

Bpl Ltd. Vs. Inter Modal Transport Technology Systems (Karnataka) Ltd.

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Court : Karnataka

Decided On : Apr-11-2001

Reported in : [2001]43CLA228(Kar); ILR2001KAR5373

Judge : R.V. Raveendran and ;B.K. Sangalad, JJ.

Acts : [Companies Act, 1956](#) - Sections 429, 429A, 433, 441, 441(1), (2), 446, 529, 529(1), 529A, 537 and 537(1); Sick Industrial Companies (Special Provisions) Act, 1956 - Sections 3(1), 15, 15(1), 16, 20, 20(1), (2), (3), (4), 22, 22(1), 22A, 25 and 32; [Constitution of India](#) - Articles 226 and 227; [State Financial Corporations Act, 1951](#) - Sections 29 and 46B; Foreign Exchange Regulation Act, 1963; Urban Land (Ceiling and Regulation) Act, 1976; [Companies Act, 1913](#) - Sections 232(1); [Provincial Insolvency Act, 1920](#) - Sections 27, 28 and 28(6)

Appeal No. : Original Side Appeal Nos. 6 and 7 of 1998

Appellant : Bpl Ltd.

Respondent : inter Modal Transport Technology Systems (Karnataka) Ltd.

Advocate for Pet/Ap. : S. Vijayashankar, ;A.G. Holla, ;P.D. Vishwanath, ;Thomas V. Peter, ;Ashok B. Hinchigeri and ;Padubidri Raghavendra Rao, Advs.

Disposition : O.S.A. No. 6 of 1998 allowed. O.S.A. No. 7 of 1998 dismissed.

Judgement :

Raveendran, J.

1. Both these appeals are filed against the order dated 29-1-1998 passed by the learned company judge dismissing CA No. 64 of 1997 (in CP No. 17 of 1989).¹ OSA No. 6 of 1998 filed by BPL Ltd., the purchaser of the assets of Inter Modal Transport Technology System (Karnataka) Ltd., being aggrieved by the rejection of CA No. 64 of 1997, filed by Karnataka State Industrial Investment and Development Corporation Ltd. ('KSIIDC') Ltd.

1.1 OSA NO.7 of 1998 is filed by Raj Kotak, an ex-director of Inter Modal Transport Technology System (Karnataka) Ltd. He has not challenged the order dismissing CA No. 64 of 1997, but contending that the company court ought have held that the sale in favour of BPL Ltd., was void even on the ground of irregularities in the sale. He has also challenged the following observations recorded by the learned company judge in the course of the order : (i) that the company and its directors have made every effort to nullify the sale by filing writ petitions repeatedly and such conduct will not entitle them to any indulgence in the hands of the court; and (ii) that the process of sale of the assets of the company by KSIIDC and the purchase by BPL is proper and does not call for interference.

1.2 As the ranks of parties differ in the two appeals, for convenience the parties will be referred to as follows : BPL Ltd. (appellant in OSA No. 6 of 1998 and 4th respondent in OSA No. 7 of 1998) will be referred to as 'purchaser' or 'BPL'; Inter Modal Transport Technology System (Karnataka) Ltd. will be referred to as the 'company' when referred with reference to the period up to the date of order of winding (31-10-1996) and as 'the company in liquidation' when referred with reference in any date subsequent to the order of winding up dated 31-10-1996. The secured creditor (KSIIDC) which is the second respondent in both appeals will be referred to as KSIIDC or the 'Corporation'. Raj Kotak (third respondent in OSA No. 6 of 1998 and appellant in OSA No. 7 of 1998) will be referred by as 'ex-director of the company'.

1.3 In this order, the [Companies Act, 1956](#) will be referred to as 'Companies Act'; the Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA'), and the [State Financial Corporations Act, 1951](#) ('SFC Act'). The Board for Industrial and

Financial Reconstruction ('BIFR') and the Appellate Authority for Industrial and Financial Reconstruction ('A AIFR').

2. The company secured its assets in favour of KSIIDC as security for repayment of amounts advanced by KSIIDC to the company. Canara Bank and Karnataka State Financial Corporation ('KSFC') are the other two secured creditors of the company. An unsecured creditor of the company [Pradeep Industrial Corporation] filed a winding up petition against the company in Company Petition No. 17 of 1989, on 21-1-1989 under Section 433(e) and (f) of the Companies Act. Three other unsecured creditors of the company had also filed petitions for winding up in CP Nos. 63 of 1988, 41 and 42 of 1990.

3. In a reference made by the company under Section 15(1) of the SICA (registered as case No. 28 of 1989), the BIFR made an order dated 7-11-1989 holding the company to be a sick industrial company under Section 3(1)(a) of SICA and appointing a special director to look after the company's financial and other interests. By the said Order, BIFR also granted permission to KSIIDC to take over the assets of the company under Section 29 of the SFC Act.

Accordingly, KSIIDC took possession of the secured assets of the company on 1-12-1989, in exercise of its power under Section 29 of the SFC Act.

4. In view of pendency of the said reference before BIFR, further proceedings in the petition for winding up were stayed. On 26-8-1993, BIFR recorded its final opinion that the company should be wound up in terms of Section 20(1) of the SICA, and also made an order under Section 20(4) authorising KSIIDC to sell the assets of the company (which were in the possession of KSIIDC) subject to the terms and conditions imposed therein.

5. When the company court received the final opinion of the BIFR, it proceeded to pass an order dated 25-3-1994 in the creditors' winding up petition (CP No. 17 of 1989 and connected petitions), allowing the petitions and ordering the company to be wound up under Section 20(2). The said order was not passed with reference to the claims of the creditors who filed those company petitions under Section 433 of the Companies Act but on the basis of the final opinion dated 26-8-1993

recorded by the BIFR under Section 20(1).

