Karnataka High Court Karnataka State Industrial ... vs Intermodel Transport Technology ... on 29 January, 1998 Equivalent citations: AIR 1998 Kant 195, 1998 94 CompCas 409 Kar Author: P V Shetty Bench: P V Shetty JUDGMENT P. Vishwanatha Shetty, J. 1. In this application, the applicant-Karnataka State Industrial Investment and Development Corporation Limited (hereinafter referred to as "the Corporation"), has made two prayers. Firstly, the applicant has prayed for modification of the order dated October 31, 1996, made in Company Petition No. 17 of 1989, to the extent this court directed the official liquidator to forthwith take charge of all the properties and effects of the first respondent, Intermodel Transport Technology Systems (Karnataka) Limited (hereinafter referred to as "the company"), and to exempt from the direction given in the said order in so far as it relates to the assets taken over by the Corporation pursuant to the mahazar dated December 11, 1989, prepared by the Corporation and their sale in favour of the second respondent ; and, secondly, to permit the Corporation to hand over the assets of the company to the second respondent pursuant to the sale of the assets of the company made in favour of the second respondent. 2. The facts, which are relevant for the disposal of this application, may be briefly stated as hereunder : (a) Pradeep Industrial Corporation instituted proceedings in Company Petition No. 17 of 1989, under Section 433(e) and 433(f) read with Section 439 of the Companies Act (hereinafter referred to as "the Act") for winding up of the company on January 21, 1989, and on the said company petition, this court directed notice on February 16, 1989, and thereafter, the company came to be wound up by this court by its order dated March 25, 1994. Subsequently, the said order was recalled on June 2, 1995. (b) It is on record that the Corporation had in all advanced a sum of Rs. 76 lakhs to the company on the security of the assets of the company, which have been mortgaged/hypothecated to the Corporation. Since, the company failed to repay the loan taken from the Corporation as per the terms and conditions of the loan advanced and committed default in payment of the loan advanced by the Corporation and the company was due in a sum of Rs. 1,46,36,070 as on September 15, 1989, to the Corporation, in exercise of the power conferred on it under Section 29 of the State Financial Corporations Act, 1951 (hereinafter referred to as "the Financial Corporations Act"), took possession of the assets of the company on December 1, 1989. Thereafter, the company had raised a reference before the Board of Industrial and Financial Reconstruction (hereinafter referred to as "the BIFR"). In Case No. 28 of 1989, as provided under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "the SIC Act"). The BIFR, by its order dated August 26, 1993, recommended winding up of the company in the event of the failure of the company to submit a viable scheme for rehabilitation in exercise of the power conferred on it under Section 20 of the SIC Act. In the same order, the BIFR had authorised the Corporation to take steps for the sale of the assets of the company in its possession subject to the terms and conditions imposed in the said order. A copy of the order dated August 26, 1993, passed by the BIFR has been produced as annexure-H to this application. Pursuant to the order, annexure-H, the Corporation notified the sale of the assets of the company by

issuing advertisements in the Economic Times (Calcutta Edition), dated March 13, 1994, Bangalore Edition, dated March 7, 1994, Ahmeda-bad Edition, dated March 8, 1994, Madras and Delhi Editions both dated March 9, 1994, and Prajavani Daily, dated March 7, 1994. In the advertisement issued in the papers, referred to above, it was notified, among other things, that persons interested in the purchase of the assets of the company, could inspect the land, building and machinery on March 18, 1994, between 11 a.m. and 5 p.m. and should send their sealed offers to the Corporation before March 30, 1994 (4 p.m.), along with an EMD as per the details set out in the said advertisement. It is, further, notified in the said paper publication that the offer made by the intending purchasers would be opened on March 30, 1994, itself at 5 p.m., in the office of the general manager (Operations) of the Corporation in the presence of the tenderers. The offer submitted by the second respondent being the highest, the same was placed before the BIFR for approval and the BIFR, by its order dated October 26, 1995, accorded its approval for conclusion of the sale in favour of the second respondent for a total sale consideration of Rs. 2 crorcs and 80 lakhs in terms of the conditions in Clause 10(j) of its order anneuxre-H, dated August 26, 1993. Pursuant to the approval accorded by the BIFR, the Corporation had issued sale letter dated December 28, 1995, to the second respondent, a copy of which has be'en produced as annexure-R to this application. The second respondent, by its letter dated December 28, 1995, accepted all the conditions stipulated in the letter, annexure-R, issued by the Corporation. Thereafter, the second respondent, as per the terms and conditions of the sale, had paid the entire sale consideration of Rs. 2 crores and 80 lakhs to the Corporation. (c) Aggrieved by the order annexure-H dated August 26, 1993, passed by the BIFR, the company had filed an appeal before the Appellate Authority as provided under the SIC Act and the Appellate Authority, by its order dated April 25, 1995, dismissed the appeal. This court, by its order dated April 25, 1995, recalled the order dated March 25, 1994, winding up the company on the ground that the appeal filed by the company against the order annexure-H was pending consideration before the Appellate Authority on the date of the winding up order made by this court on March 25, 1994. Subsequently, on the dismissal of the appeal by the Appellate Authority on April 25, 1995, this court, by its order dated October 31, 1996, allowed Company Petition No. 17 of 1989, and ordered for winding up of the company and the official liquidator came to be appointed as liquidator of the company and he was directed to forthwith take charge of all the properties and assets of the company. (d) In the meanwhile, aggrieved by the sale of the assets of the company approved by the BIFR, the company had filed Writ Petition No. 8760 of 1994, before this court and obtained an ex-parte interim order of stay of the sale on March 29, 1994. Subsequently, this court, by its order dated October 26, 1994, vacated the said ex parte interim order and the said writ petition also came to be rejected by this court, by its order dated September 25, 1996. (e) Thereafter, the company had filed one more writ petition, Writ Petition No. 8025 of 1996, and again obtained an ex parte interim order of stay of the sale of the assets of the company. This court, by its order dated April 10, 1996, discontinued the ex parte interim order earlier granted

