

(2013) 05 CAL CK 0049

In the Calcutta High Court

Case No : A.P.O. No's. 50, 65 and 105 of 2013; C.P. No's. 233 of 2008 and 513 of 2011

ICICI Bank Ltd.

APPELLANT

Vs

Dunlop India Ltd. and Others

RESPONDENT

Date of Decision : 02-05-2013

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2013) 4 BC 482 : (2013) 2 BC 632 : (2014) 2 CHN 255

Hon'ble Judges : Mrinal Kanti Chaudhuri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Ratnanko Banerjee and Mr. Siddhartha Chatterjee, For ICICI Bank Ltd, for the Appellant; Partha Sarathi Sengupta with Mr. Srenik Singhvi and Mr. Soumava Ghose, Advocates For Dunlop India Ltd., Mr. Ranjan Deb with Mr. Rohitendra Deb, Advocate For SMIEFS Capital Mkts. Ltd., Mr. Ravi Kapoor, Advocate For Madura Coats Ltd., Ms. Manju Bhutoria, R.N. Jhunjhunwala, J.B. Panda and Mr. Rishav Dutta, Advocates For Century Textile Industries Ltd., Mr. S.N. Mookherjee with Mr. Sarbapriya Mukherjee, Advocate For Kanti Commercial (P) Ltd., Mr. Shib Chandra Prasad, Advocate For Provident Fund Authority, Mr. Jishnu Chowdhury, Arnab Sardar and Mr. Abhijit Sarkar, Advocates For the Workers, Mr. Madhusudan Sarkar and Mr. Dipanjan Dutta, Advocates For WBSE Dist. Co. Ltd., Mr. Sourja Sadhan Bose and Mr. Indranil Karfa, Advocates For Indian Roadways Corp. Ltd., Mr. A. Mitra and Mr. Swapan Kumar Ash, Advocates For Industrial India Enterprise, Mr. Jayjit Ganguly and Mr. Rudrajit Sarkar, Advocates For Freight Carriers India Ltd., Mr. Ashok Banerjee with Mr. Debangshu Basak, Advocate For State, Mr. Chayan Gupta and Ms. Debashree Saha, Advocates For India Tyres Ltd., Mr. S. Srivastava, Advocate For Asstt. Official Liquidator, Mr. Debdatta Sen and Ms. S. Chatterjee, Advocates For 3i Infotech Trusteeship Services Ltd., Mr. S.N. Pandey, Advocate For Ambattur Workers Union, Ms. Noelle Banerjee, Advocate For Transport Corp. of (I) Ltd. and Mr. S.K. Tiwari and Mr. Arun Mishra, Advocates For Global Intrade, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Dunlop India Ltd. was a Tyre manufacturing Company. It changed hands from time-to-time. Ultimately, the company came within the fold of Chabarias, the liquor baron. The company became sick and was

referred to the Board of Industrial and Financial Reconstruction (hereinafter referred to as "BIFR"). While the proceeding was pending before the BIFR, Ruias came in control of the company. Ruias claimed, they got control through purchase of controlling block of shares. Be that as it may, Ruias came in control of both the factories at Sahaganj in the State of West Bengal and Ambattur in the State of Tamil Nadu. Initially Ruias opened the Sahaganj factory and started manufacturing process at least, it was claimed so. Ambattur unit was however, functioning. It now appears, during the period when matter was pending before the BIFR or so soon thereafter four valuable properties having an estimated value of Rs. 2,300 crores were surreptitiously transferred. The management wanted to avoid the restrictions of Section 22 of the Sick Industrial Companies Act, 1985, window dressed the accounts showing the net worth of the company positive and thus came out of the fold of BIFR. The management neither paid the creditors nor the workers. Both the units were shut down in course of time. The creditors started making application for winding up since 2008. There had been earlier winding up petitions that were kept in abeyance in view of pendency of the proceeding before the BIFR. For some time the company also enjoyed the benefit of relief undertaking under the State law. On a sum total of the situation, the company left no stone unturned keeping the creditors at bay. The workers were given false promises. In the hope that the factory would be reopened, the workers did not raise any serious issue pressing their longstanding dues. One of the creditors, Madura Coats Ltd. filed application for appointment of provisional Arbitrator. By a judgment and order dated March 26, 2012 the learned Judge appointed Official Liquidator as the provisional liquidator and asked the provisional liquidator to take steps as against the fraudulent transfer of the immovable properties referred to above. The Division Bench termed it as Special Officer, however, did not disturb the process of inventory. The company ultimately faced the final hearing of the winding up proceeding. By judgment and order dated January 31, 2013 the learned Judge passed an order of winding up that became the subject matter of three appeals that we heard on the above mentioned dates.

