

(2013) 02 DEL CK 0365
In the Delhi High Court
Case No : Co. Petition No. 66 of 2003

Societe Generale

APPELLANT

Vs

Daewoo Motors India Ltd.

RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Companies Act, 1956 — Section 529, 529(a), 529A
Industrial Disputes Act, 1947 — Section 2(s)
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (2013) 3 AD 572 : (2013) 180 CompCas 292

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Rajat Nair, Advocate for Mr. K.R. Sasiprabhu, Advocate for Pan India Motors, Mr. Dhruv Dewan, Advocate for ARCIL, Mr. Ajay Bhatnagar, Advocate for Applicants/Employees, Mr. Deepak Prakash and Mr. M.K. Tiwari, Advocates for Workmen, Mr. Ramesh Gopinathan, Advocate for the Receiver, DRT, Mumbai and Mr. Kanwal Chaudhary, Advocate for the Official Liquidator, for the Respondent

Judgement

S. Muralidhar, J.

Co. App. Nos. 470 of 2008, 686 of 2008, 1648 of 2012, 1650 of 2012 (by the workmen) and 924 of 2011 (by the Official Liquidator) in Co. Pet. No. 66 of 2003

1. The Respondent company, Daewoo Motors India Ltd. was ordered by this Court to be provisionally wound up on 24th November 2003 and finally wound up on 28th July 2004. The Official Liquidator ("OL") attached to this Court had been appointed as the Liquidator. Prior thereto, in the proceedings initiated by the ICICI Bank ("ICICI") before the Debts Recovery Tribunal ("DRT") No. III in Mumbai, an order had been passed on 9th May 2002 by the DRT, appointing a Receiver. A Debt Recovery Certificate in favour of ICICI was issued by DRT on 11th October 2004. ICICI assigned the Debts Recovery Certificate in favour of Asset Reconstruction Company (India) Ltd. ("ARCIL") on 29th March 2005, thereby ARCIL stepped into the shoes of ICICI in the proceedings before the DRT. The other assignee of the debt was Stressed Assets Stabilization Fund ("SASF").

The DRT, Mumbai invited bids for the sale of the fixed asset, which was the factory premises at A-1, Surajpur Industrial Area, Gautam Buddh Nagar, Noida, Uttar Pradesh, admeasuring 204 acres.

2. As far as the proceedings in this Court are concerned, it appears that by an order dated 4th March 2004 passed by the Court in an application made by ICICI, this Court was made aware of the proceedings in the DRT Mumbai under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("RDDB Act"). The Court restrained the OL from taking possession of the aforementioned factory premises and modified its earlier order in that regard passed on 24th November 2003. By an order dated 24th May 2006, in CA No. 1549 of 2005, the Court noted that 1524 claims had been received from the workmen. It, accordingly, appointed a three-member Committee, of which the Assistant Official Liquidator ("AOL") was part, to scrutinize the claims of the workmen. It is seen that the composition of the Committee was altered with one member being replaced by an order dated 30th July 2007.

3. On 1st August 2006, an order was passed by this Court in CA No. 908 of 2006, taking note of the advertisement published by the DRT, Mumbai, inviting bids for the sale of the assets of the company and copy of the said advertisement was handed over to the OL. It was directed that "the Official Liquidator will ensure that the interest of the workers is protected and take care of their interest." It was further directed that the OL "will also ensure that the sale by the Debt Recovery Tribunal, Mumbai is in accordance with the Second Schedule of the Income Tax Act, 1961 and best possible price is obtained." The Receiver appointed by the DRT, Mumbai was also represented before the Court by learned counsel, who stated that the joint inventory report had been prepared. The OL was then directed to take possession of the statutory records, including the books and accounts of the company under liquidation.

