

(2008) 10 AHC CK 0119

Allahabad High Court

Case No: None

In Re: BPL Display Device Ltd.
(Erstwhile Uptron Colour Picture
Tube Ltd.)

APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 17, 2008

Acts Referred:

- COMPANIES ACT, 1956 - Section 123, 132, 150, 17, 25
- Provincial Insolvency Act, 1920 - Section 25, 45, 46, 47, 48
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 19
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13, 22, 3, 35, 37
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 20
- Transfer of Property Act, 1882 - Section 29, 37, 69, 69A

Citation: (2009) 150 CompCas 280

Hon'ble Judges: Sunil Ambwani, J

Bench: Single Bench

Final Decision: Disposed Of

Judgement

Sunil Ambwani, J.

Heard Shri Navin Sinha, Senior Advocate assisted by Shri Vipin Sinha for the Assets Reconstruction Company (India) Ltd. (ARCIL); Shri Rajnath N. Shukla for the Official Liquidator; Shri V.M. Zaidi for ex-directors of the company. Shri Shyam Naiaian, Shri P.K. Sinha and Shri Sudhanshu Narain for BPL Display Devices Limited Workers Union; Shri Shahid Masood for the workmen (140), who were the employees of Uptron Colour Picture Tubes Ltd. taken over by BPL Display Deuces Ltd.; Shri S.K. Misra for Central Excise Department of the Central Government and Shri K.K. Chawla, Accounts Assistant, who claims to be member of the core group of

employees formed by M/s BPL Display Devices Ltd.

2. The Asset Reconstruction Company (India) Ltd. (ARCIL) is a company established to acquire non-performing assets of the financial institutions and banks with the objective of focused management of such assets and to maximize the recovery, for the secured creditors. The ARCIL is registered with the Reserve Bank of India u/s 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act) as a securitisation and construction company. It has acquired part of debts of ICICI Bank as well as debts of IFCI Ltd. and has stepped into shoes of the secured creditors of M/s BPL Display Devices Ltd. (the company. By a Deed of Assignment dated 30th June, 2007 and 12th September, 2008 executed by the secured creditors, ICICI Bank Ltd. and IFCI Ltd. have absolutely assigned and transferred its rights in the loan facilities with all underline security interest of the company to the secured creditors. M/s Uptron Colour Picture Tube Ltd. (UCPTL) was declared as sick industrial company by the Board of Industrial and Finance Reconstruction (BIFR) in the year 1993. A Draft Rehabilitation Scheme was prepared for its revival. In appeal the Appellate Authority Industrial Finance and Reconstruction (AAIFR) stayed the proceedings. However later the Supreme Court passed an order authorizing BIFR to continue the proceedings but not to pass final orders. The Supreme Court, thereafter, vacated the interim order. The scheme envisaged capital expenditure of Rs. 60 crores towards modernization/upgradation of the company's infrastructure; contribution of Rs. 71.25 crores from the incoming promoters M/s BPL Display Devices Ltd. and their associates (BPL) for the company's revival; write down of the company's equity by 90% resulting in deduction in the total value of equity to Rs. 424.90 lacs; acquisition of company's equity of Rs. 193.40 lacs by M/s BPL; Rs. 75 lacs by M/s Videocon International Ltd. and Rs. 37.50 lacs by M/s Toshiba (collaborators); settlement of outstanding dues of the companies, financial institutions, banks etc.; obligations to be fulfilled in respect of M/s U.P. Electronics Corporation Ltd. (UPECL) the holding company and reliefs and concessions from the State Government and the Central Government. The ICICI was appointed by the BIFR as Monitoring Agency (MA). The scheme envisaged the net worth of the company to turn positive during the year 1995-96 and to wipe out the accumulated losses during 1997-98.

3. On the applications filed by the Banks, the BIFR in exercise of its powers u/s 22(3) lead with Section 22(5) directed on 15.7.1996 that the operation of all the contracts, assurances, agreements and settlements with the banks namely State Bank of India, State Bank of Patiala, Bank of India and Union Bank of India to be suspended for two years from 28.6.1996.

4. In the review hearing on 21.2.2002 the Monitoring Agency noted that the company could neither settle nor pay the dues of the company's secured creditors nor could settle or pay the dues of the workers/employees. The BIFR as such directed MA to holding joint meetings to consider the status of compliance of the

scheme and to submit a report. The joint meetings were convened on 23.3.2002, 16.10.2002 and 8.11.2002 in which it was found that the fiscal/financial performance of the company for the period ended 30.9.2002 was not satisfactory. The company has failed to make OTS payment and that there was no concrete proposal from the company for the outstanding OTS dues.

