

(2011) 04 MAD CK 0211

In the Madras High Court

Case No : O.S.A. No's. 58, 59, 63, 64 and 81 of 2011

Bharat Heavy Electricals Limited

APPELLANT

Vs

Arunachalam Sugar Mills Limited
New Horizon Sugar Mills Ltd. Vs Indian Renewable Energy Development Agency Limited, (IREDA) and Others
V. Kannan, V. Baskaran, K. Usha and B. Bhavani Vs Indian Renewable Energy Development Agency Limited, (IREDA) and Others
Walchandnagar Industries Ltd. Vs The Official Liquidator and Indian Renewable Energy Development Agency Limited

RESPONDENT

Date of Decision : 12-04-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Companies (Court) Rules, 1959 — Rule 107, 272, 72, 9
Companies Act, 1956 — Section 19(19), 232, 433, 442, 443(1)
Industrial Disputes Act, 1947 — Section 25FF
Provincial Insolvency Act, 1920 — Section 47
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 19(19)
Sales of Goods Act, 1930 — Section 49, 49(1), 49(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 13(5), 13(9)
State Financial Corporations Act, 1951 — Section 29, 29, 31, 31

Citation : (2011) 04 MAD CK 0211

Hon'ble Judges : V. Periya Karupiah, J;R. Banumathi, J

Bench : Division Bench

Advocate : Anita Sumanth and N. Muthukumar, in O.S.A. Nos. 58 and 59 of 2011, T.K. Seshadri, Counsel for Gupta and Ravi in O.S.A. Nos. 63 of 2011, G. Rajagopal in O.S.A. No. 64 of 2011, Krishna Srinivas, for Ramasubramaniam and Associates in O.S.A.No. 81 of 2011, for the Appellant; Anita Sumanth and N. Muthukumar for respondent No.7 in O.S.A. No. 64 of 2011, T.K. Seshadri, Sr.Counsel for Gupta and Ravi for respondent No. 6 in O.S.A. No. 63 of 2011 G. Masilamani for King and Patridge for Respondent No. 1 in O.S.A. Nos. 63 and 64/2011 and for Respondent No. 2 in O.S.A. No. 81/2011, S.R. Sundar, for Official Liquidator for Respondent No. 2 in O.S.A. Nos. 63 and 64/2011 and Respondent No. 1 in O.S.A. No. 81/2011, S. Vasudevan, K. Krishnaswamy and Abdul Qudhose for Respondent No. 3 in O.S.A. Nos. 63 and 64/2011, Ram Kumar, R.S. Varadarajan and K. Selvakumari for Ram and Rajan, Associates for

Respondent No. 4 in O.S.A. Nos. 63 and 64/2011, R. Umasuthan and G. Sanjeevi, (for Vijaya Bank) for Respondent No. 5 in O.S.A. Nos. 63 and 64 of 2011, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—O.S.A. Nos. 63 and 64 of 2011 arise out of the order of learned single Judge dated 19.1.2011 in C.A. No. 1038 of 2006 in C.P. No. 229 of 2004, whereby the learned single Judge directed sale of assets of both immovable, land and building and plant and machinery and other movable assets of Arunachalam Sugar Mills Limited (hereinafter referred to as "ASM") by fixing the upset price at Rs. 86.44 Crores. ASM's sister concern - New Horizon Sugar Mills Limited (hereinafter referred to as "NHSM") is the Appellant in O.S.A. No. 63 of 2011. The promoters/directors and their wives are the Appellants in O.S.A. No. 64 of 2011. Being aggrieved by the dismissal of the applications "O.A. Nos. 253 and 254 of 2005 filed u/s 9 of Arbitration and Conciliation Act and directing Bharat Heavy Electricals Limited (in short, "BHEL") to lodge its claim with the Official Liquidator, BHEL has preferred the appeals" O.S.A. Nos. 58 and 59 of 2011. O.S.A. No. 81 of 2011 is filed by Walchandnagar Industries Limited, one of the unsecured creditor against the order dated 19.01.2011 made in C.A. No. 2486 of 2006 in C.P. No. 229 of 2004.

2. FACTUAL BACKGROUND OF THE MATTER:

Indian Renewable Energy Development Agency Limited (in short, "IREDA") granted financial assistance to the tune of Rs. 49,35,28,000/- to ASM under loan agreements dated 10.9.1998, 21.7.1999, 29.10.1999 and 3.12.1999; (i) for setting up a 14 MW Bagasse based Co-generation Captive Power Plant; (ii) for enhancing the capacity of Co-generation Captive Power Plant from 14 MW to 19MW; and (iii) for financing expenditure in setting up energy efficient conservation equipment. IREDA has got a first charge over the assets of ASM. IREDA has also granted financial assistance to the NHSM to the tune of Rs. 15,54,10,000/- for the purchase of energy efficient equipment to be leased and installed in ASM in juice extraction and juice concentration unit of ASM under loan agreements dated 29.10.1999 and 6.12.1999 and IREDA gets a first charge over the energy efficient equipment financed to NHSM and a second charge over all the assets of NHSM. Within few months of the commencement of production, ASM started losing altitude and both ASM and NHSM committed default in respect of the credit facilities availed by them from IREDA and other creditors.

3. O.A. Nos. 112, 113 and 114 of 2004:

IREDA has filed applications "O.A. Nos. 113 and 114 of 2004 for recovery of Rs. 62.83 Crores and Rs. 9.17 Crores respectively from ASM. IREDA has also filed O.A. No. 112 of 2004 before Debt Recovery Tribunal-I, New Delhi for recovery of Rs. 20.03 Crores from NHSM. IREDA issued notice u/s 13(2) of SARFAESI Act to

both ASM and NHSM to discharge in full the above liability. When notice u/s 13(2) was issued to both Sugar Mills, the provisional liquidator of ASM had not then been appointed.

4.C.P. No. 229 of 2004:

On 12.7.2004, one of the creditors of ASM M/s. Alstom Project India Limited filed C.P. No. 229 of 2004 for winding up of ASM. In C.A. No. 1393 of 2004 filed in C.P. No. 229 of 2004, by an order dated 22.7.2005, D. Murugesan, J. appointed Official Liquidator as provisional liquidator to take charge of the properties and effects of the Company.

5. Claims of other creditors, who sold/leased machinery to Arunachalam Sugar Mills Limited:

Sundaram Finance Limited filed application in A. No. 4401 of 2004 u/s 9 of the Arbitration and Conciliation Act seeking appointment of an Advocate Commissioner to seize and deliver the machinery available in the premises of ASM. By orders dated 8.12.2004 and 19.3.2005, the Commissioner was appointed to seize and sell the machineries. Thereafter, Sundaram Finance Limited, who let out the machineries to ASM, entered into a Memorandum of understanding on 27.9.2005 with IREDA in and by which it was agreed that IREDA would sell all the properties on or before 31.3.2006 and pay the amount due to Sundaram Finance Limited. It was also agreed that if IREDA was not able to sell the properties before 31.3.2006, Sundaram Finance Limited would be at liberty to approach the Court. BHEL, which supplied and commissioned (i) A 8400 KW Capacity Extraction cum Back Pressure Turbo generator and (ii) A 4280 KW Capacity Low Pressure Condensing Turbo generator with all its auxiliaries in the factory of ASM and to whom also payment was defaulted, initiated proceedings by invoking arbitration clause contained in the agreement by filing applications O.A. Nos. 253 and 254 of 2005 restraining ASM from selling, transferring or alienating its properties. On 19.3.2005, interim injunction was granted in both the applications.

6. Sale of assets of New Horizon Sugar Mills Limited by secured creditor Indian Bank:

NHSM at Pondicherry availed credit facilities from Indian Bank and Indian Bank initiated proceedings under SARFAESI Act, 2002 by issuing notice u/s 13(2) on 25.9.2004 demanding a sum of Rs. 27,19,15,465/-. In pursuance to the said notice, Indian Bank took possession of the assets of NHSM located at Ariyur, Pondicherry on 1.1.2005 u/s 13(4) of the Act. The assets of NHSM were sold for Rs. 52 Crores and M/s.EID Parry Limited became the highest bidder in the auction and the sale in their favour was got confirmed.

7. IREDA, which had already filed O.A. Nos. 112 to 114 of 2004 on the file of Debt Recovery Tribunal, New Delhi filed applications before the Debt Recovery Tribunal-I, New Delhi seeking permission of DRT to initiate steps under SARFAESI

Act. By the order dated 4.10.2005, those applications were allowed by DRT permitting IREDA to initiate steps under SARFAESI Act. IREDA also filed applications I.A. Nos. 872 and 874 of 2005 for withdrawal of O.A. Nos. 113 and 114 of 2004. On 5.10.2005, IREDA initiated action under SARFAESI Act and u/s 13(4) took possession of the assets of ASM for which it has financed. IREDA issued public notice on 20.1.2006 fixing the upset price at Rs. 96.80 Crores.

8. Challenging the measures taken by IREDA u/s 13(4) of the Act, the promoters/directors of the Company "ASM filed application in S.A. No. 3 of 2006 on the file of DRT-I, Chennai u/s 17 of the Act. By order dated 16.2.2006, DRT stayed opening of the tenders, but permitted IREDA to receive tenders and keep them in a sealed cover. IREDA filed I.A. No. 31 of 2006 before the Tribunal for vacating the stay. By order dated 24.3.2006, Tribunal permitted IREDA to open the tenders and retain only the highest bid and return the E.M.D. to the other bidders. In the tendercum-auction held on 20.2.2006, IREDA received highest bid from Ambika Sugars for Rs. 135.50 Crores.

9.C.A. No. 1786 of 2005:

The Official Liquidator, who was appointed as the provisional liquidator by order dated 22.7.2005, filed application in C.A. No. 1786 of 2005 seeking various directions including direction to IREDA to hand over possession of the properties. By order dated 24.4.2006, the application "C.A. No. 1786 of 2005 was allowed and IREDA was directed to hand over possession of the properties on or before 28.4.2006 to the Provisional Liquidator. However, the Court directed that the security posted by IREDA in the premises shall continue. In the said order, the Company Court directed the Provisional Liquidator to file a report regarding the valuation of the properties for further steps to be taken. In pursuance of the said order in C.A. No. 1786 of 2005, IREDA handed over possession of the assets of ASM to the Official Liquidator on 27.4.2006.

10.C.A. No. 1038 of 2006:

After handing over possession, IREDA filed the application in C.A. No. 1038 of 2006 seeking an order for fresh publication for the sale of assets of the company in liquidation (ASM) and also the machineries of NHSM by IREDA installed in ASM by joining (i) official liquidator; (ii) IREDA, and (iii) Sundaram Finance Limited. Along with C.A. No. 1038 of 2006, IREDA also filed C.A. No. 1039 of 2006 praying for confirmation of sale in favour of the highest bidder, who offered Rs. 135.50 Crores in the bid cum auction held on 20.2.2006.

11.C.A. No. 1033 of 2006:

At the same time, the promoters/directors of the Company ASM and their respective wives (Appellants in O.S.A. No. 64 of 2011) took out an application in C.A. No. 1033 of 2006 praying to transfer SARFAESI Appeal -S.A. No. 3 of 2006 on the file of DRT-I, Chennai to the High Court to be heard along with C.P. No. 229 of 2004.

12. All the three applications viz., C.A. Nos. 1033, 1038 and 1039 of 2006 were taken up together for hearing and disposed of by the order dated 3.7.2006, wherein Chitra Venkataraman, J, (i) directed fresh publication for sale in C.A. No. 1038 of 2006; (ii) dismissed C.A. No. 1039 of 2006, as a consequence thereof; and (iii) dismissed C.A. No. 1033 of 2006 on the sole ground that by the order passed on 24.4.2006 in C.A. No. 1786 of 2005, the possession taken under the SARFAESI Act was already directed to be handed over to the Official Liquidator and that therefore, nothing survived in the SARFAESI appeal, requiring the same to be transferred to this Court.

13. The Respondents 5 to 8 herein (promoters-Directors and their wives) did not challenge the orders passed in C.A. No. 1033 & 1039 of 2006, but filed an appeal in O.S.A. No. 226 of 2006, only as against the order passed in C.A. No. 1038 of 2006, directing fresh paper publication to be made for the sale of the properties. The said appeal was disposed of by a Division Bench, by order dated 25.7.2006, inter alia issuing directions and requested the Company Court to dispose of the matter within a period of three weeks. The Division Bench has permitted the interested parties to intervene and file their objections and also observed that the interveners/banks and finance companies are entitled to be heard on their objections to the auction sale and remitted the matter back to the Company Court for fresh consideration. Thereafter C.A. No. 1038 of 2006 was taken up for hearing. By the order in C.A. No. 1471 of 2006, the promoters and their wives were impleaded as Respondents No. 5 to 8 in C.A. No. 1038 of 2006. Mr. V. Kannan, who is also the Chairman of ASM filed a separate application C.A. No. 1472 of 2006 for impleading NHSM and the said application was allowed impleading NHSM (Appellant in O.S.A. No. 63 of 2011). BHEL, who obtained interim order of injunction in O.A. Nos. 253 and 254 of 2005 u/s 9 of the Arbitration Act were also impleaded as the 10th Respondent in C.A. No. 1038 of 2006. Walchandnagar Industries Limited filed an application in C.A. No. 2486 of 2006 seeking to exclude a boiler sold and supplied to ASM from the list of properties, whose sale was sought by the IREDA in C.A. No. 1038 of 2006. According to Walchandnagar Industries Limited, they have obtained a decree from the Civil Court and that they have a lien over the boiler and for the balance due they have obtained a decree from the Civil Court and execution proceedings are pending.

14. After the matter was remitted back to the Company Court in C.A. No. 1038 of 2006, V. Kannan, Chairman of ASM started sending letters to the creditors offering one time settlement. Simultaneously, V. Kannan and other directors and their wives have also filed counter affidavits to the application in C.A. No. 1038 of 2006. V. Kannan also filed an affidavit of one M.R. Ramchender claiming to be the Chairman and Managing Director of a Company incorporated in Singapore offering USD 30 million equivalent to Rs. 120 Crores for the rehabilitation of ASM. In C.P. No. 229 of 2004, V. Kannan has also filed an affidavit in March 2008 agreeing and confirming to make payment to the secured and unsecured creditors in the manner indicated in the affidavit. The promise to settle the dues

borne out to be an empty promise and about two years was lost in this process from the date of order of the Division Bench remanding the application to the Company Court. Thereafter, by an order dated 2.9.2008, Chitra Venktataraman, J. directed the Official Liquidator to bring the properties for sale viz., land of an extent of 125 acres, building, plant and machinery and other movables. The learned Judge fixed the upset price of the land at Rs. 11.44 crores, the buildings at Rs. 9.00 crores and the plant and machinery and other movable assets at Rs. 66.00 crores (totalling to Rs. 86.44 crores) on the basis of the valuation done by ITCOT Consultancy Services Private Ltd. Thereafter, IREDA filed an application listing out the machineries financed to NHSM, which in turn were leased and installed in ASM to sell all those machineries. An Order was passed on 8.9.2008 in C.A. No. 1038 of 2008 directing the Official Liquidator to indicate separately the value of the assets financed, both the Companies separately and also permitting the sale of the machineries of NHSM (financed by IREDA and leased out and installed in ASM).