4. Despite the direction of this Court to the OL to appear before the DRT and participate in those proceedings, it appears that for some reason that was not done. In an order passed on 12th February 2007 by the DRT Mumbai, on the basis of the report dated 8th January 2007 of the Receiver appointed by it, it was noted that the notice had been served on all the creditors as well as the OL of this Court. In para 23 of the order, after noting the decision of the Supreme Court in Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, that the DRT was entitled to order the sale of the properties even if the company was in liquidation but only after the notice to the OL appointed by the Company Court and after hearing the OL, the DRT noted that "In this behalf, the notice of the sale and proceedings, from time to time, has been given to the Official Liquidator, Delhi High Court." DRT, by the said order, accepted the bid submitted by Crosslinks Finlease Pvt. Ltd. ("CFPL") for Lot No. 1 only, i.e., property at A-1, Surajpur Industrial Area, Gautam Buddh Nagar, Noida, Uttar Pradesh for the sum of Rs. 765 crores It was directed that on receipt of 35% of the payment, the Receiver appointed by the DRT should hand over the

possession of the property after securing poundage fees. It was directed that on the completion of the sale of the fixed assets, Canara Bank or any other working capital bank should take over charge of the book debts and realize the same. Importantly, it was directed in para 30(e) that "A copy of the Order shall be forwarded to the Official Liquidator, Delhi High Court, to enable him to take charge of the records of the Defendant No. 1 Company, which are lying at the suit property, within two weeks time, so that DRT Receiver would be in a position to hand over possession to the Purchaser." In para 30(j), it was directed that subsequent to payment of fees of the Receiver, the amount of royalty of Rs. 30 lakhs which was deposited with the Registrar, DRT, would be paid over to ARCIL and the balance amount of the sale proceeds (after payment of the Receiver's commission/fees) would be kept in a fixed deposit ("FD").

5. It appears that on the issue of the company being entitled to duty exemption under the Export Promotion Capital Goods Scheme, demands were raised by the Customs and Excise authorities. The Customs authorities intervened in the proceedings before the DRT. Their appeal was dismissed by the Debts Recovery Appellate Tribunal ("DRAT"). They approached the High Court of Bombay. It appears that in a SLP ("SLP") filed by ARCIL against the order dated 15th April 2005 of the High Court of Bombay in the writ petition filed by the Customs authorities, an order was passed by the Supreme Court on 12th May 2005, expressing the hope that by the time the SLP was listed next, "the matter will be settled and finalised." Pursuant to the above order, a Memorandum of Understanding ("MoU") was entered into between the Government of India on the one part and ARCIL and SASF on the other, whereby, inter alia, it was agreed that the Customs authorities will be paid in terms of the calculation set out in the MoU. The MoU in para 6 also accounted for the fact that the payment of the workmen's dues would be u/s 529A of the Companies Act, 1956 ("Act"). Therefore, even prior to the order passed by the DRT on 12th February 2007, the question of payment to the Customs authorities stood concluded by way of the above MoU, which had been entered into pursuant to the order of the Supreme Court.

6. The Committee, which was appointed by this Court to examine the claims of the workmen, submitted its report in March 2008. In terms of the facts set out by the OL in its application, CA No 924 of 2011, it is seen that the Committee scrutinized as many as 1487 claims and decided as follows:

- (i) Claims of 1107 workmen totaling Rs. 19,16,00,231/- are admitted.
- (ii) Claims of 7 workmen who have obtained ex-parte awards from other labour Courts amounting to Rs. 1,20,80,311/- are computed and this Hon'ble Court is requested to take a final decision whether the same be admitted.
- (iii) Claims of 357 workmen totaling Rs. 61,30,37,607/- are rejected on account of insufficient documentation;
- (iv) Claims of 16 persons totaling Rs. 62,07,524/- are rejected on account of

their not qualifying as "workmen" within the meaning of section 2(s) of the Industrial Disputes Act, 1947 read with Section 529A of the Companies Act, 1956.

7. CA No. 1224 of 2008 was filed by certain aggrieved workmen, objecting to the above report. The following order was passed by the Court in the said application on 15th January 2009:

I do not think any orders can be passed on this application till books of accounts/ records of the company under liquidation are examined and the claims of made by the alleged workmen are thoroughly examined on the basis of records. Therefore, at this stage no orders are being passed on this application and the same is disposed of with liberty to the applicant/alleged workmen to raise claims subsequently. It is clarified that the opinion of the committee rejecting claim of the applicants has not been confirmed by this Court and will be examined at a subsequent stage.

