M/S Ngef Ltd vs M/S Chandra Developers Pvt. Ltd. & Anr on 29 September, 2005

Equivalent citations: 2005 AIR - KANT. H. C. R. 2679, 2005 (8) SCC 219, 2005 CLC 1602, (2005) 4 MAD LJ 168, (2005) 68 CORLA 324, (2005) 7 SUPREME 409, (2005) 6 COMLJ 203, (2005) 7 SCALE 715, (2005) 127 COMCAS 822, (2006) 1 SCJ 65, (2005) 4 BANKCAS 406

Author: S.B. Sinha

Bench: S.B. Sinha, C.K. Thakker

CASE NO.:
Appeal (civil) 5199-5201 of 2004

PETITIONER:
M/s NGEF Ltd.

RESPONDENT:
M/s Chandra Developers Pvt. Ltd. & Anr.

DATE OF JUDGMENT: 29/09/2005

BENCH:
S.B. Sinha & C.K. Thakker

JUDGMENT:

JUDGMENT WITH CIVIL APPEAL NO.5202 TO 5205 OF 2004 S.B. SINHA, J :

These appeals are directed against a common judgment and order dated 5.1.2004 passed by a Division Bench of the Karnataka High Court in O.S.A. Nos.67, 68 and 70 of 2003 whereby and whereunder a judgment and order dated 8.10.2003 passed by a learned Company Judge in C.A. No. 771 of 2003 was affirmed.

Background fact :

NGEF Ltd., (for short, 'the Company') herein, was a joint venture of the Government of Karnataka, holding 90.18% shares and EHG Electro- holding GMBH holding 9.72% shares therein. The Company became sick, whereupon a reference was made to the Board for Industrial and Financial Reconstruction (for short, 'BIFR') in terms of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA'). It is not in dispute that virtually all its assets had been placed either under mortgage and/or offered as collateral security to various financial institutions amongst which the State Bank of Mysore was the lead bank.

> It is furthermore not in dispute that from time to time the Company with the permission of BIFR and its secured creditors has been selling some of its surplus lands, inter alia, for the purpose of paying wages to the workers and refund of loans to the financial institutions etc. It had sold 29.225 acres of land to the Nuclear Power Corporation for a sum of Rs.63.65 crores; 1.65 acres of land to CDAC for about Rs.4.29 cores and 0.625 acres of land to Indian Oil Corporation for Rs.1.63 crores. All the vendees were public sector undertakings.

It is also not in dispute that the State of Karnataka took a decision to make disinvestment of its shares in the said Company pursuant whereto or in furtherance whereof global tenders were invited by it in terms of an advertisement dated 15.9.2001. The First Respondent herein, Chandra Developers Pvt. Ltd. (for short, 'Chandra Developers') submitted its bid for purchase of 40.45 acres of land offering the price of Rs.125/- per sq. ft. which was later enhanced to Rs.278 per sq. ft. Allegedly, valuation of lands had been done by Tata Economic Consultancy Services and Ernst & Young Pvt. Ltd. The offer of the First Respondent was said to have been accepted by the Board of Directors in its meeting dated 25.2.2002. The Company, it appears, has also submitted an application to BIFR as regard progress made by it in its attempt to privatize the Company, and praying for a direction to the financial institutions to release their charge over the assets of the Company so as to enable it to sell its surplus lands. BIFR, however, upon considering the matter in some details by its order dated 19.4.2002 opined that the Company cannot be revived.

Before BIFR some of the parties pleaded that the Company should not be wound up but BIFR decided to recommend winding up of the company and sent the same to the High Court. As regard request of the Company for sale of its assets, an observation was made by BIFR in its order dated 24.08.2002 that the Company would have to seek an appropriate direction from the concerned High Court.

Proceedings before the High Court :

> Upon receipt of the said recommendations, the High Court of Karnataka registered the same as Company Petition No. 154 of 2002. The Respondent herein filed an application before the learned Company Judge of the High Court purported to be under Rules 6 & 9 of the Companies (Court) Rules praying for a direction upon the Company to execute a deed of sale in its favour in respect of the said 40.45 acres of land relying on or on the basis of the said purported resolution dated 25.02.2002, alleging that the same constituted a concluded contract between the parties. Objections to the said application were filed by the Appellants herein.
>
> By reason of an order dated 8.10.2003, the said application was allowed on the premise that the agreement between the Chandra Developers and the Company constituted a concluded contract in relation to sale of 40.45 acres of land. A Review Application was filed by the Appellant herein which came to be dismissed. Three appeals were preferred from the said order viz. by the EHG, State Bank of Mysore and the Company before the Division Bench of the High Court which came to be

dismissed by reason the impugned Judgment.

However, the learned Company Judge appears to have dismissed an identical application filed by M/s Salapuria Housing (P) Ltd. being C.A. No.1589 of 2003, which had been relied upon by the First Respondent herein in its application, holding that the Company Court had no such jurisdiction.

