

(2011) 07 GUJ CK 0008
In the Gujarat High Court

Case No : Official Liquidator Report No. 114 of 2011 in Company Petition No. 152 of 200

Official Liquidator of M/s. Mahendra Mills Ltd.

APPELLANT

Vs

Devganga Traders Golden Transport and Others

RESPONDENT

Date of Decision : 29-07-2011

Acts Referred:

Contract Act, 1872 — Section 73 , 74
Limitation Act, 1963 — Article 113, 55, 59

Citation : (2011) 3 GLH 228

Hon'ble Judges : K. M. Thaker, J

Bench : Single Bench

Advocate : R. M. Desai, for the Appellant; Raju K. Kothari for Respondent : 1, Mr. Indravadan Parmar for Respondent : 2, Notice Served BY DS for Respondents : 3, 8, Mr. B. H. Bhagat for Respondent: 3, Mr. Vibhuti Nanavati for Respondent : 4, Mr. M. D. Rana for Respondent: 5, Mr. Navin K. Pahwa for Respondent : 6, Mr. D. S. Vasavada for Respondent; 7, Dr. Sonia Hurra for Respondent : 9, Mr. Hemang M. Shah for Respondent : 10, Mr. Satish R. Patel for Respondent : 11, DS AFF. Not Filed (N) for Respondent: 12, for the Respondent

Judgement

K. M. Thaker, J.—The OL has taken out the present report dated 28.6.2011 and prayed for below mentioned directions :-

2. Permission be granted by the Hon''ble Court to the Liquidator to terminate the sale confirmed by the Hon''ble Court and forfeit the amount deposited by respondent No. 1 -Devganga Traders Golden Transport.

On leave and permission being granted by the Hon''ble Court to terminate the same and forfeit the amount deposited by Devganga Traders Golden Transport, Respondent No. 1 the Liquidator may be permitted to auction the land and property in question on the terms and conditions that may be prescribed by the Liquidator.

2. The OL, thus, seeks that the sale of the property in question which was

confirmed by the Court at earlier stage, may be allowed to be terminated and the OL also may be permitted to forfeit the amount deposited by the respondent No. 1, i.e. the successful bidder during the auction sale.

3. So as to appreciate the purport and the scope of present application, it is necessary to take into account certain earlier events and certain orders passed in earlier application. The details relevant for the purpose for consideration and determination of the present application, are as mentioned below"

3.1 A Company, named Mahindra Mills Ltd., was ordered to be wound up vide order dated 24.1.2001. In pursuance of the said order, the OL was appointed who took the custody and possession of the property of the Company in liquidation and started taking necessary steps towards the winding up of the said Company.

3.2 As part of the said process, the OL proposed to sale certain parcels of land, more appropriately described in the advertisement for auction sale. The advertisement inviting bids were issued. After the bids were received, inter-se bidding during the auction before the Court, was permitted. It appears that during the said process, present respondent No. 1 - Devganga Traders (Originally carried on the business in the name and style of Devganga Traders and Golden Transport) appeared as the successful bidder. The said bidder offered Rs. 10.20 Crores for land, plant and machinery and building which was the highest bid quoted during the process.

3.3 Therefore, vide order dated 22.02.2006 passed in Company Application No.240/05, the said offer came to be accepted subject to compliance of diverse conditions contained in the tender document and prescribed by the said order dated 22.2.2006 which, inter alia, prescribed condition regarding payment of sale consideration which obliged the successful bidder - auction purchaser to pay the sale consideration within specified time - frame.

3.4. Before proceeding further, it would be relevant to take note of the terms and conditions on which the property was offered for sale, i.e., on which the auction was held. In this context, it may be mentioned that the tender document contained, inter alia, about 34 conditions. The relevant conditions contained in the tender document are as under :--

3. The sale is on "AS IS WHERE IS AND WHATEVER THERE IS BASIS."

6. The offerors should submit their specific offer alongwith Demand Draft/ Bankers Cheque with each offer as stated in the Salient Features of the sale, attached as a part of these Terms and Conditions, Interest Free Earnest Money Deposit drawn on any Nationalized Bank payable at Ahmedabad in favour of Official Liquidator of M/S. Mahendra Mills Ltd. (In Liqn.). The D.D./Pay Order drawn on by Co-Op. Bank will not be accepted. They will also submit the Shortfall of EMD calculated at @ The sale committee reserves the right to % of days of the confirmation of the auction if they turnout to be highest bidder.

9. The final offer after inter-se-bidding so received will be placed before the Hon''ble High Court for sanction.....The offeror shall pay 25% of the purchase consideration within one month or such time as the Hon''ble High Court may stipulate from the date of final acceptance of the particular offer. The balance amount of purchase consideration will have to be paid within three months thereafter by the purchaser or within such time as may be fixed by the Hon''ble High Court.

16. The property shall be handed over to the purchaser on payment of full sale price to the Official Liquidator and/or subject to such direction as the Hon''ble High Court may issue in the matter.

17. If the purchaser do not pay the balance amount or purchase consideration to the Official Liquidator as directed by the Hon''ble High Court in time, the Official Liquidator shall terminate the sale and forfeit the deposit. This condition and other conditions in respect of the payment of purchase consideration are without prejudice to the right of the Official Liquidator. If the vendor terminates the contract as aforesaid he will be entitled to put the properties for re-sale with the permission of the Hon''ble High Court.

24. If the purchaser fails to pay the purchase money/balance amount and all costs charges and expenses payable by him to the vendor within time specified there-in-above and in all other respect of perform these conditions or any of them, his entire amount deposited till then shall be forfeited and the vendor shall be at liberty to sell the property tendering any conveyance and/or assignment to such defaulting purchaser and without being bound to sell the property at such time and subject to such condition and in such manner in all respects as he shall think proper. The deficiency in price, if any, occasioned by such second sale and all cost charges and expenses occasioned by such subsequent sale or any attempted second sale within interest thereon as may be fixed by the Hon''ble High Court from the date of confirmation of first sale shall be immediately after such subsequent sale be made good and paid by the defaulting purchaser as by the way of Liquidated damages, while any profit on such second sale shall not belong to the defaulting purchaser. This condition is not affected by any other conditions hereof.

