

(2002) 02 AHC CK 0119

Allahabad High Court

Case No: Company Petition No. 4 of 1997, Miscellaneous Company Application No"s. 4778, 50568 and 79609 of 2001 and Civil Miscellaneous Application No. 2001 (A-44)

In Re: U.P. Cement Corporation
Ltd. (In Liquidation)

APPELLANT

Vs

RESPONDENT

Date of Decision: Feb. 14, 2002

Acts Referred:

- Companies (Court) Rules, 1959 - Rule 272, 273, 274
- Companies Act, 1956 - Section 443, 446, 457, 457(1), 466
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 20, 20(1)

Citation: (2002) 112 CompCas 562

Hon'ble Judges: Sunil Ambwani, J

Bench: Single Bench

Advocate: R.P. Goel and Ashok Mehta, for the Appellant; Anurag Khanna, S.N. Singh, P.N. Tripathi, R.P. Agarwal, Rakesh Tewari, L.K. Tewari, S.D.N. Singh, Kush Saxena, Krishna Murari, Saumitra Singh, C.B. Gupta, V.K.S. Chaudhary and Vikram Nath, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Sunh Ambwani, J.

U.P. State Cement Corporation Ltd. (UPSCCL) was declared as a Sick Industrial Company by Board for Industrial and Financial Reconstruction (BIFR) on 7-10-1992, and IDBI was appointed as the Operating Agency. Cemtech India was appointed by UPSCCL to prepare a techno - viability report which was submitted in July, 1994. As on 31-3-1994, the accumulated losses of UPSCCL were Rs. 319.81 crores as against the share capital and reserves of Rs. 68.29 crores. Company did not submit any rehabilitation proposal or comments on the report submitted by Cemtech and thus BIFR directed the company to submit an alternative revival plan to the Operating

Agency. The workers were also directed to submit rehabilitation proposal with the help of Tata Consultants within two months indicating the means of finance. No proposal was received by the Board within the time indicated. By the same order of the BIFR dated 28-12-1993, the State Bank of India, Allahabad Bank and IDBI were directed u/s 21 of the Sick Industrial Companies (Special Provisions) Act 1985, to prepare a complete inventory of all assets and liabilities and lists of registers/records/documents of shareholders and creditors and to get valuation done and to report the matter to the Board. Since no proposal were received the Operating Agency issued an advertisement for change in management on 6/8-3-1995. Four offers were received in response to the advertisement. The Operating Agency was required to examine the relative merits of the proposals. The State Government was also required to indicate their view regarding their equity of Rs. 68 lacs, and loans of Rs. 50 crores to UPSCCL in the event of privatization. Out of the four proposals, Gujarat Ambuja Cement Ltd., informed that they are not interested in the take-over and Dalmia Industries Ltd. did not submit any proposal. Dalla Sharamik Sangthan and U.P. State Cement Corporation Workers Industries Co-operative Society submitted proposals. The Operating Agency did not consider these proposals to be support worthy. In view of the employment of about 6000 workers, on the request of State Government, the Operating Agency was required to issue a fresh advertisement and to approach the resourceful parties to make reasonable efforts to locate resourceful parties to submit offers. Fresh Advertisement was issued on 24-11-1995. The Operating Agency also approached about fifteen major cement companies, but no concrete proposal was received. Dalmia Industries Ltd. H.B. group and Khandelwal Cement Ltd. sought time to submit proposals. They sought waiver of entire interest on term loans of financial institutions and bank which was not acceptable to them. Both the bidders were directed to deposit a some of Rs. 5 crores each in an interest bearing "No Lien" account with the lead Bank by 15-2-1996, and the Operating Agency was directed to examine the proposals. H.B. Group submitted a proposal and requested for some information and visit to unit.

Opportunity was given to visit the units and to have a meeting with the State Government to settle the terms and conditions. No agreed comprehensive proposal came forward for consideration. The proposals of H.B. Group did not inform to any norms of one time settlement. The Financial Institution and Banks were also not prepared to enter into a fresh term loan agreement. The proposals required the State Government to induct fresh funds on which the State Government did not give its views. The Workers union did npt agree to enter into any kind of agreement with H.B. Group. After giving opportunity to the State Government to convey their view in the matter, the Board directed that if no comprehensive rehabilitation proposal was received from the State Government by 7-11 -1996, an opinion to wind up the company would be issued. Since the State Government requested for further time to constitute a Committee whose Chairman was to be nominated by the State

Government, the Board looking into the circumstances, in which accumulated loss had increased to Rs. 380 crores and four years time had been spent in finding out and exploring all possibility of rehabilitation formed a prima facie opinion that the company was not likely to make its net worth positive within a reasonable time, while meeting all its financial obligations, and was not likely to become viable in future, and that it was thus just equitable, and in public interest that it should be wound up u/s 20(1) of the Act. A show-cause notice was issued on 18-11-1996,