Submissions :

Mr. T.R. Andhiyarujina, the learned Senior Counsel appearing on behalf of the Appellants, in Civil Appeal Nos. 5199-5201 of 2004, would, inter alia, contend that the learned Company Judge and the Division Bench of the High Court misdirected themselves in passing the impugned judgment and order insofar as they failed to take into consideration that BIFR retains the control over the assets of the company in terms of sub-section (4) of Section 20 of SICA and, thus, it was BIFR alone which could issue a direction as regard sanction of sale of assets of the company in respect whereof the learned Company Judge had no jurisdiction. In any event, the learned Company Judge had no jurisdiction to issue any direction to the Company to execute a deed of sale which amounted to grant of a decree for specific performance of contract. In any view of the matter, the finding of the Company Judge to the effect that there existed a concluded contract between the First Respondent and the Company is wholly erroneous.

Mr. Sundara Varadan, the learned Senior Counsel appearing for the State Bank of Mysore appearing in Civil Appeal Nos.5203-05 of 2004, supplemented the submissions of Mr. Andhyarujina, contending that the learned Company Judge had a duty, in larger interest of the creditors, to obtain the best price for the lands sold. Our attention, in this connection, has been drawn to the fact that the total dues of the secured creditor banks and financial institutions as on 26.02.2003 was Rs.5825.31 lakhs towards fund based facilities and Rs.522.93 lakhs towards non-fund based facilities and, thus, the consideration amount was not sufficient to meet the liabilities of the Company. The contentions raised by the State Bank of Mysore, the learned counsel would submit, as contained in various paragraphs of the objections had not been taken into consideration either by the Company Judge or by the Division Bench of the High Court. The learned counsel would urge that assuming that such contentions had not been raised during argument as was observed by the Division Bench, it was the duty of the Company Judge to take into consideration those aspects of the matter. It was urged that the considerations which arise before a Company Judge for confirmation of sale are relevant factors for the purpose of directing execution of a deed of sale even in a private transaction.

The learned counsel would argue that had a suit for specific performance of contract been filed by a vendee against the Company, the latter as also the Government of Karnataka could have raised several contentions including one that the court should not in the facts and circumstances of the case exercise its discretionary jurisdiction in

> favour of the First Respondent herein. It was argued that having regard to the statutory scheme and in particular the provisions contained in Sections 443, 446 and 447 read with Section 529-A of the Companies Act, 1956 the Company Judge cannot be held to have any inherent power to direct the Company to execute a deed of sale; and more so whence a Provisional Liquidator had not been appointed. Such a direction could only be issued to the Official Liquidator.

The First Respondent herein was represented by Mr. Dushyant A. Dave, Mr. Udaya Holla and Mr. K.K. Venugopal. Mr. Dave would submit that the power of the Company Judge as also BIFR being concurrent, the latter could ask the company to approach the High Court for a direction as regard sale of its surplus lands. The learned counsel would contend that in view of the fact that global tenders had been invited and the same having been accepted by the learned Company Judge, this Court may not exercise its jurisdiction under Article 136 of the Constitution of India.

Mr. Dave would argue that the statutory scheme envisages various stages of winding up as would appear from Section 456(1), sub-sections (1) and (3) of Section 150, Sections 457, 446(2) and Section 536(2) of the Companies Act, in terms whereof the learned Company Judge had the requisite jurisdiction to direct sale of lands in a case of this nature. Relying on or on the basis of a decision of this Court in M/s Kayjay Industries (P) Ltd. vs. M/s Asnew Drums (P) Ltd. and Others [(1974) 2 SCC 213], the learned counsel would contend that the discretion exercised by the learned Company Judge cannot be said to be arbitrary meriting interference by this Court.

Mr. Holla, has drawn our attention to a letter of the Government of Karnataka dated 30.07.2002, and submitted on the basis thereof that the Government of Karnataka had agreed to grant approval to such sale by mutual agreement by asking the Company to approach the High Court for the said purpose. Our attention has specifically been drawn to the orders passed by BIFR, the learned Company Judge as also the Division Bench of the High Court to show that apart from advancing an argument that application for according sanction for sale of land could only have been filed before BIFR, no other contention had been raised by the Appellants herein.

Mr. Holla would submit that even Article 100 of the Memorandum of Association of the Company to which a reference has been made by this Court while issuing notice on 8.3.2004 is not attracted as in terms thereof approval of the Government was not necessary.

It has, however, been contended that a new Memorandum of Articles of Association has come into being; clause (6) of Article 100 whereof is as under :

> "(6) To let, mortgage, charge, sell or otherwise dispose of, subject to the provisions of section 293 of the Act, any property of the Company either absolutely or conditionally and in such manner and upon such terms and conditions in all respects as they think fit and to accept payment or satisfaction for the same in cash or otherwise, as they think fit."