8. On the same date, a separate order was passed by the Court in Crl. O. (Co.) 5 of 2008 as follows:

1. Official Liquidator will de-seal the room in which records/books of accounts of the company under liquidation are kept in the presence of the receiver appointed by Debt Recovery Tribunal. Secured creditors of the company under liquidation and the purchaser of the assets will be intimated and informed the date and time for carrying out necessary exercise.

2. The Official Liquidator will engage services of a photocopier for making copies of the records/books of accounts after inviting tenders for the said purpose. The receiver/secured creditors/the purchaser can appoint a nominee to be present at the time when photocopying work is in progress.

3. Official Liquidator will write a request letter within two weeks to the Institute of Company Secretaries and the Institute of Chartered Accountants with a request to ask their Members to nominate article clerks for examining the books of accounts/records of the company under liquidation. The said Members and article clerks will be paid honorarium/remuneration, which will be fixed by this Court. It may be noted here that the exercise will be helpful to the said Member/article clerks, who in future can become specialist in dealing with insolvency cases and cases of companies under liquidation. The institutes are requested to circulate the letter written by the Official Liquidator amongst their members.

List again on 27th March, 2009.

9. The report of the Committee, which examined the workmen's claims, is yet to be accepted by the Court. Certain workmen filed CA Nos. 470 of 2008 and 686 of 2008, objecting to the Committee's findings. Certain other workmen who were awaiting clearance of their dues in terms of the Committee's report filed CA Nos. 1648 of 2012 and 1650 of 2012.

10. An application filed by the workmen, being CA No. 227 of 2011, was rejected

by the Court by order dated 15th July 2011, in which it was noted that out of the sum paid as upfront money by the successful auction purchaser ("AP"), a sum of Rs. 50 crores had been earmarked by the Recovery Officer ("RO") towards workmen's claims. The said amount has been kept in a separate FD by ARCIL. The prayer in the said application by the workmen that the said sum should be utilized for settling the admitted claims of the workmen was rejected by the Court after noting that an application had been filed before the DRT for setting aside the sale since the AP had not paid any further sum.

11. The OL filed CA No. 924 of 2011, in which it was, inter alia, stated that the Receiver appointed by the DRT had sold the factory premises of the company by way of a "private treaty". In para 16, it was stated as under:

16. That Official Liquidator attached to this Hon"ble Court has at no point of time been associated with the process of sale of the said property of the company in liquidation situated at A-1, Surajpur Industrial Area, Gautam Budh Nagar, Tehsil Dadri District Ghaziabad, U.P. Even the manner in which the sale proceeds have been appropriated have neither been informed to the Official Liquidator nor to this Hon"ble Court. In such circumstances the Recovery Officer, DRT, Mumbai is acting in gross violation of the settled law as regards the realization/distribution of the sale proceeds.

12. In the said application filed on 18th May 2011, it was, inter alia, prayed that the sale proceeds realised by the Receiver appointed by the DRT should be directed to be deposited by the OL; the OL should be permitted to invite the claims from all secured/preferential creditors through publication; a firm of Chartered Accountants ("CAs") on the panel of the OL should be appointed for the scrutiny of the statutory records of the company; a CA from the panel should be appointed to scrutinize the claims of the workmen and Government commission on account of actual realisation from the assets and interest accrued should be disclosed by the RO of the DRT.

13. Significantly, in the status report dated 20th April 2011 filed less than a month prior to the above application it was pointed out by the OL, in relation to the report of the Committee constituted by the Court to examine the claims of the workmen, as under:

6. That the Committee has rejected 357 claims due to insufficient documentation. In compliance of order of the Hon"ble Court passed on 15.01.2009, the office of the Official Liquidator has verified the records of the Company (In Liqn.) pertaining to the workers at the factory situated at A-1, Surajpur Industrial Area, Gautam Budh Nagar, Noida, U.P. Particulars of 1319 workers have been verified which apparently are the part of rejected claims numbering 357, It requires further examination and admission of their claims if found fit by the Committee.