Appeals:

Altogether three appeals were filed as observed herein before. M/s. Kanti Commercial Ltd. filed the first appeal claiming to be a creditor of the company opposing the winding up. Mr. Utpal Bose, learned Counsel initially represented the said appellant. Subsequently, Mr. S.N. Mookherjee, learned senior Counsel represented the said appellant. Mr. Mookherjee would contend, he had no nexus with Dunlop, he was a mere creditor, yet he did not want winding up as it would not enure to the benefit of the body of creditors.

2. The erstwhile company preferred the second appeal. Mr. Partha Sarathi Sengupta, learned Senior Counsel being assisted by Mr. Utpal Bose, learned Counsel represented the appellant.

3. The third appeal would relate to ICICI Bank Ltd. The said appellant would

contend, they would have no quarrel with the order of winding up. They joined issue when the learned Judge asked the Official Liquidator to take steps against the transfers out of which two of the transfers would effect the interest of the Bank as those properties were mortgaged to them.

Contentions:

4. Mr. Partha Sarathi Sengupta, learned Senior Counsel appearing for the appellant company, initiated the process of hearing. According to Mr. Sengupta, the judgment and order impugned did not assign any plausible reason to wind up the company. The learned Judge did not adjudicate the claims of the creditors that would be pre-requisite for entertaining a winding up proceeding at the instance of the unsecured creditors. Mr. Sengupta would also say, the petitioning creditor in whose petition the order of winding up was passed, settled the issue with the company and did not proceed with his petition. The petitioning creditor was also throughout absent at the hearing. The other creditors had independent petitions of their own. Hence, the learned Judge, without adjudicating their respective claims, could not have permitted substitution in place of the original petition to proceed with the pending winding up proceeding at the instance of someone who was also throughout absent. Mr. Sengupta would also relate to one of the creditors whose claim was relegated to suit. The learned Judge should have considered all the issues before sending the company in liquidation. Mr. Sengupta would further contend, the pre-requisite of Section 434 would require a just claim to be forwarded by the creditor to maintain his petition for winding up. The learned Judge failed to appreciate, the order of winding up in the present circumstances was neither just nor equitable and the creditors miserably failed to show, the company was unable to pay its debts. According to Mr. Sengupta, question of inability to pay would only come when there would be adjudication of the liability. Unless adjudication was made question of payability would not arise at all. He would rely upon the supplementary paper book, particularly page- 6 to say, the new management came only in 2005. They were trying their level best to settle the claims of the creditors. In fact, many creditors settled their claims and disappeared from the scene. The workers' claim were also paid off as would appear from the letters of the recognized Trade Unions. Those factors should have been considered by His Lordship before passing the order of winding up. According to Mr. Sengupta, at best there would be a quantified claim of Rs. 23 crores approximately out of which the company already deposited Rs. 10 crores after the order of winding up. The company should be given opportunity to deposit further Rs. 13 crores in four months time and the order of winding up should remain permanently stayed.

5. Appearing for the Kanti Commercial Pvt. Ltd., Mr. S.N. Mookherjee, learned Senior Counsel, would adopt the submissions made by Mr. Sengupta. He would add, learned Judge should have ascertained the wishes of the creditors u/s 557 of the Companies Act, 1956. Having not done so, the learned Judge committed illegality that should be cured by the Court of Appeal. According to Mr.

Mookherjee, the learned Single Judge did not demonstrate as to why the order of winding up would benefit the creditors or the workers at large. He would also support the contentions of Mr. Sengupta, there was no adjudication of liability. According to him, the judgment and order impugned suffered from contradictions. The learned Judge on the one hand would say, the company would get out of the BIFR by having their net worth positive and at the same time held, the company was liable to be wound up. On the just and equitable clause, Mr. Mookherjee would rely upon a Chart to show, the creditors while praying for winding up, did not plead in their respective petitions, the company was otherwise insolvent and it was just and equitable to wind up the same. On a query made by Court, Mr. Mookherjee would inform us, the company owed a sum of Rs. 129 crores to Kanti Commercial Pvt. Ltd. Kanti was also a contributory. He would rely upon the Apex Court decision in the case of *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.*, 42 CC 125 and the decision in the case of *Bharat Petroleum Corporation Ltd. Vs. National Organic Chemical Industries Ltd. and State Bank of India*,

