

Viability Study (Te Vs.) Report by Tata Economic Consultancy Services

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Court : Kolkata

Decided On : Mar-26-2012

Judge : Sanjib Banerjee

Appellant : Viability Study (Te

Respondent :) Report by Tata Economic Consultancy Services

Judgement :

IN THE HIGH COURT AT CALCUTTA ORIGINAL JURISDICTION CA No.34 of 2012 CP No.13 of 2009 IN THE MATTER OF: DUNLOP INDIA LIMITED AND MADURA COATS LIMITED For the Petitioning-Creditor: Mr Ravi Kapur, Adv., Ms Manju Bhuteria, Adv., Mr R.

Medora, Adv., Mr M.

Mukherjee, Adv., Mr Arijit Law, Adv., Mr B.M.Sharma, Adv.For the Company: Mr Utpal Bose, Adv., Mr D.N.Sharma, Adv., Mr A.

Chowdhury, Adv., Ms Debjani Chatterjee, Adv.Hearing concluded on: March 20, 2012.

BEFORE The Honble Justice SANJIB BANERJEE Date: March 26, 2012.

SANJIB BANERJEE, J.

: - Years of waiting to be paid its dues and the perceived daylight robbery in the company have prompted this petitioning-creditor to seek the immediate appointment of a provisional liquidator over the company even as the matter as to whether the company should be wound up is pending consideration.

The petitioning-creditor asserts that if there is any modicum of corporate decency that the law in this country recognises and there is any meaning left to the principle of rule of law, there cannot be any second thoughts on its immediate prayer.

The petitioning-creditor says that the conduct of those in management of the company makes a mockery of the process of law and exhorts the court to not merely sit by and end ORS.the alleged corrupt practices indulged in by the management.

As in every case under Section 450 of the Companies Act, 1956, the basis of the petitioning-creditors claim has fiRs.to be, prima facie, assessed and then the other grounds looked into.

It is only upon finding a seemingly unimpeachable claim, that the court can proceed to investigate into the additional factors cited; for, the appointment of a provisional liquidator is an exceptional order.

The claim in this case is founded on a transaction for supply of goods by the petitioningcreditor to the company and the companys admission of a part of the dues in a draft rehabilitation scheme that was placed before the Board for Industrial and Financial Reconstruction (BIFR) in couRs.of a reference relating to the company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.

The petitioning-creditor says that its claim in the present proceedings is limited to the admission in the draft rehabilitation scheme of slightly over Rs.2 crore and it has lodged a suit elsewhere in this court for its balance claim.

There are several creditors petitions that have been filed for having the company wound up.

Two of such petitions have been admitted and have been taken up at the post-advertisement stage where several other creditors have jumped into the fray to lodge their claims and support the prayer for winding-up.

At least three others have showed up, claiming to be creditors of the company and seeking to resist the order of winding-up.

The present matter cannot be seen in isolation and the several orders that have been passed on the creditors winding-up petitions relating to this company over the last four months or so form the backdrop for the present order.

The company, Dunlop India Limited, was incorporated as Dunlop Rubber (India) Limited in the 1920s and its business is to manufacture, inter alia, automobile tyres and rubber products.

The petitioning-creditor claims that between 1996 and 1998 it had supplied raw materials to the company and its claim on such account not exceeds Rs.9 crore, inclusive of interest.

In March, 1998, the petitioning-creditor served a notice under Section 434 of the Companies Act, for recovery of an amount in excess of Rs.6 crore which included a principal component in excess of Rs.3.61 crore.

Based on such statutory notice, the petitioning-creditor instituted CP No.263 of 1998 for the winding-up of the company.

Such petition was dismissed in view of the Section 22(1) of the said Act of 1985 since a reference had been made by the company to the BIFR prior to the filing of such petition.

The company made the reference under the said Act of 1985 to the BIFR in January, 1998 and the matter was registered as Case No.14 of 1998.

In June, 1998 the BIFR declared the company to be a sick industrial company within the meaning of that expression in Section 3(1)(o) of the said Act of 1985 and appointed an operating agency to undertake an exercise of rationalising the debts of the company and preparing a scheme for the companys rehabilitation.

The original operating agency was subsequently replaced.

In a draft rehabilitation scheme circulated by the company in 2003, this petitioning creditors dues were shown at Rs.224.04 lakh.

The petitioning-creditor has relied on the document and the draft scheme reflects a sum of Rs.224.04 lakh shown against Coats Viyella (petitioning-creditor Madura Coats Limited was formerly known as Coats Viyella India Limited). Even during the period April, 2000 to May, 2001 the petitioning-creditor had sold and supplied further goods to the company against immediate payment.

The petitioning-creditor has referred to a writing apparently issued on March 20, 2001 by the company, acknowledging that the amount then outstanding from the company to the petitioning-creditor was in excess of Rs.6.10 crore.

It is, however, the admitted position that the petitioning-creditor obtained leave under Section 22(1) of the said Act of 1985 from the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) to institute legal proceedings against the company for recovering an amount in excess of Rs.2.03 crore.

At paragraph 25 of the present application, the petitioning-creditor has referred to the date of the AAIFR order as May 20, 2003.

The quality of the company's defence is typified by the second sentence in paragraph 10 of its affidavit dealing with paragraph 25 of the application: 10.

I say that it is a matter of record that the AAIFR had granted leave to the applicant to recover the alleged outstanding to it by the company over and in excess of Rs.2.03 crores as alleged or at all.

In pursuance of the leave granted by the AAIFR, the petitioning-creditor launched CS No 124 of 2003 elsewhere in this court for recovery of its dues other than the sum of Rs.2.03 crore.

There is a needless controversy that the company has sought to raise on the ambit of such suit that betrays both an element of desperation and an advanced degree of dishonesty on its part.

The company seeks to suggest that the claim made in the present winding-up proceedings is already covered in the previous suit that the petitioning-creditor has instituted.

That a claim in a subsequent creditors winding-up petition is covered by a claim in a previous suit will not, by itself, make the winding-up petition not maintainable or give the concerned company any more right to defend the claim in the winding-up proceedings than it would have had if such claim was not part of a previously instituted suit.

Being aware of such position, the company suggests that in as much as the petitioning-creditors application for summary judgment (under Chapter XIII A of the Rules on the Original Side of this court) having ultimately been disposed of by requiring the company as the defendant therein to deposit a sum of Rs.1 crore to be entitled to defend such action, the petitioning-creditor is not entitled to proceed with the present winding-up proceedings.

The stand taken by the company is a deliberate attempt to mislead the court to create the illusion of a defence to the petitioning-creditors claim in the present proceedings which is founded on an admission made by the company in a draft rehabilitation scheme presented before the BIFR.