7. That as regards to the examination and admission of claim of 1107 workmen, objections were raised by the representative of the workers as to the repetition

of the names of the workers, calculation made thereon etc. on the report filed by the Committee.

It is also observed from the report of the Committee that the Committee has scrutinized the claims on the basis of random selection method i.e. 40 out of each bundle of 100 files. It appears that each and every claim of the workers has not been gone through and ascertain by the Committee. The Official Liquidator has already filed CA No. 957/10 praying to the Hon"ble Court to direct the Committee to re-examine the claim and to quantify the amount to be disbursed.

14. ARCIL has filed a comprehensive reply to the above application of the OL pointing out that the OL has taken a stand completely contrary to the one earlier taken. It was pointed out that despite the notices issued by the DRT to the OL there was no participation by the OL in the proceedings before the DRT. Reference was also made to CA No. 274 of 2007 filed by ARCIL for directions to the Committee constituted by the Court to examine the claims of the workers to submit a report. Upon such report being submitted, the OL was directed to file a formal claim before the Recovery Officer, Mumbai, DRT on behalf of the workmen within ten days. The full facts regarding the sale of the assets by the RO with the DRT and the MoU entered with the Central Government concerning the dues payable to the Customs authorities were set out in the said application.

15. In the reply filed by the OL to the said application, it was inter alia stated as under:

Para 1 to 18: In Para 1 to 18 it is submitted that the claims of the workers are under active consideration before the Committee appointed by this Hon"ble Court vide order dated 24.5.2006. Official Liquidator is eagerly awaiting the report of the said Committee. Official Liquidator would file a formal claim before the recovery officer DRT, Mumbai as and when the report is submitted by the Committee.

16. The fact that the OL was aware of the proceedings before the DRT is apparent from the letter written on 22nd January 2008 to ICICI relating to the order passed by the DRT on 16th October 2007 and asking for provision for sufficient space "so that record of the company in liquidation can be shifted." Again, in the objections filed to another application, being CA No. 470 of 2008 by the workmen, objecting to the report of the Committee, the OL took the stand in its reply as under:

In reply to para 50 to 51 it is submitted that the provisions of the RDDB Act was invoked in the matter and the properties of the company were sold by DRT Mumbai. In such a situation the role of the Official Liquidator is limited to the adjudication of the claims u/s 529(a) of the Companies Act 1956. As the claims of employees other than workmen do not fall u/s 529(A) the same have rightly been rejected.

17. The OL himself filed CA No. 957 of 2010 for directions to the Committee to re-

examine the claims of the workmen and for directions to the Receiver appointed by the DRT, the AP or workmen union to cooperate with the OL. In the said application, in para 5, it was stated as under:-

5. That the factory premises of the company (In Liqn.) is situated at A-1, Surajpur Industrial Area, Noida (U.P.) for which a receiver stands appointed by the DRT Mumbai and the Hon''ble High Court of Delhi vide its order dated 04/03/2004 had restrained the Official Liquidator, Delhi from taking over the possession of the factory premises situated at the above mentioned site and presently the factory premises of the Company (In Liqn.) has been sold by Hon''ble DRT Mumbai for a sum of Rs. 765 crore.