6. In the meanwhile, the oral (final opinion) dated 26-8-1993 recommending winding up of the company was challenged by the company before AAIFR in Appeal No. 127 of 1993. The company court was unaware of the pendency of the said appeal when it passed the order of winding up on 25-3-1994. Subsequently, when the pendency of the appeal was brought to its notice, the company court found that it could not have passed the order of winding up, during the pendency of the appeal before AAIFR having regard to the bar contained in Section 22(1) of SICA and, therefore, passed an order dated 2-6-1995 recalling the order of winding up dated 25-3-1994 and restoring the winding up petitions to file.

7. The AAIFR dismissed the appeal filed by the company against BIFR's order dated 26-8-1993, by order dated 25-9-1995. It found that there was no infirmity in the composite order dated 26-8-1993 recording the final opinion under Section 20(1) that it was just and equitable that the company should be wound up, and granting permission under Section 20(4) to KSIIDC to sell the assets of the company, AAIFR held that there was nothing to doubt that financial institutions/banks will not make efforts to secure the best possible price by sale of the assets of the company. It directed the sales committee to deposit the entire sale proceeds with the company court and made it clear that the sales committee will not have any say in the distribution of the sale proceeds. When the said order dated 25-9-1995 of AAIFR, confirming the order dated 26-8-1993 of the BIFR under Section 20(1) and (4), was brought to its notice, the company court passed a fresh order of winding up on 31-10-1996 in CP No. 17 of 1989 and connected cases, on the basis of the final opinion of BIFR under Section 20(1), and consequently directed the official liquidator to forthwith take charge of all the properties and effects of the company. The order of winding up dated 31-10-1996 was passed, not on the creditors' petition under Section 433, but solely based on the final opinion of BIFR under Section 20(1) which was affirmed by AAIFR.

8. In the meanwhile in pursuance of the permission granted as per BIFR's order dated 26-8-1993, KSIIDC took steps to sell the assets of the company by giving wide publicity. Advertisements regarding the sale appeared in the Economic Times

(Bangalore, Ahmedabad, Delhi, Madras and Calcutta editions) and the local vernacular daily Prajavani, during March 1994. The company challenged the action taken by KSIIDC regarding sale of its assets, in WP No. 8760 of 1994 and an interim order was granted by the court on 29-3-1994 directing KSIIDC not to finalise the bids received in pursuance of public sale notices issued on 7-3-1994. The offers of the intending purchasers received in pursuance of sales notices published in newspapers were opened and BPL's offer was found to be highest. However, nothing further was done in view of the interim stay. The interim stay in WP No. 8760 of 1994 was vacated on 26-10-1994. The BIFR passed an order approving the decision of KSIIDC to sell assets of the company in favour of BPL for a consideration of Rs. 2.80 crore and communicated such approval to KSIIDC by letter dated 27-10-1995. In pursuance of it, BPL made a part payment of Rs. 1.64 crore to KSIIDC on 28-12-1995, in addition to the initial payment of Rs. 32 lakh made on 3-9-1994. On receipt of such payment, KSIIDC issued a sale letter dated 28-12-1995 to BPL. By reply dated 28-12-1995, BPL accepting the terms of the sale stipulated in KSIIDC's letter dated 28-12-1995 and the sale was concluded on 28-12-1995.

9. Before BPL could make the balance payment and take delivery, yet another writ petition was filed by the company in WP No. 8025 of 1996, wherein another interim order was granted, staying the sale of assets of the company. However, by subsequent order dated 10-4-1996, the learned single judge vacated and discontinued the interim stay. The said order dated 10-4-1996 was challenged in WA No. 1825 of 1996. The said appeal was rejected on 28-6-1996. WP No. 8760 of 1994 filed earlier was dismissed on 25-9-1996 and the appeal filed by the company against the said order in WA No. 9161 of 1996 was dismissed on 12-9-1997. Thereafter, yet another petition was filed by Raj Kotak (ex-director) in WP No. 34402 of 1996, which is stated to be pending, wherein an interim order was made on 20-12-1996 to the effect that the sale of assets of the company would be subject to the result of said writ petition. On 23-12-1996, BPL paid the balance consideration of Rs. 84 lakh to KSIIDC.

10. When KSIIDC was about to deliver possession of the assets of the company to BPL, it received a letter dated 26-12-1996 from the official liquidator, referring to

the order of winding up passed on 31-10-1996 and stating that he should be associated with the sale. KSIIDC, therefore, made an application (CA No. 64 of 1997) on 29-1-1997 for modifying the order of winding up dated 31-10-1996 insofar as the direction to the official liquidator to forthwith take charge of the properties and assets of the company, by excluding the properties which had been taken over by the KSIIDC under Mahazar dated 11-12-1989 and which had been sold to BPL in pursuance of the permission granted by the BIFR in its order dated 26-8-1993 and the AAIFR in its order 25-9-1995, and the approval of the sale by the BIFR on 27-10-1995. KSIIDC also sought the permission of the company court to handover the assets of the company to BPL.

11. The said application was dismissed by the learned company judge by order dated 28-1-1998 in Karnataka State Industrial Investment & Development Corpn. Ltd. v. Inter Modal Transport Technology Systems (Karnataka) Ltd. : AIR1998 Kant195 , following the decision of a Division Bench of Bombay High Court in Maharashtra State Financial Corpn. v. Official Liquidator, Atrois Chemicals (P.) Ltd. : AIR1993 Bom392 and the decision of a Division Bench of this Court in Karnataka State Industrial Investment & Development Corpn. Ltd. v. Shivmoni Steel Tubes Ltd. [1997] 26 CLA 337. He held that the sale of assets of the company made by KSIIDC in favour of BPL without leave of the company court and without associating the official liquidator in the sale, was void and neither the permission nor the assent by BIFR for the sale will validate the sale; and, therefore, the order of winding up dated 31-10-1996 directing the official liquidator to take charge of assets of the company does not require modification. On the facts and circumstances and having regard to the fact that BPL, which had already deposited the entire price of Rs. 2.8 Crore with the KSIIDC, will be affected by any delay in resale, the company court issued the following further directions while rejecting the application :

'(i) Fresh steps should be taken to sell the assets of the company jointly by the KSIIDC and the official liquidator, fixing the minimum bid amount at Rs. 2.83 crore plus interest (at the prevailing lending rate of KSIIDC) on Rs. 2.8 crore from the respective dates of payments by BPL to the date of resale.