25. The Hon''ble High Court has right to impose such other and further terms and conditions as the Hon''ble High Court may deem, fit and proper, in the circumstances of the case may arise and said terms & conditions already specified above will be bindings on all the parties concerned.

26. The offerer shall not be entitled to withdraw or cancel his offer once submitted. If the offerer withdraw or cancel his offer the Earnest Money Deposit shall be liable to be forfeited and he will also be liable to pay to the Official Liquidator the loss, damage suffered consequent upon his backing out of their offer. The property/assets in question will then be re-sold at the risk and consequences of the offerer.

3.5 As mentioned earlier on the aforesaid terms and conditions the bids were invited and thereafter interse bidding was also permitted wherein the respondent No.1 emerged as the successful bidder with its offer of Rs. 10.20 Crores for the properties in question. Then, subject to the terms and conditions contained in the tender documents as well as in the order dated 22.2.2006, its offer was accepted. In the said order dated 22.2.2006 it was also stated that the terms and conditions mentioned in the order are "in addition to the conditions incorporated in the terms of tender.

3.6 The conditions which came to be prescribed, in addition to the conditions mentioned in clause No. 1 to 34 of the tender are to be found in the clause No.1 to 21 of para 6 of the order dated 22.2.2006. The Court while accepting the offer of respondent No.1 provided that :--

6. In view of the above, as the offer of M/s. Devganga Traders of Rs. 10.20 Crores is being the highest offer, the same deserves to be accepted and is accepted on the conditions as stated hereinafter in addition to the conditions incorporated in the terms of the tender.

3.7 The relevant conditions from amongst the further conditions prescribed vide aforesaid order dated 22.2.2006 are :-

6 (2) The auction purchaser shall pay 25% of the purchase consideration on or before 10th March, 2006. The amount of Earnest Money Deposit shall be adjusted in the last payment. The balance amount of the consideration shall be paid within three months thereafter.

(3) It is made clear that the property is purchased with certain encroachment and subject to the litigation in respect to the portion of the property on "as is where is and whatever is there" basis. Therefore, if encroachment are not removed, the purchaser will be handed over the possession with encroachment but the assistance shall be rendered by the OL for removal of encroachment after seeking proper permission of this Court.

(4) The possession of the property shall be handed over to the auction purchaser within three days from the date of the payment of full consideration to the OL. If the auction purchaser does not pay the balance amount of purchase consideration to the OL, the OL shall terminate the sale and forfeit the deposit after obtaining permission of this Court.

These conditions and the other conditions in respect of the payment of the purchase considerations are without prejudice to the rights of the OL for further auction in accordance with law.

21. The Sale Deed shall be executed, preferably within a period of two weeks from its approval by this Court.

3.8 At the time of submitting the bid, the respondent No. 1 had deposited Rs.41 lacs towards EMD. In pursuance of the provision contained under para 6(2) of the

order dated 22.2.2006 read with clause No.9 of the terms of the tender, the said respondent No. 1 (being the auction purchaser) had paid Rs.2,55,00,000/- towards 25% of the purchase consideration i.e. 10.20 Crores within prescribed time limit i.e. 10.3.2006.

3.9 According to para 6 (2) of the said order dated 22.2.2006 read with the clause No.9 and the terms of the tender the successful bidder was also obliged to pay the balance amount of the purchase consideration within 3 months from 10.3.2006 i.e. on or before 10.6.2006.

3.10 It is also not in dispute that the said successful bidder i.e. respondent No.1 did not make the payment of balance amount of purchase consideration within prescribed time of 3 months i.e. on or before 10.6.2006.

3.11 The terms mentioned in the tender document and in the aforesaid order dated 22.2.2006, inter alia provide that in the event of default by the respondent No.1 in payment of balance amount of sale consideration, the consequences contemplated and provided for by virtue of the terms of tender and the terms in the aforesaid order, would ensue.

3.12 It appears that being conscious about the default caused by it, the respondent No.1 (successful bidder) preferred an application seeking extension of time, which was registered as Company Application No. 327/2006. After hearing the parties, the Court passed following order dated 18.8.2006 in Company application No.327/ 2006 :-

Mr. A.L. Shah, learned Counsel for the applicant, has handed over a cheque for Rs.1 crore dated 17.8.2006 drawn in favour of the Official Liquidator for Mahendra Mills Limited, which is ordered to be kept with the Official Liquidator. He has also requested that time limit for making remaining payment may be extended upto 15th September 2006 in view of the flood-situation prevailing in the State. Time to make the remaining outstanding dues is extended upto 15.9.2006. S.O. To 30.8.2006.

3.13 From the record it appears after the said order dated 18.8.2006 the proceedings of Company application No.327/2006 were adjourned to 30.8.2006. Thereafter, the proceedings of Company application No.327/2006 were adjourned to 15.9.2006 when the Court passed following order :-

7...In view of the pendency of O.J.C.A. No.288 of 2006 in O.J. Appeal No.43 of 2005 and O.J.C.A. No.217 of 2005 in O.J. Appeal No.43 of 2005 which is now adjourned to 13th November 2006, office is directed to notify this matter only after disposal of aforesaid O.J. Appeal No.43 of 2005 and O.J.C.A. No.217 of 2005 in O.J. Appeal No.43 of 2005 and/or O.J.C.A. No.288 of 2006 in O.J. Appeal No.43 of 2005 and/or on filing appropriate note by either party to the present proceedings.

3.14 In the interregnum the respondent No.1 paid Rs. 1,00,00,000/- on 17.8.2006 and Rs.2,00,00,000/- on 31.8.2006. However, after 31.8.2006 till

15.9.2006 and thereafter any amount was not paid by the applicant until 12.8.2008 when the order in said Company application No.327/2006 came to be passed.

3.15 From the said order dated 15.9.2006 it appears that at the relevant time on appeal being OJ Appeal No.43 of 2005, [which was not directly connected with the subject matter of Company Application No.327/2006 and/or Company Application No.240/ 2005 (in which sale was confirmed)] was pending. The learned Company Court. observed that Company application 327/2006 may be notified after disposal of appeal No.43 of 2005.