Thus, in terms of the said provision, the approval of the Government of Karnataka was not necessary.

It was submitted that the court has inherent power to direct sale of assets of a company during the pendency of winding up proceedings even before the winding up order is passed in terms of section 536(2) of the Companies Act.

It is further submitted that sanctity of an auction sale should be maintained and in the event auctions are set aside and re-auctions are ordered on less satisfactory material, loss to exchequer would be far greater.

Mr. K.K. Venugopal, the learned Senior Counsel, would submit that having regard to sub-section (2) of Section 536 of the Companies Act, the High Court has the jurisdiction to permit sale of assets of the company even before passing of the winding up order, in relation whereto Section 20(4) of SICA will have no application.

It was urged that the provisions of both the statutes must be read together and so read, it would be manifest that when a winding up proceeding is initiated under the recommendations of BIFR in terms of Section 20(1), the power of the Company Court to order approval of a disposition, prior to passing of winding up order, would not in any manner be affected by the provisions of SICA, in view of the provisions contained in sub-section (2) thereof whereby and whereunder the Company Court has been empowered to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956. As regard application of sub-section (4) of Section 20 of SICA, it was urged that thereby the right of BIFR is also preserved for issuing any necessary direction as regard sale of the assets of the company and by reason thereof the jurisdiction of the Company Court has not been taken away. The learned counsel would contend that the provisions of SICA did not intend to denude the Company Court of its power under Section 536(2) read with Rule 9 of the rules; once the recommendations for winding up by BIFR are made. On the other hand, Section 20(2) and Section 22-A of SICA acknowledge the powers of the Company Court and in that view of the matter there being no inconsistency between the Companies Act and SICA, Section 32 thereof will have no application.

As regard the requirement of the approval of the Government of Karnataka, it was urged that the Articles of Memorandum of Association of the Company cannot control and render ineffective the exercise of statutory power under the Companies Act and in that view of the matter as the High Court has approved sale in favour of the First Respondent after examining the documents, it is not open to the Government of Karnataka to act as an Appellate Authority thereover.

Relevant provisions of the Companies Act, 1956, Companies (Court) Rules, 1958 & SICA :

> The provisions relating to winding up by the courts occur in Chapter II of the Companies Act, 1956. Section 433 of the Act enumerates the circumstances in which company may be wound up by the court including inability on the part of the company to pay its debts. Section 441 of the Act specifies as to when the proceeding

for winding up of a company by the court shall commence at the time of the presentation of the petition for the winding up. In a case, however, where winding up proceedings are initiated in terms of recommendations made by BIFR or AAIFR, as the case may be, no such petition is required to be presented. Section 443 lays down the power of a court on hearing petition; clause (d) of Sub-section (1) whereof provides for a power to make an order for winding up of the company with or without costs or any other order that it thinks fit. Section 444 lays down the consequences of winding up order. In terms of Section 446 of the Act, in the event of passing of a winding up order or appointment of liquidator as provisional liquidator, no suit or legal proceeding would commence or if pending at the date of the winding up order, shall not be proceeded with against the company except by leave of the court and subject to such terms as the court may impose. Sub-section (2) of Section 446 provides for a non- obstante clause, in terms whereof the company court shall have jurisdiction to entertain or dispose of any suit or proceedings specified therein. Section 451 lays down general provisions as to liquidators. Section 457 specifies the power of the liquidator which is required to be exercised with the sanction of the court. Sub-section (2) of Section 536 reads as under:

"536. Avoidance of transfers, etc., after commencement of winding up.

xxx xxx xxx (2) In the case of a winding up by the Tribunal any deposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall unless the Tribunal otherwise orders, be void."

Rules 6, 9 & 99 of Companies (Court) Rules, 1959 read as under :

"6. Practice and procedure of the Court and provisions of the Code to apply.- Save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the code so far as applicable, shall apply to all proceedings under the Act and these Rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the court."

"9. Inherent powers of Court.- Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

"99. Advertisement of petition.-Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by Rule 24 of these Rules. The advertisement shall be in Form No.48."

Sub-sections (1), (2) and (4) of Section 20, Section 22A & Section 32(1) of SICA read as under :

"(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 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 would 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.

(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."

"22-A. Direction not to dispose of assets. The Board may, if it is opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing, direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets

(a) during the period of preparation or consideration of the scheme under section 18; and

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court."

"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 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 this Act.

Approval of State :

The First Respondent herein admittedly filed an application for direction to the Company to execute a deed of sale, inter alia, on the premise that a concluded contract had been entered into by and between it and the Company purporting to be relying upon or on the basis of the resolution dated 25.02.2002 of the Board of Directors of the Company. It is not in dispute that along with the said application while annexing the copy of the resolution, the following sentence had been omitted.