5. The BIFR in its order dated 12.3.2004 declared the scheme to have failed and appointed ICICI as Operating Agency (OA) and directed the company to submit a draft modified rehabilitation scheme within 30 days with a condition, that if no such scheme is submitted the Board will explore alternative measures for company's revival. The Board, thereafter, gave several extensions and opportunities to the company. In the review hearing on 31.7.2006 a draft modified rehabilitation scheme was presented by the company. The BIFR, however, noted that in view of the inability of the company to settle/pay the dues of the workers, ex-employees, who were seriously concerned with the delay in payment of their outstanding dues, it was not possible to revive the company.

6. The BIFR issued directions on 31.7.2006 permitting the secured creditors to take legal action for recovery of their dues but that decree passed was to be executed only with prior permission of the Board. An opportunity was again given to the company to submit a modified revival scheme through OA with means of finance fully tied up within three months taken care of the outstanding dues of UPECL. The aggrieved employees were permitted to proceed with legal actions. The company preferred an Appeal No. 235 of 2006 before AAIFR against the order. The hearing in appeal was adjourned from time to time along with connected appeal No. 305 of 2007 and Misc. Application No. 464 of 2007.

7. The BIFR last reviewed the matter on 29.8.2007. It was found that rehabilitation scheme prepared in 1996 had already failed and that the company or existing promoters have not worked out any other rehabilitation scheme. The BIFR thus prima facie opined that it would be just, equitable and in public interest that the company should be wound up in terms of Section 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 and directed that winding up notice be issued giving last chance to the company to submit a revised/modified revival proposal keeping option for change of management open by way of take over/amalgamation/mergers by prospective bidders.

8. The Board, thereafter, adjourned the hearing on 22.11.200 and 4.12.2007 and that on 19.12.07 the Board found that all efforts to revive the company have failed and that company/existing promoter have expressed their inability to revive the company's operations on a long term basis because of techno-commercial/techno-economical reasons. It was found that the company was with BIFR for 14 years and that there was no scheme or proposal pending for revival of the company. As a final opportunity winding up notice was put in abeyance and that time was given upto 15.3.2008 for secured creditors to come up with revival

scheme.

9. On 7.4.2008 the representatives of State Bank of India, State Bank of Patiala, Canara Bank and Bank of India requested BIFR to wind up the company. The representatives of IFCI Ltd. stated that ARCIL has conducted joint meeting of the secured creditors but there was no proposal to revive the company. The secured creditors have agreed in principle to take action under the SARFAESI Act to recover their dues and that a notice u/s 13(2) of the SAREAESI Act has been issued. The representatives of IFCI requested that ARC1L be appointed as receiver.

10. The BPL Display Devices Workers Union requested the Board to revive the company as they were under financial difficulties. The BDDL Employees Union requested that U.P. Electronics Corporation Ltd. should be asked to take over the unit. The Electronics Employees Union stated that the workers would be able to run the unit but agreed that there was no proposal on hand for revival of the company. Some of the employees including Shri K.K. Chawla, and the unsecured creditors requested for payment of their dues.

11. After considering all those, who were concerned and were present the BIFR reiterated its earlier conclusion and found that there was no other option but to confirm its prima facie opinion to wind up the company. The BIFR decided to forward the opinion to the concerned High Court and since the company exposed its inability to take care of the assets of the company, the BIFR appointed State Bank of India (SBI), a secured creditor of the company as receiver to take possession of the assets of the company and to safeguard it until the Court appoints Official Liquidator. The expenses of security and insurance and other items were permitted to be recovered from the company and its assets, the UPECL or any one else having complaint against the company were permitted to take it up with the appropriate legal forum. The order dated 7.4.2008 was communicated to the High Court by letter dated 10.4.2008 and was received in the registry of the Court on 28.4.2008.

12. The SBI by its letter written to the Board found some difficulties in taking possession of the company's assets and requested that the District Magistrate, Ghaziabad be issued orders u/s 29 of the Act to take possession and to hand over the assets to the SBI appointed as receiver by the Board. On 21.7.2008 an order was issued to the District Magistrate with intimation to the High Conn. In the meantime, a letter was received from the ARCIL on 24.7.2008 that the ARCIL has taken over the company's movable and immovable assets u/s 13(4) of the SARFAESI Act on 23.7.2008 and requested that the Board should take on record the development. The Board directed the ARCIL to inform the High Court and also all other secured creditors with the development.

13. The ARCIL has filed an application in the Court, a copy of which was served upon the Official Liquidator on 29.9.2008 with the affidavit of Shri P.S. Ravindranath, since President of the company (ARCIL) with its registered office at Shreepati Arcade,

August Kranti Marg, Nana Chowk, Mumbai sworn on September 9th, 2008 bringing the developments to the notice of the Court with a prayer as follows:

It is, therefore, humbly prayed that liberty may kindly be granted:

(a) to the applicant and all those secured creditors whom it represents and who have given their no objection to the application to remain outside the proceedings for winding up of the company M/s BPL Display Devices Ltd.