18. An order was passed by the RO, DRT on 16th October 2007, where, inter alia, the following directions were issued for disbursement of the amounts deposited by the AP:

On receipt of 35% upfront payment and issuance of Debentures, allotment letters to ARCIL and SASF to their satisfaction creation of pledge and hypothecation, DRT Receiver should forthwith handover possession of the suit properties after securing poundage fees. The accrued interest on the amount of Rs. 76.5 (sic. 765) crore already deposited by the buyer would be taken into account while accepting the balance 25% upfront payment. An amount of Rs. 50 crore out of the said upfront payment shall be paid to ARCIL for being deposited and held by it on behalf of this Tribunal in an interest bearing account in a bank till payment of workmen''s dues to the Official Liquidator/Asst. Official Liquidator (in charge) of Respondent No. 1. Upon receipt of the said upfront payment, DRT Receiver shall forthwith reimburse to ARCIL all expenses incurred on behalf of first charge holders as also pay itself the Receiver''s fee being fixed under this order. Further DRT Receiver is directed to forthwith distribute the balance cash portion of said upfront payment to ARCIL on behalf of first charge holders. Upon payment of workmen''s dues to Official Liquidator/Asst. Official Liquidator (in charge) of Respondent No. 1, the surplus, if any, out of the said deposit of Rs. 50 crore (with accrued interest) shall be distributed to ARCIL on behalf of the first charge holders.

...

A copy of the Order shall be forwarded to the Official Liquidator, Delhi High Court, to enable him to take charge of the records of the Defendant No. 1 Company, which are lying at the suit property, within two weeks time. Further the Official Liquidator/Asst. Official Liquidator (in charge) of Respondent No. 1, is hereby directed to lodge/submit the final quantum of dues of workmen of Respondent No. 1 as admitted by the Official Liquidator/Asst. Official Liquidator (in charge), to this Hon''ble Tribunal within two weeks from the date of this order.

...

The Receiver would be discharged upon completion of the work entrusted as

hereinabove as far as fixed assets are concerned and shall continue as DRT Receiver for current assets till the sale of current assets & Rs. 50 lacs out of sale proceeds to be kept aside for settling the fee of DRT Receiver. Sale proceeds minus Rs. 50.50 crores [Rs. 50 crores for workmen plus Rs. 50 lakhs supra] would be released to ARCIL for clearing the dues of the crown and for rateable distribution among secured creditors. On settling the fee of the DRT receiver balance be released to ARCIL.

19. Consequently, the stand now taken by the OL in CA No. 924 of 2011 appears to either ignore or contradict what was stated before the Court in various applications earlier. The position that emerges is that despite the notices to the OL, he did not participate in the proceedings before the DRT.

20. The factual position is set out in the affidavit dated 30th April 2012 filed in this Court by the Receiver appointed by the DRT. In para 9 of the said affidavit, inter alia, it was stated as under:

9. It is submitted that the details of the sale proceeds of the assets of the company under liquidation are as below:

A total amount of Rs. 267.75 crore, being 35% of the upfront amount has been received.

That the amount received was appropriated through the DRT-III, Mumbai, a detailed below:

? Rs. 100.85 crore was paid to Commissioner of Customs, Mumbai based on Memorandum of Understanding between the Union of India and Arcil and ors. as recorded in the Order dated 9.12.2005 passed by Hon"ble Supreme Court in SLP No. CC No. 5185 of 2005

? Rs. 95.40 crore paid to first charge holders viz. Arcil and SASF towards reimbursement of expenses incurred;

? Rs. 50 crore was kept with Arcil to be held in interest bearing account on behalf of DRT Receiver toward workers dues;

? Rs. 50 lacs was kept with Arcil to be held in Interest bearing account towards receivers" fees;

? The balance amount of about Rs. 21 crores was distributed to Arcil and SASF towards their share of the sale consideration.

21. On 22nd November 2012 the RO, DRT cancelled the sale of fixed assets of the company in liquidation in favour of CFPL/Pan India Motor Pvt. Ltd. It is further informed that this order was confirmed by the Presiding Officer of the DRT by order dated 30th January 2013. The further appeal filed by the AP before the DRT is stated to be pending. The question is as to whether the sum of Rs. 267.75 crores paid by the AP stands forfeited?

22. By an order dated 22nd November 2012, the DRT has discharged the earlier

Receiver appointed by it, i.e., M/s. Khare Bapat Kabe Sinha & Associates and ARCIL has been appointed as the new Receiver. This is evident from the affidavit dated 12th February 2013 filed by Mr. Ramesh Gopinathan, Advocate appearing for the Receiver, enclosing a copy of the said order of the DRT.