and the said order was challenged in Writ Appeal No. 1825 of 1996, which came to be dismissed by the Division Bench of this court, by its order dated June 28, 1996. Further, it is also on record that one Super Sales Corporation had filed a suit, O. S. No. 684 of 1996, before the court of the Principal Civil Judge, Bangalore (Rural), seeking an order of injunction restraining the Corporation and the company from disposing of the assets of the company and obtained an ex parte order of temporary injunction against the Corporation and the company. However, the learned city civil judge, by his order dated December 20, 1996, vacated the said ex parte order of temporary injunction, Thereafter, one Sri Raj Kotak, who was the director of the company, filed one more writ petitions (i.e., third in the series), Writ Petition No. 34402 of 1996, challenging the sale of the assets of the company. However, in the said writ petition, this court, by its order dated December 20, 1996, observed that the sale of the assets of the company is subject to the result of the writ petition. (f) During the pendency of this application, the aforesaid Raj Kotak had filed Company Application No. 109 of 1997, seeking permission of this court to come on record as supplemental respondent No. 3 in this application, i.e., Company Application No, 64 of 1997. The said application was allowed by this court by its order dated September 17, 1997. Further, during the pendency of this application, by means of order dated August 13, 1997, this court had directed the applicant in Company Application No. 109 of 1997, i.e., the third respondent in this application, to furnish the valuation report of the company in respect of the assets sold by the company on the date of the sale either from an approved valuer or a Government valuer. Pursuant to the said order, the third respondent has filed three valuation reports dated August 21, 1997, March 1, 1993, and July 11, 1996, given by one Sri R. Doreswamy, chartered engineer and approved valuer. As per the valuation report dated August 21, 1997, the total value of the assets of the company as on April/ September, 1994, was in a sum of Rs. 5,56,00,000. As per the valuation report dated March 1, 1993, the total value of the assets of the company as on March, 1993, was in a sum of Rs. 4,87,50,000. As per the valuation report dated July 11, 1997, the total value of the assets of the company as on October 1, 1995, was in a sum of Rs. 6,24,50,000. I have elaborately heard Sri Ashok S. Hinchigeri, learned counsel for the applicant, Sri Thomas V. Peter, learned counsel for the official liquidator, Sri U. L. Narayana Rao, learned senior counsel appearing along with Sri K. Giridhar for respondent No. 2, and Sri Kishore Mallya, learned counsel for respondent No. 3. 3. The second respondent supported the application. The submissions of Sri U. L. Narayana Rao, learned senior counsel, and Sri Ashok B. Hinchigeri, learned counsel for the applicant, are identical. According to them, the sale of the assets of the company cannot be treated either as illegal or void in law on the ground that the sale has been done without the leave of this court. Elaborating this submission, they, firstly, submitted that the law is firmly established that the secured creditor can stand outside the winding up proceedings and realise his security without the intervention of the court by effecting the sale of the mortgaged property by private or public sale; and leave of the court is necessary only when intervention of the court is sought for realising the security; and in this case, the sale of the assets

of the company having been made in exercise of the statutory power conferred on the BIFR under Sub-section (4) of Section 20 of the Act, the sale effected is perfectly valid in law and the properties in question do not vest with the official liquidator on winding up of the company. It is their contention that since on the date of the winding up order passed by this court on October 31, 1996, in Company Petition No. 17 of 1989, the assets of the company having been sold pursuant to the proceedings initiated under the provisions of the SIC Act and the sale of the assets of the company having been approved by the BIFR and having become final, it is not permissible for the official liquidator to take possession of the said assets, which have already been sold to the second respondent. Secondly, they submitted that the SIC Act is a special enactment and the provisions contained in the said enactment will prevail over the provisions contained in the Act. In this connection, they drew my attention to Sub-section (4) of Section 20 of the Act, which confers power on the BIFR to get the assets of a sick industrial company sold in such manner as it may deem fit and forward the sale proceeds to this court for orders for distribution in accordance with the provisions of Section 529A and other provisions of the Act, and also Section 32 of the SIC Act, which provides that the provisions of the SIC Act and of any Rules or Scheme made thereunder, shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973, and the Urban Land (Ceiling and Regulation) Act, 1976, or the memorandum or articles of association of an industrial company or in any other instrument having effect by virtue of any law other than the SIC Act, etc. Therefore, relying upon the said provisions, they submitted that since the assets of the company were sold after giving wide publicity and the offer made by the second respondent, which was the highest offer, having been accepted by the Corporation; and the same also having been approved by the BIFR, there is absolutely no justification to nullify the sale or prevent the Corporation from handing over the assets of the company to the second respondent as per the terms and conditions of the sale. Thirdly, they submitted that since the sale of the assets of the company has been made prior to the order of winding up made on October 31, 1996, which has been approved by the BIFR, the provisions contained in the Act, which requires the leave of the court for the sale of the assets of the company, which is under winding up, cannot be made applicable. Fourthly, they submitted that as a matter of fact, since wide publicity in respect of the sale of the assets of the company has been given in leading newspapers, which have wide circulation in the country, and also in a Kannada daily, which has wide circulation in the State, and the sale made was approved by the BIFR, which consists of members of high reputation and vast experience, by no stretch of imagination can it be said that the interests of the company or the workmen or the creditors of the company have been jeopardised or affected in any manner on account of the sale of the assets of the company. Therefore, they submitted that so long as it is not shown that the sale of the assets of the company has resulted in serious prejudice to the company and every one interested in the company, the sale of the assets of the company made should hot be nullified by this court. Further, relying upon the orders