15. By another order passed on the same day viz., 2.9.2008, the application's O.A. Nos. 253 and 254 of 2005 filed by BHEL came to be dismissed on the ground that they are only unsecured creditors and therefore sale of the properties alone would bring relief to all the parties. The injunction order passed on 19.3.2005 in O.A. Nos. 253 and 254 of 2005 got vacated and BHEL was directed to lodge their claim with the Official Liquidator.

16. As against the order passed on 2.9.2008, NHSM and the directors of ASM and their wives filed appeals in O.S.A. Nos. 321 and 345 of 2008. As against the order of dismissal of the applications in O.A. Nos. 253 and 254 of 2005, BHEL has preferred two appeal's O.S.A. Nos. 341 and 342 of 2008. All the four appeals # O.S.A. Nos. 321, 341, 342 and 345 of 2008 were heard together by the Division Bench and by the order dated 27.10.2009 the Division Bench allowed all the four appeals and remitted the matter back to the Company Court for hearing the matter afresh after considering all the objections of all the parties.

17. In the light of the emphasis laid to consider all the objections of all the parties, the learned single Judge heard the matter at length including the objections relating to the maintainability of the application in C.A. No. 1038 of 2006. After elaborately referring to the objections raised by all the parties, by a detailed order, the learned single Judge allowed the application's C.A. No. 1038 of 2006 by order dated 19.1.2011 directing the sale of movable and immovable assets of ASM by fixing the upset of price of the properties as 86.44 crores. The learned single judge in the order inter alia held as under:

Under Section 450(3) of Companies Act, the provisional liquidator would have the same power as that of a liquidator to perform such duties as directed by the Court. Primarily the question would be whether the Court can order sale or not. The expression "Company which is being wound up" appearing in Rule 72 would indicate a stage even prior to the passing an order for winding up the company u/s 443(1)(d) of the Companies Act.

A secured creditor is entitled to stand outside the winding up proceedings and can proceed to realise the security without the leave of the winding up Court if by the time he initiated the action the Company had not been wound up. In the instant case, secured creditor's IREDA has come up before the Company Court on account of decision of the Division Bench in Asset Reconstruction Company (India) Limited Vs. The Official Liquidator, High Court as the liquidator of SIV Industries Ltd. (in liquidation), and also in view of the order passed by the Court directing IREDA to surrender possession to the Official Liquidator.

C.A. No. 1038 of 2006 has been filed by IREDA not at the instance of Sundaram Finance Limited nor in pursuance of Memorandum of Understanding dated 27.9.2005. But C.A. No. 1038 of 2006 was filed only as a result of the order passed by this Court directing IREDA to hand over possession to the Official liquidator. NHSM cannot raise serious objection about the application in C.A. No. 1038 of 2006.

NHSM has no bonafide in raising objection that the claim of IREDA on NHSM could be very well settled out of surplus funds available with the Indian Bank.

18. In so far as the claim of BHEL, in respect of Turbo generators, the learned single Judge held that the title in the good's equipment had already been passed onto the buyer and BHEL has no right to claim any lien over the goods and that BHEL has to wait in the queue along with the other unsecured creditors. O.A. Nos. 253 and 254 of 2005 of BHEL were dismissed with liberty to BHEL to lodge its claim with the Official Liquidator. In so far as the claim of Walchandnagar Industries Limited also, the learned single Judge held that the title in the goods "boiler" had already been passed to the Company in liquidation and held that the prayer of Walchandnagar Industries Limited to exclude the boiler sold by it to ASM cannot be maintained.

19. Being aggrieved by the order of learned single judge directing sale of land, building, plant and machinery, the NHSM has preferred O.S.A. No. 63 of 2011. The Directors of ASM and their wives have filed O.S.A. No. 64 of 2001. Being aggrieved by the dismissal of their applications, BHEL has preferred O.S.A. Nos. 58 and 59 of 2011. Aggrieved by the non-exclusion of the boiler supplied by them from the list of properties sought to be sold by the secured creditor, Walchandnagar Industries Limited filed O.S.A. No. 81 of 2011.

20. Mr. G. Rajagopal, learned Senior Counsel along with Mr. Ravi appearing for the promoters/directors of ASM and their wives (Appellants in O.S.A. No. 63 of 2011) contended that ordering of sale of entire assets of ASM is contrary to law and the learned Senior Counsel interalia raised the following submissions:

(i) The provisional liquidator appointed u/s 450 of the Companies Act will have the same powers as liquidator only if the Court has not limited or restricted its powers by order appointing him. The order dated 22.7.2005 appointing provisional liquidator shows that the provisional liquidator was only empowered to take charge of the assets of the Company and consequently the conclusion of

the learned single judge that while appointing provisional liquidator the Court has not limited or restricted its powers is erroneous.

(ii) The learned single judge failed to see that the process of winding up is passed u/s 453(1)(b) of the Act and mere pendency of a petition for winding up presented to the Company Court cannot be construed as a proceedings for winding up of the Company. The conclusion of the learned Judge that the expression "Company, which is being wound up", appearing in Rule 272 would indicate a stage even prior to the passing of an order for winding up of the Company u/s 443(1)(d) of the Act is erroneous.

(iii) The entire functions of liquidating Company are to be performed only by the Official Liquidator and consequently the distinction sought to be made by the learned single Judge with regard to the power of the Court and the power of the liquidator is completely non-existent as far as the Companies Act is concerned. The finding of learned judge that there is no restriction or limitation on the power of the Court to order sale of the properties through Official Liquidator even before the Company is wound up is contrary to law.

(iv) An institution seeking to invoke the powers under the SARFAESI Act and intending to stand outside the winding up proceedings will have to file an application u/s 446 of the Companies Act to obtain appropriate permission from the Company Court. While granting the said permission, Company Court is not exercising any powers under SARFAESI Act, but on the other hand it is only exercising its powers under the Companies Act.

(v) Application filed by IREDA is only to direct the Official Liquidator to direct the property for sale in terms of Section 457 of the Companies Act and IREDA has not chosen to come before the Company Court seeking leave of the Court to stand outside the winding up proceedings and continue the proceedings under SARFAESI Act.

(vi) As per the decision of *Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others*,], IREDA is deemed to have relinquished its security over the assets of ASM and will have to rank only as an unsecured creditor.

21. Learned Senior Counsel Mr. G. Rajagopal in support of his contentions placed reliance upon the decisions of *M.K. Ranganathan and Another Vs. Government of Madras and Others*, *Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others*, *Allahabad Bank Vs. Canara Bank and Another*, *Pennar Paterson Ltd. v. State Bank Of Hyderabad and Others* < Cas. Comp>; *(Remanika Silks (P) Ltd. in Liquidation (2002) 1 Comp.L.J.191 (Ker)*; unreported judgment of P. Sathasivam, J. In C.A. Nos. 10, 116 of 2002 etc., in C.P. No. 39 of 1994; *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, In Re: *Divya Chemicals Ltd.*; In Re: *N.N. Dyechem (I) Ltd.*; In Re: *Agritech Hatcheries and Foods Ltd.*, *Andhra Bank Vs. Official Liquidator and Another*, *V.K. Seshasayee and Another Vs. Official Liquidator*, *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, ; *Asset Reconstruction*

Company (India) Limited Vs. The Official Liquidator, High Court as the liquidator of SIV Industries Ltd. (in liquidation), Unreported judgment of Chitra Venkataraman,J., in C.A. Nos. 461 OF 2006 ETC., in C.P. No. 122 of 1997; unreported Division Bench judgment of this Court in W.A. Nos. 145 and 146 of 2007 dated 10.08.2007 and Tungabadra Sugar Works Mazdoor Sangh v. Subhash Kathuria and Others 2009 5 Law Weekly 173.

22. Onbehalf of NHSM, (Appellant in O.S.A. No. 63 of 2011), Mr. T.K. Seshadri, learned Senior Counsel also placed reliance on the above decisions and interalia made the following submissions:

(i) The ASM is yet to be wound up and in so far as NHSM has not filed any winding up petition. Even in respect of ASM, as an interim measure, sale cannot be ordered and if the property is sold nothing remains for winding up petition. In all the proceedings initiated by NHSM challenging the SARFAESI action initiated by the Indian Bank, NHSM has always pointed out that the entire balance amount realised by the Indian Bank after satisfying their dues should be paid to IREDA.

(ii) The Indian Bank was arbitrarily disbursing the amounts to various unsecured creditors overlooking the claims of IREDA and inspite of several letters to IREDA pointing out the conduct of India Bank in depriving IREDA their rights to get the money, IREDA chosen to remain silent and avoided taking any steps to recover the balance amount lying with Indian Bank.

(iii) IREDA having invoked the proceedings under Debt Recovery Act and SARFAESI Act as against NHSM cannot seek the assistance of the Company Court to sell the property of NHSM since no provisional liquidator has been appointed as far as NHSM is concerned. The Company Court will have no jurisdiction to exercise the powers of an authorised officer under SARFAESI Act when the affairs of the said Company (NHSM) are not pending before the Court.

(iv) The observations of the Company Court that the rights of the secured creditor under SARFAESI Act could also be exercised through proceedings in Company Court is clearly contrary to law.

(v) Merely because ASM owes certain amounts to be paid to IREDA, it does not mean that IREDA can also enforce proceedings against NHSM, which is not subjected to any winding up or subjected to the jurisdiction of the Company Court.

(vi) The liabilities of NHSM arose in respect of a loan agreement dated 29.10.1999 and 6.12.1999 in terms of which NHSM purchased energy efficiency equipment and the liabilities of the Appellant were totally distinct and separate and the properties are clearly identifiable and while so there was no justification for single Judge to brush aside the objections of the Appellant and findings of single Judge in respect of NHSM are liable to be set aside.

23. Mr. S.R. Sundar, learned Counsel appearing for the Official Liquidator has

submitted that in the order dated 22.7.2005 appointing the Official Liquidator as provisional liquidator, the powers of provisional liquidator have not been limited or restricted. The learned Counsel would further contend that as per Section 450(3), when a provisional liquidator is appointed by the Court, unless his powers have been limited or restricted, the Official Liquidator shall have the same powers as that of a liquidator. The learned Counsel would further contend that as per Section 37 of SARFAESI Act, the provisions of SARFAESI Act and Rules made there under shall be in addition and not in derogation of the Companies Act, 1956. The learned Counsel would further contend that the complementary nature of the provisions of SARFAESI Act makes it clear that the provisions of the Company Court u/s 446 of the Companies Act are not excluded, but when the Official Liquidator has been appointed as provisional liquidator, no other legal proceedings shall be commenced or proceeded with against the Company except by leave of the Court and subject to such terms as the Court may impose. It was further submitted that after the appointment of the provisional liquidator since IREDA proceeded under SARFAESI Act and taken possession of the property, following the decision in Asset Reconstruction Company (India) Limited Vs. The Official Liquidator, High Court as the liquidator of SIV Industries Ltd. (in liquidation), the official liquidator has to necessarily file an application to take possession of the properties.

24. Drawing Court's attention to various proceedings, Mr. G. Masilamani, the learned Senior Counsel submitted that the borrowers are adopting dilatory tactics. Learned Senior Counsel would further submit that IREDA, being a secured creditor, has taken possession under SARFAESI Act and surrendered possession to the Official Liquidator only in pursuance of the order of the Court and nowhere has relinquished its rights as the secured creditor. The learned Senior Counsel inter alia made the following submissions:

(i) The powers of provisional liquidator would be restricted only if the Court imposes any restriction while appointing him. When the Order dated 22.7.2005 has not restricted the powers of the provisional liquidator, there can be no distinction between the power of official liquidator and provisional liquidator in respect of the sale of assets of the Company.

(ii) The handing over of possession by IREDA by the Order of the Court shall not prejudice IREDA's rights as the secured creditor. Handing over possession on the orders of the Company Court does not result in relinquishment of security for the benefit of general body of creditOrs. (iii) IREDA has categorically stated that it retained possession over NHSM secured asset installed within ASM premises and in view of the integrated and homogeneous nature of the machineries and co-generation power plant, IREDA applies for sale of the assets of ASM along with the energy efficiency conservation equipment of NHSM installed in ASM.

25. The learned Senior Counsel Mr. G. Masilamani in support of his contentions placed reliance upon the decisions of Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, ; Reinz Talbros Limited v. Kostub Investments

Ltd. (2009(96) SCL 108 (Del)); Altos India Limited Vs. Bharti Telecom Limited, ; Andhra Bank Vs. Official Liquidator and Another, ; ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, Transcore Vs. Union of India (UOI) and Another, ; Allahabad Bank Vs. Canara Bank and Another, Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, M.V. Janardhan Reddy Vs. Vijaya Bank and Others, ; Subhash Kathuria Sole Proprietor, Anitha International Vs. Deve Sugars Limited and Others, Haryana State Industrial and Infrastructure Development Corporation Vs. Haryana Concast Limited and Another, and New Horizon Sugar Mills Ltd. Vs. The Commissioner of Labour, Government of Puducherry, Ariyur Sugar Mills Staff Welfare Union, Pudukkottai Pradesa Sarkarai Alai Thozhilalar Sangam and Ariyur Sarkarai Alai Thozhilalar Nala Sangam, .

26. On behalf of Sundaram Finance Limited, learned Counsel Mr. Vasudevan would submit that Sundaram Finance Limited had given its consent to sell the machinery of which it is the owner without relinquishing their status as an absolute owner. It was further submitted that consent has been given in order to obtain a good rate for the entire plant and machinery of ASM and the entire ASM along with machineries is one composite unit and if the machinery is separated the entire machinery will become junk and it can be sold only as scrap. In such facts and circumstances, the Company requires to be sold as one unit and not as a running concern.