"MD stated that the Board decision for the above sale will be forwarded to the Government of Karnataka and seek their formal approval."

The First Respondent, as noticed hereinbefore, has relied upon a Government Order issued by the Government of Karnataka dated 30.07.2002, which reads as follows :

"The company shall wind up the loan amount sanctioned to it by the Government in full from the proceeds of sale of assets of NGEF Ltd; and It is, however, not in dispute that although the said Government Order was placed before BIFR, the same was not placed either before the Company Judge or before the Division Bench of the High Court. The First Respondent furthermore relies upon a letter filed in Civil Appeal Nos.5203- 05 of 2004, to show that the Government of Karnataka granted implied approval as the Company was asked to approach the High Court. It, however, stands admitted that the First Respondent herein, offered its bid pursuant to or in furtherance of an advertisement issued by the Government of Karnataka and not by the Company.

BIFR, indisputably by an order dated 02.08.2002 stated :

"17. Shri M. Gowda, DS, GOK submitted that GOK had decided to close the company subject to approval of BIFR and GO had been issued in this connection on 30.07.2002. The company has cleared all the dues of FIs under OTS. The working capital dues are secured by Govt., guarantee both for fund based and non-fund based dues. Shri Gowda requested that permission be accorded to the company to sell the remaining assets in a transparent manner and discharge the liabilities of the secured creditors, employees and other creditors within a reasonable time. On a query from the Bench, Shri Gowda clarified that the funds for VRS would be provided by the State Government.

18. Shri Govind Raj, MD of the company submitted that GOK had decided to close down the unit. The company had been assured adequate funds from the State Govt., for VRS. The company was having some problem in sorting out the outstanding issued with FIs, so much so that IFCI was demanding a sum of Rs.25,000/- for issuing NOC even though their dues have been fully paid. The company was not able to fulfill the condition of working capital bankers for converting their second charge on the assets of the company into first charge because of non-

> cooperation of FIs. Canara Bank Financial Services were also not issuing NOC. The company had sought permission to sell all the assets to generate funds to pay the workers dues, VRS dues, the dues of secured creditors and others. The Bench noted that the company would have to seek further directions in the matter from the concerned High Court".

BIFR evidently, thus, asked the Company to approach the High Court if an occasion arises for obtaining sanction for disposing of its surplus lands. The First Respondent herein was not a party before BIFR. Before the Company Judge, however, it is the First Respondent herein, who filed the said application and, as indicated hereinbefore, obtained an order from the Company Judge by suppression of material fact that the Managing Director of the Company, having regard to the aforementioned resolution dated 25.02.2002 stated that the approval of the Government of Karnataka would be sought for.

The Order issued by the Government of Karnataka on 30.07.2002 does not suggest either expressly or by necessary implication that it had granted its approval for the said sale. Whether such sanction was necessary is, however, another question which we shall advert to a little later.

We may at this juncture notice that arguments had been raised before the Division Bench of the High Court that the Government of Karnataka had not approved the said transaction which is itself a pointer to the fact that the Appellants herein never accepted that there had been a concluded contract.

It is also not correct to contend that the company will be acting as an appellate authority over the High Court, if its approval is sought for. The question should, in fact, be considered from a different angle. An application before the Company Judge, if at all, was maintainable only upon obtaining the approval of the Government of Karnataka and if such approval is granted, then only it would constitute a concluded contract.

It is accepted that the advertisement was issued by the State in the following terms :

> "While preference would be given for bids offering purchase of entire unit. GOK reserves the right to accept/reject any of the offers. A party can bid for one or more alternatives."

In terms of the said advertisement, thus, the State reserved unto itself the right to accept or reject the said offer. If the bid had been made pursuant to the said advertisement indisputably the State's approval was necessary. In any event the records were required to be placed before the State so as to enable it to apply its mind as to whether offer should be accepted or not.

The submission of Mr. Venugopal that in the event if it be held that the company's approval was necessary, the same would be contrary to the statutory power of the Company Court is, thus, misconceived.

It is also not correct to contend that the question as regard the concluded contract was not raised by the Appellants herein. In fact, the Company filed a Review Petition before the Company Judge on 30.10.2003 wherein it was clearly averred that such a submission was not made in view of the observations of the learned Company Judge during the course of hearing that the issue whether there existed concluded contract would not be determined and as such there existed an error on the face of its order dated 8.10.2003.

The very fact that original advertisement was issued by the Government of Karnataka and there existed such a clause in the Memorandum of Association of the Company is suggestive of the fact that the Board of Directors of the Company proceeded on the basis that such approval of the Government of Karnataka was imperative.