made by this court in the writ petitions filed by the company and its directors and also the suit. O. S. No. 684 of 1996, filed by Super Sales Corporation, they submitted that every effort was made by the company and its directors to nullify the sale without any justifiable cause and if the Corporation is not permitted to hand over possession of the assets of the company pursuant to the sale made to the second respondent, as per the terms and conditions of the sale, it would result in irreparable injury to the Corporation and also to the second respondent. Sri Ashok Hinchi-geri submitted that huge money is outstanding to the Corporation, a public financial institution, and any delay in realisation of the money due to the Corporation would result in serious financial loss to the Corporation and other creditors. In the same tone, Sri Narayana Rao also submitted that the second respondent, in terms and conditions of the sale, has already deposited Rs. 2 crores and 80 lakhs and if, at this stage, this court takes the view that the sale of the assets of the company effected is not valid, it would result in irreparable injury to the second respondent, He further pointed out that even on this date, the third respondent has not been able to get an offer from any person for a price much more than the one at which the assets of the company are sold to the second respondent. He also submitted that it is well settled that in a court sale or a distress sale, normally the real market value in respect of an asset is not secured and that cannot be a ground to nullify the sale. Learned counsel, in support of the submissions made by them, relied upon the following decisions : (1) M.K. Ranganathan v. Government of Madras , (2) Damji Valji Shah v. Life Insurance Corporation of India , (3) Kayjay Industries (P.) Ltd. v. Asnew Drums (P.) Ltd., , (4) Aryavarta Plywood Ltd. v. Rajasthan State Industrial and Investments Corporation Ltd. [1991] 72 Comp Cas 5 (Delhi), (5) International Coach Builders Ltd. v. Karnataka State Financial Corporation , (6) Union of India v. Krishna Mills Ltd. [1994] 81 Comp Cas 50 (Raj), (7) Central Bank of India v. Elmot Engineering Co. P. Ltd. [1994] 81 Comp Cas 13 ; [1994] 4 SCC 159, (8) Gujarat State Financial Corporation v. Official Liquidator, Himalaya Tools (India) (P.) Ltd. [1996] 87 Comp Cas 658 ; [1996] 1 Comp LJ 503 (Guj), (9) Industrial Credit and Investment Corporation v. Srinivas Agencies , (10) Sudarsan Chits (I) Ltd. v. G. Sukumaran Pillai , and (11) S. V. Kondaskar v. V.M. Deshpande [1972] 42 Comp Cas 168 ; . Repelling the contentions advanced by Sri U. L. Narayana Rao and Sri Ashok Hinchigeri, Sri Thomas V. Peter, learned counsel for the official liquidator, and Sri Kishore Mallya, learned counsel for the third respondent, submitted that the proviso given to Section 529(1)(c) of the Act makes the security of every secured creditor subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and where a secured creditor, instead of relinquishing his security and proving his debt, seeks to realise the security, the liquidator is entitled to represent the workmen and enforce such charge ; and any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues and so much of the debt due to such secured creditor as could not be realised by him, shall rank pari passu with the workmen's dues and, therefore, whenever there is a pari passu charge over any property of a company in winding up by virtue of the proviso

to Section 529 of the Act, leave of the company court is necessary for the sale of the property as the charge-holder is the official liquidator. They pointed out that admittedly, in this case, when the property in question was caused to be sold by the applicant, the proceedings for winding up had already been initiated and as a matter of fact, the company also was wound up, by the order dated March 25, 1994, though the said order was subsequently recalled on March 2, 1995, and again a winding up order was passed on October 31, 1996. They submitted that even if the secured creditor is entitled to stand outside the winding up and realise his security, the sale of the assets of the company cannot be done without the leave of the company court once the winding up proceedings are initiated. They also submitted that the decisions of the Supreme Court, in the case of M.K. Ranganathan v. Government of Madras , Industrial Credit and Investment Corporation v. Srinivas Agencies , Gujarat State Financial Corporation v. Official Liquidator, Himalaya Tools (India) (P.) Ltd. [1996] 87 Comp Cas 658 ; [1996] 1 Comp LJ 503 (Guj) and International Coach Builders Ltd. v. Karnataka State Financial Corporation [1994] 81 Comp Cas 19 ; [1994] 4 Comp LJ 311 (Kar), relied upon by the applicant and the second respondent have absolutely no bearing on the facts of the present case. They pointed out that the decision of the Supreme Court in the case of M. K. Ranganathan v. Government of Madras [1955] 25 Comp Cas 344 was rendered before the introduction of Sections 529 and 529A in the Act. In the case of Industrial Credit and Investment Corporation v. Srinivas Agencies [1996] 86 Comp Cas 255, the Supreme Court has only followed the principle in Ranganathan's case [1955] 25 Comp Cas 344 (SC). They submitted that, on the other hand, the principle laid down by the Bombay High Court in the case of Maharashtra State Financial Corporation v. Official Liquidator [1995] 82 Comp Cas 342 ; [1995] 2 Comp LJ 165 fully applies to the facts of the present case. They further pointed out that the decision of the Bombay High Court in the case of Maharashtra State Financial Corporation v. Official Liquidator [1995] 82 Comp Cas 342 has been approved by the Division Bench of this court in the case of Karnataka State Industrial Investment and Development Corporation Ltd. v. Shivmoni Steel Tubes Ltd. . They further submitted that in the case of Karnataka State Industrial Investment and Development Corporation , the Division Bench of this court, after referring to the case of International Coach Builders Ltd. [1994] 81 Comp Cas 19 (Kar) and in the light of the direction given by the Supreme Court in the said case, has clearly held that the Supreme Court in Ranganathan's case [1955] 25 Comp Cas 344 did not have an occasion to consider the impact of Sections 529 and 529A of the Act or Section 537 of the Act and the rest of the decisions were based merely on the decision of the Supreme Court in Ranganathan's case [1955] 25 Comp Cas 344 and, therefore, the sale of the assets of the company made during the winding up proceedings is void in law and is not binding on the official liquidator and the applicant is not entitled for the relief sought in this application. They also pointed out that there is no conflict between the provisions contained in the Act and also the SIC Act in so far as the procedure required to be adopted in the matter of sale of assets of the company in winding up. 4. In the background of divergent contentions advanced by learned coun-