27. Mr. Vasudevan, learned Counsel appearing for Sundaram Finance Limited placed reliance upon decisions of Sri Chamundi Theatre, Mysore Talkies Ltd. V. S. Chandrasekhara Rao (1974 (II) MLJ 155)(Mad); Panchmahals Steel Limited V. Universal Steel Traders (1976) 46 Comp.Cas. 706; Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others, M.C.C. Finance Ltd. v. R. BI. (2004) 119 COMP. CAS. 355; Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, Asset Reconstruction Company (India) Limited Vs. The Official Liquidator, High Court as the liquidator of SIV Industries Ltd. (in liquidation), SMT. Usha R.Shetty and Ors. V. Radeesh Subber Pvt. Ltd. (1995) 84 Comp.Cas. 602 (Karn); unreported judgment of punjab & haryana high court dated 15.12.2008 in Co.Appeal No. 18 of 2003 ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, Transcore Vs. Union of India (UOI) and Another, and Indian Bank v. Chief Judicial Magistrate, Pondicherry and Ors. (2007) 138 Comp. Cas. 631 (Mad)

28. Onbehalf of Vijaya Bank, the learned Counsel Mr. R. Umasuthan has submitted that Vijaya Bank is the second charge holder and in the event of attempting to sell the machinery separately the same will fetch only lesser value. According to Vijaya Bank, NHSM has given a corporate guarantee for the discharge of the liability by the Company in liquidation to Vijaya Bank.

29. The Mr. R.S. Varadarajan, learned Counsel appearing for the City Union Bank has reiterated the contention of Vijaya Bank.

30. We have heard Ms. Dr. Anita Sumanth and Mr. N. Muthukumar, learned

Counsel appearing for BHEL and we have also heard Mr. Krishna Srinivas, learned Counsel appearing for Walchandnagar Industries Limited and we have referred to their submissions while we deal with their appeals.

31. Upon consideration of the order of learned single Judge, materials on record and the above submissions, the following points arise for consideration:

1. Whether the Provisional Liquidator is empowered to sell whole of the ASM Unit along with machineries thereon as a going concern u/s 457(1)(c) of Companies Act?
2. When the Official Liquidator has not filed any application for sale of the assets of the company in liquidation, can the Court order sale of the assets of the company in liquidation on the application filed by the secured creditor?
3. Whether Court's finding that it was concerned with the power of the Court to order sale and not the power of the Liquidator to order sale is a non-existent distinction?
4. Whether filing of application by IREDA in the Company Court seeking to sell the assets of the company in liquidation is not in accordance with the procedure prescribed as laid down in 2005(8) SC 190 [Rajasthan State Financial Corporation case] ?
5. Whether surrender of possession to the Official Liquidator by IRDA amounts to waiver of IREDA's right as secured creditor?
6. Whether Appellants are right in contending that IREDA cannot file application for sale of the assets of ASM in the Company Court and simultaneously say it stands outside the winding up proceedings?
7. In the winding up proceedings of ASM, can IREDA bring the machineries of NHSM for sale?
8. Whether IREDA was inactive in claiming the remaining amount from Indian Bank after the assets of NHSM were sold by the Indian Bank under SARFAESI Act?
9. Position of Sundaram Finance Limited and its right to recover the value - co-generation plant, machineries on lease by Sundaram Finance Limited?
10. Whether the learned single Judge erred in drawing the conclusions based on the materials which came to his knowledge in other proceedings?
11. Whether the order of learned single Judge is vitiated on account of reference to the other facts and circumstances like conduct of the Directors, etc?
12. What is the relief to which Walchandnagar Industries Limited entitled towards the machineries sold by it to ASM?
13. What is the relief to be granted to BHEL which sold two turbo generators for

the co-generation plant of ASM?

14. Whether the Order of sale of assets of ASM passed by single Judge is to be confirmed? If so, what is the value and how the sale has to be ordered?

15. Whether the valuation of the assets at Rs. 86.80 crores is an under valuation?

32. The entire immovable properties of ASM measuring 120 acres and 70 cents is situated in Malappambadi village, Tiruvannamalai District and land measuring 4.96 acres is situated in Annamalai Nagar Village and Post, Malappambadi and the movable assets of ASM and NHSM are sought to be sold. The machineries of ASM sought to be sold could be classified into four categories:

Co-generation plant of ASM for which IREDA financed and IREDA holds first charge.

Energy Efficiency Conservation Equipment of NHSM and installed in ASM in juice extraction and juice concentration Section for which IREDA holds first charge.

Co-generation plant and machineries given on lease to ASM by Sundaram Finance Limited. 8400 KW Capacity Extraction cum Back pressure Turbogenerator & A 4280 KW Capacity Low pressure Condensing Turbogenerator with all its accessories sold to ASM by BHEL.

Boiler sold to ASM by Walchandnagar Industries (Unsecured creditors)

33. Apart from the claims of workmen, the following are the amounts claimed by the secured/unsecured creditors from ASM:

Outstanding Dues	Creditor/ Company Name	Debtor Company Name
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Amount due IREDA (Secured Creditor)	(i) Arunachalam Sugar Mills and (ii) New Horizon Sugar Mills Additional Loan	Rs. 118 Crores Rs. 18,46,82,523/
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Rs. 1,56,27,266/- (as on 14.10.2004) Total:138,03,09,789 with subsequent interest.

Sundaram Finance	Arunachalam Sugar Mills	Rs. 16.00 Crores (as on 08.2.2006) with subsequent interest.
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Walchandnagar Industries Limited		
Arunachalam Sugar Mills	Rs. 1,05,81,632/-(till February, 2003) with subsequent interest.	
BHEL	Arunachalam Sugar Mills	Rs. 4,84,21,603/-with subsequent interest.
Vijaya Bank	Arunachalam Sugar Mills	Rs. 12 Crores with subsequent interest
City Union Bank	Arunachalam Sugar Mills	Rs. 7,08,44,043/- with subsequent interest.

34. ASM and NHSM defaulted in the payment of dues to IREDA and IREDA filed O.A. No. 113 of 2004 before the DRT-I, New Delhi for recovery of Rs. 62.83 Crores from ASM and O.A. No. 114 of 2004 for recovery of another sum of Rs. 9.17 Crores from ASM. IREDA also filed O.A. No. 112 of 2004 before DRT-I, New Delhi for recovery of Rs. 20.03 Crores from NHSM. After obtaining permission of

DRT, IREDA initiated steps under SARFAESI Act and issued notice of payment u/s 13(2) of SARFAESI Act to NHSM and ASM. In the meanwhile, Alstom Project India Limited filed C.P. No. 229 of 2004 for winding up of ASM. By the order dated 22.7.2005, Company Court appointed the Official Liquidator as the provisional liquidator of ASM and provisional liquidator was directed to forthwith take charge of all the properties and effects of ASM. On 27.9.2005, IREDA entered into MOU with Sundaram Finance Limited to effectively sell their respective assets to get better price in the interest of all creditors. On 28.9.2005, the Official Liquidator has held meeting of the secured creditors. As per the minutes of the meeting, IREDA is the major secured creditor, who is having first charge over the entire assets of the Company and City Union Bank is having first charge on stocks (sugar) and also in the form of guarantor, has paid amount to IREDA on behalf of the Company. Vijaya Bank has also given loan on hypothecation of stocks/book debts. The secured creditors were impressed upon the importance of taking possession of the Company immediately and providing security to the factory premises. In the said meeting, IREDA stated that it could bear the entire security charges.

35. After issuing Section 13(2) and Section 13(4) notices, on 5.10.2005, IREDA has taken possession of the secured creditors under SARFAESI Act. The Official Liquidator has sent a notice dated 17.1.2006 to IREDA taking strong objection for taking of possession under SARFAESI Act. In the said notice, the Official Liquidator informed IREDA that "invoking the provisions of Section 13(4) of SARFAESI Act, 2002 and Rules framed thereunder is violative of the provisions of Sections 446, 456 and 537 of the Companies Act". It was reiterated that Section 37 of the SARFAESI Act, 2002 is in addition to and not in derogation of the Companies Act, 1956 and other Acts for the time being in force. On 20.1.2006, IREDA issued public notice for sale of movable assets and immovable properties of ASM. In response to the notice, IREDA has also received a bid for Rs. 135.50 Crores. In these circumstances, after the judgment of the first Bench of this Court in Asset Reconstruction Company (India) Limited Vs. The Official Liquidator, High Court as the liquidator of SIV Industries Ltd. (in liquidation), Official Liquidator filed C.A. No. 1786 of 2005. By the order dated 24.4.2006, Chitra Venkataraman, J. directed IREDA to hand over possession of the properties to the Official Liquidator. It was further ordered that the security appointed by IREDA shall continue as before. In pursuance to the order of the Court, IREDA has handed over possession to the Official Liquidator. Stating that IREDA continues to exercise its rights under SARFAESI Act of assets of both ASM as well as the machinery of NHSM installed/erected at the factory premises of ASM, IREDA filed the applications A. Nos. 1038 and 1039 of 2006 to proceed further with the fresh advertisement for sale of movable and immovable assets of ASM by fixing the upset price of Rs. 135.50 Crores and in case no fresh bid is received, to confirm the sale in favour of existing bidder for Rs. 135.50 Crores.

36. Points No. 1 to 3:

By the order dated 22.07.2005, Provisional Liquidator was appointed. The relevant portion of the order reads as follows:

1. That, the official Liquidator, High Court, Madras attached to the Court be and is hereby appointed as Provisional Liquidator of the above named Respondent Company.

2. That, the Provisional Liquidator, do forthwith take charge of all the properties and effects of the Respondent Company.

37. Position and powers of Provisional Liquidator:

Under Section 450(3) of Companies Act, while appointing the Provisional Liquidator, Court may limit or restrict his powers by the order appointing him or by a subsequent order; but otherwise he shall have the same powers as a Liquidator. Contention of IREDA is that as per Section 450(3) of Companies Act, powers of the Provisional Liquidator are the same as that of the Official Liquidator and powers of Provisional Liquidator would be restricted only if the Court imposes any restriction while appointing him. Further contention of IREDA is that in the order dated 22.07.2005, there is no restriction on the powers of the Provisional Liquidator and the Official Liquidator was entitled to exercise his powers including power to sell movable and immovable properties u/s 457(1)(c) of Companies Act.

38. Contention of Promoters/Directors of ASM is that in the order dated 22.07.2005, the powers of Provisional Liquidator is restricted only to take charge of the assets and while so, on the application by one of the secured creditor/ IREDA, the learned single Judge erred in passing the order for sale of the movable and immovable properties.

39. Onbehalf of Appellant, Mr. G. Rajagopalan, learned Senior Counsel submitted that the Provisional Liquidator appointed u/s 450 of Companies Act will have the same powers as Liquidator only if the Court has not limited or restricted his powers by the order appointing him. The contention of the Appellant is that as per the order of the Court, Provisional Liquidator is only to take charge of all the properties and effects of ASM and the Official Liquidator has no power for effecting sale of movable and immovable properties. But the order dated 22.07.2005 appointing the Provisional Liquidator clearly shows that he was only empowered to take charge of the assets of the company and consequently, the finding of the learned single Judge that while appointing the Provisional Liquidator, Court has not limited or restricted its power is completely erroneous.

40. In order to consider the merits of the above submission, it is necessary to refer to the provisions of Section 450 of Companies Act.

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, the [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.

41. As per Sub-section (3) of Section 450 of Companies Act, powers of the Provisional Liquidator are the same as that of the Official Liquidator unless limited by the order of the Court. Section 457 of Companies Act set out the powers of the Liquidator in winding up of the company. Sub-section (1) of Section 457 of Companies Act enumerates power which can be exercised by the Liquidator with sanction of the Company Court. Sub-section (2) of Section 457 of Companies Act enumerates power which can be exercised without sanction of the Company Court.

42. Rule 107 of Companies (Court) Rules states that rules relating to Official Liquidators shall apply to the Provisional Liquidators so far as applicable subject to such a direction as the Court may give in each case. The powers of the provisional liquidator are the same as that of the Official Liquidator unless High Court limits or restricts them by the same order by which he was appointed or by a subsequent order. Form 49 of the Companies (Court) Rules would show that the provisional liquidator was authorised to take charge of all the properties and effects of the Company. The Order dated 22.07.2005 is well in accordance with Form- 49. When the powers of the provisional liquidator were not restricted by the Court, the impugned order of the Company Court authorising the Official Liquidator to sell the property cannot be challenged as the same is with the specific authority and the sanction of the Court.

43. Section 456 envisages that when a winding up order has been made or where a provisional liquidator has been appointed in terms of Clause (c) and (ca) of Section 457(1) of the Companies Act, the liquidator or the provisional liquidator, as the case may be, shall take into custody the control of the properties, assets of the company. In a winding up of the Company, the liquidator is entitled to sell the movable and immovable assets of the Company. In pursuance of the order of the Court dated 22.07.2005 the Official Liquidator, having taken over the assets of ASM, exercise of powers to sell u/s 457(1)(c) and (ca) and cannot be denied. As held by the Supreme Court in Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, in a situation of this nature, the role of the official liquidator assumes great importance.

44. In Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, the Supreme Court held that "powers and functions of the Provisional Liquidator is subject to the limitation imposed by the Court or the same as that of the Official Liquidator". In Paragraph-58 of Bakemans Industries Pvt. Ltd. Vs. New

Cawnpore Flour Mills and Others, the Supreme Court expressly rejected the contention that the Provisional Liquidators have no statutory powers in relation to effecting the sale of the movable or immovable property. All that is required of this Court, while ordering the sale, is to involve the Provisional Liquidator in the sale.

45. Referring to Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, the learned single Judge rightly rejected the contention of the Appellant that powers of Provisional Liquidator was restricted by the order of the Court dated 22.5.2005 to take charge of the assets of the company.

46. Whether Single Judge's finding that it was only concerned with the power of the Court to order sale and not power of the Liquidator to order sale is a non-existent distinction The learned single Judge held that in terms of Section 450(3), the Provisional Liquidator has the same powers as that of the Liquidator and that the same cannot be belittled. The learned single Judge has said that in any event there is nothing in the Companies Act which restricts or limits the power of the Court to order sale of the properties through the Official Liquidator. Finding of the learned single Judge in Paragraph-39 reads as under:

39... Therefore, the Provisional Liquidator has the same powers as that of the Liquidator and the same cannot be belittled. In any case, the Provisional Liquidator has not sold the properties of the company in liquidation. He has not even come up with any application for the sale of the properties. It is not the Provisional Liquidator, but one of the secured creditors (the applicant herein) who has come up with the application for the issue of a fresh advertisement for the sale of the properties of the company in liquidation. There is nothing in the Companies Act, 1956, which restricts or limits the power of this Court to order the sale of the properties through the Official Liquidator and hence, the objection based upon the power of the Official Liquidator is of no relevance to the situation of hand. In the application on hand filed by one of the secured creditors, we are concerned only with the power of this Court and not the power of the Provisional Liquidator to order the sale. u/s 451(1), the Liquidator is obliged to perform such duties as the Court may impose. Therefore, we are primarily concerned with the question whether the Court can order the sale or not.