23. On 29th November 2012, this Court had passed the following order:-

C.A. Nos. 470/2008, 853/2008 and 686/2008 & C.A. Nos. 1648 and 1650/2012

C.A. Nos. 470/2008, 853/2008 and 686/2008 have been filed by DCM Daewoo Employees Union and one Sundar Lal. C.A. Nos. 1648/2012 and 1650/2012 have been filed by the Employees Welfare Forum. All the aforementioned applicants have given their objections to the report dated 07.02.2008 given by the Committee whereby the claims of the aforementioned persons were partially admitted and partially rejected. Counsel for the applicants are permitted to file a written synopsis not exceeding two pages in support of their averments.

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Learned counsel for the parties points out that the sale which had been ordered by the DRT Mumbai is the subject matter of challenge but the earnest money of more than 265 crores which has been deposited before the Receiver Mr. Ramesh Gopinathan is yet lying with him and learned counsel for the workers submits that a sum of Rs. 50 crores in fact has been segregated for the benefit of the workers which amount has to be received by them. None is present for the Receiver. Let notice of default be issued to the Receiver.

Fresh status report be filed by the Official Liquidator.

Renotify for 21.02.2013.

24. When the above order was passed, the attention of the Company Court was not drawn to the fact that the Receiver was not Mr. Gopinathan. He was only the lawyer for the earlier Receiver appointed by the DRT, which Receiver, as noted above, was discharged by the DRT on 22nd November 2012. As of now, ARCIL is the Receiver and it has already been represented through its counsel. Learned counsel for ARCIL has confirmed that a sum of Rs. 50 crores has been kept apart in an FD for the benefit of the workmen. Accordingly, it is held that the order dated 29th November 2012 does not survive. Neither Mr. Gopinathan, Advocate nor his client, the earlier Receiver appointed by the DRT, need appear in the Court any longer.

25. One of the contentions raised by learned counsel for the workmen today was that such of the claims of the workmen that have been admitted by the Committee appointed by this Court should be paid out of the sum of Rs. 50 crores lying with ARCIL in an FD. It was repeatedly urged that while the secured creditors, the Customs authorities as well as ARCIL have been paid from the sum deposited by the AP, it is the workmen who have not received any payment whatsoever for the last several years.

26. The difficulty in entertaining the above plea is that the question whether the amount deposited by the AP should stand forfeited as a result of the sale being set aside by the DRT is yet to be decided. In fact, the validity of these orders of the DRT are in challenge in the proceedings pending before the DRAT. Consequently, it is not possible, at this stage, for the Court to pass any orders regarding disbursement of the dues of the workmen.

27. The other reason is that the report of the Committee is under challenge. Even the OL has stated that the Committee's report should not be accepted and the claims of the workmen should be re-examined. There are challenges to the report also by those workmen whose claims have been rejected. Further, it is apparent that the books and accounts of the company are yet to be examined properly by the CAs. They were also not associated at the stage of examination of the workmen's claims. In the circumstances, this Court is persuaded to accept the plea that the report submitted by the Committee appointed by this Court on 24th May 2006 to examine the workmen's claims should be rejected and this exercise be undertaken by another Committee with the participation of the two CAs.

28. Accordingly, this Court sets aside the report submitted by the Committee which examined the workmen's claims and directs that all the workmen's claims that have thus far been lodged with the OL will be examined by the following Committee:

(i) Mr. S.K. Tandon, retired Additional District Judge; residing at 244, Bank Enclave, Near Laxmi Nagar, Delhi - 110 092 (Mobile No. 9811719888)

(ii) Mr. Sanjay Yadav, Deputy OL (Mobile No. 9350907527)

(iii) Mr. Tarun Goyal, Chartered Accountant CP-58, IIInd floor, Pitampura, Delhi- 110 018. (Mobile No. 9810185384)

(iv) Mr. Sanjeev Saxena, Chartered Accountant, M/s. Sanjeev Saxena & Co., Flat No. 110, Ground Floor, 4855/24, Ansari Road, Darya Ganj, New Delhi- 110 002. (Mobile No. 9868215565).