(b) to let the applicant secured creditor realise their securities by effecting sale of the said movable and immovable property of the petitioner company

(c) and may kindly pass such other order as may deem fit and proper in the circumstances of the case.

14. Shri Navin Sinha, learned Counsel for ARCIL would Submit that BIFR by its order dated 7th April, 2008 has confirmed its prima facie opinion that it would be just, equitable and in public interest that the company be wound up u/s 20(1) of SICA. The opinion was formed after a repeated opportunities were given to the company/promoters in 14 years to explore the possible avenues for any acceptable revival scheme. The company and its present promoters have clearly admitted before BIFR that they were unable to revive the company. An appeal was filed against the order dated 31.7.2006 before AAIFR, when BIFR had declared the previous revival scheme of 1996 to have failed. The AAIFR, in view of the order dated 7.4.2008 passed by BIFR confirming its prima facie opinion to wound up the company, has dismissed the appeals as infructuous on 6.8.2008. No further appeal has been filed or is pending by any party to the proceedings.

15. Shri Navin Sinha states that ARCIL representing the secured creditors, with assignment of their dues, issued a notice u/s 13(2) of the SARFAESI Act for payment of the outstanding amount giving 60 days' time to the company from the receipt of the notice. Various oilier secured creditors constituting about 90% of the secured debt of the petitioner company have given consent u/s 13(9) of the SARFAESI Act, to exercise powers for realization of the dues from the securities. The ARCIL has acquired 18.63% of the total secured debts of the company from ICICI Bank and IFCI Ltd. and has further received consent letters in respect of 4.93% from ICICI Bank dated July 9th, 2008; 12.30% from Stressed Assets Stabilisation Fund vide consent letter dated July 8th, 2008; 6.49% of the State Bank of India; 5.67% of the State Bank of Patiala vide consent letter dated 27.3.2008; 1.77% of Union Bank of India vide consent letter dated 20.3.2008; 16.25% of the Canara Bank vide consent letter dated 11.7.2008; 11.08% of the Allahabad Bank vide consent letter dated 18.3.2008 and 16.66% of the Axis Bank vide consent letter dated 28.4.2008. All these consent letters are annexed to the application and that accordingly ARCIL has consents from the banks and financial institutions having a total of 93.76% of the value of the secured creditors, to invoke the provisions of the SARFAESI Act.

16. The consent of Kotak Mahmdra Bank having 4.54% of the secured debts and ING Bank of 1.70% of the secured debts have not been obtained so far. The ARCIL has authorized Shri P.S. Ravindranath, Vice President of ARCIL and other officers detailed in the power of attorney, to exercise all the powers under the laws for recovery of dues of the secured creditors.

17. The ARCIL has taken over possession on behalf of the secured creditors u/s 13(4) and Section 13(12) of the SARFAESI Act on 23.7.2008. In para 16 of the application it is stated that all the secured creditors represented by ARCIL have opted to remain outside the winding up and to realize their securities.

18. On receipt of the recommendations from BIFR the Court on 4.7.2008 issued notice to the company. On 21.8.2008 ARCIL informed the Court that it has already taken over the possession of the charged assets of the company on 23rd July, 2008.

19. Shri V.M. Zaidi, Advocate appears on behalf of the respondent company; Shri M.P. Saraf for State Bank of Patiala; Snri Shyam Narain and Shri Sudhanshu Narain for labour units and Shri Rajnath N. Shukla for the Official Liquidator. On 28.8.2008 the Court allowed them time to file their response to the reference made by BIFR. The ARCIL, thereafter, filed an application on which orders were issued on 29.9.2008 showing names of Shri V.M. Zaidi, Shri Shahid Masood and Shri Sajjad Ali and others for hearing and that matter was heard on 14.10.2008 and thereafter the counsels addressed the Court at length in the hearing held today.

20. The Board of Industrial Finance and Reconstruction consists of experts selected up by the Central Government with expertise m industrial and financial management for rehabilitation of the companies under one roof. The Act provides for suspending the contracts, assurances, agreements, settlements and other instruments and also for stay of the winding up proceedings, if they are pending in any Court.

21. The object of SICA is to provide rehabilitation of the sick industrial companies under a statutory umbrella. The Board established under the Act is expected to act with reasonable despatch, and to ensure rehabilitation under a time bound programme. In this case it has taken almost 14 years to explore the possibility and lo conclude that the scheme formulated in 1996 has failed. All the efforts made by the Board by firstly appointing ICICI as Monitoring Agency of the scheme prepared in 1996 and thereafter appointing ICICI as operating agency on 12.3.2004 after the scheme of 19% failed, have not resulted into any concrete proposals for revival. The company, secured creditors and the workmen have tailed to provide any acceptable rehabilitation scheme, which could have enabled the company to mm its net worth positive.