6. Appearing for the ICICI Bank Ltd., Mr. Ratnanko Banerjee, learned Counsel being led by Mr. Sudipto Sarkar, learned Senior Counsel would contend, Bank was not interested in the winding up of the company. There was no privity of contract between the Bank and the Company. Company lent and advanced huge sum to one of its constituents having no nexus with Dunlop. The properties mentioned above would belong to M/s. Salini Commercial and SPR Investments. Those two properties situated at Chennai and Mumbai were mortgaged to the Bank. Earlier, Chennai property was owned by Dunlop Properties Ltd. whereas Mumbai Property would belong to Bharatia Hotel Ltd. He would rely upon the order of Madras High Court in this regard. ICICI Bank would claim, they lent and advanced a sum of Rs. 625 crores to an American company. To secure such debts those two properties were mortgaged. Learned Judge erred in directing the Official Liquidator to recover of those properties, branding them as fraudulent transfer. He would rely upon the Apex Court decision in the case of *The Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and Others*,

7. Mr. Chayan Gupta, learned Counsel appearing for India Tyres Ltd., a creditor said to have a claim of Rs. 78.85 lacs, supported the appeal of the company. Mr. Gupta would initially contend, the company had no nexus with Dunlop although we find at page-3629, the India Tyres letter-head would have the logo of "Dunlop" printed on it. After the hearing was concluded, Mr. Gupta came back at the time of rising of the Court and tendered apology and corrected his submission by admitting, India Tyre would belong to the same Group.

8. Per contra, Mr. Ranjan Deb, learned Senior Counsel appearing for SMIFS Private Limited, a creditor of the company categorically contended, the judgment and order impugned was well-reasoned and the company could not confront effectively the said decision. In fact, each and every claim was gone into by the

learned Judge that could not be confronted. He referred to various claims referred to in the judgment. He drew our attention to page 3349 wherein the learned Judge in His Lordship's judgment and order impugned observed, the claim of SMIFS was in excess of Rs. 8 crores. Mr. Deb would contend, the plea of "just and equitable" was duly pleaded in paragraph 20 of the winding up petition. He would refer to pages 3199-3200 wherein the learned Judge observed, the company's net worth became negative that would force them to approach the BIFR. However, the company "to sleep out of the BIFR" drew illusory financial picture that resulted in the appellate authority order in bailing out the company from the clutches of the BIFR. The categorical finding of the learned Judge to the extent, no creditor present in Court opposed the winding up proceeding despite several adjournment been " given, could not be confronted. No ground was taken in the memorandum of appeal to confront such positive finding of His Lordship. According to him, the Division Bench observation made in the appeal against the order of appointment of the Provisional Liquidator was prima facie in nature and could not have any bearing on the final hearing of the winding up proceeding.

9. Commenting on the appeal of Kanti Commercial, Mr. Deb contended, no creditor approached the learned Single Judge opposing the winding up proceeding.

10. Commenting on the appeal of the ICICI Bank, Mr. Deb would contend, the transfers being fraudulent having entered into either during pendency of the BIFR proceeding or winding up proceeding was void and the learned Judge was right in directing the Official Liquidator to take steps against such fraudulent transfer.

11. Mr. Deb prayed for dismissal of the appeal.

12. Mr. Ravi Kapoor, the learned Counsel appearing for another creditor M/s. Madura Coates would contend, out of total dues of Rs. 9 crores approximately the company admitted the dues to the extent of Rs. 2.02 crores that was duly recorded in the BIFR proceeding. The Court relegated the parties to suit with regard to the disputed liability however, while filing the suit through inadvertence the creditor claimed the entire sum. Subsequently on an application for amendment being made Rs. 2.02 crores was kept out of the civil suit and was pressed before the company Court in the winding up proceeding.

13. Mr. Kapoor would contend, such unequivocal admission to extent of Rs. 2.02 crores would be sufficient to support the winding up proceeding. Commenting on the order of the Division Bench Mr. Kapoor would contend, the learned Judge's observations with regard to transfer of properties were not upset by the Division Bench. The Division Bench only modified the order by appointing Official Liquidator as special officer to make inventory of the assets and not a provisional liquidator as directed by the learned company Judge.

14. Commenting on the appeal of the Bank, Mr. Kapoor would rely upon the

order of the Division Bench, particularly at pages 3272 and 3298, and contended, the Bank having not preferred any appeal from the said order, was precluded from maintaining the present appeal. He would rely upon and support the judgment and order impugned particularly the observation of His Lordship as contained in pages 3181, 3190 and 3195 of the paper book.