sel appearing for the parties, the question that would arise for consideration is as to whether the sale of the assets of the company effected by the applicant-Corporation, is void in law on the ground that the leave of the company court for the sale of the said assets has not been obtained. 5. It is profitable to first refer to the relevant provisions of the Act, the SIC Act and also the SFC Act, before proceeding to discuss the contentions raised by learned counsel appearing for the parties. (a) Sections 446, 456(2), 529(1), 529A and 537 of the Act read as under : "446. Suits stayed on winding up order.–(1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or, if pending at the date of winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose. (2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of- (a) any suit or proceeding by or against the company ; (b) any claim made by or against the company (including claims by or against any of its branches in India) ; (c) any application made under Section 391 by or in respect of the company ; (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960. (3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court. (4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court. 456. Custody of company's property.–(2) All the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order of the winding up of the company, 529. (1) Application of insolvency rules in winding up of insolvent companies.–(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to- (a) debts provable ; (b) the valuation of annuities and future and contingent liabilities; and (c) the respective rights of secured and unsecured creditors ; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent : Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,– (a) the liquidator shall be entitled to represent the workmen and enforce such charge ; (b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of the workmen's dues ; and (c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of

the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A. (2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this Section : Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to (pay his portion of the expenses) incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realisation by the secured creditor. Explanation.–For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security. 529A. Overriding preferential payments.-(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company-(a) workmen's dues ; and (b) debts due to secured creditors to the extent such debts rank under Clause (c) of the proviso to Sub-section (1) of Section 529 pari passu with such dues ; shall be paid in priority to all other debts. (2) The debts payable under Clause (a) and Clause (b) of Sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions. 537. Avoidance of certain attachments, executions, etc., in winding up by or subject to supervision of court.–(1) Where any company is being wound up by or subject to the supervision of the court-(a) any attachment, distress or execution put in force, without leave of the court, against the estate or effects of the company, after the commencement of the winding up ; or (b) any sale held, without leave of the court, of any of the properties or effects of the company after such commencement ; shall be void. (2) Nothing in this Section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government." (b) Sections 20 and 32(1) of the SIC Act read as hereunder : "20. Winding-up of sick industrial company.–(I) 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 the 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 the 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 purposes 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 subsection (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)." "32. Effect of the Act on other laws–(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976), for the time being in force or in the memorandum or articles of association of an industrial company or in any other instrument having effect by virtue of any law other than this Act, (2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income-tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that Section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company." Now, let me examine the question that would fall for my consideration in this application. 6. No doubt, the decision of this court in the case of International Coach Builders Ltd. [1994] 81 Comp Cas 19 and the decision of the Gujarat High Court in the case of Gujarat State Financial Corporation (1996] 87 Comp Cas 658 rendered following the decision of this court in the case of International Coach Builders Ltd. [1994] 81 Comp Cas 19 relied upon by learned counsel for the applicant and the second respondent, support their contention that the secured creditor is entitled to stand outside the winding up proceedings and enforce his security and in that view of the mutter, even after the amendment of Sections 529(1), 529A of the Act, leave of the company court is not required to be obtained by the secured creditor to enforce his security and bring the assets mortgaged to sale to realise his security. The Gujarat High Court and this court, in the decisions referred to above, have taken the view that the right of the secured creditor to deal with the security and realise the same without the intervention of the court, remains unaffected notwithstanding the vesting of property coming into the custody of the court, on the principle that the right of the secured creditor does not come to the custody of the court. In the said decisions, it has been pointed out that a mortgage creates in favour of a mortgagee an interest in the mortgaged property and to the extent of the charge of mortgage, the property mortgaged does not come to the custody of the court. It is further pointed out in the case of Gujarat State Financial Corporation [1996] 87 Comp Cas 658 that by the amendment to the proviso to Section 529 of the Act and insertion of the Explanation thereto in 1985, the only change which has been made, is that the secured creditor too is liable to pay only the proportionate expenses of the preservation taking into consideration the pari

passu charge in favour of the workmen's dues, but the option is still left to the secured creditor to realise the security without proving his debt in the winding up proceedings ; and where the secured creditor opts to realise his security without relinquishing his security and without proving his debt, the realisation is to be governed by the proviso to Section 529(1) and the workmen get from such realisation only that much proportion for which they rank pari passu qua the realisation of the security. The court further pointed out that even after the Companies (Amendment) Act, the principle enunciated in Ranganathan's case [1955] 25 Comp Cas 344, still applies to the secured creditor, who, instead of relinquishing his security and providing his debts, opts to realise the security without intervention of the court. Though the decisions, referred to above, as pointed out by me, support the case of the applicant and the second respondent, in the light of the Division Bench decision of this court in the case of Karnataka State Industrial Investment and Development Corporation [1998] 94 Comp Cas 1 which has considered the earlier decision of this court in the case of International Coach Builders Ltd. [1994] 81 Comp Cas 19 and also the decision of the Supreme Court in the case of Ranganathan [1955] 25 Comp Cas 344 , and has taken the view, fairly in identical circumstances, that the sale of the assets of the company, which was the subject matter of dispute in the said case without the leave of the court, was not valid and directed for resale of the assets of the company subject to the conditions imposed in the said order, I am unable to accede to the submissions made by Sri Narayana Rao and Ashok Hinchigeri. In the case of Karnataka State Industrial Investment and Development Corporation [1998] 94 Comp Cas 1, this court has followed the decisions of the Bombay High Court in the case of Maharashtra State Financial Corporation v. Official Liquidator [1995] 82 Comp Cas 342, wherein the Bombay High Court has considered the principle laid down by the Supreme Court in the case of Ranganathan [1955] 25 Comp Cas 344 and after elaborately discussing the effect of the proviso to section 529(1) and Section 529A, which was inserted into the Act by reason of the Companies (Amendment) Act, 1985, has taken the view that though Sections 529 and 529A, as amended, do not take away the rights of the secured creditor, since a pari passu charge is created in favour of the dues of the workmen on the rights of the secured creditor, the mortgagee or the secured creditor is required to join the pari passu charge-holder in the sale and he cannot sell the property ignoring the pari passu charge-holder and, therefore, the secured creditor as well as the official liquidator as the representatives of the workmen, must join in the sale. It is useful to extract the relevant portion of the said judgment of the Bombay High Court, which reads as hereunder (page 349 of 82 Comp Cas) : "The workmen's dues and the debt due to a secured creditor to the extent such a debt could not be realised by such a secured creditor because of the pari passu charge in favour of the workmen, or the workmen's portion in his security which he has lost because of the proviso to Section 529, will rank pari passu with workmen's dues under Section 529A. In other words, the extent of his claim which a secured creditor could not realise out of his security because of the rights created in favour of the workmen because of their pari passu charge on the security, would get an overriding preference for payment in winding up