22. The Court also allowed that opportunity to the stake holders to submit any revival scheme after the reference was received from BIFR on 28th April, 2008. The company, secured creditors, workmen of any other person, have neither responded

nor provided any revival plan. Shri F.K. Sinha appearing for BPL Display Devices Limited Workers Union made a faint suggestion to adjourn the hearing to enable the union to consider and prepare revival plan. He, however, fairly conceded that no such revival plan could be prepared by the workmen in the last 14 years and that there is hardly any possibility of revival of the company by the workmen.

23. Shri V.M. Zaidi, learned Counsel appearing for the company stated that the company and its management does not have any revival plan to revive the company. He, however, expressed his reservations for allowing ARCIL to realise the security interest from the charged properties. It is contended by him that the assets including the land charged with the secured debts is very valuable land and will be able to discharge the debts of all secured creditors and workmen. In substance he submits it that the company may be wound up and the assets be sold for discharging the debts and the dues through the Official Liquidator in the supervision of the Court.

24. On going through the proceedings of BIFR and upon hearing all those, who are pie sent including the company, secured creditors and the workmen and Shri K.K. Chawla, an employee of the company, there is no escape from the conclusion, that the company declared as sick industrial company in the year 1996 has completely lost its substratum and that there is no revival proposal pending to be considered by the Court. The company as such is liable to be wound up u/s 20(1) of the SICA read with Section 433(e) and (f) of the Companies Act, 1956.

25. Shri Navin Sinha, learned Counsel appearing for ARCIL submits that u/s 35 of the SARFAESI Act the provisions of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law or any instrument having effect by virtue of such law Section 37 of the Act provides that the provisions of the Act or rules made thereunder shall be in addition to and not in derogation of the Companies Act, 1956; the Securities Contract, (Regulation) Act, 1956; Security and Exchange Board of India Act, 1992 and the Recovery of Debts due to Banks and Financial Institutions Act, 1993. He submits that the Act regulates securitisation and reconstruction of financial assets and that ARCIL as securitisation company registered with the Reserve Bank of India has been given Statutory rights to enforce the security interest u/s 13 of the Act notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act. The object of the act is to enforce and realise security interest of the secured creditors without intervention of Court or Tribunal. A complete code for realisation of the debts and sale of assets including a case where the company is in liquidation is provided u/s 13 of the Act.

26. The detailed procedure of sale of movable and immovable assets is provided in Rules 6 to 11 of the Security Interest (Enforcement) Rules, 2002. He submits that the validity of the SARFAESI Act has been upheld by the Supreme Court in [Mardia Chemicals Ltd. Vs. Union of India \(UOI\) and Others Etc. Etc.](#), and that the Court may instead of winding up the company, which may cause some complications in

realising the security interest, appoint the Official Liquidator as provisional liquidator and allow ARCIL to recover its debts without the intervention of the Official Liquidator. He submits that secured creditors option to remain outside winding up be accepted and that the ARCIL be permitted to sell the charged assets and to realise its dues in accordance with the provisions of the SARFAESI Act. The Official Liquidator in the meantime be allowed under second and third proviso to Sub-section (1) of Section 13, to invite the claims from the workmen and intimate the secured creditors, the workmen dues in accordance with the provisions of Section 529A of the Companies Act and that such estimated amount under the fourth proviso be allowed to be deposited by ARCIL, subject to payment of balance of the workmen's dues, if any, deposited by secured creditor with the liquidator.

27. Shri Rajnath N. Shukla appearing for the Official Liquidator would submit that there is no revival plan pending or proposed and thus the Court has to accept the recommendations of BIFR to wind up the company. The Official Liquidator has statutory duties to perform. A statement of affairs is required to be filed by the ex-directors and that assets coming in possession of the Court u/s 456 of the Companies Act can be sold only by the Official Liquidator. The liquidator u/s 457 of the Companies Act and the Court with the powers u/s 456 have to decide all their disputes and claims for or against the company. The Official Liquidator has been given exclusive powers u/s 457 to sell the assets of the companies for discharging all the liabilities towards creditors, workmen, government dues and contributories. The statutory rights given to the secured creditors to realise their debts, are only to the extent of the charged assets. The secured creditors have to submit proof of debts, including charges registered on the assets of the company and to prove them before the Official Liquidator. It is only, thereafter, that the seemed creditors may be allowed to deal with the assets after separating their security interest. The Official Liquidator as a statutory authority has to perform various functions and duties under the Companies Act, and that if the assets are lost, he would face difficulties in discharging his functions.