15. Mr. Kapoor distinguished the decision in the case of Bharat Petroleum Corporation Ltd. v. National Organic Chemical Industries Ltd. (supra), to say, neither any scheme was proposed by the company in the present case nor any proposal was mooted by the company as to how to clear off the dues of the creditors. In absence of such definite scheme and/or proposal being mooted the ratio decided in the case of Bharat Petroleum (supra) would have no relation.

16. Ms. Manju Bhutoria adopted the submissions made by Mr. Deb and Mr. Kapoor and contended, her client the Century Textile did have a decretal claim of Rs. 39 lakh as principal sum and Rs. 87 lakh as interest. She also drew our attention to the Balance Sheet of the company for the year 2011-2012 to show Kanti Commercial was an associate company of Dunlop. She would also contend, the so-called claim of Kanti Commercial surfaced only in the Balance Sheet of 2011-2012. The company initially filed application for sanction of the scheme of compromise being CA Nos. 760 of 2012 and 782 of 2012 u/s 391(1) and Section 391(6) respectively that the company subsequently withdrew.

17. Mr. Jayjit Ganguly, learned Counsel opposed the appeals on behalf of Freight Carrier India Limited having a principal claim of Rs. 1.4 crores. He contended, the company admitted his claim in the application for scheme. He also pleaded "just and equitable" ground in his winding up petition. Majority of the creditors supported the winding up, none came forward before the learned Single Judge to oppose winding up.

18. Mr. Madhusudan Sarkar, learned Counsel represented the Electric Supply Company having a claim of Rs. 12.5 crores whereas Mr. Swapan Kumar Ash, learned Counsel represented M/s. Industrial India Enterprise having a claim of Rs. 12.27 lakh. Learned Counsel appearing for India Road Ways Corporation pressed his claim for Rs. 1.08 crores and another learned Counsel appearing for Global Entreade pressed his claim for Rs. 78 lakh that the company admitted in its proposed scheme of compromise.

19. Appearing for the State, Mr. Debangshu Basak, learned Counsel being led by Mr. Ashok Kumar Banerjee, learned Government Pleader contended, the workers' interest should be looked into and this Court should consider the workers' interest as a paramount consideration before taking a final decision in the appeal. He referred to paragraph 11 of the affidavit filed by the State wherein the State highlighted the plight of the workers. Paragraph 11 is quoted below:

This Hon''ble Court be pleased to pass appropriate orders in the facts and circumstances of the case. This Hon''ble Court be pleased to ensure that the

factory at Sahaganj is reopened and/or restarted as soon as possible to provide employment to all the workers either under the Official Liquidator acting as a provisional liquidator or as Official Liquidator if the company is directed to be wound up upon such terms and conditions as to this Hon"ble Court may deem fit and proper. This Hon"ble Court should also be pleased to direct payment of the dues of the workers.

20. Mr. Jishnu Chowdhury, learned Counsel engaged by the learned Company Judge to assist the workers contended, the workers had a claim of Rs. 77 crores in respect of Sahaganj unit and Rs. 21 crores in respect of Ambattur unit. Mr. Chowdhury contended, the company was not at all serious about the workers. They could still deal with the claims made by the workers that they did not choose to. Mr. Chowdhury also contended, Section 557 would empower the learned Company Judge to ascertain the wishes of the creditors. In the instant case, all the creditors appearing before the learned Company Judge supported the order of winding up hence, question of holding any further meeting did not and could not arise. He further contended, the property at Worli, Mumbai was transferred on January 3, 2008 whereas Ambattur land was transferred in two phases on June 28, 2007 and July 23, 2007. Referring to the above dates, Mr. Chowdhury contended, the company deliberately violated the norms applicable to the sick companies and surreptitiously transferred the assets for illegal gain. According to Mr. Chowdhury, if any one property is returned to the company that would make the company again viable. He relied on the following decisions:

1. Siemens Aktiengesellschaft Vs. JMD Medicare Ltd., .
2. In the matter of : Hi-Tech Bearings Private Limited and In the matter of: SKF South East Asia & Pacific Pte. Limited, Singapore, 2008 Volume-II Calcutta High Court Notes 282.
3. In Re: A.B.C. Coupler & Engineering Co. Ltd., 1961 I All ELR 354.
4. Prem Singh and Others Vs. Birbal and Others,
5. Mannalal Khetan and Others Vs. Kedar Nath Khetan and Others,
6. Macfoy v. United Africa Company Limited, 1961 III All ER 1169.