(ii) If no offers exceeding the said minimum bid amount is received, the sale of the assets of the company to BPL shall be confirmed at Rs. 2.8 crore.

(iii) The official liquidator shall secure appropriate directions from the company court for fresh sale and comply with the procedure prescribed and complete the sale within two months.

(iv) The third respondent (ex-director of company) shall bear the expenses to be incurred by KSIIDC and official liquidator; for conducting the fresh sale.'

12. Feeling aggrieved, BPL, which purchased the assets from KSIIDC has filed OSA No. 6 of 1998. In brief the contentions of appellant are :

(a) Having regard to the order dated 26-8-1993 of the BIFR under Section 20(4) permitting the sale and the subsequent approval of the sale by the BIFR by order dated 27-12-1995, and the overriding effect of the provisions of the SICA, there is no need to obtain the leave of the company court.

(b) KSIIDC was a secured creditor who was in lawful possession of the assets of the company (taken over by under Section 29 of the SFC Act with the permission of the BIFR during the pendency of a reference under Section 15(1) of the SICA. It has the power of private sale without the intervention of court. After obtaining permission of the BIFR on 26-8-1993, it invited offers by giving wide publicity. The offer of BPL was the highest. The BIFR approved the sale of assets to BPL on 27-10-1995. Thereafter the sale of the assets of the company by KSIIDC to BPL was concluded on 28-12-1995. What remained to be done as on 31-10-1996 was payment of balance price of Rs. 84 lakh and delivery of possession to BPL. As the sale was long prior to the order of winding up on 31-10-1996, such sale neither required the permission of the company court, nor required the association of the official liquidator in the sale. The decision of the learned company judge is contrary to the decision of the Supreme Court in the case of M.K. Ranganathan v. Government of Madras : [1955]2SCR374 and the decision of the Division Bench of this court in International Coach Builders Ltd. v. Karnataka State Financial Corpn. [1993] 12 CLA 122.

13. On 27-2-1998, the appeal was admitted and the operation of the order of the learned single judge was stayed.

14. The learned counsel for the official liquidator and the learned counsel for Raj Kotak (appellant in OSA No. 7 of 1998) put forth the following contentions :

(i) When the order of winding up was passed on 31-10-1996, the winding up related back to the date of filing of the petitions for winding up (in the year 1988-89) and, therefore, any sale effected after the dates of filing of the winding up petitions, without the permission of the company court, was void having regard to Section 537(1)(6) read with Section 441(2) of the Companies Act.

(ii) The proviso to Section 529(1) of the Companies Act, inserted by Act 35 of 1985 subjected the security of every secured creditor to a *pari passu* charge in favour of the workman to the extent of workmen's portion therein, and authorised the official liquidator to represent the workmen and enforce the charge. Before the amendment, a secured creditor could stand outside the winding up and enforce his security by sale without intervention of court. But, after the insertion of proviso to Sections 529(1) and 529A, a secured creditor who wants to stand outside the winding up and dispose of the secured assets, will have to take permission of the company court and has to act in association with the official liquidator, who will represent the workmen. Section 20(4) should be read harmoniously with Sections 529, 529A, 433, 441(2) and 537 of the Companies Act and if so done, it will be seen that even if there is an order under Section 20(4), the requirement of obtaining the leave of company court cannot be dispensed with.

(iii) Any sale by the secured creditor, during the pendency of winding up petition, without obtaining the permission of the company court and without associating the official liquidator will be void, *vide* decision of the Bombay High Court in Maharashtra State Financial Corpn. 's case (supra) and the decision of a Division Bench of this court in Karnataka State Industrial Investment & Development Corpn. Ltd. 's case (supra).

15. The learned counsel for appellant in OSA No. 7 of 1998 contended that there were several procedural irregularities in the sale in favour of BPL resulting in

realisation of a lesser price; and the learned company judge instead of setting aside the sale on that ground also, has wrongly held that the sale of assets had been properly done. He also contended that the learned company judge was not justified in observing that the company and its director (Raj Kotak) had made every effort to nullify the sale by separately approaching this court and they are not entitled to any indulgence from the hands of the court.

16. On the contentions raised, the following questions arise for consideration :

1. When a company is ordered to be wound up under Section 20(2), on the basis of the final opinion recorded by the BIFR under Section 20(1), whether any sale of the assets of the company by a secured creditor as per directions of the BIFR under Section 20(4), made prior to the date of winding up order becomes void, if a petition under Section 433 for winding up was pending on the date of sale and leave of company court is not obtained.

2. Whether a sale of the assets of a company, during the pendency of a creditor's petition for winding up, by a secured creditor who has taken over the assets of the company under Section 29 of the SFC Act is void if such sale is made without obtaining the permission of the company court and without associating the official liquidator in the sale process.

3. Whether on the facts and circumstances of this case, the sale of the assets of the company by KSIIDC in favour of BPL is void or irregular and requires to be ignored.

17. Section 20 relating to winding up of sick industrial company is extracted below :

'Winding up of Sick Industrial Company.--(1) Where the Board, after making inquiry under Section 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of opinion that the sick industrial company is not likely to make its net worth exceed and accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to

become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.

(2) The High Court shall, on the basis of the opinion of the Board, order winding up of the sick industrial company and may proceed and cause to proceed with the winding up of the sick industrial company in accordance with provisions of the [Companies Act, 1956](#) (1 of 1956).

(3) For the purpose of winding up of the sick industrial company, the High Court may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of the sick industrial company and the officer so appointed shall for the purpose of the winding up of the sick industrial company be deemed to be, and have all the powers of, the official liquidator under the [Companies Act, 1956](#) (1 of 1956).