A copy of the plaint relating to the suit is appended to the present application.

Paragraph 22 of the plaint reads as follows: 22.

In spite of demands, the defendant has failed neglected and refused to pay the said sum or any part or portion thereof.

By virtue of the aforesaid order of AAIFR, the plaintiff is entitled to sue and sues the defendant for the balance sum of Rs.7,42,68,827.85 after keeping aside the above stated sum of Rs.2.03 crores admitted before the AAIFR.

Notwithstanding such statement, the petitioning-creditors claim in the suit was for the entire sum of Rs.9,45,68,827.85p as is evident from the fiRs.relief sought in the suit instead of the figure of Rs.7,42,68,827.85p referred to at paragraph 22 of

the plaint.

The company says that despite paragraph 22 of the plaint if the petitioning-creditor made the entire claim in the suit, including the sum of Rs.2.03 crore that was allegedly admitted in a draft rehabilitation scheme submitted by the company in couRs.of the reference before the BIFR, and an application for summary judgment in the suit has resulted in the company being required to deposit only a sum of Rs.1 crore to defend the suit, the companys right to defend the claim of Rs.2.03 crore which is the subject-matter of the present winding-up proceedings has been recognised and the alleged undeniable character of the claim for Rs.2.03 crore has been destroyed.

The company emphasises that if the suit court was given the impression that the entirety of the petitioning-creditors claim was before it and the application for summary judgment in the suit culminated in only a deposit of Rs.1 crore being directed to be furnished, it is not open for the petitioning-creditor to assert or attempt to recover a part of the claim that has been included in the suit in any separate proceedings.

The company would have been absolutely right in such assertion had the claim of Rs.2.03 crore made in the present proceedings been included in the suit or if the suit court, in couRs.of the petitioning-creditors application for summary judgment, had proceeded on the basis that the amount claimed in the suit reflected the entirety of the petitioning-creditors claim against the company.

The petitioning-creditors application for summary judgment in the suit was allowed to the extent of the principal amount claimed in the suit of about Rs.3.61 crore, in the sense that the company was permitted two months time from the date of the order of June 21, 2005 to deposit such amount or, in default, there was to be a decree for such sum together with interim interest and interest on judgment at the rate of 9% per annum.

For the rest of the claim, the company obtained unconditional leave to defend the suit.

The order of June 21, 2005 was upheld in appeal with the observation that the company's defence to the amount recognised by the trial court is nothing but illusory, sham and moonshine .

On a petition for special leave to appeal to the Supreme Court from the order of the Division Bench of this court, the company has been permitted to deposit an amount of Rs.one crore within one week.

of the order dated September 21, 2007 passed by the Supreme Court.

The parties herein have made no submission whether the special leave petition or the possible appeal arising therefrom has yet been disposed of.

Following the petitioning-creditors statutory notice dated May 26, 2008 on which the present winding-up proceedings have been based, the company replied on June 18, 2008 that the sum of Rs.2.03 Crore is the subject matter of CS No.194 of 2003 and also the subject matter of the application made under Chapter 13A of the Original Side Rules for summary judgment and an order has been passed finally by the Honble Supreme Court of India.

It was at such stage that the petitioning-creditor may have realised that the principal relief claimed in its suit mistakenly included the claim for Rs.2.03 crore on which the petitioning creditor intended to institute winding-up proceedings.

The petitioning-creditor lodged the present winding-up proceedings in the year 2009 but prior thereto it applied in its suit for amendment of the plaint relating thereto to reduce the relief claimed therein to Rs.7,42,68,827.85p, which was the figure mentioned at paragraph 22 of the plaint.

The amendment application was allowed on May 5, 2011.

More importantly, and contrary to the impression that the company attempts to convey, the suit court was alive to the fact that the petitioning creditors claim was restricted to what the petitioning-creditor perceived to be due from the company over and above the amount of Rs.2.03 crore that had been admitted by the company in the draft rehabilitation scheme.

The same is evident from the following passage from the order dated June 21, 2005: In the scheme the defendant has provided for payment of a sum of Rs.2.03 crore and the rest of the balance claim viz 3,61,54,627.54p was allowed by granting leave to be recovered in accordance with law.

Hence, the suit has been filed by the plaintiff for recovery of above portion leaving the balance portion for recovery under the scheme.

Since it is not evident that the claim for Rs.2.03 crore made in the present winding-up proceedings is not covered by the petitioning-creditors previous suit for recovery of money against the company, it remains to be assessed, prima facie, as to whether the company has, or has been able to indicate, any defence to such claim for Rs.2.03 crore.

A draft rehabilitation scheme is prepared in couRs.of a reference under the said Act of 1985 by an operating agency in consultation with the sick industrial company or by the company itself.

In either case, the scheme is prepared with reference to the companys books and it generally indicates the break-up of the dues of the creditors of such company.

The company contends here that since the draft rehabilitation scheme that the petitioning-creditor refers to was merely a draft and not final, any figure mentioned therein to be due to the petitioning-creditor is robbed of its sanctity upon the scheme not being accepted or implemented.

There is no basis to such argument.

The figures shown in a draft rehabilitation scheme as amounts outstanding to the concerned sick industrial companys creditors constitute an admission on the part of such company as the extent of its indebtedness to the named credit ORS.As to whether the draft scheme is accepted or not depends on factors that have no connection with the amounts shown to be outstanding to the creditors of the sick industrial company.

Such factors could be that there are no funds shown to repay the creditors or the repayment schedule does not appeal to the BIFR or other like reasons.

But once a sick industrial company shows an amount to be outstanding to a particular creditor in a draft rehabilitation scheme, it is an admission by the company of its acknowledged extent of indebtedness to the creditor and can be discredited on very limited grounds.

The company has not urged any ground to discredit the admission, its only submission on the admission evident in the relevant draft rehabilitation scheme is that the acknowledgement of the figure therein as being outstanding to this petitioning-creditor does not amount to any admission on the companys part.

Prima facie, the claim of the petitioning-creditor in the present proceedings appears to be unimpeachable.

The petitioning-creditor has, thus, qualified for the other grounds urged in support of its prayer for the appointment of a provisional liquidator over the company to be looked into.

The discussion on such aspect of the matter should be in the light of the facts recorded in the relevant draft rehabilitation scheme as the background therefor: Background DIL, incorporated in 1929 as a public limited company, has two plants in Shahganj (West Bengal) and Ambattur (Tamil Nadu) for the production of a wide range of tyres and tubes.

It was operating profitably upto 1991-92 whereafter downtrend continued leading to closure of operations in February 1998 DIL made reference to BIFR u/s 15(1) of SICA in January 98 on the basis of its accounts for the financial year ending 31.3.97.