28. In *Mardia Chemicals Ltd. v. Union of India* (supra) the Supreme Court found that the normal process of recovery of debts, through Courts is lengthy and time taking. The financial liquidity is essential for financial assistance given to the industries. The blockage of large sums as non-paying assets retards the economic progress of the country followed by consequential ill effects on the economy. The Recovery of Debts due to Bank and Financial institutions Act, 1993 did not bring in the desired results, and in order to meet the challenges of global economy, it was necessary to have an effective mechanism by which banks and financial institutions can securitise the charged assets. The SARFAESI Act was enacted after submissions of the reports by Narsimham Committee and thereafter a Committee headed by Mr. Andhyarujina to bring the necessary steps within the legal framework. The financial climate world over require a policy for speedier legal method for recovery of dues.

29. The Supreme Court found that the Act provides sufficient guidelines for objections to be raised by the borrower. The borrower must be informed with the reasons of rejection and have right to approach the Debts Recovery Tribunal in appeal after recovery measures are taken. He can also approach the Civil Court in case of fraud and absurdity. The precondition of depositing 75% of the amount under Sub-section (2) of Section 17 of the Act was held to be unreasonable and arbitrary and was consequently declared ultra vires.

30. The question of any possible conflict between the provisions of the SARFAESI Act and the Companies Act was neither argued nor considered in Mardia Chemicals case.

31. In [Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another](#), the Supreme Court held that the right to sell under the State Financial Corporation Act or the Recovery of Debts Due to Banks and Financial Institution Act by a creditor, stands outside the winding up is different from distribution of proceeds of sale of the security. After examining the provisions of the State Financial Corporation Act, 1951 the Supreme Court held that when the company is under winding up, the power of sale can be exercised by State financial Corporation only after obtaining appropriate permission from the company court and acting in terms of directions issued by company court as regards conduct of sale and distribution of proceeds in terms of Section 529 and 529A of the Companies Act. It was further held that sale of assets of the company under winding up by the Recovery Officer of the Debts Recovery Tribunal u/s 19 and 25 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993, can be exercised only after issuing notice to the Official Liquidator or liquidator appointed by the company court and after hearing him. The Official Liquidator must be associated with the sale of assets as he represents the workmen's interest and that distribution of sale proceeds of the company can only be made in accordance with the scheme provided u/s 529 529A and 530 of the Companies Act. The Supreme Court summed up the legal position in para 18 as follows.

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

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

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

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

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

32. In *State Bank of Patiala v. North Land Sugar Complex and Ors.* 2004 (121) Com 847 Cas 847 the Punjab High Court held that dues of the workmen in case of winding up of the company u/s 529A of the Companies Act have a pari pasu charge with the security o the secured creditors. Even if the secured creditors stands outside the winding up, the property is required to be apportioned with the permission of the company court, as the company court is the custodian of the interest of all the secured creditors and workmen. The receiver appointed by Civil Court on being approached by the secured creditors would look after the interest of the creditor and in case of conflict the liquidator has to receive precedence over the receiver in as much as the liquidator looks after the interest of large claim of creditors along with that of the workmen.

33. In *State Bank of India v. Provisional Official Liquidator of Volvo Steel Ltd.* [2004] 122 Comp Cas 440 (Guj.) , the Gujarat High Court held that where the bank, seeks to initiate proceedings u/s 13 of the SARFAESI Act, the prior permission of the company court is necessary. The applicant banks as secured creditors after complying with the provisions of Section 13(9) of the Act are empowered to initiate the proceedings. However, since the matter was pending before the company court, prior permission of the company court u/s 456 of the Act was inquired to be taken, and when such an application is moved, there is no reason for the Court not to grant such permission. In the said case the applicant banks had applied for permission of the company Court. The Gujarat High Court further observed that in view of the *Mardia Chemicals Ltd.* the applicant bank could not part with the assets of the company by way of lease, assignment or sale and that before sale is finalised, it is to be confirmed by the company court and at the time of confirmation of the sale the Court would certainly look into the claim of the workers and statutory dues of the government.

34. The Supreme Court in *Mardia Chemicals Ltd. and Rajasthan Financial Corporation* (Supra) and the Punjab and Haryana High Court in *State Bank of Patiala v. North Land Sugar Complex* (Supra) and Gujarat High Court in *State Bank of India*

v. Pro. Official Liquidator (supra) did not get an opportunity to consider whether provisions of the SARFAESI Act are inconsistent with the provisions of the Companies Act, 1956 and whether the banks and financial institutions are required to obtain permission of the company court before proceedings to enforce v the security interest u/s 13 of the SARFAESI Act.