3.16 It appears that during the pendency of the said OJ Appeal No.43/ 2005 present applicant had preferred an application No. 154/2007 wherein present applicant had, inter alia, prayed for permission to make the balance payment of sale consideration. The Division Bench did not entertain the said application and while disposing of the said application the Division Bench in the order dated 1.8.2008 observed that :-

3. It will be open to the applicant to pursue the Company Court in accordance with law for making the payment of balance consideration and obtaining suitable direction.

3.17 It further appears that subsequently the above mentioned Company application No.327/2006 was heard and after considering the submission and request of the applicant the order dated 12.8.2008 came to be passed whereby the learned Company Court, by specific direction, rejected the auction purchaser's request for extension of time.

3.18 Thus, any other order after the order dated 18.8.2006 extending time to pay balance amount of sale consideration beyond 15.9.2006 was not passed in said Company application No.327/2006. Furthermore, what emerges from the record is the fact that though by order dated 18.8.2006 time to make payment of remaining amount of sale consideration was extended upto 15.9.2006, the applicant did not pay balance amount on or before 15.9.2006 and that after the order dated 18.8.2006 any order extending time for payment beyond 15.9.2006 was not passed.

3.19 By the aforesaid order dated 12.8.2008, the Company application No.327/2006 and the request for extension of time were formally rejected by the learned Company Court; which was formal pronouncement of the fact situation existing after 31.8.2006, and in any case after 15.9.2006. The Court vide aforesaid order dated 12.8.2008 observed that :-

Request made by learned Advocate for the applicant to permit the applicant to pay the remaining amount of Rs.4.20 Crores with some interest that may be ordered by the Court, is not found acceptable and is rejected.

3.20 The applicant felt aggrieved by the said order dated 12.8.2008 and preferred OJ Appeal No. 146 of 2008 on or around 4/9/2008. In the said appeal,

on 11.9.2008 the Division Bench passed an order giving certain directions to OL. The relevant part of the said order dated 11.9.2008 passed by the Division Bench reads thus :-

Heard the learned Advocate for the Appellant as well as learned Advocate for the Official Liquidator.

Admit.

Notice for final disposal returnable on 18.09.2008. Learned Advocate for the Official Liquidator is directed to waive the notice. Direct service permitted qua other respondents.

CIVIL APPLICATION No. 254 of 2008.

Rule returnable on 18.09.2008. In the meantime impugned order dated 12.08.2008 made in Company Application No. 327 of 2006 shall not operate and any steps taken by the Liquidator pursuant to the impugned order shall be subject to the outcome of this Appeal. The Official Liquidator is directed to ensure that no further proceedings are continued or taken pursuant to impugned order dated 12.08.2008. Direct service permitted.

3.21 During pendency of the said Appeal No. 146/2008, one of the bidders who had participated in the auction sale had preferred an application in the said appeal which was disposed of observing that he may not be allowed to be impleaded as party to the proceedings. Aggrieved by the said order the applicant-shareholder had preferred SLP No.5415/10 before the Apex Court. The Apex Court disposed of the said SLP vide order dated 28.4.2011 wherein the Apex Court observed as follows :-

The SLP is, accordingly, disposed of, but we also make it clear that any observation made in this order should not influence the outcome of either the appeal or any subsequent proceeding taken therefrom. The order dated 22nd December, 2010, passed by this Court staying further proceedings before the High Court is vacated.

In view of this order, LA. No.5 filed by the workmen is disposed of as infructuous, but this will not prevent the workmen from appearing before the Appellate Court, if so advised.

3.22 Thereafter, aforesaid appeal being OJ Appeal No. 146 of 2008 was taken-up for hearing and the Court, after hearing the concerned parties passed order dated 20.6.2011 and disposed of the appeal. While disposing of the appeal, the Division Bench, inter alia, observed as follows :--

15. There is one additional reason that, as per Clause-4 of the sale confirmation order dated 22.02.2006, if there is failure to deposit the amount of the balance consideration (in such a situation, where the time is not extended), mandate has been given to OL to terminate the sale and to forfeit the deposit, after obtaining permission of this Court. Once the amount of remaining balance

consideration is not paid and the time is not extended by the Court, consequence in law was to follow and had fallen.

17. We find that in any event it will be for the OL to submit report before the learned Company Judge and at that stage, the learned Company Judge may consider all the relevant aspects. Hence, we leave the said aspects open to be decided by the learned Company Judge, as and when the appropriate report is submitted by the OL, for suitable directions in accordance with law. Considering the facts and circumstances, we find that as the matter is old and a stalemate was created on account of the pendency of the appeal, OL shall submit the appropriate report to the learned Company Judge, preferably within a period of TWO WEEKS, from today. We make it clear that at that stage rights and contentions of the all concerned, as may be available in law, shall remain open.

18. In view of the aforesaid observations and discussions, O.J. Appeal No. 146 of 2008 is PARTLY ALLOWED. The direction No.(I) is NOT INTERFERED with and the same is CONFIRMED. However, direction Nos.(II) and (III) made therein in the impugned order are set aside. Rule is made absolute to the aforesaid extent.

19. In view of the order passed in the main matter, the rights of the parties concerned shall stand COVERED accordingly and consequently Civil Application No. 273 of 2011, Civil Application No. 282 of 2011, Company Application No. 215 of 2011, Misc. Civil Application No. 85 of 2010 and Civil Application No. 9 of 2011, stand DISPOSED OF, accordingly.

3.23 It is in pursuance of the said order dated 20.6.2011 passed by the Division Bench in OJ Appeal No. 146 of 2008 that the OL has, within 9 days thereafter taken out present report dated 28.6.2011 seeking above noted relief/s

4. Mr. Desai, learned Advocate has appeared for the OL, Mr. Shah, learned Counsel has appeared with Mr. Kothari, learned Advocate for the respondent No. 1. Mr. Vasavada, learned Advocate has appeared for the workers of the Company in liquidation representing by respondent No.7 Union, Mr. Parmar, learned Advocate has appeared for respondent No.2, Mr. Bhagat, learned Advocate has appeared for respondent No.3, the respondent No.4 is represented by Mr. Nanavati, learned Advocate, the respondent No.4 is represented by Mr. Nanavati, learned Advocate, the respondent No.6 is represented by Mr. Pahwa, learned Advocate, the respondent Nos. 9, 10 and 11 have, though entered appearance not made any submission. So far as the respondent Nos. 2 to 7 including secured creditors and the workmen of the Company in liquidation are concerned they have supported the request made by the OL.