The net worth of DIL as on 31.12.97 was held not to have been eroded.

However, on 22.6.98, considering DILs accounts as on 31.12.97, BIFR declared it sick.

Thereafter, several developments took place: (a) litigation before AAIFR, Honble High Court of Kolkata, Honble Supreme Court of India; (b) failure of opportunity given for revival package u/s 17(2) of SICA; (c) appointment of IDBI and OA u/s 17(3) of SICA; (d) techno-economic viability study (TE versus report by Tata Economic Consultancy Services (TECS) in June 2000; (e) asset valuation and valuation of shares by M/s Shah Gupta & Co. in March 2000 and by M/s Haribhakti & Co. in September 2000; (f) DILs negotiations with workers unions followed by Memoranda of Understanding (MOUs) with them; (g) formation of Assets Sale Committee (ASC) by BIFR for the disposal of surplus assets; (h) restart of the plants in 2000 by promoters by induction of Rs.26 cr and subsequent closure; (i) submission of several rehabilitation proposals by DIL/promoters and consideration of those proposals at several joint meetings convened by IDBI (OA) and hearings held by BIFR; (j) circulation of a draft rehabilitation scheme by BIFR on 3.8.2001 (DRS-01). (k) consideration of objections/suggestions to DRS-01 by BIFR on 19.10.2001, when the scheme could not be sanctioned because several issues remained disputed or undecided and some further directions were given by BIFR. DILs Appeal 1/2002 against BIFR's order dated 19.10.2001 was heard by AAIFR on 7.3.2002 when orders were pronounced on the following issues raised during the hearing: conversion of promoters contribution of Rs.26 cr and an equivalent amount from out of dues of banks/debenture-holders into equity; promoters undertaking to meet shortfalls in means of financing; disposal of surplus assets by ASC, reliefs from Government of West Bengal/WBSEB; amount to be obtained from pension fund.

Directions were given to DIL to submit fresh DRs. DIL submitted a modified DRS on 21.3.2002 and further information/statements, sought by this Authority (orders dated 27.3.2002 and 11.4.2002). On 24.4.2002, which have been examined and the present DRS-02 is prepared with the cut-off date 31.3.2002.

The reference relating to the company remained pending before the BIFR from January 19, 1998 with no apparent scheme having been formulated by the BIFR for nearly a decade.

Meanwhile, merely by virtue of the pendency of the reference, the company enjoyed the suspension of legal proceedings, contracts and the like under Section 22(1) of the said Act of 1985 save to the extent the BIFR or the AAIFR granted leave to any person to bring any claim or enforce any contract against the company.

It is a matter of common knowledge and a notorious fact that the said Act of 1985 which was brought into existence as a beneficial legislation, inter alia, to prevent the loss of employment, has been grossly misused by industrial companies - and, in the odd case, by even nonindustrial companies - only to enjoy the temporary immunity recognised by Section 22(1) of the Act and to stretch the period of invulnerability to as long as possible.

The Act which was introduced to help a board of experts to speedily determine preventive, ameliorative, remedial and other measures which need to be taken with respect to (sick companies owning industrial undertakings) and the expeditious enforcement of the measures so determined,.

has been consistently abused and misused to be reduced to a tool of oppression, including against the employees that the Act seeks to protect, with references thereunder having nothing to do with speed or expedition.

The manner in which the Act has been distorted and battered beyond recognition to be used as an engine of persecution against those that it seeks to protect is exemplified in the story Dunlop India Limited and its reference before the BIFR.

During the pendency of the reference before the BIFR, the majority shareholding in the company was transferred to the persons not in control thereof in or about the year 2005.

During the following financial year, 2006-07, a series of measures was adopted by the new management of the company as a part of a vicious and malafide design to cheat its credit ORS. deceive all authorities and, w ORS. of all, hurt its employees, particularly the workmen at the two manufacturing facilities of the company in Ambattur near Chennai and Sahaganj near Calcutta.

Even as creditors of the company, be they trade or statutory creditors or employees and workmen having outstanding salaries and wages, were kept at bay by virtue of the statutory injunction that the company enjoyed as its reference before the BIFR was still in place, in couRs.of the financial year ended March 31, 2007 valuable immovable properties of the company were sought to be alienated against little or no consideration at all.

Upon such villainous exercise being completed under the statutory protection of the 1985 Act, the new management in the company sought to shed the protection; for what was till then a shield could very likely have become the sword dangling over the managements head.

The companys new management revalued its fixed assets (primarily, the immovable properties other than those in and around its manufacturing facilities) and, voila, it presented a fait accompli to the BIFR that the company was no longer subject to the BIFRs scrutiny or supervision as the effect of the revaluation of its assets took the company beyond the pale of the 1985 Act.

The company not suggests that its alienation of its valuable properties during the year 2006-07 is of no concern to the company court in seisin of the proceedings for the company being wound up.

The company proffers no explanation for having indulged in a spree of transfers of its treasured immovable properties, not does it make any attempt to justify the consideration received therefor or demonstrate the availability of the funds in its till.

In exercise of its powers under said Act of 1985, the BIFR had appointed a nominee on the board of directors of the company.

Such nominee reported to the BIFR sometime in the year 2007 that the company had sold some of its valuable immovable properties without either a reference to the BIFR or to the assets sales committee that had been put in place to consider raising funds for the rehabilitation of the company upon sale of some of its non-core assets.

The arrogant stand of the company before the BIFR upon being confronted with such matter, the impunity with which those in the management of the company proceeded to conduct themselves and the scant regard that the company and its management have shown to those that the company owed money and to those that had once toiled to put the companys products on the assembly line, betray a despicable lack of repentance on the part of a gang of corporate predators involved in one of the most heinous cases of commercial corruption that this country would have seen.

The petitioning-creditor says that the misdeeds of the company, or those in management thereof, would be evident from the balance-sheets and other statutory documents of the company and its related business concerns and from the minutes of the meetings held before the BIFR.

The petitioning-creditor refers fiRs.to the summary record of the proceedings of the hearing held before the BIFR on July 23, 2007.

Apart from the company, representatives of the Government of West Bengal, operating agency State Bank of India, secured creditors Catholic Syrian Bank Limited and Punjab National Bank, the workers union and several other creditors of the company attended the hearing.

The minutes record that at a hearing held before the BIFR on April 11, 2007, the BIFR had observed that the company needed to have close interaction with the OA in order to finalise formulation of the DRS .

The BIFR recorded that at such previous hearing it had observed that the company had to provide specific information with regard to (i) infusion of funds so far made by the new promoteRs.(ii) subscription of rights issue as permitted by the Bench vide order dated 16.3.2007; (iii) provisions made for margin money; (iv) details of the workers dues; (v) details of the statutory dues; (vi) contingent and other liabilities of the company and (vii) list of secured creditors etc.