21. Ms. Noelle Banerjee, learned Counsel appearing for the Transport Corporation of India having a claim of Rs. 31.84 lakh supported the order of winding up.

22. Mr. Shib Chandra Prasad, learned Counsel appearing for Provident Fund Authority informed this Court, a sum of Rs. 130 crores was due on account of arrear of provident fund. No records could be found at the office of the company record. He referred to two Apex Court decisions in this regard reported in Municipal Corporation of Delhi, Delhi Vs. Association of Victims of Uphaar Tragedy and Others, Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and Others).

23. Mr. Ratnanko Banerjee, learned Counsel appearing for the appellant in ICICI Bank appeal contended, the loan was given to one UK based company against co-lateral securities that had nothing to do with Dunlop. It was nothing but a re-financing done by ICICI Bank. The Worli property had already been mortgaged for repayment of loan to the UK based company. He relied on documents appearing at pages 620-628 of his paper book.

24. Mr. Srenik Singhvi, learned Counsel appearing for the company contended, company paid the provident fund dues. The company also cleared off all the dues of the workers who either died or committed suicide after the closure. The workers who took voluntary retirement were also paid to a substantial extent. Mr. Singhvi contended, this Court might issue necessary direction for protection of assets of the company. The erstwhile management did not have mala fide intention to syphon off the assets and/or resources the management paid a sum of Rs. 32 crores after the order of winding up.

25. Mr. Sarbapriya Mukherjee, learned Counsel appearing for the Kanti Commercial in reply informed this Court, the workers' claim would at best be a sum of Rs. 11.16 crores that would be paid by instalments as agreed upon in a bipartite meeting with recognized unions. He contended, the company was viable and this Court should direct its revival.

Cases Cited at the Bar:

26. Mr. Mookherjee relied on the decision in the case of Madhusudan Gordhandas (supra) and Bharat Petroleum (supra) to support his contention, the Court must ascertain the wishes of the creditors before putting the death nail on the jurist entity. In the case of Bharat Petroleum (supra), the Bombay High Court considered the earlier decision of the Apex Court in the case of Madhusudan Gordhandas (supra) and observed, the company Court even at the stage of admission must consider the views of the creditors having clear mandate of Section 557. We do not find any further scope to deliberate on such well-settled principle of law. Mr. Kapoor would however, contend, in the case of Bharat Petroleum (supra), the Court considered a situation when the secured creditors wanted to intervene in a winding up proceeding. The question arose as to whether the creditors would have a say in the matter. The Bombay High Court observed, "At the present stage the Court has only to consider the question whether the creditors should be heard in the company petition. For the reasons recorded herein above, I am of the view that the creditors should be permitted to intervene".

27. Mr. Chowdhury relied on six decisions mainly on the rights of the workers in case of winding up whereas Mr. Prasad relied on the decision in the case of Delhi Municipal Corporation (supra) and Maharashtra State Cooperative Bank (supra) with regard to provident fund dues.

28. With regard to the fraudulent transfer, Mr. Chowdhury relied on three decisions in the case of Macfoy (supra). Lord Denning observed, "if an act is void,

then it is in law a nullity. It is not only bad, but also incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometime convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

29. The Apex Court in the case of Mannalal Khetan (supra) observed, "a contract which involves in its fulfilment the doing of an act prohibited by statute is void. Where a contract, express or implied, is expressly or by implication forbidden by statute, no Court can lend its assistance to give it effect".

30. In the case of Prem Singh (supra) the Apex Court once again observed, "When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity".

31. In the case of ABC Coupler (supra) the English Court observed, the Court should consider the wish of the majority of the creditors before passing an order of compulsory winding up.

Our View:

32. The well-reasoned decision of the learned Single Judge would clearly show, the Court tried its best to find out a solution for revival of the company. The management was however, not serious. For 14 months, the matter was kept pending. The company came with a scheme for compromise, immediately withdrew the same. The facts would depict, properties were transferred in a clandestine manner. The creditors would say, reversal of one property would make the situation completely stable and congenial for revival. Yet, the management was not prepared. Section 531 would deal with fraudulent preference. Any transfer of immovable property within six months before commencement of winding up of the company would be deemed to be a fraudulent preference and in terms of Section 536(2), in case of winding up any disposition of property made after the commencement of winding up would be void unless otherwise ordered by Court. On a combined reading of the aforesaid two provisions any transfer prior to date of the commencement of winding up proceeding or during the pendency would be void. Similarly, under the Sick Industrial Companies Act, 1987 any transfer of immovable assets during pendency of the reference before the BIFR is prohibited. Transfer of four properties referred to above, were either made during the pendency of the reference or immediately before or during pendency of the winding up proceeding. In such event, the learned Judge was justified in directing Official Liquidator to take steps in this regard.