5. Mr. Desai, learned Advocate for the OL has submitted that office of OL has taken out present report in view of the direction in the order dated 22.2.2006 and in view of the observations by the Division Bench in OJ Appeal No. 146 of 2008. The direction by the Court in para 6(4) of the order dated 22.2.2006, which is emphasized by the learned Advocate for OL, required and obliged the OL to:- "___terminate the sale and forfeit the deposit after obtaining permission of

this Court" while the observation made by the Division Bench in para 17 of the order dated 20.6.2011 required and obliged the OL to :-

....submit the appropriate report to the learned Company Judge, preferably within a period of TWO WEEKS, from today. We make it clear that at that stage rights and contentions of the all concerned, as may be available in law, shall remain open.

5.1 Mr. Desai, learned Advocate also submitted that the original auction purchaser i.e. present respondent No.1 did not pay full sale consideration and that therefore the sale did not conclude and the OL is, therefore, entitled to the relief/s prayed for in present report.

5.2 Mr. Desai also submitted that the order and the tender document prescribed and specified, as condition, the consequence of non-compliance of breach of the "payment condition" in view of which the termination of sale and forfeiture of amounts paid would ensue and therefore also the application deserves to be allowed.

6. Mr. Shah, learned Counsel appearing with Mr. Kothari, learned Advocate for the respondent No.1 has submitted that :-

(a) The OL has, by accepting payment after 10.6.2006, waived the right to terminate the agreement and/or to forfeit the amount.

(b) The direction sought by the OL and the application are time barred as such right could have been exercised within three years" period in view Article 55 and/or Article 113 of the Limitation Act.

(c) Any term of the agreement which is in nature of penalty cannot be enforced and that therefore the OL, assuming that he has right to receive damages, cannot forfeit the entire amount paid by respondent No.1 but only so much of amount as the loss suffered.

6.1 Mr. Shah, learned Advocate referred to and relied on the reply affidavit filed by respondent No.1 and relying on the submissions contained in para 9 and 10 of the affidavit, he submitted that auction sale in favour of respondent No.1 does not stand canceled or terminated and the OL is not entitled to forfeit the deposited amount. Mr. Shah, learned Advocate further submitted that the OL accepted payment after 10.6.2006 without any objection and by the said conduct the OL waived the right, if any, to terminate the contract. In this context, he submitted that the respondent No.1 paid Rs.1 Crore on 17/18-8-2006 and further a sum of Rs.2 Crores on 30.8.2006. Mr. Shah, learned Advocate further submitted that even if it is held that the respondent No.1 committed breach of contract the OL would be, at the best entitled to reasonable compensation for the damage that he might have suffered on account of such breach. He submitted that for the said purpose the extent of damage would be determined as on the date on alleged breach but he cannot forfeit the entire amount paid by the applicant.

7. Mr. Desai, learned Advocate for the OL in his rejoinder vehemently opposed the contentions raised by the learned Advocate for the applicant. In his rejoinder Mr. Desai, learned Advocate for OL further submitted that during the pendency of the Company application No.327 of 2006 and subsequently during pendency of OJ Appeal No. 146 of 2008 stay order granted by the Court was operating and that therefore the contention raised on behalf of ground of limitation is misconceived. He further submitted that it is only in aid of the subsequent steps that the request for the permission is made. Countering the contention on the ground of damages and penalty, learned Advocate for OL submitted that the terms of the tender and the order clearly postulate that the amount paid by the successful bidder i.e. auction purchaser would be forfeited. Therefore the said condition being part of the agreement is equally binding to the parties and the applicant cannot wriggle out of the said provision. Countering the contention on ground of alleged waiver, Mr. Desai submitted that the right was never wived and actually it was the respondent who continued the application and the appeal, because of which the application could not be filed. The learned Advocates for other respondents have adopted submission made by Mr. Desai, learned Advocate for the OL.

7.1 Learned Advocate for the respondent No.1 supplemented the submissions by submitting that there was no stay granted by the Court against the exercise of right, if any, by OL.

8. The above noted facts give out that during the auction sale, the present applicant appeared as a successful bidder with the offer to the tune of Rs. 10.20 Crores. The Court accepted the said offer and directed the OL to confirm the auction/sale in favour of the offer made by the present applicant for sum of Rs. 10.20 Crores. The Court passed order dated 22.2.2006 and with aforesaid directions confirmed the sale and also made it clear that the condition mentioned in the said order i.e. order dated 22.2.2006 were in addition to the condition incorporated in the terms mentioned in the tender document.

8.1 Thus, conjoint reading of the terms and conditions contained in the tender documents and the aforesaid order dated 22.2.2006 brings out the position that the auction purchaser was obliged to pay 25% of the sale consideration on or before 10.3.2006. The further requirement was that the auction purchaser shall have to pay the entire balance amount of the sale consideration within three months on or before 10.6.2006. Admittedly the auction purchaser did not pay the balance amount of the sale consideration within the specified time. Instead on or around 22.6.2006 (i.e. about 12 days after the said date 10.6.2006) the auction purchaser moved an application being Company application No.327/2006 seeking extension of time to make the payment.

8.2 It needs to be noted that in view of the Court's order dated 18.8.2006 extending time limit to pay the sale consideration, the clause No.9 of the tender document and para No.6(2) of the order dated 22.2.2006 will have to be read with the said order dated 18.8.2006 and the consequence which occur on breach

of the payment condition, would thus, occur and ensue on and from 15.9.2006.

9. There is no dispute about the fact that any order extending time for payment beyond 15.9.2006 was never passed. It is also undisputed fact that any payment after 31.8.2006, more particularly after 15.9.2006 was not and has not been made.