The BIFR noted that the company had been directed to provided the requisite information within two weeks of the previous hearing as agreed by them; the

operating agency was directed to call a joint meeting within three weeks and submit the draft rehabilitation scheme; and, the assets sale committee constituted by the operating agency was directed to include a representative of the State Government and the director nominated on the board of the company by the BIFR.

What transpired thereafter at the meeting of July 23, 2007 is evident, inter alia, from paragraphs 7, 8, 19 and 24 of the minutes; 7.

At today's hearing, the representative of SBI (OA) submitted that the company had not given the information as sought by the OA and as directed by BIFR at the last hearing held on 11.4.2007.

A J. was called on 3.5.2007 but the company did not attend the meeting on the ground that their networth had turned positive and they had applied for de-registration from BIFR.

The OAs representative further submitted that the company's shares were not being quoted on the Stock Exchange and the networth of the company as per the balance-sheet as on 31.3.2005 stood at (-) Rs.330.92 crores.

The factories had remained closed since the year 2000 and had run for a few days only and only a few tyres had been manufactured.

Hence, the operating loss during this period was bound to increase.

Accordingly, the networth of the company as on 28.2.2007 (the date of the recent balance-sheet) could not have turned positive through its core activities.

However, mainly because of profit on sale of assets (Rs.335.66 crores), profit on sale of shares (Rs.1.87 crores) and profit under miscellaneous heads for Rs.0.40 crores, the company had shown a profit of Rs.110.03 crores during 2006-07 and networth has been shown as positive.

SBI's representative submitted that the details of the assets sold were not available with the Banks/OA.

This is not acceptable since it does not reflect the true performance and health of the company, is not in consonance with the objectives of SICA and does not take care of the interest of all stakeholders. In view thereof, the OA was of the view that the company should not be de-registered from BIFR till it gains health through improved business operations.

8.

The Advocate representing CSBL submitted that the Bank had not received a copy of the company's application for de-registration and requested that a copy of the same be given to the Bank.

Although BIFR had constituted an Asset Sale Committee (ASC), it had not specified which assets were allowed to be sold.

Thus any sale of assets by the company had been done behind the back of BIFR/ASC/secured credit ORS. Further, as the company was not paying the Bank's dues and had already alienated some of its assets, Counsel for CSBL prayed for permission u/s 22(1) of SICA to proceed legally for recovery of their dues.

19.

Counsel for PCBL and HTC further submitted that DIL has requested for de-registration based on its balance-sheet as on 28.2.2007 which is not a regular balance-sheet as it has no Auditor's report and is based only on an Auditor's certificate.

Section 227 of the Companies Act specifies the powers and duties of Auditors in terms of which extensive comments are required to be made by the Auditor's with definite reports having to be submitted.

The accounts have also not been finalized as required under Section 3(1)(d) of SICA.

In paras 1 and 2 of its application for deregistration, DIL has submitted that in compliance with the provisions of the DRS submitted on 9.10.2006.

the company has taken certain steps.

In that case, the entire scheme should have been implemented and only networth becoming positive was not enough.

He further submitted that for 9 long years DIL had enjoyed the protection of SICA against legal action by its credit ORS. While still enjoying this protection, DIL had sold its assets illegally and without the permission of BIFR and not wanted to be deregistered.

He submitted that applications had been filed on behalf of PCBL and HTC for permission u/s 22(1) of SICA to proceed for recovery of their dues.

Further, PCBL had received cheques subject to realisation in respect of full settlement of their dues.

In view of the foregoing, the company cannot be allowed to de-register from BIFR counsel prayed that BIFR may be pleased to pass the following order: i) DIL be directed not to dispose of any of its assets without BIFR's consent pending preparation or consideration of a rehabilitation scheme under SICA.

ii) Transfer of assets including non-core assets, made by the company to its subsidiaries and/or other third parties be immediately recalled and set aside and the assets may be reinstated in the books of DIL.

iii) At the application for de-registration made by the company be dismissed in limine.

24.

The company's counsel did not give any specific reply to the query from the Bench whether the company obtained BIFR's permission to sell/transfer assets and whether the ASC procedure was followed.

After considering the submissions made and the material on record, the Bench observed that the Special Director (BIFR's Nominee) on the company's BOD had informed that the company had sold/transferred some of its assets without routing

through the Assets Sales Committee (ASC) or without the consent of the ASC.

He has also reported that the authorized share capital was increased from Rs.70 crore to Rs.175 crore(permission given for Rs.75 crore).As the counsel for the company wanted a copy of the said report the Bench directed to give a copy to the company.

The company is also directed to give details of permission obtained from BIFR to issue Preference Shares of Rs.100 crore on preferential basis and to whom it is to be issued.

From Schedule-17B(2) Notes to Accounts it appears that certain assets of the company have been transferred/sold to its wholly owned subsidiaries/others.The company is directed to explain why this has been done without the permission of BIFR when restrictions u/s 22A of SICA were in force and further, why action should not be taken against the company/its Directors/officials u/s 24 of SICA and the sale/transfer nullified.

The company should also explain whether valuation of the assets was done and reserve price fixed, advertisements given as required and whether the assets were transferred/sold through a transparent bidding process through the ASC.

The company is further directed not to dispose of any assets without the permission of BIFR.

The BIFR declined the companys prayer for de-registration of the reference and directed the company to submit certain particulars and explanations on several points, including whether the decrease in the current liabilities of the company from Rs.121 crore to Rs.20 crore was on account of actual payments made to trade creditors or it reflected a substantial amount having been written off with or without the consent of the creditors and whether the change in management in the company had been approved by the BIFR.

The company preferred an appeal from the BIFR order of July 23, 2007 which was dismissed on December 4, 2007 with the following observations at paragraphs 6 and 7 of the relevant order: 6.

A question may be raised that why should a sick company, which has the benefit of protection of Section 22, wish to get out of the purviews of SICA.

There could be many reasons for this; one of them being that there are a lot of surplus assets especially land and buildings available with the company which are of a very high value in the market today and the same could be sold on considerable profit and the funds siphoned off to some other companies.

While it is not being suggested that this is indeed the company's intention, there is equally no obligation on the part of either BIFR to accept at face value any such assertion.

7.

On perusal of the impugned order we find that BIFR was not satisfied with the conduct of the appellant company.

Further, the appellant company had not complied with the directions given by BIFR on 11.4.2007.

It is in this context that BIFR had given a further opportunity to the appellant company to furnish relevant information/details in order to determine whether DIL should be discharged from the purview of SICA on account of its net worth becoming positive as on 28.2.2007.