35. In the present case the ARCIL had sought permission of the Court to stand outside the winding up, and to enforce security interest of secured creditors by sale of the charged assets u/s 13 of the SARFAESI Act. The position of secured creditors standing outside the winding up was discussed in [Allahabad Bank Vs. Canara Bank and Another](#), . It was submitted by the Attorney General in the case that the effect of Section 19(19) of RDB Act is that only Section 529A of the Companies Act is attracted lot limited purpose, if the question of workmen's portion is involved. In the company court any secured creditor, who has not stood out of winding up, but wants to come before the company court has to give up his security and prove his debt before the liquidator to seek distance as per the insolvency rules mentioned in Section 529(1) read with Section 45 - 50 of the Provisional Insolvency Act and land in the queue along with all unsecured creditors u/s 529(2). Even that procedure is applicable only in respect of any money realised by the company court and not by the Tribunal. If any money is realised by the bank by standing outside winding up and if any part of such realisation of Canara Bank are taken away by the liquidator for payment to workmen, only to the extent of such workmen's portion can the bank have priority over other creditors. The Supreme Court observed that the jurisdiction of the Tribunal with regard to adjudication is exclusive and that the DRT as an elusive Tribunal for adjudication. The procedure for execution, in both the acts is inconsistent and that since RBD Act is subject act act with an additional Section like Section 34, the leave of the company court is not necessary, u/s 537 or u/s 446 for execution proceedings before the Recovery Officer. If the jurisdiction of the Tribunal is exclusive, the company court cannot use its powers u/s 442 against the Tribunal/Recovery Officer. Sections 442 446 and 437 of the Companies Act cannot be applied against the Tribunal. It was observed in para 43 that Section 442, 446 and Section 537 are not saved by the RBD Act. Even Section 34(2) of the RDB Act does not save the provisions of the Companies Act. The Supreme Court further observed in para 50 that at the sage of adjudication u/s 17 and execution of the certificates u/s 25 the provisions of RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to the banks and financial institutions and there can be no interference by the company court u/s 442 read with Section 537 or u/s 446 of the Companies Act, 1956.

36. In respect of money realised under the RDB Act the question of priorities among banks and financial institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above exception inconsistent with the provisions of the Companies

Act, 1956 and later act has to yield to the provisions of the former. This position holds good during pendency of the winding up petition against debtor company, and also after winding up order is passed. No leave of the company court is necessary for initiating or continuing the proceedings under RDB Act, 1993. This judgment was later on considered in Rajasthan State Financial Corporation and Anr. and was harmonious so far as workmen's portion is concerned and to that extent it was observed that transfer of assets of a debtor company in liquidation by financial corporation can be made only after obtaining appropriate permission from the company court and acting in terms of the directions issued by that Court as regards associating the Official Liquidator with the sale, fixing of the upset price or the reserved price, confirmation of sale, holding of the sale proceeds and the distribution thereof among creditors in terms of Section 529A and 529 of the Companies Act.

37. In [Andhra Bank Vs. Official Liquidator and Another](#), the Supreme Court did not agree with the ratio of the judgment in Allahabad Bank v. Canara Bank in so far as the workmen's dues are concerned. In para 22 and 23 the Supreme Court held:

22. In terms of the aforementioned provisions, the secured creditors have two options (i) they may desire to go before the Company Judge; or (ii) they may stand outside the winding up proceedings, The secured creditors of the second category, however, would come within the purview of Section 529-A(1)(b) read with proviso (c) appended to Section 529(1). The "workmen's portion" as contained in proviso (c) of Sub-section (3) of Section 529 in relation to the security of any secured creditor means the amount which bears to the value of the security in the same proportion as the amount of the workmen's dues bears to the aggregate of (a) workmen's due, and (b) the amount of the debts due to all the creditors. The submission of Mr. Gupta is that in a situation of this nature, what was necessary to be considered by the learned single Judge was to find out the amount in relation wherein the appellant was raising its claim as a secured creditor, namely, 135 lakhs vis-a-vis the aggregate of the amount of the workmen's dues of 19 crores and the claim of any other secured creditor was not required to be taken into consideration. We cannot accept the said contention. The illustration appended to Clause (c) of Sub-section (3) of Section 529 is a clear point to the effect that the amount of debts due to the secured creditors should be taken into consideration for the purpose of ascertaining the workmen's portion of security.

23. The language of Section 529-A is also clear and unequivocal, in terms whereof the workmen's due or the debts due or the 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 have priority over all other debts. Once the workmen's portion is worked out in terms of proviso (c) of Sub-section (1) of Section 529, indisputably the claim of the workmen as also the secured creditors will have to be paid in terms of Section 529-A.