Jurisdiction of the Company Court :

> The provisions of SICA contain non-obstante clauses. It is a special statute. It is a complete code in itself. The jurisdiction of the Company Court in such matters would arise only when BIFR or AAIFR, as the case may be , has exercised its jurisdiction under Section 20 of SICA recommending winding up of the company upon arriving at a finding that there does not exist any chance of revival of the company.
>
> Mr. Venugopal has placed reliance upon a decision of a learned Single Judge of the Karnataka High Court in Karnataka State Industrial Investment and Development Corporation Ltd. vs. M/s Intermodel Transport Technology Systems and Others [AIR 1998 (Karnataka) 195] for the proposition that despite the fact BIFR retains jurisdiction to get the assets of a sick company sold in terms of sub-section (4) of Section 20 of SICA; still the leave of the Company Court, therefore would be required. The said decision, however has been reversed by the Division Bench of the Karnataka High Court in BPL Limited, Bangalore vs. Intermodal Transport Technology Systems (Karanataka) Limited, Bangalore (In Liquidation) and Others. [2001 (3) Kar.L.J. 622 (DB)], holding that the company Court has no such jurisdiction. We generally accept the views of the Division Bench.
>
> It is difficult to accept the submission of the learned counsel appearing on behalf of the Respondents that both the Company Court and BIFR exercise concurrent jurisdiction. If such a construction is upheld, there shall be chaos and confusion. A company declared to be sick in terms of the provisions of SICA, continues to be sick unless it is directed to be wound up. Till the company remains a sick company having regard to the provisions of sub-section (4) of Section 20, BIFR alone shall have jurisdiction as regard sale of its assets till an order of winding up is passed by a Company Court.
>
> Apart from the fact that sub-section (4) of Section 20 contains a non- obstante clause and, thus, it shall prevail over the provisions contained in sub-section (2). The said Act is also a latter statute.

The provisions of SICA would prevail over the provisions of the Companies Act. Section 20 of SICA relates to winding up of the sick industrial company. Before BIFR or AAIFR, as the case may be, makes a recommendation for winding up of the company, an enquiry is made in terms of Section 16 thereof wherefor all relevant facts and circumstances are required to be taken into consideration. Before an opinion is arrived at in that behalf, the parties are given an opportunity of hearing. The satisfaction arrived at by BIFR that the company is not likely to become viable in future and it is just and equitable that the company should be wound up must be based on objective criteria. The High Court indisputably on receipt of such recommendation of BIFR would initiate a proceeding for winding up in terms of Section 433 of the Companies Act. Sub-section (2) of Section 536 ipso facto does not confer any jurisdiction upon the Company Court to direct sale of the assets of the sick company. It has to exercise its power thereunder subject to the provisions of the special statute governing the field. Despite the fact that the procedures laid down under the Companies Act would be applicable therefor but they must be read with sub-section (4) of Section 20 of SICA which contains a non-obstante clause and in terms thereof, BIFR is authorized to sell the assets of the sick industrial company in such a manner as it may deem fit. By reason of the said provision, BIFR is also empowered to forward the sale proceeds to the High Court for orders for distribution in accordance with Section 529-A and other provisions of the Companies Act which in no uncertain terms would mean that the distribution of the sale proceeds would be for the purpose of meeting the claims of the creditors in the manner laid down therein. The intention of the Parliament in enacting the said provision becomes clear as in terms of Section 22-A of SICA, BIFR is empowered to issue any direction in the interest of the sick industrial company or its creditors or share-holders and direct the sick industrial company not to dispose of its assets except with its assent. Section 32, as noticed hereinbefore, again contains a non-obstante clause. The scheme suggests that BIFR retains control over the assets of the company and in terms of the aforementioned provisions may either prevent any sale or permit any sale of the assets of the sick industrial company. Such a power in BIFR remains till a winding up order is passed by the High Court and a stage arrives at for the High Court for issuing orders for distribution of the sale proceeds.

SICA was furthermore enacted subsequent to the provisions of the Companies Act. It is not, thus, possible to accept the submission that the High Court exercises a concurrent jurisdiction.

It may be true that the High Court's jurisdiction is that of the Appellate Authority but keeping in view the terminology contained in sub- section (4) of Section 20 read with Section 32 of the Act leaves no manner of doubt that the provisions of SICA shall prevail over the provisions of the Companies Act. For the aforementioned purpose, it was not necessary for the Parliament to mention specifically the provisions of sub-section (4) of Section 20 that the same shall prevail over Section 536 of the Companies Act, as was suggested by the learned counsel appearing for the First

Respondent. The construction of the provisions of both the Acts, as suggested by the learned counsel, that both the provisions of sub-section (4) of Section 20 and Section 536 should be read conjointly so as to enable an applicant to obtain a sanction of both BIFR and the Company Court, thus, do not appeal to us.

It is inconceivable that in law not only the approval will have to be taken from both the courts; in case of any private sale, the Company will have to obtain the consent of both the Company Court or BIFR. While interpreting the provisions of the two statutes, the court cannot remain oblivious of the fact that in a given case, possibility of a conflict in the orders passed by the two courts may arise, which must be avoided.