We do not find any justification for interfering with the impugned order passed by BIFR which is in the nature of an interlocutory order.

We also find that BIFR has not given any finding whether the company should or should not be discharged from the purview of SICA.

BIFR had sought additional information/details which are indicated at para 25 of the impugned order.

We, therefore, dismiss the appeal and direct the appellant company to expeditiously furnish the relevant information/details sought for by BIFR vide para 25 of the impugned order dated 23.7.2007.

Prior to the aforesaid orders of the BIFR and AAIFR being passed, the company had instituted proceedings under Article 226 of the Constitution of India before the Madras High Court against seizure of certain goods by the customs authorities.

The basis of the writ petition was that the company was entitled to the protection under Section 22 of the 1985 Act and, as such, the authorities that had been impleaded as respondents to the writ proceedings, could not have taken any coercive measures against the company or its goods.

The Madras High Court noted that though the net worth of the company was negative for the ten financial years up to the year ended March 31, 2006, the balance-sheet of the company showed that for the year ended March 31, 2007 its net worth was a positive sum of Rs.242.65 crore.

The court noticed that a financial restructuring had been undertaken by the company following which its net worth had become positive and observed that notwithstanding the BIFR and AAIFR orders, the BIFR cannot retain its jurisdiction over the petitioner company any further.

The court read the 1985 Act to imply that there was no necessity to apply for de-registration of a reference when net worth becomes positive wiping out the accumulating losses (and) there is no question of BIFR being concerned with the sick company any longer.

Though the writ petition was dismissed on such ground, the order had the incidental effect of absolving the company of any obligation to explain its conduct of alienating its immovable properties without so much as a by your leave.

of the BIFR.

Buoyed by such order, the company marched to the AAIFR, raked up a pending appeal and threw the Madras High Court order on its face.

The AAIFR was left with no option since it was bound by the order of a superior forum and it observed that the company was no longer a sick industrial company within the meaning of Section 3(1)(o) of the said Act of 1985 and, as such, the

BIFR and the AAIFR had ceased to have any jurisdiction in respect of the company.

Such order was passed by the AAIFR on March 3, 2008.

The petitioning-creditor next refers to the balance-sheet of a company by the name of Dunlop Properties Private Limited for the year ended March 31, 2008.

The fiRs.schedule to the balance-sheet records that such company (hereinafter referred to as Dunlop Properties) had issued 8,10,000 shares in such company of face value of Rs.10/- each fully paid up and 8,09,900 shares in such company were held by its holding company, Radiant Investments Limited of Mauritius.

In the notes on account under Schedule V to such balance-sheet there is a disclosure in respect of related parties.

The names of 50 companies figure in such list, including Dunlop India Limited, Shalini Properties & Developers Private Limited and SPR Resorts Limited.

The notes on accounts under Schedule V to the balance-sheet declare that the company was incorporated on February 23, 2007.

There is also an announcement that the company had purchased Land worth Rs.80 Crores from Dunlop India Limited, and allotted 8,00,000 Equity Shares of Rs.10/- each at a premium of Rs.999/- per share towards consideration.

The final note says that 8,09,900 equity shares in the company had been transferred to Radiant Investments Limited (of Mauritius) on January 16, 2008.

What is evident, therefore, from the balance-sheet of Dunlop Properties for the year ended March 31, 2008 is that it had only been incorporated about a year back, that it had acquired a property worth Rs.80 crore from Dunlop India Limited against shares in such company issued to Dunlop India Limited and that probably the entirety of the shares obtained by Dunlop India Limited in Dunlop Properties as consideration for the sale of the property superficially said to be worth Rs.80 crore was transferred to the Mauritius company.

There could not have been any other possibility since the number of issued shares in Dunlop Properties was only 8,10,000.

A look at the profit and loss account of Dunlop Properties for the year ended March 31, 2008 reveals that it had cash and bank balance of Rs.1,000/- and it had obtained loans and advance of Rs.33,000/-.

Dunlop Properties does not appear to have carried on any business during the relevant financial year and it had incurred preliminary expenses of Rs.4.28 lakh in such period.

The petitioning-creditor has relied on a copy of the form No.8 relating to creation or modification of charges that was filed by Dunlop Properties with the Registrar of Companies sometime after September, 2008.

The company has not questioned the veracity of the document.

The document reveals the creation of a charge by Dunlop Properties by way of a registered deed of mortgage.

The petitioning-creditor says that the charge was obviously created in respect of the only property standing in the name of Dunlop Properties which had been acquired from Dunlop India Limited.

The charge was created on September 26, 2008 for securing an amount of Rs.575 crore.

The document describes the immovable property as the land admeasuring 58.52 acre in Athipattu village in Chennais peripheral district of Ambattur to secure the facilities sanctioned to Shalini Properties and Developers Private Limited and SPR Resorts Limited.

The document says that a stand-by letter of credit was sanctioned to the said two companies by ICICI Bank Limited.

Shalini Properties and Developers Private Limited and SPR Resorts Limited appear to have their registered offices at the same place as Dunlop Properties and

both these companies share a common email address at ruiagroup29@gmail.com.

It is apparent that a company that had been incorporated in February, 2007 and did no business at all till the end of financial year 2007-08 had acquired a property, ostensibly shown to be worth Rs.80 crore, from Dunlop India Limited against shares issued at a stupendous premium.

Such company which acquired the property then mortgaged it against credit facilities of Rs.575 crore extended to two sister concerns.

Since the affairs of Dunlop Properties as a subsidiary of Dunlop India Limited would have been subject to scrutiny if the affairs or accounts of Dunlop India Limited were looked into, the worthless shares of Dunlop Properties that Dunlop India Limited obtained were transferred to a Mauritius company to delink the transaction.

The company and those in management thereof had meticulously planned the entire scheme with the skill of a trained killer.

There is more to the matter.

The Ambattur property stolen from the companys fold and parked with Dunlop Properties must have been worth substantially more than Rs.575 crore since banks keep a margin before granting credit facilities against any immovable property.

Such position is confirmed from the balance-sheet of Dunlop Properties for the year ended March 31, 2011 where its land and building is valued at Rs.614.46 crore against the valuation therefor in the previous financial year of Rs.80.04 crore.

The company, it is obvious, sold one of its landed properties at a gross undervalue to an entity controlled by the same management.

That the land was sold at an undervalue is evident both from the fact that ICICI Bank agreed to grant credit facilities of value of Rs.575 crore against it and the fact that its present value is shown to be in excess of Rs.614 crore by the company

that not holds it.