along with workmen's dues. Therefore, because of the proviso to Section 529, the secured creditor is not the only mortgagee entitled to sell the security. He has a co-mortgagee (in the form of workmen) with an equivalent charge 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-holder ; and (2) as an officer of the court in 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 mortgage security by the secured creditor. 7. What are the rights of a pari passu charge-holder ? Can a mortgagee exercise his power of sale without the consent of a pari passu charge holder ? 8. The meaning of the word 'pari passu' is defined in Jowitt's Dictionary of English Law, Volume II, 1959 Edition, page 1294 as ; 'With equal step, equally, without preference'. The term is similarly defined in Black's Law Dictionary, Sixth Edition, page 1115 as, 'By an equal progress . . . used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other'. Prem's Judicial Dictionary, Volume III, 1964 Edition, page 1217 also defines pari passu as :"With equal steps, that is to say, proceeding side by side at the same pace". Therefore, the rights of an official liquidator as representing the workmen rank equally with the rights of secured creditors. 9. In the case of co-mortgagees, the courts have held that one co-mortgagee cannot sell or institute any proceeding for the sale of the mortgaged property without joining the other co-mortgagees, if the other co-mortgagees are not willing to join as plaintiffs they should be joined as defendants. This is because the mortgaged security is one and it must be realised as a whole by a common sale, thus, in the case of Mohammed Ismail Maracair v. Doraisami Mudaliar, AIR 1958 Mad 621, the court considered the case of co-mortgagees and held as a proposition of law that a mortgage is one and indivisible in regard to the amount and security. The court said that no suit can, therefore, be filed to enforce a mortgage which entails the disintegration of either the amount or the security. 10. That, therefore, normally all the mortgagees should join. But if some of them refuse to join, they should be included as defendants. Such mortgagees-defendants are not pro forma parties but are necessary parties in that the mortgage right vests in them along with the plaintiff-mortgagees, 11. The Privy Council in the case of Sunitibala Debi v. Dhara Sundari Debi, AIR 1919 PC 24, said in the case of two mortgagees holding as tenants-in-common that the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree. It is, therefore, necessary that when a sale of a mortgaged property takes place, both the charge-holders should join in the sale. 12. 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-mortgagee, 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 realising 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 a sale takes place, it is for the simultaneous recovery of claims of all pari passu charge-holders." 13. It was further observed in paragraph 23 thus (page 355) : "Also, the statutory right which is given to financial corporations under Section 29 to sell the property has to be exercised consistently with the rights of a pari passu charge-holder in those 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". 14. Again, while referring to the contention that in view of the provisions contained in Section 46B of the SFC Act, the provisions of Section 29 of the Act would prevail the Bombay High Court observed thus (page 356 of 82 Comp Cas) : "We, however, do not see any inconsistency between the provisions of Section 29 of the State Financial Corporations 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." 15. As stated above, the principle extracted above, laid down by the Bombay High Court has been approved by the Division Bench of this court. Further, this court, keeping in view that an appeal against the earlier decision of this court in the case of International Coach Builders Ltd. v. Karnataka State Financial Corporation [1994] 81 Comp Cas 19, was admitted; and the Supreme Court, while granting special leave to appeal, has directed the secured creditor to act jointly with the official liquidator, under the supervision and in accordance with the directions of the company judge for effecting the sale, distinguished the decision of this court in the case of International Coach Builders Ltd. v. Karnataka State Financial Corporation [1994] 81 Comp Cas 19 and followed the decision of the Bombay High Court in Maharashtra State Financial Corporation v. Official Liquidator [1995] 82 Comp Cas 342, It is relevant to extract paragraphs 21 and 22 of the said judgment, which, in my view, is a direct answer to the contentions advanced by Sri Narayana Rao and Ashok Hinchigeri. The said paragraphs read as hereunder (pages 13 to 15 of 94 Comp Cas) : "Having due regard to the fact that an appeal against the decision of the Division Bench of this High Court in International Coach Builders Ltd. v. Karnataka State Financial Corporation [1994] 81 Corp Cas 19 is admitted and the Supreme Court has given certain directions while so granting special