It is interesting to note that a learned Single Judge of the said Court dismissed a similar application filed by M/s Salapuria Housing (P) Ltd. although the First Respondent's application categorically mentions about the pendency of the said application.

Inherent Power :

The Company Court has inherent power. Such inherent power of the Company Court is saved in terms of Rules 7 and 9 of the Companies (Court) Rules. The Company Court, therefore, may have the requisite jurisdiction to approve sale of the assets of a company but the question which arises for consideration is as to whether such inherent power can be exercised despite existence of a provision contained in another statute..

Section 32 of SICA contains a non-obstante clause stating that provisions thereof shall prevail notwithstanding anything inconsistent with the provisions of the said Act and of any rules or schemes made thereunder contained in any other law for the time being in force. It would bear repetition to state that in ordinary course although the Company Judge may have the jurisdiction to pass an interim order in exercise of its inherent jurisdiction or otherwise directing execution of a deed of sale in favour of an applicant by the Company sought to be wound up; but keeping in view the express provisions contained in sub-section (4) of Section 20 of SICA such a power, in our opinion, in the Company Judge is not available. [See BPL Limited (supra).

We may, however, observe that the opinion of the Division Bench in BPL Limited (supra) to the effect that the winding up proceeding in relation to a matter arising out of the recommendations of BIFR shall commence only on passing of an order of winding up of the company may not be correct. It may be true that no formal application is required to be filed for initiating a proceeding under Section 433 of the Companies Act as the recommendations therefor are made by BIFR or AAIFR, as the case may be, and, thus, the date on which such recommendations are made the Company Judge applies its mind to initiate a proceeding relying on or on the basis thereof, the proceeding for winding up would be deemed to have been started; but

there cannot be any doubt whatsoever that having regard to the phraseology used in Section 20 of SICA that BIFR is the authority proprio vigore which continues to remain as custodian of the assets of the Company till a winding up order is passed by the High Court.

Some precedents on court's power:

The decisions of the Karnataka and Bombay High Courts reported in Smt. Usha R. Shetty and Others vs. Radeesh Rubber Pvt. Ltd. and Another [1995 (84) CC 602] and Kamani Metallic Oxides Limited vs. Kamani Tubes Limited [1984 (56) CC 19], relied upon by Mr. Holla cannot be said to have any application in the instant case. The other decisions cited at the bar taking the similar view also have no application.

In Buckley on the Companies Acts , the law is stated, thus :

"When the application should be made.- In an early case it was argued that the sanction of the court should be obtained before the transaction is entered into and cannot be given afterwards, but Malins VC, disagreed, 'for it would be almost impossible that directions could from time to time be obtained; but when the matter is brought before the court, it must have regard to all the surrounding circumstances'. Vaisey J agreed that the object of the section is that, if a winding up order is made, any transaction which has been entered into since the commencement of the winding up shall be subject to review by the liquidator and held that he had no jurisdiction while the petition was pending. Roxburgh J went to the other extreme and on an application made after the winding up order refused to validate the transaction on the ground that the applicant ought to have applied before the transaction was entered into. Buckly J held that he had jurisdiction to sanction and did sanction while the petition was pending a proposed transaction which on any possible view would be beneficial to the creditors, one of the objects of the section being to protect the interests of the creditors during the pending of the petitions. Since this last decision such orders have regularly been made, normally in one of two cases: the first being where the proposed transaction is not in the ordinary course of business (as in the case last cited) and the second where it is necessary to persuade the company's bankers to unfreeze the account in order to enable the business to be carried on."

In Pankaj Mehra and Another vs. State of Maharashtra and Others [(2000 (2) SCC 756] whereupon the learned counsel appearing on behalf of the First Respondent placed strong reliance, construction of sub-section (2) of Section 536 of the Companies Act came up for consideration and it was held that having regard to the phraseology used therein, the transaction shall be void unless the court otherwise orders. It is interesting to note that in para 19 thereof, this Court noticed the principles laid down in Gray's Inn Construction Col. Ltd., Re [1980 (1) All.E.R. 814 (CA)] emphasizing the point that the courts would be very circumspect in the matter of validating the payments and the interests of the creditors as well as the company

would be kept uppermost in consideration. Thus, a disposition of assets during the interregnum may not be irretrievably void but the courts are required to exercise power with circumspection and caution.

Jurisdiction of the Company Court, if any, how should be exercised : Assuming that the Company Court alone has the jurisdiction to sanction sale of the assets of a sick company, it having regard to its duties towards the debtors was required to apply its mind as regard the question as to whether the disposition of the asset of the company is in the interest of its creditors. In this case, the company was not the applicant. It did not join the First Respondent in its application. It had all along resisted its claim. In the winding up proceeding no order admitting the petition was passed at the relevant time. Order admitting the petition was passed much later. Even no provisional liquidator was appointed.