38. In *ICICI Bank Ltd. v. Sidco Leather Ltd.* AIR 2006 SC 2088 the Supreme Court once again considered the legal issue on the option given by the secured creditors to stand outside the winding up or to relinquish his security for the general benefit of the creditors and held in para 53 to 56 as follows:

53. Section 47 of the Provincial Insolvency Act is attracted by virtue of Section 529(1) of the Companies Act. Sub-section (2) of Section 47 would become applicable where a secured creditor voluntarily relinquish his security for the general benefit of the creditors.

54. The expression "relinquish" has a different connotation. In P. Ramanatha Aiyar's *Advanced Law Lexicon* at page 4047, it is stated:

Relinquish: To give over possession or control of; to leave off.

55. It envisages a conscious act, i.e., an act where a person was aware of his right and then relinquishes the same. The same must be for the general benefit of the creditors. His action must lead to a conclusion that he, for one reason or the other, intended to stand in the queue for receiving money owed to him. It, however, does not stand obliterated only by the filing of an affidavit or proof of claim with the official liquidator. Such a claim had been filed pursuant to a notice issued by the official liquidator. If the creditor does not respond to the said notice, he would not be in a position to bring to the notice of the official liquidator, the existence of his right.

56. Sub-section (3) of Section 47 clearly envisages the position where he does not either realise or relinquish his security. He, in such a situation, may state in his Affidavit of Proof, the particulars of the security and value at which he assesses the same. The consequences therefore would ensue. If the Official Receiver proceeds to sell the security, the Court first has to pay the amount at which the security was valued to the secured creditor out of the sale proceeds.

39. The SARFAESI Act, 2002 was enacted to provide for regulating securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The Act provides for enforcement of security interest without intervention of the Court or Tribunal. The validity of the Act has been upheld in *Mardia Chemicals* case. There is no apparent inconsistency between SARFAESI Act and the Companies Act and that there does not appear to be any conflict between provisions of sale of the assets by secured creditors to realise the security interest. The SARFAESI Act, however, has to be harmonised with the Companies Act, as it is in addition to not in delegation of Companies Act, 1956 (Section 37 of the SARFAESI Act).

40. In a given situation, where recommendation of winding up has been made by the BIFR and that Court is satisfied that there is no possibility of rehabilitation, and that recommendation is liable to be accepted, the permission or sale of assets by a

securitisation company may not be refused by the company court. Ordinarily such permission is not required, but in a situation, where the recommendation for winding up by BIFR is pending or where a provisional liquidator is appointed and also in case where company is in liquidation, in order to avoid any conflict of interests and to realise workmen's dues, who have been treated as secured creditors having pari passu charge over the assets of the company, after the amendment of Section 529A by Act No. 35 of 1985, it is necessary that the Company Court must be informed, so that directions be given to associate the Official Liquidator for the purposes of identifying and claiming the workmen's dues, which are to be ranked equally with the secured debts in the winding up of a company and are to be paid under the amended Section 529A in priority to all other debts and in case of insufficiency are to abate in equal proportions.

41. Where the provisions of the special act are provided to override the provisions of other laws and have been given the same status to be treated in addition and not in derogation of the earlier act, the Court must harmonise the provisions of both the statutes. The object of the Part VII of the Companies Act is to provide an effective mechanism of winding up and for dissolution of the companies. In such case the provisions applicable to sale, realisation and the preferences in payments, have to be ensured in accordance with the statutory scheme. If the securitisation and reconstruction of financial assets and the enforcement of security interest under the SARFAESI Act does not come in conflict with the scheme of winding up and liquidation of the company. The SARFAESI Act gives the secured creditors special rights to enforce to securitise their dues or to enforce their securities without intervention of the Court. The object of speedier recovery of loans from non-performing assets would be defeated, if the Official Liquidator would intervene to enforce the provisions of the Companies Act and to monitor each step of the, securitisation and enforcement of security interest. The company court, therefore, must allow the provisions of SARFAESI Act to be put into motion even if the proceedings of winding up have been recommended or are pending or that company is under liquidation. The statutory duties of the company court for protecting the workmen's dues and the interest of other stake holders including the public interest will, however, oblige the Court to be informed with the process of sale.

42. The company court is under statutory duty under the scheme of the winding up and dissolution of the companies in Part VII of the Companies Act to watch the interest of workmen and the other stake holders. The role of the company court, however, is very limited and which may not extend beyond the ascertainment of the securities, if realised from charged assets, the valuation of the assets, fixation of reserved price and confirmation of sale. The Court will, thereafter, insist upon depositing the amount of the workmen's dues or dues estimated by the liquidator to be deposited with condition that balance of the workmen's dues if they are entitled from the excess amount is secured. If the realisation from the charged

assets of the company is over and above the dues of the secured creditors, the company court may insist upon deposit of such excess amount for the purposes of other stake holders namely government dues, the unsecured creditors, the employees and the contributories.