10. It is necessary to note at this stage that the order dated 12.8.2008 passed by the Court was passed in the application No.327 of 2006 which was preferred by the present respondent No.1 wherein it had prayed that :- the delay in making payment of balance purchase consideration amount be condoned and the period for making payment of balance purchase consideration amount be extended up to 31.8.2006.

10.1 Another important aspect to be noted is that the respondent No.1 had prayed for extension of time only until 31.8.2006 and that there is nothing on record to demonstrate or suggest that during the pendency of the said application and until it came to be rejected by order dated 12.8.2008 the said prayer was amended.

10.2 Thus, the fact remains that the respondent No.1 did not amend the prayer clause in application No.327/2006 and also did not make any payment after 31.8.2006. Hence, the agreement in question remained, so to say, only in the nature of and at the stage of "agreement - to - sell" and the conveyance (sale deed) was never made and has not been made and the title in the property, was not, and has not been transferred.

11. When the Company application No.327 of 2006 was rejected vide order dated 12.8.2008 and the order was carried before the Division Bench in the final order dated 20.6.2011 passed by the Division Bench it is observed by the Division Bench that :-

as per Clause-4 of the sale confirmation order dated 22.02.2006, if there is failure to deposit the amount of the balance considering (in such a situation, where the time is not extended), mandate has been given to OL to terminate the sale and to forefeet: the deposit, after obtaining permission of this Court. Once the amount of remaining balance consideration is not paid and the time is not extended by the Court, consequence in law was to follow and had fallen.

12. Thus, on conjoint reading of the condition Nos. 9, 17 and 24 of the terms in the tender document with para No.6, with sub-para 2 and sub-para 4 para 6 of the order dated 22.2.2006 and para 15 of the order dated 20.6.2011 passed by the Division Bench in OJ Appeal No. 146 of 2008 alongwith the direction No.1 in the order dated 12.8.2008 what emerges, is the fact that the consequence of breach of agreement had automatically occurred and visited the purchaser immediately on nonpayment of sale consideration within specified/extended time limit i.e. 15.9.2006:

13. However, with a view to complying the direction in para 6(4) of the order

dated 22.2.2006 and in para 15 of the order dated 22.6.2011, the OL has taken out present application, which is, inter alia, resisted by respondent No.1 on grounds of alleged "waiver" (i.e. waiver by conduct) of his right and law of limitation.

14. Now, with reference to the contention - objection on ground of "waiver" of right is concerned it is claimed that since OL accepted the payment on two occasions after 10.6.2006 the right, to terminate the sale and/or forfeit the amount, stands waived. The said contention overlooks that the OL did not have discretion or Authority to extend time for payment and consequently did not have discretion or Authority to accept payment after the expiry of time/last date for payment. Thus, the OL had not, of his own discretion or volition, extended the time limit for payment and had not, of his own discretion and volition accepted the amount. The time was extended by and under Court's order and the order of the Court allowed the respondent No.1 to pay further amounts after 10.6.2006 and on or before 15.9.2006. The time was extended until 15.9.2006 by the Court's order. The respondent No.1 paid the amounts on 17.8.2006 and 31.8.2006. Any amount was not paid after 15.9.2006 and was not accepted by the OL after 15.9.2006 i.e. after the period of extension granted by the Court. The order passed by the Court on 18.8.2006 (when the Court directed that "Mr. A.L. Shah, learned Counsel for the applicant ahs handed over a cheque for Rs. 1 crore dated 17.8.2006.....,which is ordered to be kept with the official liquidator.....time to make remaining outstanding dues is extended up to 15.9.2006) read with the order passed on 30.8.2006 (when the Court directed that "the Deputy Official Liquidator is directed to handover the cheque of Rs.1 crore dated 17th August 2006 to the learned Advocate appearing for the applicant and cheque dated 30th August 2006 offered today of Rs. 1 crore is also returned to Shri. A.L. Shah, learned Counsel to be replaced by demand draft of Rs.2 crores). Furthermore, the amount was paid by the auction purchaser and received by the OL within the extended time, which was extended by Court's order. Thus, when payment of the amount on two occasion after 10.6.2006 and its acceptance by OL was under and as per Court's order, it cannot be construed as "waiver" of the right by conduct or otherwise. Hence, the said contention raised on the ground of alleged "waiver" is not acceptable in the facts of the case and the same is, therefore, rejected.

15. Now, so far as the contention on ground of limitation is concerned the respondent No.1 has raised the contention and opposed the application on ground of bar of limitation, citing the provision under Article 55, 59 and 113 of the Limitation Act.

15.1 It is contended that if at all OL had the right to terminate the sale and/ or to forfeit the amount paid, then such right could have been exercised within period of 3 years from the date of breach of and that therefore the applicant cannot now take any action since the breach occurred on 15.9.2006 while the action is sought to be taken in 2011.

15.2 The nature and scope of the application shows, that the application merely seeks permission to take certain action/s mentioned therein and is preferred only on account of, and for the compliance of, the direction contained in para 6(4) of the order dated 22.2.2006 and para 17 of the order dated 22.6.2011 which obliges the OL to seek permission of the Court, which is otherwise not required by law and ordinarily would not be necessary.

15.3 However, since the respondent No. 1 has raised the contention it would be appropriate and necessary to consider and deal with the same. In this context it is relevant to note that the terms in the said order and/or in the tender document did not provide any discretion to OL to extend the prescribed time limit and till the last date i.e. 10.6.2006 neither the full payment of entire sale consideration was made nor any request for extension of time was made by the respondent No. 1 and nor such request was granted by the Court (and the OL could not have granted such extension in absence of any provision). Thus between the auction purchaser and the vendor (the OL) the agreement stood breached on non-compliance of condition for payment on the specified date and that therefore, on commission of such breach the specified consequence followed.

15.4 This aspect, stands clarified and decided by the order dated 20.6.2011 passed by the Division Bench in OJ Appeal No. 146 of 2008 wherein the Court observed in para 15 that :-

...Once the amount of remaining balance consideration is not paid and the time is not extended by the Court, consequence in law was to follow and had fallen...

The termination of agreement or forfeiture of deposit, as observed by Division Bench, are mere consequence of, and therefore occurred simultaneously with, the breach on account non-payment of sale consideration.