47. Assailing the above findings, Mr. Ravi, learned Counsel for ASM vehemently contended that the entire function of the liquidating company is performed only by the Official Liquidator and consequently, the distinction sought to be made by the learned single Judge with regard to the power of the Court and power of the Liquidator is completely non-existent as far as Companies Act is concerned. It was further submitted that when the exercise of powers by the Liquidator u/s 457 of Companies Act is only with the sanction of the Court, the observation of the learned single Judge to draw the distinction between power of the Liquidator and the power of the Court is non-existent and consequently, the entire conclusion of the learned single Judge is erroneous and liable to be set aside.

48. Learned Senior Counsel Mr. T.K. Seshadri appearing for NHSM contended that u/s 433, jurisdiction of the Company Court extends only to those matters which are specified in the Act and there is no separate power of the Court to order sale and while so, the learned single Judge erred in trying to make the distinction between the power of the Official Liquidator and the power of the Court. Contention of learned Senior Counsel is that apart from the powers u/s 433 of Companies Act, IREDA cannot ask the Company Court to sell the assets of ASM to realise IREDA's dues for which it has already proceeded under SARFAESI Act and learned single Judge erred in saying that "we are concerned only with the power of the Court and not the power of Official liquidator."

49. The Official Liquidator has the power to sell the properties of the Company subject to the over all superintendence of the Company Court. The general principle is that the Official Liquidator must act in the interest of the general body of creditors to realise the assets of the Company to their best advantage. In winding up, the liquidator acts not merely for creditors but for contributories and for the company also. His principal duties are to take possession of assets, to make out the requisite lists of contributories and of creditors, to have disputed cases adjudicated upon, to realise the assets subject to the control of the court in certain matters and to apply the proceeds in payment of the company's debt and liabilities in due course of administration, and having done that, to divide the surplus amongst the contributories and to adjust their rights.

50. After filing of the Company Petition and making IREDA to surrender possession, the Official Liquidator has not taken any further steps to sell the assets of ASM nor moved the Court for appropriate direction. As pointed out by the learned single Judge, the Official Liquidator has not even come up with any application for the sale of the properties. It is in these circumstances, IREDA has filed applications in A. No. 1038 and 1039 of 2006 seeking to sell the movable and immovable assets of ASM by joining all the three parties viz., Official Liquidator; IREDA and Sundaram Finance Limited by fixing the upset price at Rs. 135.50 crores or to confirm the sale infavour of the existing bidder for Rs. 135.50 crores in case no fresh bid is received.

51. The object of winding up of a Company by the Court is to facilitate the protection and realisation of its assets with a view to ensure an equitable distribution thereof among those entitled. The object of Section 446 is to see that the assets of the Company are brought under the control of the winding up of Court to avoid, wherever possible expensive litigation and to see that all the matters in dispute which are capable of being expeditiously disposed of by the winding up Court are taken up by that Court. Section 446 makes it a duty of the Court to entertain all matters falling within the scope of Sub-section (2). The historical evolution of Section 446 was traced by the Supreme Court in *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, .

52. u/s 457(3) of the Companies Act, any creditor or contributories can apply to the Court with respect to the exercise or the proposed exercise of the powers of

the Official Liquidator. In the liquidation proceedings, IREDA, the secured creditor who has taken possession of the secured assets has handed over the possession to the provisional/official liquidator under orders of the Court.

IREDA being unable to effect sale on its own under SARFAESI Act has filed the application to pass an order to effect sale of the property for IREDA and by joining the Provisional Liquidator and Sundaram Finance Limited. Taking note of the fact that the Official Liquidator has not even come up with any application for sale of the properties, the learned single Judge rightly observed that the Court has; power to order sale of the properties on the application filed by the secured creditor.

53. In *Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others*, , the Supreme Court held as follows:

45. 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.

54. In Paragraph-58 of its decision in *Bakemans* case, the Supreme Court expressly rejected the contention that the Provisional Liquidators have no statutory powers in relation to effecting the sale of the movable or immovable property. While ordering the sale, all that is required of the Court was to involve the Provisional Liquidator in the sale. Therefore, the learned single Judge was right in saying that we are concerned with the power of the Company Court and whether Court can order sale.

55. Whether Court has power to order sale of the properties even before the Company is wound up # Contention of ASM is that u/s 456(2) of the Companies Act, the property and effects of the company shall be deemed to be in the custody of the Court only as from the date of the order of the winding up of the company. Consequently, the property of the company would come in the custody of the Court only from the date of making the order for winding up and while so, the conclusion of the learned single Judge that there is no restriction or limitation on the power of the Court to order sale of the properties even before the company is wound up is contrary to law and therefore, liable to be set aside. On behalf of ASM, it was further contended that in exercise of its powers, the Court must work out the workmen's dues and debts due to the secured creditors before allowing the secured creditors/IREDA to sell the property in enforcement of their security and without making the order winding up, the Court cannot order sale of secured assets by IREDA.

56. As per Section 450(3) of Companies Act, the Provisional Liquidator has the same power as Liquidator unless limited or restricted by the order of the Court appointing him or by a subsequent order. Section 457 of Companies Act details the powers of the Official Liquidator. Therefore, powers of the Official Liquidator

to sell the movable and immovable properties u/s 457(1)(c) of the Act will also be available to the Provisional Liquidator, which of course is with the sanction of the Court. Rule 107 of Companies (Court) Rules states that the rule relating to the Official Liquidators shall apply to the Provisional Liquidators so far as applicable subject to such directions as the Court may give in each case. Rule 272 of Companies (Court) Rules prescribes that unless the Court otherwise orders, no property belonging to a "company which is being wound up by the court" shall be sold by the Official Liquidator without previous sanction of the Court and every sale shall be subject to the confirmation of the Court. The expression "company which is being wound up by the court" appearing in Rule 272 clearly empowers the Court to order sale of the properties during the course of hearing of the Petition for winding up. As rightly contended by the learned Senior Counsel Mr. Masilamani appearing for IREDA, in spite of the time given to revive the company, the Promoters of ASM have not availed the opportunities either in repaying the amount or reviving the Unit.

57. Holding that the Company Court can exercise its powers u/s 446(2) by appointing Official Liquidator as provisional liquidator, in *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, the Supreme Court has held as under:

If a winding up petition is pending meaning thereby that an Official Liquidator is appointed as provisional liquidator which is a stage in the process of winding up, the court before which such proceeding is pending can be stayed as a court winding up the company and ipso facto it would have jurisdiction to entertain the proceeding enumerated in Clauses (a) to (d) of Sub-section (2) of Section 446.

Applying the ratio of the above decision, in exercise of the powers of the Company Court, on the application filed by the secured creditor/IREDA, the learned single Judge was right in ordering sale of the assets of ASM.

58. Learned single Judge referred to the decision reported in 2009 (96) SCL 108 (Del.) [*Reinz Talbros Ltd v. Kostub Investments Ltd*], where the order passed by the Company Judge for an auction sale of the properties of the company involved in winding up proceedings, came to be challenged before the Division Bench of the Delhi High Court on two grounds. The first ground related to the validity of the valuation report. The second ground of challenge was that the Provisional Liquidator had no authority to sell the property. But the said contention was rejected by the Division Bench on the basis of Section 450(3) of the Companies Act, 1956. A similar view was expressed much earlier by a Division Bench of the High Court of Punjab and Haryana in *Altos India Limited Vs. Bharti Telecom Limited*,

59. Since in the order dated 22.07.2005 appointing the Provisional Liquidator, no limitation u/s 450(3) of Companies Act was imposed, the learned single Judge rightly held that Provisional Liquidator can exercise all the powers of Official Liquidator as stipulated in the Companies Act. Pointing out that the Provisional Liquidator has not come out with any application for sale of the properties, the

learned single Judge was right in holding that in any event on the application filed by IREDA, the Court has got power to order sale of the properties of the company in liquidation.

60. Points No. 4 to 6:

As pointed out earlier, since ASM and NHSM committed default in the payment of dues to IREDA, IREDA classified the accounts of ASM and NHSM as Non-Performing Assets and filed O.A. Nos. 113 and 114 of 2004 before DRT-I, New Delhi for recovery of Rs. 62.83 Crores and Rs. 9.17 Crores respectively. IREDA also filed O.A. No. 112 of 2004 against NHSM for recovery of Rs. 20.03 Crores. After obtaining necessary permission from DRT, IREDA proceeded under SARFAESI Act. On 27.9.2005, IREDA has entered into MOU with Sundaram Finance Limited to effectively sell the respective assets to get better price in the interest of all creditors. On 28.9.2005, the Official Liquidator has held meeting of all secured creditors. After issuing notices u/s 13(2) and 13(4) of SARFAESI Act, IREDA has taken possession of the assets of ASM along with the machineries of NHSM on 5.10.2005. In pursuance of the direction of the Court in C.A. No. 1786 of 2005, IREDA handed over possession of assets to the Official Liquidator on 27.4.2006. The Order in C.A. No. 1786 of 2005 directing IREDA to hand over possession reads as under:

In the light of the Division Bench order, the Respondent No. 1 shall hand over possession of the properties on or before 28.04.2006. The security arranged by the first Respondent shall continue as before. It is made clear that the first Respondent shall hand over the valuation report and all other details pertaining to the company including land and building and immovable properties thereon. After going through the valuation report, the Official Liquidator shall file a report before this Court as regards the valuation fixed in respect of each one of the property so that further steps may be taken to auction the properties for sale. It is open to all, who had submitted a bid before the DRT to participate in the auction as and when it is held. This application is closed on the above terms.

61. Contention of the Appellant/ASM is that the conduct on the part of IREDA in abandoning the remedies under RDBI Act and SARFAESI Act and approaching the Company Court seeking a direction to the liquidator to sell the properties has to be clearly construed as an act of relinquishment of security as contemplated u/s 47 of the Provincial Insolvency Act, 1920. It was further submitted that having approached the DRT under the RDBI Act, IREDA has also chosen to invoke SARFAESI Act and after abandoning the same approached the Company Court for sale of the properties of the Company and having chosen to join the winding up proceedings clearly amounts to relinquishing of IREDA's rights over the security and consequently IREDA will not be entitled to any preferential right over the security.

62. Mr. Ravi, learned Counsel for ASM would further contend that only in view of the Contempt Petition filed by the Official Liquidator as the provisional liquidator,

IREDA handed over back the custody of the properties of the Company to the Official Liquidator, whereas the Official Liquidator has also taken custody of the Company as early as 22.7.2005 and completely ignoring the above said facts, the learned single Judge has proceeded as if IREDA has surrendered possession to the Official Liquidator only for the purpose of associating the Official Liquidator in the process of sale under SARFAESI Act is clearly contrary to the material on record and is liable to be set aside.

63. The learned Senior Counsel Mr. G. Masilamani has submitted that IREDA has handed over possession of the property to the provisional liquidator only under threat of contempt proceedings and mere handing over of possession would not amount to relinquishment of IREDA's security.

64. As per Section 37 of SARFAESI Act, the provisions of the SARFAESI Act or Rules made thereunder are in addition to and not in derogation of the provisions of the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

65. The objection that there cannot be parallel proceedings when the applications in O.A. Nos. 113 and 114 of 2004 filed by IREDA u/s 19 of RDBI Act are still pending cannot be countenanced. In Transcore Vs. Union of India (UOI) and Another, the Supreme Court held that the SARFAESI Act was inspired by the provisions of Sections 29 and 31 of State Financial Corporations Act and that the secured creditors are provided cumulative remedies with an option to choose one or more. As held by the Supreme Court in Andhra Bank Vs. Official Liquidator and Another, , 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 529-A (1)(b) read with proviso (c) appended to Section 529(1). When IREDA has got two options, it cannot be said that by coming before the Company Court, IREDA has recourse to two parallel proceedings.

Nowhere IREDA has stated that they have handed over possession of the assets giving up their security. As pointed out earlier, in pursuance to the Order of the Court in C.A. No. 1786 of 2005 (dated 24.4.2006), IREDA has handed over the possession to the Official Liquidator, who is the provisional liquidator. In all its correspondence, IREDA has reiterated its rights as secured creditor and as a secured creditor, it will have priority over the interest of the other unsecured creditors. In its letter dated 6.1.2006 addressed to the Official Liquidator, IREDA has reiterated its stand that "the interest of secured creditors will take priority over the interest of unsecured creditors in any circumstances and in taking possession IREDA is realising its dues which are secured against the said assets.

66. The fact that there was no voluntary handing over of possession is well

established by the various documents and materials. In the meeting of all the secured creditors held on 28.9.2005, IREDA, as the major secured creditor, who is having first charge over the entire assets of ASM, has volunteered to bear the whole expenses of appointing security. IREDA has obtained leave before DRT, Delhi to proceed under SARFAESI Act to exercise its rights as secured creditor. On 6.10.2005, IREDA addressed a letter to the Official Liquidator giving details of inventories and Panchanama pointing out that the minutes of meeting was signed without prejudice to IREDA's rights. In its reply to the Official Liquidator dated 6.1.2006, IREDA has replied that it has no intention to defy the orders of the Court and that IREDA has undertaken to distribute the dues to the workers u/s 529-A of the Companies Act read with Section 13(9) of the SARFAESI Act. It is thus clear that possession was handed over to the Official Liquidator by the Order of the Court. It is explicit that there is no relinquishment of security and IREDA stands outside the winding up proceedings, however subject to Section 529-A(1)(b) read with proviso (c) appended to Section 529(1) and there is no surrender of its rights as a secured creditor. In fact, in its application C.A. No. 1038 of 2006, IREDA has clearly stated that they continue to exercise their rights under the SARFAESI Act in respect of the assets of ASM and the machineries of NHSM installed/erected at the factory premises of ASM. There is no force in the contention of the Appellants that IREDA's handing over of possession of the property amounted to voluntary surrender of security.

67. It is seen from the preamble of the SARFAESI Act that it has been enacted with a view to regulate the securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected there to. The Act enables the banks and financial institutions to realize long term assets, manage problems of liquidity to the assets liability, and to improve recovery by exercising powers to take possession of security, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The object of the NPA Act is to enforce the security interest belonging to the Bank/financial institutions by virtue of the contract between the parties or by operation of any law. Under SARFAESI Act, a secured creditor will be allowed to enforce security interest i.e., sell the secured assets or if required for the purpose of the same, to take possession of the secured assets without the intervention of the Courts by following the procedure of Section 13.