(4) Notwithstanding anything contained in Sub-section (2) or Sub-section (3), the Board may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of Section 529A, and other provisions of the [Companies Act, 1956](#) (1 of 1956).'

17.1 Section 22 of the SICA provides for suspension of legal proceedings, contracts, etc. Sub-section (1) provides, inter alia, that where an inquiry under Section 16 is pending or an appeal is pending under Section 25, no proceedings for the winding up of the industrial company shall lie or be proceeded with further, except with the consent of the BIFR or the AAIFR as the case may be. Sub-section (3) provides, inter alia, that where an inquiry under Section 16 is pending, the BIFR may declare that all contracts, agreements, assurances of property, settlements, awards, standing orders or other instruments in force, to which the sick industrial company is a party, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder shall remain suspended or shall be enforceable only with such adaptations and in such manner, as may be specified by the BIFR. Sub-section (4) provides, inter alia, that any declaration made with Sub-section (3) shall have effect notwithstanding anything contained in the Companies Act or any other law or any instrument or

memorandum and articles of association or any agreement or any decree or order of a court or Tribunal or authority and any remedy for the enforcement of any right and obligation all proceedings relating thereto pending before any court or Tribunal or authority shall remain stayed or be continued subject to such declaration.

17.2 Section 22A provides, inter alia, that the Board (BIFR) may direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets, during the period beginning with the recording of opinion by the BIFR, for winding up of the company under Section 20(1) and upto the commencement of the proceedings relating to the winding up before the concerned High Court.

17.3 Section 32 of the SICA, inter alia, provides that the provisions of that Act shall have effect notwithstanding anything inconsistent therewith contained in any other law (except Foreign Exchange Regulation Act, 1963 and Urban Land (Ceiling and Regulation) Act, 1976 for the time being in force).

18. The scheme of the SICA, as contained in Sections 20, 22, 22A, and 32 makes it clear that from the date of commencement of an inquiry in regard to any reference received under Section 15, till passing of an order of winding up by the High Court under Section 20(2), the BIFR retains absolute control over the affairs of the company and can either prevent any sale or permit any sale and the sick industrial company is entirely governed by the provisions of the SICA. On the other hand, once an order of winding up is made by the High Court under Section 20(2), acting on the opinion of the BIFR under Section 20(1), the control and jurisdiction over the company, its affairs and assets pass over to the High Court and the BIFR ceases to have any power to pass any orders or give any directions.

19. Sub-section (4) of Section 20 provides that notwithstanding anything contained in Sub-section (2) or Sub-section (3) of Section 20, the BIFR may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of Section 529A and other provisions of the Companies Act. That is, even though the power to order winding up and proceed with the winding up of the sick company on the basis of the opinion of the BIFR, is entrusted to the High Court under Section 20(2), the BIFR is entrusted with the

power to cause to be sold, the assets of the sick industrial company in such manner as it deems fit, subject only to the condition that the sale proceeds should be forwarded to the High Court for distribution. It follows therefrom that until the High Court passes an order of winding up under Section 20(2) on the basis of the opinion of the BIFR, the jurisdiction and power over the company, in particular to cause the assets of the company to be sold as per Section 20(4), rests with the BIFR.

20. The purpose intended to be served by Sections 537(1), 441(2) and 446, in case of orders of winding up under Section 433, is served by Sections 20, 22 and 22A during the pendency of an inquiry before the BIFR leading to either revival/rehabilitation, or recording of an opinion that the company be wound up. SICA is an Act subsequent to Companies Act enacted after amendment of the Companies Act by Act 35 of 1985. Apart from the fact that having regard to Section 32 of the SICA, the provisions of SICA will have overriding effect over the provisions of the Companies Act. Section 20(4) specifically provides that power given, the BIFR under Section 20(4) is notwithstanding the provisions for winding up under Section 20(2). There is no inconsistency between the provisions of SICA and the Companies Act, We hold that any sale in pursuance of a direction by the BIFR under Section 20(4) before an order of winding up under Section 20(2) is valid, and there is no question of obtaining any leave or permission of company court for such sale.

20.1 In this case the sale in favour of BPL was permitted by the BIFR on 26-8-1993, and approved by the BIFR on 27-10-1995 and in pursuance of it, KSIIDC concluded the sale in favour of BPL on 28-12-1996. The order of winding up was passed under Section 20(2) only on 31-10-1996. The requirements relating to permission of the company court for sale by the secured creditor and association of the official liquidator with the sale, will not apply in regard to the sale in favour of BPL in view of the fact that the sale was prior to the order of winding up, and in accordance with the direction of the BIFR under Section 20(4). Therefore, the sale by KSIIDC, in favour of BPL is valid and cannot be ignored.

21. We may refer to yet another ground and to why the sale by KSIIDC in favour of BPL with the permission of the BIFR under Section 20(4) is valid. The ground is based on the fundamental difference between order of winding up of a company under Section 433 and an order of winding up of a sick industrial company under Section 20(2).

21.1 Section 537 provides for avoidance of certain attachments, execution, sales, etc., in winding up by or subject to supervision of court. Sub Section (1) of Section 537 provides that where any company is being wound up by or subject to the supervision of the court, any sale held without the leave of the court, of any of the properties or effects of the company after commencement of the winding up shall be void.

21.2 Having regard to the provision for relating back contained in Section 441(2), the words 'commencement of the winding up' occurring in Section 537(1) refers to the time of presentation of the petition for winding up and not the date of order of winding up, where the winding up order is passed under Section 433. The intention of relating back the winding up of a company to the date of presentation of the petition for winding up is to avoid dispositions of the property, made after presentation of the petition for winding up. Therefore, when an order of winding up is made, even though the actual process of winding up starts from the date of the order, the winding up of the company is deemed to commence from the date of filing of the petition for winding up. But such relation back of the commencement of winding up of the company to the date of filing of the petition for winding up, does not extend to relating back of the passing of the custody of the company's properties, to the date of winding up petition.