Reliance has been placed on a decision of the learned Single Judge of the Allahabad High Court in Bengani Food Products Private Ltd. vs. Official Liquidator and Others [1998 (94) CC 762] wherein it was held that the court has the jurisdiction to approve the disposition of the property provided it is found that the scheme or proposal which has been put forward is a viable scheme and would be in the interest of the creditors as well as beneficial for the general public.

It may be true that therein the Allahabad High Court was considering the case involving a sick industrial company but the questions which have been raised herein were not raised there. The High Court considered the prayer made in the application and was of the opinion that the proposal given by the applicant was not a viable one for the benefit of the company or its creditors. In the instant case, the said relevant factors were also not considered by the High Court.

In Sudarsan Chits (I) Ltd. vs. O. Sukumaran Pillai and Others [(1984) 4 SCC 657], this Court observed :

"10. The Appellate Bench declined to direct the Provisional Liquidator to file claim petition at the instance of the Company under Section 446(2)(b) on the sole ground that such a petition at the instance of the Liquidator would be maintainable in the course of winding up of proceedings which means that the winding-up proceedings are pending. Undoubtedly, Section 446(1) manifests the legislative intention that the procedure thereunder prescribed could be availed of when the winding-up order has been made or where the Official Liquidator is appointed as the Provisional Liquidator. Section 446(1) envisages two situations in which the court will have jurisdiction to make the order thereunder contemplated. These two situations are: where a winding-up order has been made or where the Official Liquidator has been appointed as Provisional Liquidator.

The first of the two situations envisages an order for winding-up of the company having been made and which is subsisting. The second situation is where without making a winding-up order, the court has appointed Official Liquidator to be the Provisional Liquidator. Section 450(1) of the Companies Act confers power on the Company Court to appoint Official Liquidator to be Provisional Liquidator at any time after the presentation of the winding-up petition and before making of the winding-up order. The court before which a winding-up petition is presented has power to appoint Official Liquidator as Provisional Liquidator of the company even before making the winding-up order. If ultimate winding-up order is made, the Official Liquidator acts as such. And let it be remembered that where a winding-up order is made, it relates back to the date when petition for winding-up is presented. Referring to Section 446(1) it becomes clear that the court will have jurisdiction to make the order therein contemplated, where a winding- up order has been made or prior to the making up of the winding-up order, Official Liquidator has been appointed as Provisional Liquidator as contemplated by Section 450(1)."

Once the Company Judge proceeds to direct disposition of assets of the Company whether during pendency of the proceedings or upon culmination thereof, ordinarily a provisional liquidator is appointed.

There lies a distinction between accord of sanction for private negotiation of sale of assets of the Company vis-`-vis the auction held by the Official Liquidator. It is not in dispute that no Provisional Liquidator was appointed. The court may have an inherent power to approve a transaction of sale entered into by and between the Company and the third party; but it is beyond any cavil of doubt that while doing so the Company Court must bear in mind its duties towards the creditors. While exercising jurisdiction under Section 433 of the Companies Act, the Company Court remains the custodian of the interest of the Company and its creditors. It has, thus, a duty to satisfy itself that having regard to the market value of the property, the price offered is reasonable. [See M/s Kayjay Industries (P) Ltd. (supra)]. It is further more required to be borne in mind that upon liquidation, the assets and properties of the Company vest in the Official Liquidator for the benefit of its creditors. [See Allahabad Bank and Others vs. Bengal Paper Mills Co. Ltd. and Others [(1999) 4 SCC 383].

The satisfaction as regard adequacy of the price is one of the relevant factors for proper and reasonable exercise of the judicial discretion vested in it. There cannot be any doubt or dispute that when an auction is held upon compliance of the statutory provisions, withholding of auction on the ground that still higher price may be obtained may prove to be self-defeating exercise as has been held in M/s Kayjay Industries (P) Ltd. (supra) and State of Punjab vs. Yoginder Sharma Onkar Rai & Co. and Others [(1996) 6 SCC 173] but having regard to the accepted position that the Company Judge in a case of this nature exercises a discretionary jurisdiction; it is bound to act with great circumspection and caution. Such a jurisdiction should ordinarily be exercised in exceptional cases and when necessary for seeing the company as an on-going concern.

It may, furthermore, be true that before the Company Judge or before the High Court the secured creditors did not raise objections which have been raised before us although specifically taken in their objections, as would appear from paragraphs 7, 9, 11, 12 and 13 thereof, but if such

considerations were relevant having regard to the statutory duties imposed upon the court, the learned Company Judge must be held to have failed and/or neglected to exercise its discretionary jurisdiction in a fair and reasonable manner.

