collection and distribution of the company's assets. I agree that the bringing of disqualification proceedings is not a function which is conferred on the official receiver "in the winding up"; if it were, the costs of the proceedings would be payable out of the assets of the estate. It is not necessary to consider whether the gathering of evidence for the purpose of such proceedings is part of "his functions in the winding up", for this formulation is unduly narrow. The liquidator's functions in relation to the company which is being wound up are not and never have been limited to the recovery and distribution of the company's assets. It would be very odd if the liquidator of a company in voluntary liquidation could apply to the court to direct a public examination in the wider public interest but could not invoke Section 236 to order a private examination in the same interest. In practice the liquidator would usually prefer to invite the official receiver to make the application; and even where the application was made by the liquidator the court would be disposed to invite the views of the official receiver. But it is impossible to say that the liquidator would be acting outside his proper role in the one case and not in the other. Section 236 contains no express limitation on the purpose for which it may be invoked. Of course it may be invoked only for a legitimate purpose in relation to the company which is being wound up, and the court, which has discretion to make or refuse an order, should be astute to see that the powers conferred by the section are not abused. It would plainly be an abuse to use those powers for a purpose which is foreign to the functions of the applicant in relation to the company which is being wound up. But I reject the unspoken assumption that the functions of a liquidator are limited to the administration of the insolvent estate. This is only one aspect of an insolvency proceeding; the investigation of the causes of the company's failure and the conduct of those concerned in its management are another. Furthermore such an investigation is not undertaken as an end in itself, but in the wider public interest with a view to enabling the authorities to take appropriate action against those who are found to be guilty of misconduct in relation to the company. If the investigation yields information material to the Secretary of State's decision to bring or continue disqualification proceedings, it must be reported.

It was furthermore opined:

In my opinion, the only limitation which is implicit in Section 236 is that it may

be invoked only for the purpose of enabling the applicant to exercise his statutory functions in relation to the company which is being wound up. Whether the applicant is the official receiver or the liquidator or other office-holder these include the provision of information to the Secretary of State or the official receiver which is relevant to the bringing or continuing of disqualification proceedings.

61. Interestingly, Mr. Rajiv Shakhder has made extensive reference from Farar's Company Law, Third Edition to contend that as the appellant had defaulted in payment of its dues to various secured and non-secured creditors including SICOM, it was admittedly heading towards insolvency and in that view of the matter, the assets of the company were really in a practical sense their assets and not the assets of the creditors. We may notice the observations made by the learned author:

As we have seen, directors do not owe duties to shareholders as such. Neither do they owe duties to the company's creditors. The orthodox position being as stated by Dillon LJ in *Multinational Gas and Petrochemical Co. v. Multinational Gas & Petrochemical Services Ltd.* 1983 Ch. 258 directors owe fiduciary duties to the company though not to the creditors, present or future, or individual shareholders.

Winkworth v. Edward Baron Development Co. Ltd. (1987) 1 All ER 114, a House of Lords decision, might suggest that there has been a change to that position with Lord Templeman stating:

...a company owes a duty to its creditors, present and future. The company owes a duty to its creditors to keep its property inviolate and available for repayment of its debts. The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors'.

The learned author furthermore observed:

Support here for this approach can be found in *West Mercia Safetywear Ltd. v. Dodd* (1986) 4 ACLC 215 where Dillon LJ approved the following statement of the position by the New South Wales Court of Appeal in *Kinsela v. Russell Kinsela Pty Ltd.* (1989) AC 755:

In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If as a general body, they authorize or ratify a particular action of the director, there can be no challenge to the validity of what the directors have done. But where a company is insolvent, the interests of the creditors intrude. They become prospectively entitled through the mechanism of liquidation, to

displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that through the medium of the company are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration'.

62. This is the meet of the matter. If the property which has been put to auction was the prime property over which the fate of the creditors depended, be they secured or non-secured ones, the company court, in exercise of its equity jurisdiction could not have obliterated it from its mind the cases of the others. If the assets belong to the creditors, that must mean the whole body of the creditors and not only one of the secured creditors. The inconsistency of is self-evident, as, on the one hand, it is stated that the property of the company does not vest in the court or the official liquidator, on the other hand, it is stated that it is vested in the body of the creditors and not only in SICOM.