15.5 It could, therefore, be claimed and contended that the agreement/sale stood (and stands) terminated on breach of condition viz. condition to pay full consideration within fixed time frame, and that therefore there is no need for OL to terminate the agreement/sale.

15.6 The contention of respondent No.1 can be considered from another perspective also. Even if it is assumed that on 15.9.2006 the agreement/sale did not, despite breach of condition for payment of sale consideration i.e. on account of non-payment of consideration, stand terminated, then also when the request seeking extension of time for payment came to be rejected on 12.8.2008 (then) the agreement/sale stood terminated and that therefore it cannot be said that auction terminating sale is time barred.

15.7 Besides this, if it is assumed that any further action even after the order dated 12.8.2008 and/or despite natural consequence of the breach, for terminating the sale was required to be taken by OL then also the OL had ample time i.e. until 14.9.2009 (assuming that Article 55 or 59 or 113 are applicable to such action) or until 9.6.2009 to terminate the agreement/ sale and/or to forfeit

the amount, however by the order dated 11.9.2008 passed by the Division Bench in the OJ Appeal No. 146/2008 preferred by the respondent No. 1 against the order dated 12.8.2008 where the Division Bench ordered that no further proceedings shall be continued or taken pursuant to impugned order, and the operation of the said order dated 11.9.2008 continued until 22.6.2011 and that therefore atleast from 11.9.2008 (and at that stage atleast 12 months time i.e. until 14.9.2009 was still available with OL) to 22.6.2011 the OL could not have complied the direction of the Court vide para 4(6) of order dated 22.2.2006 and without complying the said direction OL could not have requested for the permission of the Court. Hence, for the aforesaid reason also the bar of limitation would not apply and in the facts of the case the question of limitation would not and does not arise.

15.8 Furthermore, any party cannot take and/or cannot be allowed to take disadvantage of its own actions. Any party cannot be put to suffer disadvantage on account of Court's order which restrained the said party from taking any action or required such party to take some action. In present case according to the order dated 22.2.2006 and the tender document the time limit for payment of sale consideration was 10.6.2006. It was then extended by the Court to 15.9.2006 by order dated 18.8.2006 and after 15.9.2006 any extension was not granted. Thus, proceeding on the premise that the said provisions of the Limitation Act would be applicable to present application, then also the OL had time available until 14.9.2009. However much before the said date the Division Bench passed the order dated 11.9.2008 in C.A. No. 254/2008 in OJ Appeal No. 146/2008 and directed OL to ".....ensure that no further proceedings are continued or taken pursuant to impugned order dated 12.8.2008". Hence, from 11.9.2008 i.e. much before 14.9.2009 the OL was restrained by Court's order - passed in the proceedings taken out by the respondent No.1 - from taking out any proceedings or continuing any proceedings. The said restrain order continued during pendency of OJ Appeal No. 146/2008. The said appeal was disposed only in June 2011 (20.6.2011). So, until then the OL was restrained by the Court's order and then the OL immediately (on 28.6.2011) i.e. within 9 days after the appeal was disposed off, preferred present application. Under the circumstances the respondent No.1, who took out the proceedings and requested the Court to restrain the OL from taking any action, cannot now raise objection on ground of limitation and cannot be heard to oppose the application on such ground. In any case, order of Court would not act in prejudice to anyone, more so when it is on account of the Court's restrain order that the applicant could not take action and it is Court's order which has necessitated this application.

15.9 The final picture which emerges from the aforesaid facts is that the time for payment was extended until 15.9.2006 by Court's order. Consequently even in light of the contention of respondent No.1 to the effect that after three years from 15.9.2006 any action by OL would become time barred, the OL had time until 14.9.2009 (assuming such period of limitation would applicable). However, before 14.9.2009 two major events, so far as the respondent's contention on

ground of limitation is concerned, occurred viz. the Court rejected, on 12.8.2008, the respondent's request for extension of time and the Court, on 11.9.2008, passed restrain order against OL. Both the events occurred before 14.9.2009 and the restrain order continued until 22.6.2011. Thus, when the OL was under restrain order of the Court for substantial part of period of limitation, the application and/or the direction sought for by the OL is not or cannot be said to be barred by law of limitation. Hence, in light of such facts the contention raised by the respondent No.1 cannot be accepted and therefore the same is rejected.

16. The aforesaid aspects coupled with the terms in the tender document and the directions by the Court vide order dated 22.2.2006 particularly para 6(4) thereof, make it clear that the OL is entitled to treat the sale as terminated and/or to terminate the sale and to treat the deposit forfeited and/or to forfeit the deposit. The said rights of the OL are, intact and are not extinguished in any manner whatsoever, much less on account of bar of "limitation" or alleged "waiver".

17. Now, coming to the contention of the respondent No.1, that OL is not entitled to forfeit any amount and/or is not entitled to claim and receive more than reasonable compensation for the loss suffered on account of breach of condition and for the purpose of assessing the reasonable loss, the relevant period would be the date on which the breach occurred. It is contended that the applicant cannot claim or recover any amount which would be in nature of penalty.

17.1 Mr. Desai, learned Advocate has submitted that the provisions of the tender document and the order dated 22.10.2006 are clear and allow the OL to forfeit the deposited amount which condition was accepted by the respondent and that therefore the objection is misconceived and OL is entitled to forfeit the amount as per the provision and therefore the permission as prayed for be granted.

18. The terms of the tender including clause No. 17, inter alia, prescribe that in the event the auction purchaser does not pay the balance amount of sale consideration, the OL shall terminate the sale and forfeit the deposit. There is no dispute between the parties that the term "deposit" in clause No. 17 and para 6(4) of the order dated 22.2.2006 means Earnest Money Deposit (EMD) paid by the bidders at the time of tendering the bids.

18.1 It is also necessary to refer to the provision contained under Clause 24 of the terms of condition, which inter alia, prescribe that if the purchaser fails to pay the purchase money/balance amount of cost charges and expenses payable by him to vendor within specified time or fails to perform the condition or any one of them, then the entire amount deposited till then would be forfeited and the vendor shall be at liberty to sale the property.....Thus, while clause 17 prescribe that "the deposit" may be forfeited, clause No. 24 prescribe that "entire amount deposited till then" shall be forfeited. From perusal of clause 24 it however appears that it would operate when fresh auction/sale is held and the details of price (sale consideration) fetched by such fresh auction/sale are available with the OL in light of which the OL can assess as to whether any

deficiency in price is occasioned by such second -fresh auction/sale, or not. Therefore, it is not necessary to examine the nature and effect of the said clause at this stage.