Just to emphasise the point, company Dunlop India Limited did not get money against the transfer of the Ambattur land, it only got some worthless paper in a useless company which dud paper it transferred to a Mauritius company against a consideration that is not known as the company does not volunteer any information in such regard.

The petitioningcreditors perception of daylight robbery in the company is vindicated and the transaction lends support to the petitioning-creditors request for a provisional liquidator to be immediately appointed over the company.

The Ambattur property transaction was not a solitary, one-off case of the company being stripped of a valuable property against virtually no consideration at all and the property being made over to an entity controlled by the same management.

The same scheme has been adopted in respect of another property of ostensible value of Rs.60 crore that was sold off in favour of another company controlled by the same management around the same time.

The balance-sheet of Dunlop Infrastructure Private Limited (hereinafter referred to as Dunlop Infrastructure) for the year ended March 31, 2008 reveals that it had issued 6,10,000 shares of Rs.10/- each fully paid up.

Dunlop Infrastructures cash and bank balance was of value of Rs.10,000/- at March 31, 2008.

The related parties disclosure in its notes on account forming part of the same balance-sheet shows that Dunlop Infrastructure belongs to the same group that controls 50 other companies as in the case of Dunlop Properties, including Dunlop India Limited and Suryamani Financing Limited and India Tyre & Rubber Co.(India) Limited.

As in the case of Dunlop Properties, Dunlop Infrastructure was also incorporated on February 23, 2007.

Dunlop Infrastructure did not commence its commercial activities till March 31, 2008, but it had purchased land worth Rs.60 Crores from Dunlop India Limited, and allotted 6,00,000 Equity Shares of Rs.10/- each at a premium of Rs.990/- per share towards consideration.

The shares in Dunlop Infrastructure acquired by Dunlop India Limited as consideration for sale of the property were subsequently transferred to Dunlop Investments Limited.

That is evident from the fiRs.schedule to the balance-sheet of Dunlop Infrastructure for the year ended March 31, 2008 which announces that Dunlop Infrastructure is a wholly-owned subsidiary of Dunlop Investments Limited.

Again, the company has volunteered no information as to the consideration that it received for transferring the dud shares that it held in Dunlop Infrastructure to Dunlop Investments Limited.

The petitioning-creditor refers to the balance-sheet of a third company, Dunlop Estates Private Limited (hereinafter referred to as Dunlop Estates).for the year ended March 31, 2008.

Such balance-sheet shows that Dunlop Estates had issued 3,10,000 shares therein of Rs.10/- each fully paid up.

In its notes on accounts under Schedule V to the balance-sheet as at March 31, 2008, Dunlop Estates shows a similar list of 50 related parties as in the cases of Dunlop Properties and Dunlop Infrastructure.

Dunlop Estates was incorporated on February 27, 2007.

It had cash and bank balance of value of Rs.11,000/ as at March 31, 2008 and had not commenced its commercial activities till such date.

Yet, Dunlop Estates purchased land worth Rs.30 Crores from Dunlop India Limited, and allotted 3,00,000 Equity Shares of Rs.10/- each at a premium of Rs.990/- per share towards consideration.

Again, company Dunlop India Limited transferred its entire shareholding in Dunlop Estates to Dunlop Investments Limited during financial year 2007-08 such that Dunlop Estates became a wholly-owned subsidiary of Dunlop Investments Limited.

A fourth company by the name of Bhartiya Hotels Limited (hereinafter referred to as Bhartiya Hotels) declares in its balance-sheet for the year ended March 31, 2008 that it had land and building of value of Rs.150 crore that appears to have been acquired in financial year 2006-07.

The notes on accounts in the same balance-sheet contain a similar list of related parties as in Dunlop Properties, Dunlop Infrastructure and Dunlop Estates.

According to the same balance-sheet, Bhartiya Hotels had not commenced its commercial activities till March 31, 2008.

But Bhartiya Hotels had purchased land worth Rs.150 Crores from Dunlop India Limited, and allotted 15,00,000 Equity Shares of Rs.10/- each at a premium of Rs.990/- per share towards consideration.

The shares in Bhartiya Hotels that were allotted to Dunlop India Limited were, in couRs.of financial year 2008-09, substantially transferred to Rapid Investments Limited, another Mauritius company, as is evident from the balance-sheet of Bhartiya Hotels for the year ended March 31, 2009.

Though the issued share capital in Bhartiya Hotels remained the same as at March 31, 2011 as it was at March 31, 2009, the shares held by its holding company increased by about four per cent by the end of financial year 2010-11.

More interestingly or alarmingly, the land and building held by Bhartiya Hotel that had been shown to be worth slightly over Rs.150 crore as at March 31, 2010 swelled to Rs.1,012 crore in value as at March 31, 2011.

Four valuable immovable properties of the company were, therefore, shown to have been removed from the companys fold and placed in the laps of other companies under the same management by depressing the actual values thereof, receiving almost no consideration against them and by the company transferring -

whether a substantial part or the entirety thereof - the shares which it received by way of ostensible consideration to other companies in the same management such that the beneficiary companies, which had become subsidiaries of the company upon the allotment of shares as consideration, were delinked from the company.

If a property shown to be of value of Rs.80 crore was actually worth more than Rs.600 crore and another of stated value of Rs.150 crore was seen to be worth Rs.1,012 crore within the next two years, it would not be uncharitable to the company or its management to see that the two other properties ostensibly valued at Rs.60 crore and Rs.30 crore may collectively have been worth about Rs.700 crore.

There is no doubt that a company has a right to sell its properties and the prices at which it sells its properties may not be justifiable.

But such principle which is founded on the doctrine of indoor management - like the rule as to freedom to extend one's arm as long as it does not touch another's nose - is not absolute; and a company's act of selling its assets should not be opposed to public interest or seen to cause unfair prejudice to another if such other is entitled to complain of it before a court of law.

The company would have been perfectly justified in selling off its properties to meet its debts and pay off its creditors or its employees and workmen.

This company did not take such a mundane road.

Instead, it effected the transfers of most of them, when its creditors had no access to it or its properties by virtue of the protection that it enjoyed under the said Act of 1985 and the company did not use the money to pay off its creditors. Its management used the company for the cash that it was for self aggrandisement and to the detriment and prejudice of its creditors, employees and workmen.

Whether or not the transactions were in breach of the provisions of the said Act of 1985, they are good enough grounds to be cited to seek the appointment of a

provisional liquidator over the company.

It must not be lost sight of that Dunlop India Limited is a listed company and its controlling shareholding may not even constitute fifty per cent of its paid-up capital.

Since the four immovable properties have been alienated from the company and parked with entities under the exclusive control of the group holding the controlling shareholding in the company, such act would also amount to gross mismanagement qua the other shareholders of the company and be seen as a fraud on such other shareholders. The petitioning-creditor has referred to a judgment reported at 63 Comp.