leave to appeal, directing the secured creditor to act jointly with the official liquidator under the supervision and in accordance with the directions of the learned company judge for effecting the sale, we are of the opinion that the other decisions referred to above and relied upon by Sri Gopal Hegde, learned counsel for the KSIIDC, the appellant, need to be distinguished firstly on the ground that the Supreme Court in Ranganathan's case [1955] 25 Comp Cas 344 did not have an occasion to consider the impact of Sections 529 and 529A of the Act on Section 537 of the Act, and, secondly, on the ground that the rest of the decisions were based mainly on the said decision of the Supreme Court in Ranganathan's case [1955] 25 Comp Cas 344. It is only Mrs. Justice Sujata Manohar of the Bombay High Court, as she then was, speaking for the Bench in Maharashtra State Financial Corporation v. Official Liquidator [1995] 82 Comp Cas 342 who has dealt with every aspect of the matter concerning the sale of assets of a company in winding up when the secured creditor prefers to stand outside the winding up and enforces his security in exercise of the power under Section 29 of the SFC Act. We fully agree with the exposition of law as made by Mrs. Justice Sujata Manohar in this regard. It is no doubt true that on July 29, 1994, the appellant-KSIIDC had taken over possession of the assets of the company under liquidation, acting under Section 29 of the SFC Act. It is also true that no provisional liquidator had been appointed under Section 450 of the Act. Nevertheless, by the time the appellant completed the sale transaction in favour of respondent No. 7 on September 30, 1995, the winding up order had already been passed on September 8, 1995, and the official liquidator had already come into the picture as liquidator of the company under Section 449 of the Act, There were workmen's dues to the tune of Rs. 80 lakhs. Because of the proviso to Sub-section (1) of Section 529 of the Act, the KSIIDC is not the only secured creditor entitled to sell the security by invoking Section 29 of the SFC Act, the KSIIDC has to contend with the pari passu charge in favour of the workmen's dues, the workmen being represented by the official liquidator. The official liquidator would, thus, be an interested party in the sale of security. The proviso to Sub-section (1) of Section 529 as also Section 529A of the Act, having created a pari passu charge in favour of the workmen, the same would affect the right of the appellant, the KSIIDC to sell the security directly by itself by invoking Section 29 of the SFC Act. The appellant is required to join the official liquidator in the sale, and the property cannot be sold ignoring the pari passu charge-holder. Similarly, though the official liquidator, by virtue of Section 457(1) of the Act has the power to sell the property of the company in winding up, and as a pari passu charge-holder under Section 529 of the Act, he has the power to sell the said property with the sanction of the court to realise the charge, he cannot sell the property all by himself ignoring the secured creditors like the KSIIDC. Thus, both the secured creditor, namely, the KSIIDC, as also the official liquidator as the representative of the workmen, are to exercise the power to sell under the directions of the court. The aspect of repugnancy between the provisions of two Acts, i.e., the SFC Act and the Companies Act, and, in that situation, the provisions of the SFC Act having overriding effect over the provisions of the Act, by virtue of Section 46B of the SFC Act, is not

to be seriously considered because there is no inconsistency between the provisions of the said two Acts. Section 29 of the SFC Act merely confers certain powers on the secured creditor. It does not deal with a situation where there is a pari passu charge-holder, The power to sell which has been given to the KSIIDC under Section 29 of the SFC Act has to be exercised consistently with the right of the 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 the pari passu charge-holder in whose favour a 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 the 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. The learned company judge was, therefore, right in declining to approve the sale in favour of respondent No. 7 and giving fresh directions for resale of the property by the appellant, KSIIDC by standing outside the winding up in association with the official liquidator right from the time of settling the terms of advertisement, and making the said resale subject to confirmation by the court." (emphasis supplied) 16. This court, in paragraph 16 of the judgment, has also considered the decision of the Supreme Court in the case of Ranganathan [1955] 25 Comp Cas 344 and has observed as follows (pages 8 and 9 of 94 Comp Cas) : "Sri Gopal Hegde relied upon a decision of the Supreme Court in M. K. Ranganathan v. Government of Madras [1955] 25 Comp Cas 344 reported in this regard. The Supreme Court was dealing with the provisions of Section 232 of the Indian Companies Act, 1913, analogous to the provisions of Section 537 of the Act. It was held therein that the secured creditor was outside the winding up and could realise his security without leave of the court. This decision of the Supreme Court certainly supports the case of the appellant, KSIIDC. But the said decision had no provision corresponding to Sections 529 and 529A of the Act. Consideration of Section 537 of the Act (section 232 of the Indian Companies Act, 1913) in the light of Sections 529 and 529A, therefore, did not arise before the Supreme Court in the said decision." (emphasis supplied) 17. As can be seen from the discussion made by this court in the case of Karnataka State Industrial Investment and Development Corporation Limited [1998] 94 Comp Cas 1 following the decision of the Bombay High Court in the case of Maharashtra State Financial Corporation v. Official Liquidator [1995] 82 Comp Cas 342, this court has taken the view that in view of the amendment made to Section 529(1) and Section 529A by means of the Companies (Amendment) Act, 1985, since the workmen are given a pari passu right in respect of the security of the secured creditor, leave of the company court is necessary to sell the assets of the company even at the instance of the secured creditor of the company. I am in respectful agreement with the views expressed by this court in the case of Karnataka State. Industrial Investment and Development Corporation [1998] 94 Comp Cas 1 rendered following the decision of the Bombay High Court in the case of Maharashtra State. Financial

Corporation v. Official Liquidator [1995] 82 Comp Cas 342. I am also unable to accept the submission of Sri Rao that in view of the decision of the Supreme Court in the case of Industrial Credit and Investment Corporation v. Srinivas Agencies [1996] 86 Comp Cas 255 , the Division Bench decision of this court in the case of Karnataka State Industrial Investment and Development Corporation [1998] 94 Comp Cas 1 does not lay down the correct law. The Supreme Court in the case of Industrial Credit and Investment Corporation v. Srinivas Agencies [1996] 86 Comp Cas 255 relied upon by Sri Rao has only reiterated the principle laid down by it in Ranganathan [1955] 25 Comp Cas 344 which was considered by this court and also by the Bombay High Court in the cases referred to by me earlier (see : para. 2 of the judgment). Therefore, I am of the view that the sale of the assets of the company made by the applicant in favour of the second respondent without the leave of the company court is void. 18. At this stage, it is necessary to consider the contention of Sri Narayana Rao and Ashok Hinchigcri that since the sale has been effected in view of the provisions contained in Sub-section (2) of Section 20 of the SIC Act, the decision of this court in the case of Karnataka State Industrial Investment and Development Corporation [1998] 94 Comp Cas 1, which was rendered only considering the provisions of the SFC Act, has no bearing as the provisions of the SFC Act, have overriding effect over the provisions of the Act, which is a general law. It is true that, as laid down by the Supreme Court in the case of Damji Valji Shah v. Life Insurance Corporation of India [1965] 35 Comp Cas 755, the provisions of the special Act will override the provisions of the general Act in the event of conflict between the two enactments. Under these circumstances, the question that would arise for consideration is as to whether there is any conflict between the provisions contained in SIC Act, which is a special enactment, and the provisions of the Act ; and, in that event, the provisions of the SIC Act would prevail over the provisions of the Act as contended by Sri Narayana Rao and Sri Ashok Hinchigeri. 19. I am of the view that there is no merit in the above submission of learned counsel. Sub-section (1) of Section 20 of the SIC Act provides for enquiry being conducted by the BIFR and it confers power on the BIFR to recommend to the High Court for winding up of the company under certain circumstances set out in the said provision. Sub-section (2) of Section 20 of the SIC Act confers power on the High Court to wind up the sick unit on the basis of the recommendation made by the BIFR. Sub-section (3) of Section 20 confers power on the High Court to appoint a liquidator for the purpose of winding up of such a company. However, subsection (4) of Section 20 of the SIC Act was relied upon by Sri Rao and Sri Hinchigeri in support of their plea that the BIFR has absolute right to get the assets of the company sold and, therefore, since the sale in question of the company was caused to be effected by the BIFR, leave of the company court was not required to be secured. No doubt, Sub-section (4) of Section 20 of the SIC Act confers power on the BIFR to get the assets of the sick industrial company to be sold in such manner as it deems fit notwithstanding anything contained in Sub-section (2) or Sub-section (3) of Section 20 of the Act in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with