18.2 In addition to the said clause 17, reference also needs to be made to the provision regarding forfeiture as contained under clause 26 of the tender document. The said clause reads thus :-

26. The offerer shall not be entitled to withdraw or cancel his offer once submitted. If the offerer withdraw or cancel his offer the Earnest Money Deposit shall be liable to be forfeited and he will also be liable to pay to the Official Liquidator the loss, damage suffered consequent upon his backing out of their offer. The property/assets in question will then be re-sold at the risk and consequences of the offerer.

The said clause 26, as such, would be attracted in case the offer is withdrawn.

19. It is relevant and necessary to note that the bidders including the auction purchaser were intimated, at the outset. (i.e. at the stage when the tender documents were supplied) about the said conditions. Thus, the respondent No.1, was aware about the above referred condition even before he tendered his bid/ offer.

19.1 In view of the fact that the said condition formed part of the terms of tender document, the moment the respondent No.1 submitted the filled -up tender and participated in the tender process, the respondent No.1 bound itself by all the terms of the tender document including the term pertaining to forfeiture and when it paid 25% of the sale consideration and thereafter the further amounts, the respondent No.1 acted in furtherance and in compliance of the said accepted and binding condition regarding forfeiture. The respondent No.1 cannot escape the binding conditions and its effect which it accepted at the outset, while tendering its bid.

19.2 However, as noted earlier, the learned Counsel for the respondent No.1 has submitted that assuming that the OL has right to terminate the sale and to forfeit the amount then the forfeiture should not be of amount more than the loss suffered by OL on account of the breach. The forfeiture of any amount higher than that, according to the learned Counsel for the respondent No.1, would be in nature of penalty. In support of the said submission Mr. Shah learned Counsel has heavily relied on the provision u/s 74 of the Contract Act.

19.3 On the other hand, learned Counsel appearing for the OL has submitted that the OL is entitled to forfeit not only EMD as per clause 17 of the tender document but the OL is entitled to forfeit, as per clause 24 of the tender document, the entire amount deposited by the auction purchaser until the date of default.

20. It would be appropriate to examine the contention in light of the observations made in the case between Oil and Natural Gas Corporation Ltd. Vs.

SAW Pipes Ltd., wherein after considering the earlier decision by the Court in the cases between Maula Bux Vs. Union of India (UOI), and Fateh Chand Vs. Balkishan Das, the Apex Court observed as follows :-

46. From the aforesaid Sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise in the usual course of things from such breach. These Sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

65. It is apparent from the aforesaid reasoning recorded by the arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand's case (*supra*) wherein it is specifically held that jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. u/s 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, *inter alia* [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual

loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration; if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is - whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different,

(emphasis supplied).

The Apex Court, then, explained the position thus :-

69. From the aforesaid discussions, it can be held that :-

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

21. In present case the right of the OL to forfeit the amount, emerges from the terms of the tender and also from para 6(4) of the Court's order dated 22.2.2006.

22. In this context it is pertinent to note that the above referred clause 17 of the tender document, or even clause 24 thereof, did not require or contemplate the requirement to seek permission of the Court for forfeiting the amount and/ or terminating the sale or treating the sale as terminated, but it was by virtue of the order that the Court directed OL to take permission of the Court. The applicant has therefore, preferred present application to seek permission of the Court, as required by virtue of the direction contained in the order dated

22.2.2006. But for the condition in the order, the OL could have and would have forfeited the amount without seeking permission.

22. I While responding to the application, the respondent No.1 has raised the said contentions and resisted the application. It is true that as per the prayer clause, the scope of the application is only to grant or decline the permission and that actually these issues (i.e. as to whether the provision is in the nature of penalty or not and what could be the reasonable compensation in the facts of the case etc.) are not the issues and aspects which would ordinarily be dealt with or decided at this stage, since the aforesaid issues would arise for consideration when the amount is actually forfeited and such forfeiture is challenged. However in present case the Court is called upon to decide these issues at the instance of the respondent No.1 who has opposed the application on the ground of said contentions. Therefore, it is necessary to decide said issues since they are the premise and base of said respondent's objections against the application. The contention raised by the respondent No.1 is examined on merits without entering into the issue as to whether, in view of the nature, scope and purpose of present application, the provisions under Article 55, 59 or 113 of the Limitation Act would be attracted and applicable to this application and/ or at this stage. It is clarified that the observations in this order are made for the limited purpose of deciding the application at this stage and that present order shall not stand in the way of the respondent No.1 if in the event it takes out any proceedings against the actual decision and action of forfeiture by Official Liquidator and the Court shall independently decide such motion on merits and in light of such evidence as may be on record.

23. While considering the application in view of the objections and contentions raised by respondent No.1, one of the perspectives which emerge from the matter is that as per the provisions in the tender document the amount which can be forfeited by the OL is a "specified amount" and that therefore it is in nature of liquidated damages which the parties considered to be "appropriate and reasonable compensation" which the OL can forfeit as per and in view of the terms of agreement.

24. So far as the loss suffered by the OL is concerned, it is necessary to take into account that the OL has to pay-off the claims of the workmen and the secured creditors from the sale proceeds of the assets of the Company. Ordinarily upon such auction - sale being finalized - confirmed and upon payment of full sale consideration, the same can be disbursed amongst the workers and the secured creditors, however when it fails half-way i.e. upon breach of any condition and/or on account of non-payment of full amount of sale - consideration then such payments to workers and creditors cannot be made, as it happened in present case, because of the breach by the respondent No.1 and the subsequent proceedings taken out and pursued by: it. These are also the relevant aspects which go - into consideration when the provision for compensation on account of breach is made and provided for the tender.

In this context it is also necessary and relevant to take into account that in such cases the breach would not only result into delay in payment of dues to the workers and creditors but would also entail the entire process of sale and the resultant expenditure once over again.