68. As pointed out by the learned single Judge, neither the Transfer of Property Act, 1882 nor the Contract Act, 1872 nor even SARFAESI Act, 2002 suggest even remotely that mere surrender of possession by a secured creditor would be deemed to have given up his possession. When a secured creditor stays outside the winding up proceedings and seeks permission of the Court to sell the assets, it does not amount to relinquishment of security. Relinquishment requires a positive act. A secured creditor can be stated to have relinquished his security only if he voluntarily and by a positive act surrenders his security. Relinquishment of security has to be in accordance with the provisions of law. As discussed earlier, there is nothing on record to show that the handing over of

possession of the property to the official liquidator amounted to voluntary surrender of security.

69 Considering the scope of the expression "relinquishment" in ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, the Supreme Court held thus:

the expression "relinquish" has a different connotation. In P. Ramanatha Ayer's Advanced Law Lexicon at p. 4047, it is stated:

Relinquish." To give over possession or control of; to leave off.

It envisages a conscious act i.e. an act where a person was aware of his right and then relinquishes the same. The same must be for the general benefit of the creditors. His action must lead to a conclusion that he, for one reason or the other, intended to stand in the queue for receiving money owed to him. It, however, does not stand obliterated only by the filing of an affidavit or proof of claim with the Official Liquidator. Such a claim had been filed pursuant to a notice issued by the Official Liquidator. If the creditor does not respond to the said notice, he would not be in a position to bring to the notice of the Official Liquidator, the existence of his right.

70. The ratio of the above decision makes it clear that the Companies Act cannot take away the rights of a mortgagee, which is created under the Transfer of Property Act. The Companies Act does not override the Transfer of Property Act. Any relinquishment of security or mortgage will have to be express and not implied. The Supreme Court in the said judgment approved the views of the Division Bench of Gujarat High Court that participation in sale proceedings will not amount to relinquishment at all, which reads under:

58. A Division Bench of the Gujarat High Court in Gujarat Steel Tube Employees Union v. O.L. of Gujarat Steel Tubes Ltd.⁹ (disposed of on 9-1-2006) held:

The Court is also of the view that simply because the secured creditors participate in the sale proceedings undertaken by the Court and they also became the members of the Sale Committee constituted pursuant to the directions issued by the Court does not mean that they have exercised their option of remaining outside the winding up and they have relinquished their security. As a matter of fact, relinquishment of security by the secured creditors require a positive action on the part of the secured creditors. They have never stated in any of the proceedings that they are relinquishing their securities. On the contrary, they have made it clear that they remain outside the winding up and they participate in the sale proceeds only with a view to facilitate the sale proceeds so as to get the auction proceedings completed as expeditiously as possible. There is also substance in the say of the secured creditors that as soon as the assets of the companies are sold and realisation has taken place, their securities are converted from the specified assets into cash and they have equal right in cash which is realised on sale of the assets of the company in liquidation.

(underlining added) Therefore, applying the ratio of the above decision, we are of

the view that handing over of possession by IREDA by an order of the Court shall not in any way prejudice IREDA's rights as a secured creditor. Handing over of possession on the orders of the Company Court does not result in relinquishment of security.

71. Mr. Ravi, learned Counsel for the Appellant # ASM would further contend that IREDA having abandoned its rights under SARFAESI Act and consequently participated in the winding up proceeding cannot claim any preferential treatment as secured creditor. Placing reliance upon *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, and *Asset Reconstruction Company (India) Limited Vs. The Official Liquidator*, High Court as the liquidator of *SIV Industries Ltd. (in liquidation)*, the learned Counsel for ASM contended that an institution like IREDA seeking to invoke the powers under SARFAESI Act and intending to stand outside the winding up proceedings will have to obtain appropriate permission from the Company Court. It was submitted that the net result is that the creditor will have to file an application u/s 446 of the Companies Act to initiate proceedings or continue the proceedings under the said enactment for realising their security and while granting the said permission, the Company Court is not exercising any powers under the SARFAESI Act, but only exercising its powers under the Companies Act in the light of Sections 529 and 529-A of the Companies Act.

72. Mr. Ravi, learned Counsel for ASM contended that it would be appropriate for the ASM to exercise its right under SARFAESI Act to go before DRT after taking permission from the Company Court and by involving the Official Liquidator who has stepped into the shoes of the company. Contention of ASM is that having come before the Company Court, IREDA cannot say that it exercises its statutory power to cause sale of the assets of ASM through the agency of the Court/ Company Court and at the same time would contend that it stands outside the winding up proceedings. Relying upon certain observations in *Bakemans case*, it was contended that in one hand, IREDA cannot urge that the Court sale be effected through Company Court and at the same time take a stand that it stands outside the jurisdiction of the Court and it is impermissible for IREDA to take such a contradictory stand.

73. In support of his contention, learned Counsel placed reliance upon a decision of *In Re: Divya Chemicals Ltd.*; *In Re: N.N. Dychem (I) Ltd.*; *In Re: Agritech Hatcheries and Foods Ltd.*, wherein the Bombay High Court held as under:

... In so far as the assets which are held by the official liquidator are concerned during the pendency of the proceedings before the DRT, the official liquidator shall hold the said assets till appropriate directions are given by the DRT and in an event if the DRT directs the assets to be handed over to the private receiver appointed by the DRT then in such event the liquidator is bound to hand over the possession thereof to such private receiver subject to recovery of his cost, charges and expenses as well as the payment to the security agencies which is appointed by him

74. Same effect is the unreported decision of P. Sathasivam,J., dated 27.9.2002 in Company Application No. 10, 116, 701, 193 and 194 of 2002 in Company Petition No. 39 of 1994 wherein it was held as under:

20. It is clear from the above discussion, particularly para 53, which I have already extracted show that in respect of monies realized under the RDB Act, the question of financial institutions and other creditors can only be decided by the Debts Recovery Tribunal under the RDB Act and in accordance with Section 19 (19) read with Section 529 A the Companies Act and the said position applies not only during pendency of the winding up petition of the debtor company, but also after winding up order is passed....

25. In the light of what is stated above, I am of the view that the decision of the Supreme Court in the case Allahabad Bank v. Canara Bank reported in 2000 (2) CLJ 170 the sale proceedings with regard to the assets of the Company in Liquidation will have to be continued only by the Debts Recovery Tribunal and not by the Official Liquidator and the applicant Official Liquidator will be consulted by the Recovery Officer while finalizing the secured assets and distribution of the sale proceeds. I also accept the claim that the second Respondent ICICI's case u/s 529 of the Companies Act in order to stand out side the winding up to realise its security. Apart from this, Section 19 (19) of RDB Act, permits distribution of sale proceeds to secured creditors in accordance with Section 529-A who stand outside the winding up proceedings.

26. It is not disputed that the applicant Official Liquidator is representing the company in the Debts Recovery Tribunal proceedings, hence the Official Liquidator can very well participate in the sale proceedings before the Debts Recovery Tribunal. However, it is made clear that when the property is in the custody of the Official Liquidator, leave of the Company Court having jurisdiction has to be obtained....

75. Placing reliance upon the decision of the Supreme Court in M.K. Ranganathan and Another Vs. Government of Madras and Others, Mr. Ravi, learned Counsel for ASM contended that from the above decision it is clear that the terminology "standing outside the winding up proceedings" would mean that the secured creditor invokes the remedies available to him outside the purview of the Company Court and the secured creditor intending to stand outside the winding up proceedings has to invoke the remedies available to him for realisation of its security without coming before the Company Court or without intervention from the Company Court.

76. In sum and substance, the contention of ASM are as under:

After handing of possession to the Official Liquidator pursuant to the order of the Company Court dated 27.4.2006, IREDA did not file any application u/s 446 of the Companies Act to continue to exercise its rights under the Securitisation Act.

IREDA has not chosen to come before the Company Court seeking leave of the

Court to stand outside the winding up proceedings and continue the proceedings under SARFAESI Act.

On the contrary, IREDA surrendered its possession of secured assets to the Official Liquidator and filed C.A. No. 1038 of 2006 for directions to the provisional liquidator to exercise powers u/s 456 of the Companies Act by filing the said application and participating in the winding up proceedings, for all intent and purport, IREDA has waived its right as a secured creditor.

77. In the light of consistent principles laid down by the Supreme Court in *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, the above contentions cannot be countenanced. The Supreme Court held that prior to 1985, it might have been possible for secured creditor u/s 529 of the Companies Act, 1956 or Section 232 of Companies Act, 1913 as interpreted in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, to opt to stand outside winding up and realise the security by bringing it to sale. This was possible because prior to amending Act 35 of 1985, the secured creditor had unrestricted right of standing outside the winding up and proceeding against the property mortgaged to him.

78. In *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, the Supreme Court considered the impact of the amending Act 35 of 1985 by which the amendments were carried out in Section 529 and new Section 529-A was enacted and observed that "the decision in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, held the field for a considerable period, both under the Companies Act, 1913 and the Companies Act, 1956. However, by amending Act 35 of 1985, amendments were carried out in Section 529 and a new Section 529-A was enacted. These developments, in our view, brought about a qualitative change in the legal situation. It is important to notice that was decided under the Companies Act, 1913 which did not have any provision corresponding to the proviso to Section 529 or Section 529-A of the Companies Act, 1956. Obviously, therefore, *M.K. Ranganathan and Another Vs. Government of Madras and Others*,) could not have considered the impact of these amendments on the provisions of Section 232 of the Companies Act, 1913 (corresponding to Section 537 of the Companies Act, 1956).

79. In terms of Section 529(1) and 529-A(1)(b), 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 529-A(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 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 secured creditors. The Illustration appended to Clause (c) of Sub-section (3) of Section 529 is a clear pointer to the effect that the amount of debts due to the

secured creditors should be taken into consideration for the purpose of ascertaining the workmen's portion of security. Vide Andhra Bank Vs. Official Liquidator and Another,

80. At this stage we may also refer to the judgment of the Supreme Court in Allahabad Bank Vs. Canara Bank and Another, . In that case, the question of jurisdiction of the Debts Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, vis-a-vis the Company Court arose for decision. The Supreme Court held that even where a windingup petition is pending, or a winding-up order has been passed against the debtor company, the adjudication of liability and execution of the certificate in respect of debts payable to banks and financial institutions, are respectively within the exclusive jurisdiction of the Debts Recovery Tribunal and the Recovery Officer under that Act and in such a case, the Company Court's jurisdiction under Sections 442, 537 and 446 of the Companies Act stood ousted. Hence, no leave of the Company Court was necessary for initiating proceedings under the Recovery of Debts Act. Even the priorities among various creditors, could be decided only by the Debts Recovery Tribunal in accordance with Section 19(19) of the Recovery of Debts Act read with Section 529-A of the Companies Act and in no other manner. The Court took into account the fact that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was a legislation subsequent in point of time to the introduction of Section 529-A of the Companies Act by Act 35 of 1985 and it had overriding effect. But the Supreme Court held that by virtue of Section 19(19) of the RDB Act, the priorities among various creditors had to be decided by the Recovery Tribunal only in terms of Section 529-A of the Companies Act and Section 19(19) did not give priority to all secured creditOrs.

61. The Respondent's contention that Section 19(19) gives priority to all "secured creditors" to share in the sale proceeds before the Tribunal/ Recovery Officer cannot, in our opinion, be accepted. The said words are qualified by the words "in accordance with the provision of Section 529-A". Hence, it is necessary to identify the above limited class of secured creditors who have priority over all others in accordance with Section 529-A.

Further, the Supreme Court held in Para No. 71 as under:

71. But the point here is that the occasion for such a claim by a secured creditor (here Canara Bank) against realisations by other creditors (like Allahabad Bank) u/s 529-A read with proviso (c) to Section 529(1) can arise before the Tribunal only if Canara Bank has stood outside winding-up and realised amounts and if it shows that out of the amounts privately realised by it, some portion has been rateably taken away by the liquidator under Clauses (a) and (b) of the proviso to Section 529(1). It is only then that it can claim that it is to be reimbursed at the same level as a secured creditor with priority over the realisations of other creditors lying in the Tribunal. None of these conditions is satisfied by Canara Bank. Thus, Canara Bank does not belong to the class of secured creditors covered by Section 529-A(1)(b).

82. In *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, the question that fell for consideration before the Supreme Court was as to the right of State Financial Corporation u/s 29 of the State Financial Corporations Act, 1951 against debtor company to sell assets of company and realize security, when the company is under winding up. The Supreme Court held that in such a case the said power can be exercised by the State Financial Corporation only after obtaining appropriate permission from Company Court and acting in terms of directions issued by Company Court as regards conduct of the sale and distribution of proceeds thereof in terms of Sections 529 and 529-A of the Companies Act. In Paragraphs 17 and 18, the Supreme Court held as follows:

17. 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 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 529-A 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 529-A 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 Vs. Canara Bank and Another*, and in *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, in respect of the applicability of Sections 529 and 529-A 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. 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 529-A 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 Ltd. Vs. Karnataka State Financial Corpn., The Debts 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.

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 529-A 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 realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company in liquidation.

83. In *Asset Reconstruction Company (India) Limited Vs. The Official Liquidator, High Court as the liquidator of SIV Industries Ltd. (in liquidation)*, In the above case, South India Viscose Limited was ordered to be wound up by the Company Court and the Official Liquidator was appointed as a liquidator and the Official Liquidator has taken possession of the assets and sold certain movables. The Official Liquidator has also got the valuation done of certain properties and

application for sale has been filed for the sale of two residential flats belonging to the Company under liquidation. In the said decision, the First Bench of this Court considered the question whether the Asset Reconstruction Company incorporated under the SARFAESI Act is entitled to be associated in the process of sale of assets of the Company under liquidation along with the Official Liquidator. After extensive reference to *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, the First Bench of this Court has held that the power under SARFAESI Act could be exercised by the secured creditor only after obtaining appropriate permission from the Company Court and acting in terms of the directions issued by that Company Court.

84. As regards associating the Official Liquidator with the sale, the Court has held as under:

13. In the light of the law laid down by the *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, it is clear that where the bank or the financial institution has initiated proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Debts Recovery Tribunal would be entitled to order sale even if a company is under 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. Where, however, no proceedings have been initiated under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 the case would fall under paragraph 18 (iii) of the judgment of the Supreme Court in *Rajasthan State Financial Corporation Case*. In that event if the securitisation company acting u/s 13 of the Securitisation 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 distribution thereof among the creditors in terms of Section 529-A and 529 of the Companies Act.