21.3 Section 441(1) relates back the winding up, to the date of passing of resolution for voluntary winding up, where the winding up order is under Section 433(a). Section 441(2) relates back the winding up to the date of presentation of petition for winding up, where the order of the winding up is under Section 433(6) to (f). Section 441(2) provides that winding up of a company by the court in cases, other than those covered by Section 441(1) shall be deemed to commence at the time of presentation of the petition for winding up. Therefore, relating back of the

order of winding up to the date of presentation of the petition for winding up, will occur only where the order of winding up is made under Section 433(b) to (f) in a petition for winding up. Where the order of winding up is under Section 20(2) on the basis of an opinion under Section 20(1), there is 'no presentation of petition for winding up'. Consequently there is no 'relating back' of the winding up to any date prior to the order of winding up, when the order of winding up is passed under Section 20(2). It follows, therefore, that where the order of winding up is under Section 20(2), any sale without the leave of the company court will be void under Section 537(1), only if such sale takes place after the date of winding up and not earlier.

21.4 The proviso to Sub-section (1) of Sections 529 and 529A provides that workmen's dues shall rank *pari passu* with the debt due to the secured creditor in the winding up of the company. This overriding deeming provision is applicable only when there is 'winding up' of a company. If there is no order of winding up, the workmen's dues will not rank *pari passu* with the debt due to the secured creditor. We have already held that in the case of an order of winding up under Section 20(2), the winding up commences from the date of the order of winding up and not the date of presentation of any petition under Section 433 for winding up. Therefore, when a secured creditor effects a sale of the secured assets either by private treaty or by public auction, before an order of winding up, with the permission of the BIFR under Section 20(4), there is no need to seek or obtain the leave of the company court or associate the official liquidator in the sale process.

21.5 In this case, the order of winding up though passed in a proceedings initiated by creditor under Section 433 is not an order of winding up under Section 433. The order of winding up is made under Section 20(2). Therefore, the sale by KSIIDC in favour of BPL, which is before the date of winding up order under Section 20(2) is valid and unaffected by such order of winding up.

Re. Point (2)

22, In fact second question does not survive in view of our finding on Point (1). However, as elaborated arguments were addressed on this aspect and as the learned company judge, has decided the matter with reference to this issue, we

will examine the question.

23. The position of a secured creditor who stands outside the winding up proceedings and realises his security was considered in M.K. Ranganathan's case (supra). The Supreme Court held that a secured creditor can stand outside the winding up and realise his security without intervention of the court, by effecting the sale of the mortgaged property, by private treaty or public auction. But, when the intervention of any court is sought by a secured creditor to realise his security, either by filing a suit or otherwise, he is bound to obtain the leave of the winding up court. The Supreme Court held that the words 'any sale held without leave of the court of any of the properties' occurring in Section 232(1) of the [Companies Act, 1913](#) [corresponding to Section 537(1)(b) of the [Companies Act, 1956](#)] refers only to sales held through the intervention of the court and not to sales effected by the secured creditor, outside the winding up without the intervention of the court. This was reiterated in Industrial Credit & Investment Corpn. of India Ltd. v. Srinivas Agencies [1996] 21 CLA 94 (SC).

24. In the case of International Coach Builders Ltd. (supra), a Division Bench of this court considered whether there was any change in the law declared by the Supreme Court in M.K. Ranganathan's case (supra), after insertion of proviso to Section 529(1) and Section 529A by Act No. 35 of 1985. The Division Bench held that the only change brought about by the amendment of Section 529 and insertion of Section 529A of Act 35 of 1995, is of subjecting the security of the secured creditor to pari passu charge for workmen's dues and empowering the liquidator to join the secured creditor in enforcing workmen's charge on the security when the secured creditor proceeds to realise his security standing outside the winding up. Consequently the Division Bench of this court held that the permission granted to KSFC (a secured creditor of the company), in winding up by the company court, to sell that company's assets which were already in its possession and constituting security for repayment of the loan, and realise its security subject to payment of workmen's dues as undertaken by it by standing outside such winding up, was in accordance with the provisions of amended Sections 529 and 529A and Sections 29 and 46B of the SFC Act. It was also held that the power of sale need not be shifted to the official liquidator from the secured

creditor, when an order of winding up was passed. It is stated that the appeal against the said decision is pending before the Supreme Court. While entertaining a petition for special leave against the said decision, the Supreme Court has issued an interim direction to the secured creditor to sell the property acting jointly with the official liquidator under the supervision and in accordance with the directions of the company court and further directed that the sale proceeds shall be deposited in the court and then distributed in accordance with the directions of the company judge.

25. The decision of the Division Bench of this court in International Coach Builders Ltd. s case (supra) is followed in Gujarat State Finance Corpn. v. Official Liquidator, Himachal Tools (P.) Ltd. [1996] 87 Comp. Cas. 658 (Guj.). The Gujarat High Court has also taken the view that the amendment of Section 529 and insertion of Section 529A, by amending Act No. 35 of 1985 has not altered the position of a secured creditor, as envisaged under Section 28(6) of the Insolvency Act, 1920 read with Section 529(1)(c), to stand outside the winding up and realise the security without intervention of the court. It, however, directed that from out of the sale proceeds realised by GSFC, proportion of workmen's dues shall be realised by the official liquidator from GSFC in view of the proviso to Section 529(1).

26. In Aryavarta Plywood Ltd. v. Rajasthan State Industrial & Investment Corpn. Ltd. [1991] 72 Comp. Cas. 5, the Delhi High Court held that the assets of a company are deemed to vest in court on the date of winding up order; and that though the winding up relates back to the date of winding up petition, the vesting of the assets of the company do not relate back to date of winding up petition. In that case, the financial corporation took over the assets of the company during the pendency of the winding up petition. Subsequently, the winding up order was passed. Thereafter, the financial corporation sold the assets. The financial corporation did not seek the intervention of court either for taking possession or for sale. The company in liquidation filed an application for setting aside the sale. Relying on M.K. Ranganathan's case (supra) the Delhi High Court held that the sale of the assets of the company by exercising its powers under Section 29 without intervention of the court was not invalid and Section 537 was inapplicable

to such sale. Similar view was taken by the Bombay High Court in *State Industrial & Investment Corpn. of Maharashtra v. Maharashtra State Financial Corpn.* [1988] 64 Comp. Cas. 102 and by the Rajasthan High Court in *Boolani Engg. Corpn. v. ASUP Synthetics & Chemicals Ltd.* [1994] 81 Comp. Cas. 872 and *State Bank of India v. Spintex Tubes & Constructions Ltd.* [1995] 82 Comp. Cas. 290.