Cas.

299 (Canara Bank v.

Brunton and Company Engineers Limited) that set out some of the relevant considerations for the appointment of a provisional liquidator over a company as it quoted from Penningtons Company Law (4th Ed.) as follows: The purpose of making the appointment is to preserve the company's assets and to prevent the directors from dissipating them before a winding up order can be made.

It has been said that a provisional liquidator will only be appointed if the company is the petitioner or if it consents to the appointment, or if the company is clearly insolvent, or if it is obvious to the court that a winding up order will be made.

These dicta show the courts reluctance to pre-judge the issue between the petitioner and the company by appointing a provisional liquidator before the hearing of the petition, but it has also been held that the courts power to appoint a provisional liquidator is not limited to such cases, and may be exercised if there is an interest of the public to be protected, .

Another judgment reported at 81 Comp.

Cas.

805 (Darshan Anilkumar Patel v.

Gitaneel Hotels PVT.LTD.has been carried by the petitioning-creditor for the proposition that there can be no specified class of cases for a provisional liquidator to be appointed and the matter is left entirely to the judicial discretion of the court.

In that case, the court proceeded to specify some situations where the appointment of a provisional liquidator would be justified at page 819 of the report: It is neither possible nor desirable to exhaustively enumerate the situations in which a provisional liquidator may be appointed by the company court.

I would, however, give illustration of cases where appointment of a provisional liquidator would be justified.

Some such illustrative situations can be broadly listed as under: a) where the company is virtually insolvent or the substratum of the company had disappeared and a strong prima facie case is made out; b) where the assets of the company are in jeopardy; c) where it is proved by a strong prima facie case that the management representing the majority shareholders of the company is conducting the business of the company to the prejudice of the company and the minority shareholders as if their own (and) contrary to normal business principles proving lack of probity and jeopardy to the interest of complaining shareholders.d) where the majority of the shareholders in collusion with each other are indulging in acts of manipulation and purported transactions which appear on their face to be a subterfuges or bogus; e) public interest; f) interest of company or shareholders as a class.

The element of public interest which has been judicially recognised to have been incorporated in the manner in which the company courts discretion under Section 450 of the Companies Act is to be exercised has statutory support, inter alia, in Sections 397 and 398 of the Companies Act that deal with oppression and mismanagement, respectively.

The consideration as to public interest will be even more relevant if the company is a listed company.

Dunlop India Limited was once a blue-chip company that not appears to be in the clutches of a marauding bunch of corporate predators which is single-mindedly devoted to stripping the company bare of its assets while leaving the companys credit ORS.employees and workmen in the lurch.

The company has made no attempt - none at all - to show that the said four transactions were necessary or they were made in the interest of the company or for the purpose of augmenting resources to discharge the companys debts.

Indeed, the companys resources were not enhanced upon the company being denuded of the four properties.

As noticed above, two of the creditors winding-up petitions against the company have been admitted and advertised and a third has been pending from before a reference relating to the company was made to the BIFR.

Under Section 441(2) of the Companies Act, the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for the winding up.

Section 447 of the Companies Act provides that an order for winding up of a company shall operate in favour of all the creditors and of all the contributories of the company as if it had been made out on a joint petition of a creditor and of a contributory.

Section 531 of the Companies Act prescribes that any transfer of property, moveable or immovable or delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly.

Section 53 of the Transfer of Property Act defines fraudulent transfer.

Sub-section (1) of Section 53 of such Act prescribes that every transfer of immovable property made with intent to defeat or delay the creditors of the transferors shall be voidable at the option of any creditor so defeated or delayed.

The provision permits a suit to be instituted by a creditor of the transferor in representative capacity for the benefit of all the credit ORS. That Section 53(1) of such Act does not affect any law relating to insolvency only implies that it does not derogate from any law relating to insolvency.

There is, therefore, the recognition in the general law of this country for a creditor to regard the transfer of an immovable property by the debtor to be fraudulent in some circumstances.

The claims of the numerous creditors of the company have been taken up at the post-advertisement stage of CP No.233 of 2008 and CP No.159 of 2011.

The number of creditors joining the fray to support the order of winding up is increasing by the day.

Three companies alleging to be creditors of Dunlop India Limited have also appeared to oppose the winding-up.

Such credit ORS. India Tyre and Rubber Company Limited, Ruia Corporate Services Private Limited and Suryamani Financing Company Limited, are all under the same management as the one which controls the company.

In couRs. of the claims of the creditors of the company being taken up at the post-advertisement stage in two of the petitions, the company has filed an affidavit through Ashok Kumar Agarwal affirmed on January 6, 2012 wherein it has furnished three lists detailing what according to the company are the amounts outstanding to its secured credit ORS. the value of its present assets and the extent of its statutory liabilities.

In the list pertaining to its secured credit ORS. the company has shown a total outstanding of Rs.127 crore, though the figure appears to have been depressed as at least one of the secured credit ORS. Catholic Syrian Bank, has asserted that it

has a claim of Rs.42 crore against the company whereas the company has acknowledged only Rs.7.5 crore in the list.

In the list pertaining to its assets, the company has claimed the value of the assets to be Rs.1,339 crore, including inventory of value in excess of Rs.50 crore that is primarily made up of the perceived worth of raw materials that the company holds.

In the list of statutory liabilities, the company has shown a total amount of about Rs.26 crore, including workmens wages in excess of Rs.1 crore and gratuity as per actuarial valuation in excess of Rs.9 crore.

In another affidavit filed by the company through Ashok Kumar Agarwal affirmed on January 13, 2012 in CP No.233 of 2008, it has claimed that the number of creditors of the Company is approximately 400 and the total amount payable to them as per Companys Book as on March 31, 2011 is Rs.3383.53 lacs being the sundry creditors under Schedule 11 .

Elsewhere in the same affidavit the company has admitted that before 30th June 2008 that is during the financial year 2006-07 the company transferred certain assets to its wholly-owned 100% subsidiary companies for Rs.320 crores which in consideration of such transfer allotted fully paid-up Equity Shares to the company.

The rest of the passage, at paragraph 9 of the affidavit, makes interesting reading: The surplus arising out of such transfer has inter alia set off the accumulated losses of the company and as a result whereof the net worth of the company became positive.

Accordingly, the company filed an application to BIFR on 23rd April 2007 inter alia praying for an order directing de-registration of BIFR Case No.14 of 1998.

Ultimately, the company was able to come out of the provisions of the Sick Industrial Companies (Special Provisions) Act 1985.