85. In the instant case, though in pursuance to the order of the Court, IREDA has handed over possession of the assets to the Official Liquidator, IREDA has also got valuation of the assets by ITCOT Consultancy Services, Chennai. Now what we have is:

(i) a liquidation proceeding is pending and the Official Liquidator and the secured creditors are before the Company Court; (ii) IREDA approached the Company Court for permission to sell the property of the Company in liquidation and at the same time standing outside the winding up proceedings. In such factual matrix of the case, ratio of the above decision in *Para 17 of Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, squarely applies to the instant case. On application filed by IREDA, Company Court has rightly directed that the sale be held in association with the Official Liquidator and that the sale notice is to be issued by the Official Liquidator both on his behalf and on

behalf of the applicant (IREDA) as well as Sundaram Finance Limited in respect of the assets of the Company in liquidation (ASM) as well as that of NHSM. The directions thus made by the learned single Judge are clearly consistent with the provisions of the relevant Acts and the views expressed by the Supreme Court in the decisions referred to supra. In this situation, we find no reason to interfere with the order of the learned single Judge.

86. u/s 529(1) of the Companies Act, 1956, the Rules, which are in force under the Law of Insolvency with respect to the estates of persons adjudged insolvents shall apply even to the winding up of an insolvent company, in so far as 3 aspects are concerned viz., (i) debts provable; (ii) valuation of annuities and future and contingent liabilities; and (iii) the respective rights of secured and unsecured creditors. The Proviso to Section 529 makes it clear that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein. It is further stipulated by the Proviso that if the secured creditor opts to realise his security, instead of relinquishing his security and proving his debt, there must be rateable distribution and that the Liquidator would be entitled to represent the workmen. After making a comparison of the provisions of the Companies Act with the provisions of the Provincial Insolvency Act, 1920, in paragraphs 102 to 117, the learned single Judge held that the right of the applicant/IREDA as secured creditor cannot be lightly obliterated. We fully concur with the views of the learned single judge.

87. At this juncture, we may also refer to Section 13(9) of the SARFAESI Act. Section 13(9) provides that in the case of financing of financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him pursuant to Sub-Section 4 unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding and such action shall be binding on all the secured creditors. Proviso to Section 13(9) stipulates that in the case of a Company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act.

88. As pointed out earlier, on 28.9.2005, the Official Liquidator held the meeting of the secured creditor's IREDA, Sundaram Finance Limited, City Union Bank and Vijaya Bank, wherein it was agreed that IREDA is a major secured creditor, who is having the first charge over the entire assets of the Company. The secured creditors were impressed upon the importance of taking possession of the Company immediately and providing security to the factory premises. On 5.10.2005, IREDA has taken possession of all the assets of ASM along with the machineries of NHSM installed in the ASM. From the panchanama proceedings dated 5.10.2005, all the lender banks/financial institutions viz., Sundaram Finance Limited, City Union Bank, Vijaya Bank have signed the minutes. That

apart, the representative of ITCOT Consultancy Services, who has done the valuation and the representatives of the security agencies have also signed in the minutes of the meeting. Referring to the minutes dated 28.9.2005, in its letter dated 6.1.2006, IREDA has clearly stated that "action has been taken by IREDA in the interest of all the lender Banks dated 5.10.2005 and that all the lender banks have agreed to the action taken by IREDA". In terms of Section 13(9), IREDA has acted in the interest of all the lender Banks, though it has later handed over the possession to the Official Liquidator in pursuance of the orders of the Court.

89. Where a Company is wound up, secured creditor has the right to file the application seeking to sell the assets. IREDA has rightly filed the petition to seek the leave of the Company Court to sell the assets through Official Liquidator and at the same time standing outside the winding up proceedings.

90. To sum up our conclusions, In pursuance to the orders of the Court, handing over possession of the assets by IREDA to the Official Liquidator would not amount to relinquishing of rights of secured creditor.

By mere participation in the proceedings of Company Court and the winding up proceedings, right of secured creditor remains unaffected except to the extent of Section 529-A.

IREDA seeking permission of the Court to sell the properties of the Company in liquidation is inconsistent with and the directions of the learned single Judge are clearly consistent with the provisions of the relevant Acts and the views expressed by the Supreme Court. IREDA is well within its right approaching the Company Court to sell the properties of the Company in liquidation and also for permission to stand outside the winding up.

91. Points No. 7, 8 and 10:

During 1998-99, IREDA advanced a total sum of Rs. 15,54,10,000/- to NHSM for purchase of energy efficient conservation equipment for being installed in juice extraction and juice concentration Section of ASM. IREDA has a first charge over energy efficient equipment financed to NHSM and second charge over all the assets of NHSM. NHSM had obtained loan from Indian Bank, Pondicherry. Since NHSM defaulted in payment of the amount, Indian Bank, Pondicherry initiated proceedings under the provisions of SARFAESI Act and a notice u/s 13(2) of the Act was issued on 25.9.2004 demanding a sum of Rs. 27,19,15,465/-. Indian Bank, Pondicherry took possession on 1.1.2005 of all the assets - movables and immovables, over which it allegedly claims security interest. This was done by the Indian Bank, Pondicherry in exercise of its powers u/s 13(4)(a) of the Securitisation Act. The Indian Bank after issuing a tender notice dated 16.2.2005 for sale of land with plant, machinery, consumables, etc., of NHSM at Ariyaloor, Pondicherry, the properties of NHSM were sold in public auction. E.I.D Parry Limited, Chennai became the highest bidder . As NHSM defaulted in repaying the amount to IREDA, IREDA filed O.A. No. 112 of 2004 before DRT-I, New Delhi for

recovery of Rs. 20.03 Crores from NHSM. After obtaining permission from DRT-I, New Delhi, IREDA invoked the provisions of SARFAESI Act. On 18.1.2005 notice u/s 13(2) of SARFAESI Act was issued to NHSM. On 5.10.2005, IREDA has taken possession of secured assets of ASM and also energy efficiency conservation equipment of NHSM installed in ASM. As discussed earlier, on 8.12.2005, IREDA issued notice for sale of secured assets of ASM as well as the machineries of NHSM installed in ASM.

92. Challenging the SARFAESI proceedings issued by Indian Bank and alleging that Indian Bank did not return the documents of title of other movable and immovable properties belonging to NHSM, which were not sold, NHSM filed W.P. No. 1897 of 2006, which was disposed of with a direction to NHSM to approach the Debts Recovery Tribunal for the relief's. The Writ Appeal W.A. No. 1142 of 2006 preferred by NHSM was also disposed of by the order dated 27.3.2007 with a direction to NHSM to approach the Debts Recovery Tribunal to adjudicate their grievance. It is stated that NHSM has moved DRT and DRT has now seized of the matter.

93. The Energy Efficiency Equipment financed by IREDA is installed in the juice extraction section of ASM, which is now sought to be brought for sale along with movable and immovable assets of ASM. On behalf of NHSM, learned Senior Counsel Mr. T.K. Seshadri submitted that NHSM is a public limited Company. Merely because the promoters held majority of the shares, NHSM as well as the ASM cannot be considered as one and the same as both companies are separate and distinct legal entities in the eye of law. The learned Senior Counsel would further contend that the amount due and payable by NHSM arose in respect of a loan agreement dated 29.10.1999 in terms of which NHSM purchased energy efficiency equipment and when the liabilities of the Appellant were totally distinct and separate, there was no justification for the learned single Judge to brush aside the objections of NHSM on the ground that it does not appeal to the conscience of the Court.

94. The learned single Judge held that if the equipment of NHSM would get segregated it would result in damage and reduction in value of both and there is no legal impediment for a secured creditor, who has initiated proceedings under SARFAESI Act to sell the properties, which are the subject matter of SARFAESI proceedings and at the same time, seek the sale of the properties of the Company, which is in liquidation (ASM) through the Company Court. The learned single Judge observed that

except the sadistic pleasure of having deprived the creditors of their legitimate dues, the ninth Respondent may not gain anything out of it. If both of them issue advertisements at the same time in the same newspapers and conduct the sale simultaneously, the objection of the ninth Respondent will become meaningless. But it would involve unnecessary expenditure, which should be avoided. Therefore, the first and second objections of the ninth Respondent cannot hold water.

95. Taking strong exception to the above observation of the learned single Judge, the learned Senior Counsel Mr. T.K. Seshadri has contended that the provisional liquidator is not entitled to take possession of the assets belonging to NHSM and that the energy efficiency conservation equipment of NHSM has to be segregated and handed over to NHSM.

96. The contention of IREDA is that the Energy Conservation Efficiency Equipment, which was purchased by NHSM from out of the loan amount sanctioned by IREDA but installed in ASM, is a secured asset of IREDA and over the said equipment, IREDA has the first charge and exercising its rights under u/s 13(4) of the SARFAESI Act, IREDA has taken possession of the secured assets of NHSM. It was further submitted that by the intervention of the Court, the factory and premises of ASM were handed over to the provisional liquidator and while being so, IREDA has categorically stated that it retained possession over secured assets of NHSM within the ASM premises.

It was further submitted that in view of the integrated nature and functionality of the equipment, any segregation would result in deprivation of the value of unit and if the equipment is to be segregated it would not have any value, but only it has to be sold as scrap. As pointed out earlier, IREDA is the first charge holder of the Energy Efficiency Equipment purchased by NHSM, but installed in ASM. The energy efficiency equipment is an integrated unit, which are sought to be exempted by NHSM are the integrated part of ASM and if the assets as claimed by NHSM are separated from the rest of the assets of ASM, it would be impossible to sell the unit (ASM). In view of the integrated and homogeneous nature of the sugar mills and co-generation power plant, IREDA applied for joining Official Liquidator and Sundaram Finance Limited in the sale. As discussed earlier, only by intervention of the Court, IREDA was compelled to hand over the properties of the secured asset/energy efficiency equipment of New Horizon Sugar Mills Limited, which are in the hands of IREDA.

97. If the assets as claimed by NHSM are segregated and separated from the machinery and assets of the Company in liquidation, the entire machinery would become a scrap. If the assets as claimed by NHSM are separated and detached from the entire set of machineries, the same would not only reduce the machinery into a junk, but would also reduce the sale consideration of the unit to be realised. Keeping in view the larger interest and also the interest of the creditors, the learned single Judge rightly ordered sale of all the properties exercising inherent powers vested with him under Rule 9 of the Companies (Court) Rules. Separation of the various machinery in the integrated system and selling them individually will dwindle the value. The learned single Judge held that to issue separate advertisement for the power energy efficiency equipment of NHSM would involve unnecessary expenditure which should be avoided.

98. It is pertinent to note that the Directors/promoters of NHSM and ASM are one and the same and are aware of the fact that IREDA has brought sale of leased assets of NHSM situated at ASM. It is also pertinent to note that NHSM

has not individually challenged the SARFAESI proceedings initiated and taking of possession by IREDA against NHSM. Only ASM has filed S.A. No. 3 of 2006 before the DRT, Chennai. Having not challenged the SARFAESI proceedings, the NHSM is estopped from raising any plea against the proposed sale in question of its machinery installed in ASM.

99. Whether New Horizon Sugar Mills Limited is deprived of right of appeal because proceedings under SARFAESI Act are conducted through the Company Court:

The learned Senior Counsel Mr. T.K. Seshadri has contended that IREDA filed O.A. No. 112 of 2004 against NHSM in DRT-I, New Delhi and obtained interim order against Indian Bank restraining them from disbursing the sale consideration realised by them and IREDA did not enforce the said interim order, but on the contrary with a view to bring the entire property of ASM, IREDA moved an application before DRT to withdraw O.A. No. 112 of 2004 with the liberty to initiate action against NHSM under the SARFAESI Act. According to the learned Senior Counsel, the conduct of the Appellant pursuant to the proceedings of SARFAESI Act before the Company Court is a totally malafide. According to NHSM, had the proceedings been initiated under SARFAESI Act, NHSM would have had the right of appeal under the provisions of SARFAESI Act. As pointed out earlier, NHSM did not challenge the sale notice dated 8.12.2005 issued by IREDA and no SARFAESI appeal was filed u/s 17 of the Act. NHSM cannot file an appeal u/s 18 of the Act as they have to deposit 50 percent of the claim amount. Having not initiated any action against sale notice issued under SARFAESI Act, NHSM now cannot contend that by proceeding before Company Court, they are deprived of the right of appeal. As rightly contended by the learned Senior Counsel Mr. G. Masilamani, the matter being heard before the High Court, gives NHSM a better opportunity to defend their case and enlarges the ambit of enquiry. Under SARFAESI Act, scope of appeal u/s 17 is limited viz., whether due procedure as laid down in the Act and Rules was followed by the secured creditors. Evidently, in these proceedings, NHSM has raised all the available points against taking over of possession and sale in the proceedings before the Company Court and in our opinion, no prejudice is caused to NHSM. No valid objection could be raised by NHSM for bringing the machineries to sale along with assets of ASM.

100. Whether the claim of IREDA on NHSM could have been settled out of the surplus funds available with the Indian Bank. In the counter affidavit filed by NHSM, it was averred that in O.A. No. 112 of 2004, IREDA has sought for attachment of excess money realised by Indian Bank from the sale of secured creditors of NHSM and in such circumstances it is not open to NHSM to seek parallel remedies at various forums for the same relief. On behalf of NHSM, the learned Senior Counsel Mr. T.K. Seshadri has submitted that NHSM has always pointed out that the entire balance amount realised from Indian Bank after satisfying their dues should be paid to IREDA the second charge holder and

instead of doing so, Indian Bank proceeded to arbitrarily disburse amounts to various unsecured creditors overlooking the claims of IREDA. It was further submitted that NHSM has sent several letters to IREDA pointing out the conduct of Indian Bank in depriving IREDA their rights and inspite of the said communications; but IREDA has chosen to remain silent and avoided taking any steps to recover the balance amount lying with the Indian Bank. It was further submitted that instead of criticising the conduct of IREDA in letting Indian Bank to fritter away the valuable rights available to them in respect of assets of NHSM, the learned single Judge commented upon NHSM based on the facts which were not even placed before the learned single Judge at the time of arguments. The learned Senior Counsel took strong exception to the observations and the learned single Judge in taking note of another writ petition filed by NHSM in W.P. No. 11881 of 2010, which was heard by the learned single Judge while sitting in the Writ Petitions, though the Writ Petition was heard and disposed of by the order dated 29.6.2010 long after the Company applications were heard and reserved for orders.