Therefore, such cases are in slightly different league than usual sale of immovable property since its breach would entail whole expensive and time consuming exercise once over again, in addition to delay in payment to workers and creditors and that therefore the measure for determining as to whether the named amount is genuine pre-estimate of the loss-damage which would occur due to breach and/or what could be reasonable compensation, would be different in such cases than other usual transaction related to immovable property. The OL being the party inviting bids is entitled to make estimate of the loss - damage and take into account relevant aspects to arrive at proper estimated amount, and that is what OL did in present case.

Having regard to the relevant aspects discussed hereinabove it appears that in cases such as present one alongwith the normal measures for assessing reasonable compensation for loss and damages, the monetary value (i.e. the value in terms of money) for delay which occurs on account of the breach (which entails the entire exercise once over again) the expenditure already incurred (and which goes waste because of the breach) towards valuer's fees and C.A.'s fees, the expenditure incurred towards advertisement and the fresh expenditure that may again have to be incurred on the said head, the additional/fresh expenditure for initiating fresh process for auction sale e.g. inviting offers, exercise for revaluation of the property etc. the expenses towards advertisement, Chartered Accountant's fees, fees of the valuer for revaluation of property other incidental expenses towards auction process, inter - se bidding before the Court during the Court hours and such other expenses which will have to be again incurred only because of the breach of agreement by the auction purchaser, also need to be taken into account for considering and determining as to whether the compensation named in the agreement reflects assessment or determination of reasonable compensation or as to whether the named amount is in the nature of penalty and in the facts of the case what amount would be reasonable compensation for OL.

25. It has emerged as undisputed fact that the respondent No.1 has committed breach of the condition regarding payment of sale consideration. The Court had even extended the time for payment till 15.9.2006 with the fond hope that the auction sale may go - through and it may not fail merely on account of inflexible insistence for compliance of the term regarding time frame for payment. However, even though extension of 15 days more than what was asked for (by respondent No.1) was granted by the Court, the respondent No.1 did not pay the balance amount. The agreement (to sell) thus failed. Ultimately the Court had to reject the request for extension of time, vide order dated 12.8.2008.

25.2 In view of the above discussed provisions of the tender document and the

condition prescribed by the Court vide order dated 22.2.2006, the breach by the respondent No. 1 entails, and the said facts also justify, the specified consequence viz. termination of sale and forfeiture of the amount in accordance with the terms of the tender read with the conditions in the order. However, since the order dated 22.2.2006 mandate that OL should seek permission, present application is preferred by the OL.

26. According to the respondent No.1 the applicant OL cannot forfeit amount more than what Section 74 mandates or allows. The said provision u/s 74 is, as observed by Apex Court, required to be read alongwith Section 73 and that as observed in para 69(2) of the said decision if the terms are clear and unambiguous stipulating the liquidated damages then the defaulting party has to pay such compensation unless it is held that estimate is unreasonable.

26.1 At this stage it is also relevant to note that the Apex Court, in the said decision in the case of ONGC v. SAW pipes (supra) also observed that :-- "Therefore, the emphasize is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result form the breach of it, there is no question of proving such loss or such party is to require to lead evidence to prove actual loss suffered by him. Burden is on the party to lead evidence for proving that no loss is likely to occur by such breach.....".

26.2 Further, as observed and explained in para 46 of the said decision, even in cases where Court finds that the term providing compensation is by way of penalty, the Court may grant reasonable compensation not exceeding named amount. Thus, even if the relevant provisions are held to be in nature of or by way of penalty then also OL would be entitled to reasonable compensation not exceeding named amount.

27. On overall consideration of the facts of present case and having regard to the aspects discussed above and the position regarding such provision explained, by the Apex Court in the aforesaid decision in the case of ONGC v. SAW pipes (supra), it emerges that in view of the facts of this case and in light of the other provisions of the tender the provision under clause 17 of the tender cannot be said to be unreasonable estimate and/or penalty.

28. When (a) there is no dispute on the fact that the respondent No.1 committed breach of agreement/sale and (b) when the Court is satisfied that the right of OL to forfeit the amount is intact and is not extinguished or hit by law of limitation or principle of waiver and the OL is entitled to exercise such right and (c) when for the reasons recorded hereinabove, the amount named in clause 17 is not found to be "penalty" and (d) when it is the requirement under Court's order that permission of the Court must be obtained and the application is preferred in

compliance of such mandate, the Court would have no justification to deny the permission for forfeiture. The Court cannot relieve a party who is in breach.

29. In view of and as consequence of the breach on account of nonpayment of balance amount of sale consideration; the OL, as per the terms of tender and para 6(4) of the order dated 22.2.2006, is entitled to take action as per and in accordance with clause 17 and para 6(4) of the order dated 22.2.2006 and the permission as contemplated by the said order therefore deserves to be granted and is hereby granted.

30. So far as the relief prayed for in para 24(2) is concerned it is clarified that the request for permission to auction sale the land and property in question can be considered only after the valuation of the land and property in question is made available before the Court. The valuation made at the relevant time is too stale at this stage and cannot be taken into consideration and cannot be made base for action of sale of the property in question. Therefore, the said request cannot be considered at this stage and the OL may, after completing all formalities necessary to auction sale the property in question, move appropriate application for the said purpose. With the aforesaid clarification and direction the OLR is partly accepted - allowed. Accordingly the OLR stands disposed of.

31. After the order is dictated, learned Counsel for the applicant has requested that operation of the order may be stayed for period of two weeks so as to enable the respondent No.1 to take out appropriate proceedings.

32. The request for time to prefer OJ Appeal and pursue remedy against present order would have been ordinarily entertained, however, having regard to the fact that before actual sale process takes place or before the process of issuing and receiving tenders/bids OL will have to get fresh valuation of the property which will be followed by Notice inviting bids and only thereafter the actual process of sale would begin. This process will take atleast another 20 - 25 days (i.e. which is the time requested for by the applicant) and consequently the applicant will have sufficient time to pursue the remedy against present order and since any order in the accompanying application being OLR No.1 16/2011 is yet not passed, there is actually no need for such order, hence not accepted.