27. We may now refer to the decisions which take the contrary view.

27.1 In the first *Maharashtra State Financial Corpn.*'s case (*supra*), the Bombay High Court held as follows :

'...because of the proviso to Section 529, the secured creditor is not the only mortgagee entitled to sell the security. He has a co mortgage (in the form of workmen) with an equivalent charges on the same security. These workmen are to be represented by the official liquidator. Therefore, when a secured creditor seeks to realise his security, he has also to contend with the official liquidator. The official liquidator is an interested party in the sale of the security in two capacities in such a situation (1) as a representative of the *pari passu* charge holders; and (2) as an officer of the court in the custody of the company's properties, who is responsible for the sale and distribution of the assets of the company in winding up. In both these capacities, he has an interest in the sale of the mortgaged security by the secured creditor.

What are the rights of a *part passu* charge holder Can a mortgagee exercise his power of sale without the consent of a *pari passu* charge holderIt is, therefore, necessary that when a sale of a mortgaged property takes place, both the charge holders should join in the sale.

The same ratio, in our view, would substantially apply to two charge holders who have a *pari passu* charge for the recovery of their dues. It may be that unlike a co mortgage, a *pari passu* Charge holder can receive payment of his mortgage debt from the mortgagor and release his charge independently. But when it comes to realise the security, both the *pari passu* charge holders must join or realise the security simultaneously. The sale proceeds are required to be divided proportionately between them in the same proportion as their dues. Hence, when

& sale takes place, it is for the simultaneous recovery of claims of all pari passu charge holders.

'... Also, the statutory right which is given to financial corporation under Section 29 to sell the property has to be exercised consistently with the rights of a pari passu charge holder in whose favour a statutory charge is created by the proviso to Section 529 of the Companies Act when the company is in liquidation. Therefore, such a power can be exercised only with the concurrence of the official liquidator and the official liquidator is required to take the permission of the court before giving such concurrence since he is an officer of the court and is required to act under the directions of the court while exercising his powers on behalf of the workers... .

'... We, however, do not see any inconsistency between the provisions of Section 29 of the State Financial Corporation Act and Section 529 of the Companies Act. Section 29 of the State Financial Corporations Act merely confers certain powers on the mortgagee. It does not cover a situation where there is a pari passu charge holder. Therefore, the power to sell which is given to a financial corporation under Section 29 has to be exercised consistently with the right of a pari passu charge holder. Such a right can be exercised with the consent of the pari passu charge holder or on orders of the court after making him a party to the proceedings to enforce the security. Since the charge holder is the official liquidator, this power to consent is subject to the sanction of the court.

In the premises, whenever there is a pari passu charge over any property of a company in winding up by virtue of the proviso to Section 529, leave of the court is necessary for the sale of the property as the charge holder is the official liquidator.' [Emphasis supplied] (p. 395)

27.2 In Karnataka State Industries Investment & Development Corpn. Ltd. s case (supra), a Division Bench of this court held that the decision in M.K. Ranganathan's case (supra), and the other decisions following it (referred to in paras 15.2 to 15.4 above) were not relevant as the decision in M.K. Ranganathan's case (supra), was rendered by the Supreme Court prior to insertion of proviso to Section 529(1) and insertion of Section 529A by Act 35 of

1985. It distinguished the earlier decision in International Coach Builders Ltd.'s case (supra) in view of the interim order granted by the Supreme Court in the appeal filed against the said decision. The Division Bench followed the decision of Bombay High Court in the first Maharashtra State Financial Corpn.'s case (supra), and held as follows :

'The power to sell which has been given to KSIIDC under Section 29 of the SFC Act has to be exercised consistently with the right of pari passu charge holder who in the case of a company under liquidation, would be the official liquidator, whose consent can be subject to sanction of the court. Therefore, the statutory right given to the appellant-KSIIDC under Section 29 of the SFC Act being required to be exercised consistently with the right of pari passu charge holder in whose favour statutory charge is created by the proviso to Sub-section (1) of Section 529 of the Act when the company is in liquidation, and the said pari passu charge holder being official liquidator who is required to act under the directions of the court, leave of the court would be necessary, and any sale without such leave would be void under Section 537 of the Act....'

28. In Andhra Pradesh State Financial Corpn. v. Official Liquidator : AIR 2000 SC2642 , the Supreme Court considered the challenge by State Finance Corporation to the order of the learned company judge of the Andhra Pradesh High Court imposing the following conditions while granting permission to the State Financial Corporation to stay outside the liquidation proceedings :

- (i) The State Financial Corporation will undertake to discharge its liability due to the workers, if any, under Section 529A;
- (ii) The petitioner shall inform at least 10 days in advance of the date fixed for receipt of tenders, to the official liquidator about the proposed sale of the properties of the company.
- (iii) The petitioner shall also obtain the permission of the court before finalising the tenders.