101. As pointed out by the learned single Judge, the promoters of ASM and NHSM have also promoted two non-banking finance companies by name (i) Pondicherry Nidhi Limited and (ii) PNL Nidhi Limited. These finance companies committed default in payment of the deposits on maturity. Number of criminal cases were registered against the promoters of the Company. For nonpayment of dues to Indian Bank, the Bank proceeded against NHSM under SARFAESI Act and the assets of NHSM were sold in public auction. M/s.E.I.D. Parry Limited was the highest bidder for a sum of Rs. 50.20 Crores for the sale of assets of NHSM. After the Indian Bank adjusted its dues, the remaining amount was lying with the Indian Bank. For the remaining amount, a sale certificate was issued on 10.8.2005 to the highest bidder viz., M/s.E.I.D. Parry Limited, but the sale certificate could not be registered in view of the attachment order passed by the competent authority under Pondicherry Protection of Interests of Depositors in Financial Establishments Act, 2004.

102. Regarding the non-payment of amount to the depositors and also the claims of the workmen, Writ Petitions were filed in which an interim order was passed appointing a retired judge of the Court to pass the claim of the workmen and directing the Indian Bank to deposit Rs. 6 Crores in a no lien account for the said purpose and for eventual disbursement to workmen. The said order of the Division Bench was the subject matter of appeal before the Hon'ble Supreme Court in C.A. Nos. 6381 and 6382 of 2009 and both the appeals were disposed of by the Apex Court by order dated 31.8.2009. In paragraph No. 9 of its order, the Supreme Court directed the Indian Bank to transfer an amount of Rs. 6.00 Crores from out of the sale proceeds to a no lien account for the purpose of disbursement to the workers. In pursuance to the aforesaid orders, the process of computation of the claims of workmen have commenced by the Commissioner of Labour. When the workmen and the Commissioner of Labour took 31.10.2006 as a date upto which the workmen will be deemed to have been in service for the

purpose of computation of benefits u/s 25FF of the Industrial Disputes Act, 1947. NHSM protested the same contending that the Bank had taken possession even on 1.1.2005 itself u/s 13(5) of the SARFAESI Act. It was in that context, the NHSM has filed W.P. No. 11881 of 2010 which came up before the single Judge (Justice V. Ramasubramanian). Referring to the said proceedings, the learned single Judge rejected the contention of NHSM that IREDA could have sought for payment from out of the surplus funds available with the Indian Bank.

103. Of course, the said Writ Petition- W.P. No. 11881 of 2010 came to the notice of the learned single Judge after the learned single Judge has reserved the matter for orders in the Company Petition. Even though the matters were already argued before the learned single Judge, NHSM has made no efforts to apprise the Court about the pending claims by the workmen. When there were claims of workmen, NHSM was not justified in contending that IREDA ought to have satisfied its claim from out of the remaining sale proceeds amount available with the Indian Bank. In fact, NHSM ought to have brought to the notice of the learned single Judge about the claims of workmen and the claims of several depositors in respect of Pondicherry Nidhi Limited and PNL Nidhi Limited. When those material facts were came to the knowledge of the learned single Judge in the course of other proceedings, it cannot be contended that the learned single Judge committed an error in taking note of those facts which otherwise came to his knowledge in other proceedings.

104. Point No. 9: Claim of Sundaram Finance Limited to recover the value of co-generation plant and machinery given on lease:

Sundaram Finance Limited is the owner of plant and machinery and the same was leased to ASM under three lease agreements (i) first agreement is Rs. 86,58,380/- repayable in sixty months from 9.2.2001 and ending on 8.2.2006; (ii) second agreement is for Rs. 49,19,575/- repayable in sixty monthly instalments from 9.2.2001 and ending on 8.2.2006 and (iii) third agreement is for Rs. 14,02,49,505/- repayable in sixty monthly instalments from 9.2.2001 to 8.2.2006. The total amount payable to Sundaram Finance Limited is Rs. 15,38,27,460/-.

105. As ASM defaulted in repaying the amount, Sundaram Finance Limited filed application # A. No. 4401 of 2004 u/s 9 of Arbitration and Conciliation Act for appointment of Advocate Commissioner to re-possess the machinery. By Order dated 19.3.2005, the High Court appointed the Advocate Commissioner to seize and sell the machinery of Sundaram Finance Limited available in ASM "as is where is" basis. IREDA has invoked SARFAESI Act over the entire sugar mill of ASM of which the machinery of Sundaram Finance Limited was also part and ownership of the premises. IREDA impleaded itself in the proceedings filed by Sundaram Finance Limited in A. Nos. 4401 of 2004 and 1448 of 2005. On 27.9.2005, IREDA and Sundaram Finance Limited entered into Memorandum of understanding by which IREDA will sell the entire machinery along with Sundaram Finance Limited. The said Memorandum of Understanding was

recorded in Application No. 4401 of 2004. As per the said Memorandum of Understanding dated 27.9.2005, sale has to be completed before 31.3.2006.

106. In pursuance to the Order of the Court in Company Application No. 1786 of 2005 (24.4.2006), IREDA handed over possession of the unit along with machineries including the machinery of Sundaram Finance Limited to the Official Liquidator. IREDA filed Company Application No. 1038 of 2006 seeking sale of the movable and immovable assets of ASM including the plant and machinery of Sundaram Finance Limited and other machineries in the premises.

107. Sundaram Finance Limited is the owner of the plant and machinery and it has leased out the same to ASM. The stand of Sundaram Finance Limited is that it had given its consent to sell the machinery of which it is the owner without relinquishing its ownership in order to obtain good rate for the entire plant and machinery of ASM. Reiterating the submissions of IREDA, the learned Counsel Mr. S. Vasudevan would submit that the entire ASM is one composite unit and if the machinery of Sundaram Finance Limited is separated the entire machinery would become junk and they can be sold only as a scrap. Without relinquishing its ownership or their status as an absolute owner, Sundaram Finance Limited permits the sale of the plant and machinery along with other machinery of ASM. In so far as the machinery leased out by Sundaram Finance Limited, the learned single Judge observed as under:

75. In so far as the equipment leased out by Sundaram Finance Ltd (second Respondent herein) to the company in liquidation is concerned, the company in liquidation cannot claim ownership, since these equipment are given on lease by Sundaram Finance Ltd to the company in liquidation.

Therefore they have the right of re-possession. As a matter of fact, Sundaram Finance Ltd., has already obtained orders in the applications (A. Nos. 4401 of 2004 and 1448 of 2005) filed u/s 9 of the Arbitration and Conciliation Act, 1996, for re-possession and sale. The application A. No. 4401 of 2004, was closed on 7.12.2005 after the applicant and Sundaram Finance Ltd., entered into a Memorandum of Understanding on 27.9.2005. Therefore, the sale of the third category of plant and machinery and equipment, leased out by Sundaram Finance Ltd., to the company in liquidation, cannot be objected to for two reasons viz., (i) that Sundaram Finance Ltd., is the owner and (ii) that there are already orders for re-possession and sale.

108. In so far as machineries of Sundaram Finance Limited, we fully concur with the views of learned single judge. The ownership of plant and machineries is with Sundaram Finance Limited and the same were leased out to ASM. Being the owner of the plant and machineires, Sundaram Finance Limited has the right of re-possession. However, keeping in view the larger interest of the unit and that plant and machineries form integral part of ASM, Sundaram Finance Limited has consented for the sale of its plant and machineries in ASM.

109. Point No. 11 "Reference to the conduct of the directors" Whether justifiable:

Promoters of ASM also promoted two non-banking finance Companies by names (i) Pondicherry Nidhi Limited and (ii) PNL Nidhi Limited. The promoters/Appellants in O.S.A. No. 64 of 2011 did not honour the financial commitments towards the depositors. The learned single Judge observed that the Appellants in O.S.A. No. 64 of 2011, who promoted Arunachalam Sugar Mills Ltd., and New Horizon Sugar Mills Ltd., and PNL Nidhi Ltd., are facing prosecution under the Pondicherry as well as Tamil Nadu Protection of Interest of Depositors Act, on the allegation that thousands of depositors have been cheated. They were arrested and detained in custody from 9.8.2005 to 10.12.2005.

110. The learned single Judge further observed that the news item published in The Hindu in its edition dated 10.8.2005, reported that the total number of depositors of the Nidhi were 13,295 and that it was a scam of the magnitude of Rs. 68.50 crores. As per the news item published in The Hindu, dated 21.7.2009, several senior citizens who were retired officials, had invested their retirement benefits in the Nidhi and the number of depositors from Pondicherry alone were 6,000, whose deposits totalled to Rs. 57 crores. The Express newspaper also carried the sad tales of thousands of depositors.

111. The Government of Pondicherry issued notification in G.O. Ms. No. 12 dated 18.2.2006 attaching the properties in terms of the provisions of Pondicherry Protection of Interests of Depositors in Financial Establishments Act, 2004. The validity of the said G.O. came to be challenged both by the promoters and also by the auction purchaser from the Indian Bank (EID Parry). The batch of writ petitions were disposed of and the said order became subject matter before Division Bench in W.A. Nos. 1788 and 1919 of 2005 and the writ appeals came to be disposed of by a common order dated 27.3.2007. The S.L. Ps came to be filed in C.A. Nos. 6381 and 6382 of 2007 and the issue raised in those appeals related only to the claims of workmen and the balance amount is payable to NHSM.

112. The learned single Judge observed that the Appellants in O.S.A. No. 64 of 2011 (ASM) are attempting to stall the sale with a view to protect themselves from the depositors. If the sale is postponed, the hopes of thousands of depositors would be kept alive and if the sale takes place, the secured creditors may take away a major chunk of the proceeds, exposing the Respondents 5 to 8 to the risk of being proceeded against personally, by the depositors.

113. In Paragraph Nos. 119 to 123 of the order under appeal, the learned single Judge elaborately referred to the conduct of the promoters and the plight of the depositors. In so far as the question of payment of workmen's dues upto Supreme Court, the learned single judge had observed as under:

They have fought the question of payment of workmen's dues upto the Supreme Court once and also fought the issue relating to the date up to which the workmen's dues were to be paid. The only benefit that appears to have accrued out of this series of litigation by the Respondents 5 to 9, is a little development of the law through contributions from the best of legal brains that they could

afford to engage, though in the process, the creditors and the depositors are left high and dry. Therefore, all the objections raised by the Respondents 5 to 8 and 9, not only lack legal tenability, but also lack bona fides.

114. Taking strong exception to the above observation, the learned Counsel for the Appellants submitted that the learned single Judge was not justified in criticising the conduct of the promoters and taking note of the events, which are unconnected with the ASM. It was further submitted that the learned single judge appears to have been swayed by the other factors which are not relevant to the issue.

115. It is a matter of record that the promoters have not only promoted ASM and NHSM but also two non-banking finance companies and the promoters could not honour their financial commitments to the depositors. The prosecution and other litigations pertaining to the depositors is a matter of record and the judgments was also been reported in G. Govindusamy and Others vs. P.N.L. Nidhi Limited The High Court is a Court of Record. It cannot be said that the learned single Judge has adopted erroneous approach in referring to the conduct of the promoters. To our mind, the conduct of the promoters cannot be said to be insignificant. Though the learned single Judge stretched the discussion a little far, we are unable to countenance the submission that the learned single Judge erred in referring to the criminal proceedings, claims of depositors and the conduct of the promoters of ASM.

116. Point No. 12 O.S.A. No. 81 of 2011:

Walchandnagar Industries Limited is engaged in the business of manufacturing and supplying Boilers and Auxiliaries. In pursuance to the contract, Walchandnagar Industries Limited supplied Boiler and the contract was priced at Rs. 7,31,50,000/-payable in accordance with Clause 3.13 of the General Conditions of the Contract. Walchandnagar Industries Limited received payment of Rs. 6,26,70,411/- till February, 2003 and an amount of Rs. 1,05,81,632/- became due and payable by ASM. Alleging that inspite of several reminders ASM failed to pay the amount, Walchandnagar Industries Limited has filed the suit in C.S. No. 19 of 2005 on the file of Civil Judge, Senior Division at Baramati, State of Maharashtra. The said suit was decreed exparte on 28.6.2005 and the decree was transferred to Sub-Court, Tiruvannamalai for execution. Walchandnagar Industries Limited filed E.P. No. 15 of 2005 for execution of the money decree by sale of immovable properties of ASM.

117. On noticing tender-cum-sale notice issued by IREDA to sell movable and immovable properties of ASM and also noticing the advertisement published in "The Hindu" for selling the properties of ASM in pursuance to the order passed in A. No. 1038 of 2006, Walchandnagar Industries Limited filed C.A. No. 2486 of 2006 praying that the Boilers supplied by Walchandnagar Industries Limited be excluded from the schedule of properties. Referring to Section 49(1) of Sale of Goods Act, learned single Judge dismissed the application on the ground that the

title in the goods (Boiler) has already passed to the company in liquidation and therefore, Walchandnagar Industries Limited had lost its lien on the Boiler and consequently, it had become merely an unsecured creditor and can only stand in the long queue of unsecured creditors behind all those secured creditors and workmen. Being aggrieved by the dismissal of application in C.A. No. 2486 of 2006, Walchandnagar Industries Limited has come forward with this appeal in O.S.A. No. 84 of 2011.

118. Clause 3.11 of General Conditions of Contract reads as under:

The title and ownership in goods shall immediately on these being handed over to the transporter shall pass on to the PURCHASER and these will become remain the property of the PURCHASER, provided always that the SUPPLIER shall have a particular possessory lien on the goods to the extent of the value of the goods remaining to be realized from the PURCHASER.

119. Mr. Krishna Srinivas, learned Counsel for Walchandnagar Industries Limited has submitted that Clause 3.11 of the General Conditions of Contract clearly states that Walchandnagar Industries Limited would retain the possessory lien on the property in respect of such amount as remained unpaid by the purchaser. It was further submitted that though Walchandnagar Industries Limited has parted with the possession of the Boiler by virtue of the conditions of the contract, it still retains its possessory lien on the Boiler. It was further submitted that in view of Section 49(2) of Sale of Goods Act, mere obtaining of money decree would not amount to waiver of the lien.

120. Lien pre-supposes seller's possession. Consequently, when seller's possession ceases and buyer gets lawful possession, the right of lien comes to an end. Thus lien of unpaid seller terminates when buyer or his agent lawfully obtains possession of the goods.

121. u/s 49(1) of Sale of Goods Act, 1930, an unpaid seller loses his lien, under three circumstances viz., (i) when he delivers the goods to a carrier or other bailee for transmission to the buyer, without reserving the right of disposal; (ii) when the buyer or his agent lawfully obtains possession of the goods; and (iii) by waiver. As pointed out by the learned single Judge, the ownership of boiler has already passed to the company in liquidation and since the seller already parted with possession of the boiler, the lien of Walchandnagar Industries Limited is terminated and it becomes an unsecured creditor.