In any event having regard to the importance of the questions involved and in particular the question as to whether the impugned order is contrary to the statutory provisions contained in sub-section (4) of Section 20, we have thought it proper to consider the same.

The Company Judge moreover will have to bear in mind the provisions contained in Section 529-A of the Companies Act in terms whereof the dues of the workman and the debts due to the secured creditors to the extent such debts rank in clause (c) of the proviso appended to sub- section (1) of Section 529 pari passu therewith and shall have a priority over all other debts.

In Andhra Bank vs. Official Liquidator and Another [(2005) 5 SCC 75] , a three-Judge Bench of this Court, observed :

> "Section 446 of the Companies Act indisputably confers a wide power upon the Company Judge, but such a power can be exercised only upon consideration of the respective contentions of the parties raised in a suit or a proceeding or any claim made by or against the company. A question of determining the priorities would also fall for consideration if the parties claiming the same are before the court. Section 446 of the Companies Act ipso facto confers no power upon the court to pass interlocutory orders. The question as to whether the courts have inherent power to pass such orders, in our opinion, does not arise for consideration in this proceeding. Assuming such a power exists, it was imperative that the same should have been exercised on consideration of the factors laid down by this Court in Morgan Stanley Mutual Fund etc. vs. Kartick Das etc. [(1994) 4 SCC 225]. An unreasoned order does not subserve the doctrine of fair play [See M/s. Mangalore Ganesh Beedi Works Vs. The Commissioner of Income Tax, Mysore and Anr. JT 2005 (2) SC 442]".

It was further observed that for judging the correctness of an equitable order even the subsequent events can be taken into consideration. In any view of the matter an equitable order passed by a Company Court in exercise of its inherent jurisdiction or otherwise must conform to the requirements of the relevant statutes. [See Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal -AIR 1962 SC 527, Vareed Jacob vs. Sosamma Geevarghese and Others (2004) 6 SCC 378 & National Institute of Mental Health & Neuro Sciences vs. C. Parameshwara (2005) 2 SCC 256] In re A.I. Levy (Holdings) Ltd. [1964 (1) Chancery Division 19] Buckley J. while considering the provisions of Section 227 of the English Companies Act which is pari materia with Section 536(2) of the Indian Companies Act, opined that the object of the said section was to protect the interests of the creditors from the possible unfortunate results which would ensue from the presentation of a petition and to protect their interests as much during the period while the petition was pending as after an order has been made on it. The said decision, therefore, does not lay down a law that the provision of Section 536(2) of the Act is meant to benefit the vendee. In fact such a provision enures to the benefit of the creditors. A Company Judge granting sanction in terms of the aforementioned

provision, thus, has a duty to see that the transaction is one which must benefit the unsecured creditors of the company.

In A.I. Levy (Holdings) Ltd. (supra) it was held :

> "In these circumstances, this being a case in which it appears to me to be manifest that the transaction is one which must benefit the unsecured creditors of the company if in due course a winding up order is made, the reason which affected Vaisey J.'s mind, that is to say, that the liquidator should be given an opportunity to investigate the matter and bring it before the court representing the interests of all the creditors, does not affect my mind, for I do not think the liquidator could make the position clearer to me than it is at the present time on the facts."

CONCLUSION :

BIFR had admittedly power to sell the assets of the Company but the High Court until a winding up order is issued does not have the same. BIFR in its order dated 02.08.2002 might have made an observation to the effect that the Company may approach the High Court in case it intended to dispose of its property by private negotiation but the same would not mean that BIFR could delegate its power in favour of the High Court. BIFR being a statutory authority in absence of any provision empowering it to delegate its power in favour of any other authority had no jurisdiction to do so. 'Delegatus non potest delegare' is a well-known maxim which means unless expressly authorized a delegatee cannot sub-delegate its power. Moreover, the said observations of BIFR would only mean that the Company Court could exercise its power in accordance with law and not de'hors it. If the Company Court had no jurisdiction to pass the impugned order, it could not derive any jurisdiction only because BIFR said so.

In any view of the matter, BIFR had permitted only the Company to approach the High Court in case any occasion arises therefor. BIFR did not permit any other person to do so. The Company did not file such an application. It opposed the prayer of the First Respondent The Company, as noticed hereinbefore, had preferred an appeal before the Division Bench of the High Court questioning the correctness of the order passed by the learned Company Judge. The Company has since been directed to be wound up and is now being represented by the Official Liquidator who also questions the correctness of the order. Before us an application has been filed by the Government of Karnataka for impleading it as a party being I.A. Nos.2-4 of 2005 in Civil Appeal No.5199-5201 of 2004 wherein also, the validity of the impugned order is in question.

In this view of the matter, we are of the opinion that the impugned judgment of the High Court cannot be sustained. It is set aside accordingly.

For the reasons aforementioned, the Appeals are allowed. No costs.