The Supreme Court upheld the aforesaid conditions imposed by the company court on the following reasoning :

'The Act of 1951 is a special Act for grant of financial assistance to industrial concerns with a view to boost up industrialisation and also recovery of such financial assistance if it becomes bad and similarly the Companies Act deals with companies including winding up of such companies. The proviso to Sub-section (1) of Section 529 and Section 529A being a subsequent enactment, the non obstante clause in Section 529A prevails over Section 29 of the SFC Act in view of the settled position of law. We are, therefore, of the opinion that the above proviso to Sub-section (1) of the Section 529 and Section 529A will control Section 29 of the Act of 1951. In other words the statutory right to sell the property under Section 29 of the Act of 1951 had to be. exercised with the rights of part passu charge to the workmen created by the proviso to Section 529 of the Companies Act. Under the proviso to Sub-section (1) of Section 529, the liquidator shall be entitled to represent the workmen and enforce the above pari passu charge. Therefore, the company court was fully justified in imposing the above conditions to enable the official liquidator to discharge his function properly under the supervision of the company court as the new Section 529A of the Companies Act confers upon a company court the duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with the provisions of the above Section. The Legislature has amended the Companies Act in 1985 with a social purpose, viz., to protect dues of the workmen. If conditions are not imposed to protect the right of the workmen there is every possibility that the secured creditor may frustrate the above pari passu right of the workmen.'

[Emphasis supplied]

29. Thus, there are three diverse views :

(1) The first view is expressed in *Aryavartha Plywood Ltd. 's case* (supra) that the right of the secured creditor to stand outside the winding up and realise his security is unaffected by Section 529(1) proviso and Section 529A and, therefore, the secured creditor can sell the secured assets in his possession, without the leave of the company court and without associating the official liquidator, after an

order of winding up.

(2) The second view is expressed in International Coach Builders Ltd. 's case (supra) that there is no change in the legal position expressed by the Supreme Court in M.K. Ranganathan's case (supra) even after amendment to Section 529(1) and insertion of Section 529A by Act 35 of 1985 except subjecting the sale proceeds realised by the secured creditor to a pan passu charge in favour of the workmen's dues as provided in the proviso to Section 529(1) and, therefore, the right to secured creditor to stand outside the winding up and realise his security remains unaffected and, therefore, there is no need to shift the power of sale from the secured creditor to the official liquidator, when an order of winding up is made. In the case as the sale was with the permission of the company court, the question whether leave of company court was necessary for sale or not did not arise for consideration.

(3) The third view is expressed in Shivmoni Steel Tubes Ltd.'s case (supra) that sale of the assets of the company, by the secured creditor standing outside the liquidation proceedings without the leave of the company court and without associating the official liquidator will be void under Section 537 of the Companies Act.

30. The appeal against the decision in International Coach Builders Ltd.'s case (supra) is still pending before the Supreme Court. In Shivmoni Steel Tubes Ltd.'s case (supra), the Division Bench has considered and distinguished the earlier decision in International Coach Builders Ltd,'s case (supra), in view of the conditions imposed by the Supreme Court in the interim order passed in the appeal against the said decision. The decision in International Coach Builders Ltd.'s case (supra) has to be read with the condition imposed by the Supreme Court while granting special leave that the secured creditor should sell the secured property, acting jointly with the official liquidator, under the supervision and directions of the company court. Further, the view taken in Shivmoni Steel Tubes Ltd's case (supra), that the official liquidator should be associated with the sale, finds support in the subsequent decision of the Supreme Court in the case of Andhra Pradesh State Financial Corpn. (supra). Therefore, the legal position at

present (unless the Supreme Court decides otherwise in the pending appeal) is that even as secured creditor who wants to stand outside the winding up proceedings and realise his security, should, on the passing of an order of winding up, obtain the leave of the company court for sale of the assets of the company and also associate the official liquidator in the sale process.

31. But, it should be noted that the above position is in regard to a sale by the secured creditor after the order of winding up. The decisions in International Coach Builders Ltd. 's case (supra) and Shivmoni Steel TubesLtd.'s case (supra) are cases relating to sale by the secured creditor subsequent to the order of winding up. In neither of those cases, nor in the decision of Bombay High Court in the first Maharashtra State Financial Corpn.'s case (supra) has considered the position in regard to sale of the assets of the company, by the secured creditor, during the pendency of a winding up proceedings, that is before the order of winding up, been considered.

32. Section 529 (corresponding to Section 229 of the [Companies Act, 1913](#)) provides that in regard to the rights of secured and unsecured creditors, in the winding up of an insolvent company, the rules which are applicable to the estates of persons adjudged insolvent, under the law of insolvency, will prevail. The provisions of the [Provincial Insolvency Act, 1920](#) governs the law of insolvency. Sections 27 and 28 of the said Act, relate to order of adjudication and effect of an order of adjudication. Sub-section (6) of Section 28 of the Insolvency Act provides that an order of adjudication shall not affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it, if Section 28 had not been passed. Thus, it has always been recognised that the secured creditor can stand outside the winding up and if the law and/or terms of mortgage so provided, realise his security without the intervention of court, by effecting a sale either by private treaty or by public auction. Section 232(1) of [Companies Act, 1913](#) [corresponding to Section 537(1) of the Companies Act] was considered by the Supreme Court in M.K. Ranganathan 's case (supra). It was held that the said provision did not affect the position of secured creditor or his right to realise the security by private treaty or by public auction, without intervention of the court. When the Companies Act

was enacted there was no change in law on this aspect and, therefore, the principle laid down in M.K. Ranganathan's case (supra), with reference to the corresponding provision in the old Act continued to apply, in regard to the right of a secured creditor to stand outside the winding up and realise his security without intervention of court. Sub-section (1)(c) and proviso to Sub Section (2) of Section 529 of the Companies Act specifically recognise and refers to the rights of a secured creditor to realise his security. It follows, therefore, that if Section 537 is not applicable to a sale by the secured creditor prior to the date of winding up, the sale will not become void.