122. As pointed out earlier, Walchandnagar Industries Limited had also filed Civil Suit in C.S. No. 19 of 2005 and obtained a decree which has been transmitted to the Sub-Court, Tiruvannamalai for execution. As laid down in Sub-section (2) of Section 49 of Sale of Goods Act, an unpaid seller of goods having lien thereon, does not lose his lien by a reason only that he has obtained a decree for the price of the goods. This is because of the obvious reason that unless the decree is successfully executed, the price remains unpaid.

123. Ofcourse, Walchandnagar Industries Limited does not lose its lien by reason that it has obtained a decree for the price of the goods. But in the plaint averments in C.S. No. 19 of 2005 Walchandnagar Industries Limited clearly averred that there is an arbitration clause in the original agreement . However, since the amount was settled in the meeting dated 20.03.2002 and ASM expressly acknowledged their liability by their letter dated 01.03.2003, there is no existing dispute between the parties and that present suit (C.S. No. 9 of 2005) is a simple suit for the recovery of the agreed amount.

124. Having regard to the fact that the dispute between Walchandnagar Industries Limited and ASM was already sorted out in the meeting, Walchandnagar Industries Limited has chosen to file a suit in C.S. No. 19 of 2005 for recovery of the money and the averments in the plaint would clearly show that Walchandnagar Industries Limited had lost its lien on the boiler and consequently, Walchandnagar Industries Limited had become merely an unsecured creditor who holds the decree in its favour. As held by the learned single Judge, Walchandnagar Industries Limited can only stand in the long queue of the unsecured creditors behind all the secured creditors and workmen. We do not find any error warranting interference with the finding of the learned single Judge and the appeal [O.S.A. No. 81 of 2011] preferred by Walchandnagar Industries Limited is liable to be dismissed.

125. Point No. 13 O.S.A. Nos. 58 and 59 of 2011:

Bharat Heavy Electricals Limited [BHEL] had entered into agreement with ASM for supply and supervision of (i) A 8400 KW Capacity Extraction cum Back Pressure Turbo generator and (ii) A 4280 KW Capacity Low Pressure Condensing Turbo generator with all its auxillaries and executed the contract. The value of the total contract for a 8400 KW Capacity Extraction cum Back Pressure Turbogenerator is Rs. 507 lakhs, out of which, Rs. 72.96 lakhs has been due from ASM. Likewise, the value of the total contract for A 4280 KW Capacity Low Pressure Condensing Turbogenerator with all its auxillaries is Rs. 411 lakhs, out of which, ASM paid Rs. 54.5 lakhs and the outstanding amount of Rs. 411.251 is due. In O.A. No. 253 of 2005, the amount involved is Rs. 72.92 lakhs and the amount involved in O.A. No. 254 of 2005 is Rs. 411.251 lakhs. For recovery of the said outstanding amount, BHEL has filed O.A. Nos. 253 and 254 of 2005 u/s 9 of Arbitration and Conciliation Act praying for (i) interim injunction restraining ASM, its officers, directors or agents from selling, transferring or otherwise alienating or disposing in any manner the land and building comprising of factory situate at Arunachalam Nagar, Malapampadi, Tiruvannamalai Taluk and the plant and equipments installed therein and or lying in or available at the said premises including the equipments being A-8400 KW Extraction-cum-back Pressure Turbo Generator and 1 x 4 MW STG Low Pressure condensing Turbo Generator (TG3) covered by the contract. Interim injunction granted in both the applications was vacated, which was challenged by the BHEL in O.S.A. Nos. 341 and 342 of 2008. Those two appeals were heard along with the appeals in O.S.A. No. 321 of 2008

filed by NHSM and O.S.A. No. 345 of 2008 filed by Kannan and others. By common judgment dated 27.10.2009, all the appeals were allowed and the matters were remitted back to the learned single Judge to be heard afresh. Observing that two sets of Turbo Generators and auxiliaries were already supplied to the company in liquidation and that the title of the goods had passed on to the buyer, learned single Judge held that BHEL has no right to claim any lien over the goods. Observing that BHEL stands in no better footing than Walchandnagar Industries Limited, learned single Judge held that the objection of the BHEL for the sale of Turbo Generators supplied by them to ASM cannot be sustained and the applications filed u/s 9 of Arbitration Act came to be dismissed.

126. Learned Counsel for BHEL has submitted that when the land and building and other equipments belonging to the company in liquidation are liable to be brought to sale, there is no justification for bringing to sell the equipments supplied by BHEL in which, ASM has no title. It was further submitted that learned single Judge should have made distinction between the equipments supplied by BHEL and the land and building and other equipments belonging to ASM and both the assets cannot be treated on par. Learned Counsel for BHEL would mainly contend that as per Clause 3.11.1 of General Conditions of the Contract, till the entire money is paid BHEL has possessory lien over the Turbo Generators and therefore, the machineries supplied by BHEL cannot be brought for sale and in view of the arbitration clause, Section 9 application filed by the BHEL is to be allowed.

127. In pursuance to the contract, BHEL has supplied (i) A 8400 KW Capacity Extraction cum Back Pressure Turbo generator and (ii) A 4280 KW Capacity Low Pressure Condensing Turbo generator with all its auxiliaries. Clause 3.11.1 of General Conditions of Contract provides for possessory lien. Clause 3.11.1 reads as under:

Clause 3.11.1 " The Goods, shall immediately, in consideration of payment of the first installment of the Contract Price to the SUPPLIER by the PURCHASER, become and remain the property of the PURCHASER; provided always that the SUPPLIER shall have a particular possessory lien on the Goods to the extent the value thereof exceeds the total value of the installment payments made by the PURCHASER to the SUPPLIER. Transfer of title to goods shall be ex-works.

128. By careful reading of Clause 3.11.1 of General Conditions of Contract, it is seen that on payment of first instalment at the contract price, the ownership of the goods shall immediately be passed to the purchaser and remain the property of the purchaser. Even though, Clause 3.11.1 stipulates that the supplier shall have possessory lien on the goods, as per Section 49 of Sale of Goods Act, the seller loses its lien under three circumstances viz., (i) when he delivers the goods to a carrier or other bailee for transmission to the buyer, without reserving the right of disposal; (ii) when the buyer or his agent lawfully obtains possession of the goods; and (iii) by waiver. ASM has already taken delivery of A 8400 KW Capacity Extraction cum Back Pressure Turbo generator and A 4280 KW Capacity

Low Pressure Condensing Turbo generator with all its auxillaries and title has already passed to the buyer/ASM. While so, BHEL has no right to claim any lien over the goods u/s 49 of Sale of Goods Act and lien of BHEL is terminated when ASM had taken lawful possession of the goods. As held by the learned single Judge, position of BHEL is only as unsecured creditor. BHEL has to establish its claim before Official Liquidator and has to stand in the long queue of unsecured creditors behind all secured creditors and workmen. We do not find any error warranting interference with the finding of the learned single Judge and the Appeals [O.S.A. Nos. 58 & 59 of 2011] preferred by BHEL are liable to be dismissed.

129. Points No. 14 and 15:

ASM did not deny the debt, but was merely taking time to settle the dues. Inspite of repeated demands by IREDA and other secured creditors and opportunities by IREDA, ASM has not repaid the amount in the Company Court. Inspite of taking sufficient time, ASM could not secure investor/purchaser and ASM neglected to pay the huge amount to IREDA and to other secured creditors and also non-secured creditors is a prima facie evidence of its inability to pay the amount. The incapability of ASM to pay the debt is writ large on the facts.

130. Upon analysis of materials on record, the learned single Judge rightly ordered sale of assets of ASM along with the machines thereon. It is unfortunate that IREDA, a Government of India Enterprise, which has parted with huge amount is unable to recover its dues. On the application filed by IREDA, being the major secured creditor, the learned single Judge rightly ordered sale of movable and immovable assets of ASM. We only hope that the assets are sold for a better price.

131. Based on the valuation of ITCOT Consultancy Services Private Ltd, the learned single Judge fixed the upset price at Rs. 86.44 Crores as under:

(1) Land (120.70 Acres) - Rs.11.00 crores	(2) Land (4.96 Acres) - Rs. 0.44 crores
(3) Building - Rs. 9.00 crores	(4) Plant and Machinery & other movable assets - Rs.66.00 crores
----- Rs.86.44 crores -----	

Even in January, 2006, when IREDA has caused sale notice, the upset price was fixed at Rs. 96.80 Crores. After giving wide publicity in news papers, bid cum auction was held by IREDA on 20.2.2006.

Even in February 2006, IREDA received bid from Ambika Sugars for Rs. 135.50 Crores, which did not fructify because of subsequent proceedings. In the Company Court, ASM has brought an offer from one Ramchander, who was ready to give a loan of around Rs. 120 Crores to rehabilitate the unit, which also subsequently did not fructify. In such facts and circumstances, we are of the view that fixing upset price of Rs. 86.44 Crores is very much on the lower side.

132. Based on the ITCOT valuation, the learned single Judge has fixed the upset

price at Rs. 86.44 Crores as stated above. Considering the above valuation, we find that value of the land appears to have been taken around Rs. 90,000/- per acre. Even though land is situated at Mallappambadi, as the land is being used for industrial purpose where sugar mill has been running in a 125.66 acres in one lot, in our view, the value of Rs. 90,000/- per acre is very less. Having regard to the escalation of land prices and other factors, we deem it appropriate to take the value of the land per acre at Rs. One Crore. In so far as the valuation of the building, the valuation of the building was fixed at Rs. 9 Crores and the same is increased by another 50 percent. i.e., value of the building is fixed at Rs. 13.50 Crores. The value of plant and machinery and other movable assets are taken at the same value of Rs. 66.00 Crores. Accordingly, the total value is fixed at Rs. 204.46 Crores as under:

(1) Land (120.70 Acres) - Rs.120.00 crores	(2) Land (4.96 Acres) - Rs. 4.96 crores
(3) Building - Rs. 13.50 crores	(4) Plant and Machinery & other movable assets - Rs. 66.00 crores
----- Rs.204.46 crores -----	

The above valuation is not only reasonable but also justifiable. As pointed out earlier, in 2006, IREDA received offer from Ambika Sugar Mills for Rs. 135.50 Crores. For arriving at the current value, giving reasonable increase of 10 percent every year for the said amount of Rs. 135.50 Crores in 2006, in our considered view, fixing of upset price at Rs. 204.46 cores is quite reasonable.

133. For the assets to fetch a better price, we direct the Official Liquidator to give wide publicity of the proposed sale not only within the State but throughout the country. We also direct the Official Liquidator to take every endeavour to see that the assets are sold for a better price. All other directions of the learned single Judge for effecting paper publication inviting tenders shall hold good.

134. In the result, O.S.A. Nos. 58, 59, 63, 64 and 81 of 2011 are dismissed, with the following directions:

The Official Liquidator is directed to effect publication in one edition of the English Daily "THE HINDU" in all the editions throughout India and one edition of the Tamil Daily "Daily Thanthi" throughout Tamilnadu inviting sealed tenders for the purchase of the assets, both movable and immovable belonging to the company in liquidation Arunachalam Sugar Mills and financed by the IREDA and Sundaram Finance Limited. The publication shall indicate that it is issued by the Official Liquidator both on his behalf and on behalf of IREDA and other secured creditors in respect of the assets of the company in liquidation as well as the machineries of New Horizon Sugar Mills Limited, now lying in the factory premises of the Arunachalam Sugar Mills. The paper publication shall be effected on or before 16.05.2011. The last date for receipt of tenders shall be indicated as 16.06.2011 and the date of auction shall be fixed as 23.06.2011. The cost of Tender Forms is fixed at Rs. 1,000/-.

(1)Land (120.70 Acres) - Rs.120.00 crores	(2)Land (4.96 Acres) - Rs. 4.96
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crores (3)Building - Rs. 13.50 crores	(4) Plant and Machinery & other movable assets - Rs. 66.00 crores	-----	Rs.204.46 crores

135. The paper publication shall also indicate that the intending purchasers who wish to inspect the properties may give an indication to the Official Liquidator and that upon an intimation being delivered by the intending purchasers, the Official Liquidator will arrange an inspection at the convenience of the Official Liquidator and Tenderers. The Official Liquidator shall also cooperate with the intending purchasers to arrange for the inspection of the premises and the machineries without any delay. If necessary the Official Liquidator shall seek adequate police protection from the Superintendent of Police of the District, on the dates of inspection. Upon production of a copy of this order by the Official Liquidator, the Superintendent of Police of the District concerned shall provide adequate police protection to ensure smooth inspection on the dates indicated above. It is open to the Officials of IREDA, the officials of Sundaram Finance and other secured creditors/non-secured creditors and the representatives of the company in liquidation Arunachalam Sugar Mills to accompany the Official/ Deputy Official Liquidator, on the dates of the inspection along with the intending purchasers. The cost of the paper publication in the English Daily and the Vernacular Daily shall be borne by the Official Liquidator, which can be reimbursed from out of the sale proceeds. Apart from issuing paper publications, the Official Liquidator shall also send intimation of the proposed sale to the leading Sugar Mills in the country including (i) Ambica Sugar Mills which already offered to purchase for Rs. 135.50 crores; (ii) the Sugar Mills which already evinced interest in buying these properties by tendering letters of offer and Mr. M.G. Ramachandran, who made offer for investment; and (iii) the Sugar Mill which purchased the properties of New Horizon Sugar Mills Limited.

136. In order to avoid any confusion, it is made clear at the cost of repetition that the news paper publications inviting tenders, should contain the following details:

(i)The upset price of the land, building, plant and machinery and other movables, as detailed in the preceding paragraph.

(ii)The cost of the Tender Forms, the last date for submission of tenders, the dates for inspection and the date of auction.

(iii)The fact that the Tender Forms should be accompanied by Demand Draft/Pay Order representing 5% of the bid amount quoted by the tenderer towards Earnest Money Deposit.

(iv)The fact that the sealed tenders are to be submitted along with the Pay Order/ Demand Draft, addressed to the Registrar General, High Court, Madras on or before 16.06.2011.

(v)Indicating that the tenders will be opened and the auction amongst the

tenderers will be held before the single Judge on 23.06.2011.

(vi) The fact that it is issued by the Official Liquidator both on his behalf and on behalf of IREDA as well as Sundaram Finance Limited and the secured creditors and non-secured creditors in respect of the assets of the company in liquidation Arunachalam Sugar Mills as well as the machineries of New Horizon Sugar Mills Limited, now lying in the factory premises of the company in liquidation.

137. The matter shall be listed before the single Judge on 16.6.2011 i.e., the last date for receipt of sealed tenders. The learned single Judge shall then call the matter on 23.06.2011 for the conduct of auction and the parties and interested bidders are directed to appear before the single Judge. It is open to the Official Liquidator/IREDA to seek any clarification, if necessary.

However, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.