29. Each member of the Committee will be paid a fee of Rs. 1,00,000 and a sum of Rs. 20,000 will be paid to each member as an initial fees within a period of two weeks out of the Common Pool Fund of the OL and the balance fee after the completion of the exercise. The Committee will endeavour to complete its exercise within a period of two months from today and, in any event, will submit its report not later than three months from today.

30. The next issue that needs to be considered is whether the direction should be issued, at this stage, on the application, CA No. 924 of 2011, filed by the OL to the effect that any monies that remain for disbursal as a result of the final orders in the proceedings arising from the orders of the DRT setting aside the sale to the AP and any fresh sums that might be received hereafter should be placed under the control of the OL and be disbursed only by the OL subject to the

supervision of the Court.

31. Mr. Kanwal Chaudhary, learned counsel for the OL, has placed reliance on the decisions of the Supreme Court in *Rajasthan State Financial Corporation v. Official Liquidator* (supra) and *Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others*, to urge that once the liquidation proceedings are in progress, the disbursal of the amounts, even by the DRT, would be subject to the directions of the Company Court. The above submissions are countered by Mr. Dhruv Dewan, learned counsel for ARCIL, who points out that in terms of the aforementioned decisions, what is required to be done is to associate the OL both at the stage of bringing the properties of the company in liquidation to sale as well as at the stage of the disbursal of the amounts.

32. The question as to the jurisdiction of the Company Court vis-?-vis the powers of the DRT in relation to the company in liquidation was examined by a three-Judge Bench of the Supreme Court in *Rajasthan State Financial Corporation v. Official Liquidator* (supra). The matter came to be referred to a three-Judge Bench as a result of the apparent conflict in the decisions of the Supreme Court in *Allahabad Bank Vs. Canara Bank and Another*, and *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., .*

33. The facts in *Rajasthan State Financial Corporation v. Official Liquidator* (supra) show that even before the Appellants could initiate the proceedings under the State Financial Corporations Act, 1951 ("SFC Act"), the company in question was already under liquidation pursuant to the order passed by the Company Court. It was held by the Supreme Court that "whether the assets are realised by a secured creditor even if it be by proceeding under the SFC Act or under the Recovery of Debts Act, the distribution of the assets could only be in terms of Section 529A of the Act and by recognising the right of the liquidator to calculate the workmen's dues and collect it for distribution among them *pari pasu* with the secured creditors."

34. In para 17 of the said judgment, it was observed:

Thus, on the authorities what emerges is that once a winding-up proceeding has commenced and the Liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the financial institutions coming under the Recovery of Debts Act or of financial corporations coming under the SFC Act, can only be with the association of the Official Liquidator and under the supervision of the Company Court.

35. While clarifying that there was no consistency in the decisions in *Allahabad Bank v. Canara Bank* (supra) and *International Coach Builders Ltd. v. Karnataka State Financial Corporation* (supra), the Supreme Court clarified:

the distribution of the sale proceeds under the direction of the Company Court is his responsibility. To ensure the proper working out of the scheme of distribution,

it is necessary to associate the Official Liquidator with the process of sale so that he can ensure, in the light of the directions of the Company Court, that a proper price is fetched for the assets of the company-in-liquidation.

36. Finally, in para 18, the legal position was summarized as under:

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

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

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

iii) If a financial corporation acting u/s 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529A and Section 529 of the Companies Act.

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

37. This Court does not find the decision in *Bakemans Industries Pvt. Ltd. v. New Cawnpore Flour Mills* (supra) to be directly concerning the point regarding the disbursement of the auction proceeds. The said decision, no doubt, reiterates that a financial institution governed by the SFC Act would still be amenable to the discipline of Section 529A of the Act and that where a company is under liquidation, the sale of the properties of the company as well as the distribution of the proceeds would be under the directions of the Company Court.