63. The High Court, therefore, could not have ignored the official liquidator only on the ground that a provisional official liquidator was appointed and not a regular official liquidator. The power and functions of the provisional official liquidator for all intent and purport would be the same as that of the official liquidator and, therefore, it was not necessary for the Company Judge to wait till the Company was wound up.

64. If the jurisdiction of a Company Judge is limited, any substantial deviation and departure therefrom would result in unfairness. When an order is passed in total disregard of the mandatory provisions of law, the order itself would be without jurisdiction. In this case, however, even otherwise a fair procedure was not adopted. We, however, very much appreciate the anxiety on the part of the Court to see that otherwise just dues of SICOM be realized. Conduct of a party plays an important role in the matter of grant of a relief. However, only because the conduct of a party was not fair, the same, by itself, cannot be a ground to adopt a procedure which is unjust or unfair, particularly, when by reason thereof, not only the Company itself but also other creditors are seriously prejudiced. We fail to see any reason as to why the hearing of the case was to be preponed. Why even a day's time could not have been granted when a prayer for adjournment was made. The jurisdiction of the Company Court is vast and wide. It can mould its reliefs. It may exercise one jurisdiction or the other. It may grant a variety of reliefs to the parties before it. The parties before the Company Judge are not only the Company or the creditors who had initiated the proceedings but also others who have something to do therewith. Even in a given case a larger public interest may have to be kept in mind. The court may direct winding up. It may prepare a scheme for its restructuring.

65. We, therefore, are of the opinion that the Company Judge was not correct in its view and passed the impugned judgments only having regard to the wrongful conduct on the part of the appellant in obtaining an award from the conciliation tribunal or failure to bring a better offer from another bidder.

66. The question which is really an intricate one is what relief can be granted. On the one hand, the Company has committed wrongs, on the other, its property has been sold in auction. Even a part of the property has been permitted by us to be taken out of the country. The factory, we are told, has started operation. It has employed a large number of workmen. Would that itself mean that we should refrain ourselves from granting any relief? Direction issued by this Court in a case of this nature need not be a narrow one.

The court has to take into consideration the fate of not only those workmen who are working but also those who have a claim against the Company. We must also take into consideration the fate of the other creditors.

67. We, therefore, are of the opinion that interest of justice would be subserved if while allowing the appeal, the learned Company Judge is requested to go into the question afresh in accordance with the provisions of the Companies Act and hold a fresh auction.

While doing so, indisputably, Ceylon Biscuits Pvt. Ltd.'s offer would be considered. The Company Judge may consider the question of grant of some preference to Ceylon Biscuits Pvt. Ltd. but while an auction is to be held, there should be a proper valuation of all the assets of the Company both movable and immovable.

The court, indisputably, may consider the question of framing an appropriate scheme if it is found that there is a possibility of revival of the Company. In other words, we leave all options open to the learned Company Judge as are available in terms of the provisions of the Companies Act including adjustment of equities amongst the parties.

Till, however, a final order is passed, Ceylon Biscuits Pvt. Ltd. would continue to function not as an auction purchaser but as a Receiver of the Company Court. Ceylon Biscuits Pvt. Ltd. shall file all statement of accounts in regard to the amounts which it had invested and all other requisite statements including the valuation of machinery it had taken out of the country before the Court. The Court may appoint a Chartered Accountant to verify the said statements. The court, if it thinks fit and proper, may, apart from the provisional liquidator, appoint another person to supervise the works and functioning of Ceylon Biscuits Pvt. Ltd. as a receiver of the Court. As Ceylon Biscuits Pvt. Ltd. is being appointed as a receiver, it goes without saying that it shall act strictly under the supervision of the court and abide by the orders which may be passed by it from time to time.

68. For the reasons aforementioned, the appeals are allowed to the aforementioned extent. In the facts and circumstances of the case, however, there shall be no order as to costs.