43. The Court as such find that it will be appropriate that the company may not be wound up and that at present a provisional liquidator may be appointed u/s 150 of the Companies Act, 1956. The Official Liquidator is as such appointed as provisional liquidator of BPL Display Devices Ltd. (erstwhile M/s Uptron Colour Picture Tube Ltd.) with its registered office at A-41/42, Site 4 Industrial Area, Shahibabad, District Ghaziabad. He will call upon the ex-directors, who have consented to the appointment of the provisional liquidator and have given undertaking through Shri V.M. Zaidi to file statement of affairs within a period of 21 days. The provisional liquidator will scrutinise the statement of affairs and take over the entire books of accounts, records and other assets, which are not charged and which are not taken over by ARCIL (for which an inventory has been provided with the application filed by ARCIL). The Court in exercise of its powers under Sub-section (3) of Section 450 of the Companies Act limits and restricts powers of the provisional liquidator to the extent that the application of ARCIL is being considered and allowed by the Court.

44. The Official Liquidator as provisional liquidator will authorise to invite claims from all the stake holders including the secured creditors (who do not wish to opt to stand outside winding up proceedings), workmen, government dues, unsecured creditors, employees, suppliers, or any other person or persons who may have interest to be paid u/s 529 529A and, 530 of the Companies Act, 1956. The Official Liquidator shall invite these claims by advertisement in daily newspapers "Indian Express", "Economic Times" published from Delhi and "Amar Ujala" published from Delhi and Ghaziabad. All the expenditure incurred by him will be charged from the amount realised from the sale of assets. The Official Liquidator will take the assistance of the Liquidation Claims Committee constituted by the Court and prepare a report for declaring interim dividend in accordance with the provisions of the Companies Act, 1956.

45. Shri Shyam Narain, Shri P.K. Sinha and Shri Sudhanshu Narain appearing for workmen as well as Shri Shahid Masood appearing for the workmen of erstwhile Uptron Colour Picture Tube Ltd. shall be at liberty to submit claims of the workmen's dues represented by them on the affidavit of proof and the form 66 and other supporting documents in accordance with Companies (Court) Rules, 1959.

46. The ARCIL shall file the details of the charges of the secured creditors, represented by it over the movable and immovable assets of the company within three weeks. They will also file affidavit along with report of the valuation valuing the property for the purposes of sale within six weeks.

47. After hearing all the parties and considering the records and with the consent of all those, who are appearing in the proceedings including the applicant, the application of Asset Reconstruction Company (India) Ltd. to grant or to remain outside the proceedings for winding up and to allow the applicant secured creditor to realise their securities by effecting sale of the movable and immovable property of the company u/s 13 of the SARFAESI Act read with Rule 8 and 9 of the Security Interest Enforcement Rules, 2002 is allowed subject, to following conditions:

(1) The ARCIL shall file an affidavit giving Details of the charged assets and the charge certificates under Sections 123/132 of the Companies Act, 1956 of the secured creditors over the assets of the company.

(2) The ARCIL shall file in the Court an affidavit giving the valuation of the seemed assets, which are proposed to be sold along with copy of the valuation report of the valuation carried out, for the purposes of determining the upset price or the reserve price.

(3) The ARCIL shall present the highest bid of both the movable and immovable properties either separately or if highest bid are received as single lot, with all necessary details and particulars including the bid sheet to the Court before the confirmation of sale.

(4) The ARCIL shall not confirm the sale until the Court has considered and given approval for such confirmation.

(5) The ARCIL shall strictly follow the procedure prescribed under the SARFAESI Act, 2002 and under Rule 8 and 9 of the Security Interest (Enforcement) Rules, 2002 in carrying out the sale, and shall keep a true and accurate record of the proceedings for inspection by the Court.

(6) After the sale is confirmed and the sale consideration is deposited, the entire sale consideration shall be kept by the ARCIL in a separate account.

(7) The expenses incurred by ARCIL and the Official Liquidator in carrying out their statutory duties shall be deducted from the sale proceeds before any appropriation or disbursement.

(8) The ARCIL shall submit the details of the claims of secured creditors including their interest (with details of the calculation of interest) for appropriation, with approval of the Court, after adjustment and deposit of the workmen's dues u/s 529, 529A and 530 of the Companies Act, 1956, and deposit with the Official Liquidator, the surplus amount, if any, for disbursement in accordance with law.

48. The matter shall be listed again on 1st December, 2008.

49. A copy of the order be given to learned Counsel for the parties by Monday.