33. Mr. Sengupta argued on behalf of the company. He would try to raise dispute with regard to the creditor's claim. His contradiction would at best hint towards quantum however, liability was not in dispute. When a company was not in a

position to dispute the liability towards its creditors for revival they must suggest as to how they would propose to discharge such liability, at least to the extent, they would admit. Mr. Sengupta would contend, the liability would at best be the sum of Rs. 23 crores and he would clear it off within four months" time. While making such statement neither he took the workers in confidence nor the secured creditors. The letter relied on by and on behalf of the company certifying, the workers" dues were being paid, was from one union. Mr. Chowdhury representing the workers at the request of the Court would, however, depict a complete different picture. The unsecured creditors were able to establish their claims to a substantial extent that could not be successfully confronted either by the company or by its associates. No concrete proposal was before the Court for revival.

34. Kanti Commercial one of the appellants, tried to maintain an independent character although Ms. Bhutoria was successful in demonstrating from the record, it was an associate company. Kanti claimed, they had a claim of Rs. 129 crores. Such claim featured for the first time in the Balance Sheet of 2011-2012 being the period when winding up proceeding was in vogue. Under what circumstance such liability was created, is not clear to us. Another creditor, M/s. India Tyres Limited was also a group company as would be apparent from their letter head, Mr. Chayan Gupta appearing for them also admitted so. Hence, we do not find a single creditor having entity independent of the company, to come forward and support the prayer for revival made by the company and/or its associates. We fail to appreciate, what the creditors would decide, even if we call a meeting for the said purpose, in case we are not able to give them food for thought being a scheme of compromise for consideration.

35. Mr. Sengupta tried to demonstrate, the claims of the pressing creditors were in dispute. Even if we give credence to what he would say, if the company was serious about its revival he should have taken a definite stand suggesting a complete mode of revival taking unsecured creditors, secured creditors and workers, all in confidence. We are constrained to say, the company did not do so, possibly they do not wish to.

36. Lot was said on Section 557. When the Court would ask someone to ascertain the wishes of the creditors such direction must be based on a definite proposal for revival coupled with repayment schedule. We do not have any such proposal either from the company or from its associates save and except a bald statement from the bar expressing intention to deposit Rs. 13 crores in four months, that too, after the running the units. We are constrained to hold, the management was not at all serious for revival. The assets are no more safe in the hands of the erstwhile management. It is fit and proper, Official Liquidator must take immediate step for possessing the assets and proceed with the winding up. With regard to the appeal of ICICI Bank, we are of the view, the direction of His Lordship for restoration of the assets was nothing but a direction upon the Official Liquidator to take lawful steps against the wrong. Such step

would obviously deserve a regular proceeding upon notice to the transferee and/or the persons claiming title under them. ICICI Bank claiming to be the mortgagee, would be at liberty to contest such proceeding. Their apprehension is premature. If the mortgage was lawful, they would at liberty to say so in the proceeding, if any, brought for the purpose. The order of the learned Company Judge could not be construed to mean a forcible attempt by the Official Liquidator repossessing the assets that was not contemplated by His Lordship. In this regard, we may refer to the appropriate direction as contained in the order dated March 26, 2012. The learned Judge observed, "The provisional liquidator will take every step that is permissible to not only protect the assets and interest of the company and its creditors, employees and workmen but will also take all steps in accordance with law to forthwith recover and arrest the further alienation of the four immovable properties that were fraudulently transferred by the company in the year 2006-2007 or their abuts as referred to above". In the judgment and order dated January 31, 2013, the learned Judge passed the order of winding up. While doing so, His Lordship observed, "The official liquidator will immediately take the steps to ensure that the assets transferred by the company in derogation of the prohibitory orders of the BIFR are brought that to the company's fold and made available for realization of the creditor's dues". Neither of the observations quoted above, would suggest forcible repossession of the properties, it would require a lawful proceeding to be brought for the purpose. In case such proceeding is brought ICICI Bank would be free to contest. Our intervention at this stage is not warranted.

The appeals fail and are hereby dismissed without, however, any order as to costs.

Dr. Mrinal Kanti Chaudhuri, J.

I agree.