The properties which were transferred during the period 2006-2007 inter alia included the Worli property in respect whereof the news articles were published in the Times of India, Mumbai edition.

I state and submit that after 2006-2007, the Worli property never belonged to the company.

The factum of transfer of certain assets during the period 2006-2007 was within the knowledge of the Honble High Court at Madras as well as the Appellate Authority for Industrial and Financial Reconstruction which would appear from the judgement and order dated 19th December 2007 passed by the Honble High Court at Madras as well as the Order dated 3rd March 2008 passed by the Appellate Authority for Industrial and Financial Reconstruction, copies whereof are annexed hereto and collectively marked as Annexure E. The factum of such sale was also disclosed by the company in its Balance-sheet for the financial year ended 31st March 2007 which was duly approved by the members of the company at its 80th Annual General Meeting held on 19th July 2007.

I state and submit that the factum of transfer mentioned hereinabove has not been suppressed and was disclosed before the Honble High Court at Madras, the Appellate Authority for Industrial and Financial Reconstruction and all the shareholders of the company and the public at large.

Thus, there was no clandestine sale or transfer by the company.

According to the same affidavit by the company, it has 850 workmen at its Sahaganj factory and 550 workmen at its Ambattur manufacturing facility.

In addition, the company has another 100 managerial or administrative employees in its rolls.

Both the Sahaganj and the Ambattur factories are not closed, according to the company.

The Sahaganj workmen have not been paid their wages after July, 2011 and the Ambattur workmen after January, 2012.

The State says that it pays the Sahaganj workmen Rs.1,500/- per month as dole.

The State maintains that there has been no commercial production at Sahaganj since the year 2005 through the factory has been intermittently opened during the

interregnum for apparent cleaning up.

operations by the company.

The State insinuates that the company may have opened the Sahaganj factory at times for other reasons.

The State says that its electricity utility has a claim of Rs.11.20 crore in respect of the Sahaganj factory; the West Bengal Industrial Development Corporation Limited has a claim of Rs.14 crore; and, a sum in excess of Rs.7.95 crore is due by way of land revenue apart from sales tax dues of Rs.40 crore.

Though the State has not used any affidavit, it says that there are 341 erstwhile workmen of the Sahaganj factory who have not been paid their retiral dues and a further 287 former workmen of the Sahaganj factory who opted out under an early retirement scheme have not been paid any money under such scheme.

The irony is in the companys repeated attempt in seeking statutory protection to ward off its credit ORS.Despite the company coming out of the purview of the said Act of 1985 in dubious circumstances, it sought and obtained a similar protection under the West Bengal Relief Undertakings (Special Provisions) Act, 1972.

The company has enjoyed such protection from October 22, 2008 to April 26, 2009; June 10, 2009 to December 9, 2009; December 10, 2009 to June 9, 2010; and, June 17, 2010 to December 16, 2010.

It is not clear as to what impelled the State to accord the benefit of the said Act of 1972 to this recalcitrant company, but one need not waste time pondering over matters that are sometime governed by political and rank extraneous considerations.

What is obvious is that the company has taken recourse to the provisions of a Central Act and a State Act that have been brought in to subserve the Constitutional mandate of guarding the employment of those who most need it, only to misuse the protection accorded thereunder by stealing the companys assets and handing them on a platter to the dishonest persons in control of the

company and extending the time before such matter could be complained of.

There is no shred of rem ORS.shown by the company.

There is no attempt by the company to offer to cause its management to bring back the assets to the companys fold despite such enormous dissipation of assets being discovered.

The only submission made by the company to show its bona fides.

is the token offer of paying the Sahaganj workmen their August, 2011 dues within a week.

The offer is in the nature of an inducement to court to lay its hands off the company and the reprehensible acts of those in management thereof.

The workmen deserve much better and, given the scandalous conduct of those in management of the company, the court will not sell the workmen short.

In a society governed by the Constitution which spells out its aspirations and even a sense of morality, no constitutional functionary - far less a court owing not only allegiance but its existence to it - can condone the acts of graft that have come to light.

The company and its management may appear to be unconcerned upon the discovery of the brazen acts of defalcation, doubtless inspired by the perception of corruption elsewhere in the society; but even without elevating the discussion to a moral highground, it is apparent that the assets of the company are in serious jeopardy in the hands of those at present responsible for protecting the same.

If the workmen of the company have a paramount charge over its assets for their dues and stand at par with the secured creditors of a company even in respect of the secured assets, the immediate appointment of a provisional liquidator is called for over the company with full authority as liquidator.

The more sagacious judicial pronouncements instruct that a judgment should not betray any agitation on the part of the judge and should not be intemperate in its

expression.

But public interest demands at times that a cheat be described as such for him and others that he has cheated to be aware that there is appropriate recognition on the basis of the character of a persons conduct and not by the brand of the design-wear that such person flaunts.

Plainspeaking must sometimes be used if only to bolster the image of the institution and to instill confidence in it.

It is also a matter of regret that every attempt was made at the Bar to delay and defer this matter, including a most dramatic submission by advocate-on-record of the company to be given leave to retire on moral grounds one week only to return the following week.

It is also most distressing to read in the attitude of companys management a sublime confidence that its conduct of misappropriating valuable assets of the company may meet some road bumps but will ultimately stand endorsed.

There appear to be no systemic checks against such dishonest corporate behaviour, not even by the media in the country that tom-toms its independent and crusading credentials; or maybe, it was another case of an intrepid journalists copy being sacrificed at the altar of advertisement revenue or something more sinister.

CA No.34 of 2012 is allowed by appointing the official liquidator as the provisional liquidator over and in respect of Dunlop India Limited with full powers as liquidator under the Companies Act, 1956.

The provisional liquidator will take every step that is permissible to not only protect the assets and interests of the company and its credit ORS.employees and workmen, but will also take all steps in accordance with law to forthwith recover and arrest the further alienation of the four immovable properties that were fraudulently transferred by the company in the year 2006-07 or thereabouts as referred to above.

The company will pay costs assessed that 3,000 GM to the petitioning-creditor.

The company and its direct ORS.managers and all concerned will remain obliged to forthwith ensure that all books, records, documents, assets and properties of the company are made available for the effective control, and protection thereof and of the companys interests, by the official liquidator.

All decisions of the company will be subject to the approval of the official liquidator.

Since the four transactions entered into by the company in the year 2006-07 or thereabouts were fraudulent, the title therein may not be deemed to have passed at all from the company.

Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.) Later: The company seeks a stay of operation of the order.

In view of the despicable conduct of those in the management of the company, particularly of stripping the company of immovable properties of value in excess of Rs.2,000 crore against almost no consideration received by the company, such prayer is declined.

(Sanjib Banerjee, J.)

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