38. The Madras High Court has, in *Subhash Kathuria Sole Proprietor, Anitha International Vs. Deve Sugars Limited and Others*, , summarized the entire law in para 41. For the purposes of the present case, sub paras 19, 21, 23, 35 and 37 of the said para 41 are relevant and read as under:

19. Once the recovery certificate is issued by DRT in favour of the banks and

financial institutions, who are secured creditors, then sale of immovable properties cannot be carried out by the Official Liquidator in winding up proceedings and such sale is to be conducted by the Recovery Officer in execution of recovery certificate issued by the DRT.

...

21. The participation of the Official Liquidator in the proceedings before the DRT is in discharge of his duties and as a necessary corollary, non-participating in the proceedings and not defending the interest of the company or the secured credits or the workmen, would amount to failure in discharging the duties.

...

23. DRT and the Recovery Officer can sell the property, but, only after issuing notice to the Official Liquidator and after hearing him.

...

35. RDB Act 1993 is a special law and hence will prevail over the general law, in the Companies Act.

...

37. Once the sale is confirmed by the Recovery Officer and the Sale Certificate is issued, it cannot be said to be illegal or void.

39. In the considered view of the Court, as far as the present case is concerned, the question whether a further auction of the property in question will be required to be undertaken cannot be decided at this stage. This is a question that can be answered only on the conclusion of the proceedings arising out of the orders passed by the DRT setting aside the same. The further question, whether the amount paid by the AP will stand forfeited, will also depend on the outcome of the above proceedings only on the hope that the said question would be answered. To reiterate, therefore, it would be premature for the Court to speculate as to whether the sum of Rs. 50 crores, which is in an FD with ARCIL, would remain with it for meeting the dues of the workmen. At the same time, the Court records the submission by ARCIL that, subject to the orders that may be passed in the proceedings under the RDDB Act, it is prepared to settle the dues of the workmen which would be found admissible by the Committee appointed by this Court.

40. The plea of learned counsel for the OL that as and when the monies become available for disbursement as a result of the proceedings under the RDDB Act they should be placed at the disposal of the OL is different from the law explained by the Supreme Court in *Rajasthan State Financial Corporation v. Official Liquidator* (supra). What appears from a careful reading of paras 16, 17 and 18 of the said judgment is that the OL has certainly to be associated in all the proceedings of sale by public auction or otherwise of the properties of the company in liquidation and the orders of the DRT. As noted hereinbefore, the DRT

has issued notices to the OL at every stage. The Court is now informed that since 2012, the OL has been participating in the proceedings before the DRT and now before the DRAT. Therefore, there may be no apprehension that the orders might be passed in the proceedings under the RDDB Act without the participation of the OL. It is for the OL to diligently pursue those proceedings hereinafter.

41. Further, the legal position that emerges is that the exercise of disbursal of the sums by the DRT can be undertaken only with the participation of the OL. It is the OL who will settle the claims of the workmen and of all the secured, preferential and unsecured creditors. This disbursal of the amounts should happen hereafter only with the full participation of the OL.

42. The Court is not inclined, at this stage, to pass orders regarding the sums that have already been disbursed pursuant to the orders of the DRT. There was an opportunity for the OL to have participated at that stage, but for the reasons best known to him, he did not choose to do so. The payments made to the Customs authorities in terms of the MoU also cannot be interfered with unless, of course, the sale itself is set aside or an appellate court holds that the amount cannot be forfeited. In such circumstances it should be returned to the AP. This action, therefore, will have to await the outcome of the orders passed in those proceedings.

43. The Court, therefore, holds that if and when the stage is reached for disbursal of any further amounts with the DRT, it will be done only after hearing the OL and strictly in accordance and, in particular, the scheme of Section 529A of the Act.

44. The OL's application, CA No. 924 of 2011, is disposed of in the above terms.

45. The other applications, i.e., CA Nos. 470 of 2008, 686 of 2008, 1648 of 2012 and 1650 of 2012, are also disposed of in the above terms.

Co. Pet. No. 66 of 2003

List on 22nd May 2013.