Section 529A and other provisions of the Act. It is relevant to point out that Sub-section (4) of Section 20 of the SIC Act provides for non-obstante clause with regard to what is contained in Sub-section (2) and (3) of Section 20 of the Act, but it does not state that notwithstanding what is contained in the Act or any other law, the provisions of subsection (4) of Section 20 of the SIC Act shall prevail. However, Section 32 of the SIC Act, on which strong reliance has been placed, provides that the provisions of the SIC Act and of any rules or schemes made under the SIC Act shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973, and the Urban Land (Ceiling and Regulation) Act, 1976, for the time being in force or in the memorandum or articles of association of an industrial company or in any other instrument having effect by virtue of any law other than the SIC Act. Therefore, the question that is required to be considered is whether there is any conflict between the provisions contained in Sub-section (4) of Section 20 of the Act, which gives power to the BIFR to get the assets of the sick industrial unit sold and the provisions contained in the Act, in the matter of the sale of the assets of a company, in respect of which proceedings for winding up have been commenced. It is well settled that if the provisions contained in the two enactments can be read harmoniously and if such harmonious construction would subserve the purpose or objects contained in both the enactments, the court should proceed to harmoniously construct and interpret the provisions contained in both the enactments. While the secured creditor has a right to stand outside the winding up proceedings and get his security enforced ; and when the proceedings are pending before the BIFR, the BIFR also has undoubted rights in view of Sub-section (4) of Section 20 of the SIC Act notwithstanding what is provided in Sub-section (2) of Section 20 of the SIC Act to get the assets of such company sold, the question is whether it is not necessary in view of the pendency of the proceedings before the company court, to secure leave of the court for such a sale ? The power to grant permission for sale of the assets of the court in respect of a company, in respect of which winding up proceedings have commenced, is given to the court, Under these circumstances, there cannot be any doubt that the court will take into consideration not only the interest of the secured creditor, who is entitled to enforce his security by standing outside the winding up proceedings, but also the interest of the workmen, who are also given substantial rights for which a charge is created on the security of the secured creditor and also various other creditors of the company. If a sale is to be caused by the BIFR in exercise of the power conferred under Sub-section (4) of Section 20 of the SIC Act, the BIFR may be primarily guided by the interest of the secured creditor only. Under these circumstances, while I am of the view that in view of Sub-section (4) of Section 20 of the Act, the BIFR has the undoubted right to get the assets of a sick industrial unit sold either during pendency of the proceedings before it or notwithstanding the power conferred on the court to appoint a liquidator, etc., leave of the company court would be necessary for disposal of the assets of a company in respect of which winding up proceedings have commenced. If, without the leave of the company court, the assets of the company are caused

to be sold even by the BIFR, in my view, such a sale would be void. I do not find any conflict between the provisions contained in the Act and the provisions contained in Sub-section (4) of Section 20 of the SIC Act. As stated by me earlier, while power is given to the BIFR to get the assets of the company caused to be sold by it, what is required is that leave of the court has to be secured for such sale, if winding up of the company has already commenced. If such a construction is placed to the provisions contained in the Act and the SIC Act, it would protect the interest of everybody, who is interested in the affairs of the company and who has a claim against the company. Otherwise, if the assets of the company are sold for a price much less than the market value at the instance of the secured creditor through the exercise of the power by the BIFR, it would seriously affect the interest of the workmen, who are given a pari passu right and for whose benefit, a charge is also created on the security of the secured creditor. In fact, the observation of the Supreme Court in the case of Industrial Credit and Investment Corporation v. Srinivas Agencies [1996] 86 Comp Cas 255 made at paragraph 6 supports my view. It is useful to refer to the said observation, which reads as hereunder (page 260) : "The aforesaid questions arise because a secured creditor who has, initiated a suit or proceeding in a civil court is interested in realisation of his debt only, whereas the company court looks after the interest of all the creditors ; so too, the workmen's dues, which rank pari passu with debts due to secured creditors. This is brought home not only by Section 529A, which was inserted by the Companies (Amendment) Act, 1985, but also by the proviso to Sub-section (1) of Section 529 inserted by the same Amendment Act. The winding-up court does these acts through a liquidator, who has been given wide powers by Section 457 of the Act. As against this, a receiver appointed by a civil court on being approached by a secured creditor would basically look after the interest of that creditor, whose interest may in many cases be in conflict with that of the liquidator, as was acknowledged in Karamelli and Barnett Ltd. [1917] 1 Ch 203. We feel no difficulty in stating that in case of such conflict, the interest of the liquidator has to receive precedence over that of the receiver inasmuch as the former looks after the interest of a large segment of creditors along with that of workmen, whereas the latter confines his concern to the interest of the secured creditor on whose approach the receiver has been appointed . . . ." (emphasis supplied) 20. It is, therefore, not possible to take a view that merely because the BIFR consists of highly responsible and reputed members and the secured creditor also would be interested in securing a high price, always a fair price will be secured in respect of the assets of the company, caused to be sold by the BIFR, as contended by learned counsel for the Corportaion and respondent No. 2. 21. Therefore, in the light of the above discussion, 1 am of the view that there is no conflict between the provisions contained in Sub-section (4) of Section 20 of the SIC Act and the provisions contained in the Act. In fact, the view taken by the Division Bench of this court in the case of Karnataka State Industrial Investment and Development Corporation Limited [1998] 04 Comp Cas 1 following the decision of the Bombay High Court in the case of Maharashtra State Financial Corporation v. Official Liquidator [1995] 82 Comp Cas 342 ; , while considering Section