33. The decision in M.K. Ranganathan's case (supra) and the several decisions following it make it clear that the secured creditor can stand outside the winding up and realise the amount due to it by selling the security without the intervention of the court and Section 537 will be inapplicable to such sales by the secured creditor. In Shivmoni Steel Tubes Ltd's case (supra) this court has held that having regard to amendment to Section 529(1) and insertion of Section 529-A, by Act 35 of 1985, Section 537(1)(b) will apply to sale by secured creditor, in a case where the sale is after the date of winding up. The proviso to Section 529(1) creates a pari passu charge in regard to workmen's dues over the security held by a secured creditor. But, the proviso to Sections 529(1) and 529A make it clear that pari passu charge in favour of the workmen arises only when the order of winding up is made. The deemed pari passu charge does not exist before the order of winding up. Having regard to the fact that Section 537 is inapplicable to a sale of the secured assets by the secured creditor, without intervention of court and the fact that the deemed pari passu charge in favour of workmen comes into effect only when the order of winding up is passed, any sale by the secured creditor standing outside the winding up proceedings, before passing of the winding up order will not be rendered void, on the passing of the order of winding up. The only effect of proviso to Section 529(1) is that on an order of winding up being made, the official liquidator representing the workmen having pari passu charge for their dues, will be entitled to apportionment of the sale proceeds, from the secured creditor in accordance with Section 529.

Re. Point (3)

34. It is contended that though, KSIIDC has obtained a valuation with regard to properties at Rs. 3.03 crore, the third respondent had obtained a valuation report valuing the assets at more than Rs. 4 crore, and the assets of the company have been sold in the year 1995 in pursuance of an advertisement given in March 1994 and there were violations in terms of sale in regard to manner of payment of sale price. Raj Kotak has filed OSA No. 7 of 1998 contending that the procedure adopted by KSIIDC in holding the sale is irregular and that has resulted in a sale at a price far less than the market price. The next question that arises for consideration is whether the sale should be interfered with on the ground that the sale price is inadequate or on the ground of alleged irregularities in the sale procedure.

35. The BIFR permitted KSIIDC to sell the assets of the company by order dated 26-8-1993. That order was confirmed by AAIFR on 26-9-1995. In pursuance of the direction of BIFR, KSIIDC invited tenders and reported to BIFR that the price of Rs. 2.80 crore offered by BPL was the highest and proposed to accept the said offer. The BIFR by its order dated 27-10-1995 approved the conclusion of sale of assets of the company by KSIIDC in favour of BPL for a consideration of Rs. 2.80 crore and in accordance with such approval, the sale has been concluded between KSIIDC and BPL on 28-12-1995. The company court does not sit in appeal over the orders of the BIFR, nor exercises power under articles 226 and 227 of the Constitution. Therefore, when the BIFR has approved the sale, the question of company court re-examining the correctness of price or the procedure adopted for sale, or holding the sale to be invalid or ordering resale does not arise. In view of above, the challenge by the official liquidator and Raj Kotak to the sale, by way of objections to application filed by KSIIDC for modification of the direction issued while ordering winding up does not arise. Thus, the contention that there were several irregularities in the sale in favour of BPL and the sale price is inadequate and, therefore, the sale ought to have been set aside by the learned company court on that ground is misconceived and is liable to be rejected. This answers the third point.

Re. Other points

36. The second grievance of the appellant in OSA No. 7 of 1998 relates to observations of the learned company judge that the company and its directors had made every effort to nullify the sale by repeatedly approaching this court and though held not entitled to an indulgence in the hands of the court. The appellant in OSA No. 7 of 1998 does not dispute that a series of writ petitions were filed challenging the permission for sale, approval of sale to BPL and the sale in favour of BPL. The observation by the learned company judge is only a statement of fact. We do not find any reason to delete the said observation.

37. The next grievance of the appellant in OSA No. 7 of 1998 is that the learned company judge had erred in observing 'it must be held that the sale of assets of the company has been properly done' in para 14 of his order. A reading of para 14 is entirely shows that the said 'statement' is not a finding by the company court, but is the reference to a contention of KSIIDC and BPL, to that effect. Hence, we do not find any merit in OSA No. 7 of 1998.

38. As far as workers' dues are concerned, we find that there are adequate safeguards. It is not disputed by KSIIDC that the sale is in terms of the permission granted by the BIFR under Section 20(4) which clearly provides that the entire sale proceeds will have to be forwarded to the High Court for distribution in accordance with provisions of Section 529A and other provisions of the Companies Act. Even the AAIFR, while confirming the order of the BIFR in appeal, has made it clear that the amount realised shall have to be deposited with this court for distribution as per law. It is stated that the sale realisation of Rs. 2.80 crores is with KSIIDC. KSIIDC will have to deposit the sale realisation with the company court for being dealt in accordance with Section 20(4) read with the proviso to Section 529(1). On the facts and circumstances, interest of justice will be served if KSIIDC is directed to deposit the sale proceeds in a fixed deposit with a Nationalised Bank in the joint names of KSIIDC and official liquidator so that the said funds could be dealt with as per the orders of the company court. Having regard to the fact that KSIIDC itself is a financial institution, it is also open to KSIIDC to make an appropriate application to the company court to permit it to retain the said amount in trust subject to condition that the same will generate interest equivalent to the rate of interest given by Nationalised Banks, until distribution as per proviso to Section

529(1) read with Section 20(4).

39. In view of above, we pass the following order :

(a) OSA No. 7 of 1998 is dismissed.

(b) OSA No. 6 of 1998 is allowed and the order dated 29-1-1998 of the learned company judge dismissing CA No. 64 of 1997 is set aside.

(c) CA No. 64 of 1997 is allowed and the direction of the company court to the official liquidator, in the order of winding up dated 31-10-1996, to forthwith takeover the properties and assets of the company is modified by excluding from such order, the properties possession of which have been taken over by KSIIDC and sold to BPL in pursuance of the permission granted by the BIFR in its order dated 26-8-1993 and by AAIFR in its order dated 26-9-1995 and duly approved by the BIFR as per order dated 27-10-1995.

(d) As a consequence, KSIIDC may handover the possession of the assets of the company which were the subject-matter of sale to BPL subject, however, to any order that may be made in the pending writ petitions challenging the sale.

(e) The sale proceeds of Rs. 2.80 crore realised by KSIIDC shall be kept in a fixed deposit in any nationalised bank in the joint names of KSIIDC and the official liquidator, for being distributed by the company court in terms of Section 529(1) and other provisions of the Companies Act.

(f) Parties to bear their respective costs.