529 of the Act and Sections 29 and 46B of the SFC Act, which confer right on the secured creditor to enforce his security, in my view, would support the view I have taken while interpreting the provisions contained in Sub-section (4) of Section 20 of the SIC Act and the provisions of the Act, referred to above. At paragraph 20 of the decision, this court has observed as follows (page 13 of 94 Comp Cas) : "Referring to the contention that because of Section 46B of the SFC Act, the provisions of Section 29 of the said Act would prevail over the provisions of Section 529 of the Companies Act, it was observed thus (page 356) : 'We, however, do not see any inconsistency between the provisions of Section 29 of the State Financial Corporations 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 pan 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 pan 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, his power to consent is subject to the sanction of the court'." 22. I am also unable to accept the submission of Sri Narayana Rao and Sri Ashok Hinchigeri that since the sale of the assets of the company was made prior to the date of the winding up order, leave of the company court was not required to be obtained. It is necessary to point out that Sub-section (2) of Section 441 of the Act, in unmistakable terms, states that in the circumstances other than those set out in Sub-section (1) of Section 441, the winding up of the company by the court shall be deemed to commence at the time of presentation of the petition for winding up. The said provision reads as follows : "441. Commencement of winding up by court.–(2) In any other case, the winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up." Section 537(1)(b) of the Act provides that when a company is being wound up by or subject to the supervision of the court, any sale held, without leave of the court, of any of the properties or effects of the company after such commencement, is void. Therefore, a combined reading of Sub-section (2) of Section 441 and Clause (b) of Sub-section (1) of Section 537 of the Act, makes it clear that even in cases where winding up petitions have been presented, if the sale of the assets of the company is made, such sale would be void even though there is no order of winding up. 23. In so far as the contention advanced on behalf of the applicant and the second respondent that every effort was made by the company and its director to get the sale of the assets of the company nullified by repeatedly filing writ petitions before this court and this court having rejected the writ petitions, it must be held that the sale of the assets of the company has been properly done and, therefore, the applicant is entitled to deliver the assets of the company to the second respondent pursuant to the sale held, is concerned, it is no doubt true that every effort was made by the company and its director to nullify the sale by repeatedly approaching this court, as referred to by me earlier. If the conduct of the company and its director is to be examined, certainly, they will not be entitled for any indulgence

from the hands of this court. But, what this court is required to consider in this case is the validity of the sale held in the light of the provisions contained in the Act, referred to by me earlier. Since, I have taken the view that the sale held was invalid, merely because the company and its director have made every effort to nullify the sale by repeatedly invoking the jurisdiction of this court under Articles 226 and 227 of the Constitution of India, cannot be a ground to approve the sale, which is invalid in law. Therefore, I am unable to accept the submission of Sri Rao and Sri Hinchigeri that since the writ petitions filed by the company and its director having been rejected, the sale of the assets of the company must be held to be valid. It is also true as pointed by Sri Rao and Sri Hinchigeri that in a distress sale, the properties sold generally do not get the fair market price. The decision of the Supreme Court in the case of Kayjay Industries (P.) Ltd. v. Asnew Drums (P.) Ltd., , relied upon by Sri Rao, no doubt, supports their submission. But, when the validity of the sale is examined in the light of the provisions contained in the Act, in my view, the principle laid down by the Supreme Court in the case of Kayjay Industries (P.) Ltd. v. Asnew Drums (P.) Ltd., , referred to by Sri Rao, that in a distress sale, a fair market price is not secured, and therefore, the sale cannot be set aside, cannot be applied. The said decision was rendered while considering whether there was any material irregularity or illegality in the sale conducted. 24. In the light of the discussion made above, I am of the view that this application is liable to be rejected and the order dated October 31, 1996, directing the official liquidator to forthwith take charge of all the properties and effects of the first respondent-company, does not call for modification. 25. However, it is necessary to point out that since the second respondent has complied with the terms and conditions of sale and in all, deposited a sum of Rs. 2,80,00,000 (rupees two crores and eighty lakhs) on various dates and the said money has been in deposit with the Corporation, when fresh steps are taken to sell the assets of the company, which are mortgaged/hypothecated to the Corporation, jointly by the Corporation and the official liquidator, the minimum sale price/bid amount that has to be fixed must be at least Rs. 3,00,000 (rupees three lakhs) more than Rs. 2,80,00,000 (rupees two crores and eighty lakhs), for which the assets of the company were sold to the second respondent, plus the interest that would accrue on the said amount taking into consideration the various dates of deposit made by the second respondent at the rate which is being charged by the Corporation. Further, if no one offers to purchase the assets of the company exceeding the minimum bid amount, referred to above, the assets of the company, which are already sold to the second respondent, shall be confirmed in favour of the second respondent at Rs. 2,80,00,000 (rupees two crores and eighty lakhs) only. The process of sale shall be completed within two months from today, after fully complying with the procedure prescribed. It is also necessary to place on record the submission made by Sri Mailya on behalf of the third respondent Sri Raj Kotak that he will bear the expenses for conducting fresh sale, to be incurred by the official liquidator and the Corporation. The said statement made by Sri Mailya is made binding on the third respondent. The official liquidator shall secure appropriate directions from this court for sale of the assets of the com-

pany immediately. 26. Subject to the observations made above, the application is rejected. 27. However, no order is made as to costs.