2. On 6-2-1997 the Board found that H.B. Group had withdrawn their proposal and obtained refund of the amount. It gave a further opportunity to the company. State Government and Workers to submit a comprehensive twice. A revival proposal was submitted on 26-3-1997 for closure of two production lines, modernization/expansion of existing facilities. OTS of the dues of financial institution and banks, VRS as well as various concessions from the State Government including of induction of fresh funds for OTS, waiver of interest and conversion of their loans into equity. Operating Agency reported that the corporation will require interest free funds of order of about Rs. 250 crores for two years of implementation of scheme and that the State Government has not communicated their commitment to induct requisite interest-free funds in the corporation for its revival. Subsequently the Operating Agency by its letter dated 17-6-1997 informed that even during the extended period they have not received any communication from the Government of UP, and thus Board concluded that the promoters were not serious about rehabilitating the company, and that there was no rehabilitation proposal with means of finance fully tied up before the Board for consideration despite ample opportunities having been given to all concerned. The Board, thereafter confirmed this prima facie opinion that the company is not likely to make its net-worth exceed the accumulated losses with 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 hence it should be wound up u/s 20(1). This opinion of the Board in its order dated 2-7-1997 was forwarded by the Registrar of BIFR vide its letter No. 60792-B-III dated 9-7-1997 to this Court which was received on 14-7-1997 in the Registry and on 17-7-1997 in the company section, and was registered as Company Application No. 4 of 1997.

3. Aggrieved by the aforesaid order of the BIFR the company filed an appeal No. 169 of 1997 before the AAIFR on 8-8-1997 which was admitted and the operation of the order of BIFR was stayed. The company moved an application No. 62817 dated 24-9-1997 on 25-9-1997 for staying the proceedings before this Court. Appeal was dismissed on 19-2-1998 upon, which the Chief Standing Counsel for State of U.P., filed an application No, 40402 of 1998 (A-8) u/s 20(2) of the Sick Industrial Company (Special Provisions) Act, 1985 dated 14-7-1998 filed on 15-7-1998 informing the Court that the appeal has been dismissed on 19-2-1998 praying that the Court may order winding up of the UPCCCL, and appointed an Officer as official liquidator of UPCCCL having all the powers of Official Liquidator under the Act. This application

was supported by the affidavit of Sri Vishwa Nath Dubey, Upper Division Assistant in Industrial Development Department, U.P., Lucknow. Thereafter an application No. 43683 of 1998 was filed by the State Government through Chief Standing Counsel on 24-7-1998 for listing the matter for orders for appointment of liquidator. An Application No. 44062 of 1998 was filed by the company on 27-7-1998 through its counsel Sri Shiv Nath Singh for winding up of the company and to appoint Official Liquidator as liquidator of the company along with affidavit of Padam Singh, Managing Director of U.P.C.C.I. Churk, Mirzapur.

4. Cement Workers Union (CITU) and 13 other trade unions filed a Writ Petition No. 15134 of 1998 challenging the order dated 19-2-1998 passed by AAIFR and the order dated 2-7-1997 passed by the BIFR. They filed an affidavit (A-12) in this company application to keep the proceedings in abeyance till the disposal of the Writ Petition. The State Government filed a reply to the aforesaid application filed by the Cement Workers Union in the form of Affidavit of Sri K.L. Meena, Special Secretary, Government of U.P. Industrial Development Department, Lucknow, for rejection the application to keep the winding up proceeding in abeyance on the ground that UPSCCL is incurring losses. In detailed objection in the form of affidavit he gave reasons for losses suffered by the company. In para 9 it was stated that UPSCCL has on its rolls, including casual muster roll 5300 workers and that the major reason for the sickness of the Sick Company were financial, productive, technical, raw material, managerial and marketing problems. In paragraphs 10 to 35 he spelled out the reasons of financial losses which included the old and completely worn/out factory of Churk plant. The second plant of the Sick Company at Dalla, Cement Factory was installed and commissioned in the year 1970-71. It was stated that dry process cement plant established by the company for clinker production at Dalla and Grinding unit commissioned in 1982, could never produce/ manufacture to its full capacity. The maximum production, was achieved only in the year 1986-87, of 10.34 lacs metric tone against the installed capacity of 16.80 lacs tones, which over the year have come down to approximately 2.2 lacs metric tones per year. The dry process plant was set up after taking huge amount of loan from financial institutions which the corporation failed to pay and that the bank and financial institutions have refused to give any further financial assistance to the company. The company was unable to meet competition from private sector which manufacture about 90 per cent of the installed capacity of cement. In paragraphs 36 to 45 Sri K.L. Meena mentioned about the steps taken by the BIFR to explore the possibilities of rehabilitation. He stated that the workers union had given exaggerated statement of surplus assets based on the report of Chartered Accountant in pursuance of the orders of this Court in July, 1998 claiming Rs. 151 crores as surplus assets which is self contradictory to the stand of the workers union before the Board as well as before the High Court in the Writ Petition in which the workers unions have claimed surplus assets to be not more than five crores. In the writ petition the workers' union filed a fresh rehabilitation scheme in which the surplus assets were shown to be of 23

crores. In para 46 he stated that as the three units of the company were not able to comply with the prescribed standard of emission norms in its various sectors on which the Central Pollution Control Board on 16-6-1997 has issued directions u/s 5 of the Environment (Protection) Act, 1986, and directed the company to stop their operation in all their three units. In the same paragraph it was stated that the continuous running of the company is causing disastrous effect on the natural vegetation/inhabitants of the area. In paragraph 59, he referred to the case of Rohtas Industries Ltd., Dalmia Nagar in District Rohtas Bihar reported in 1986 (86) Company Cases, Page 1, in which the Apex Court entertained the writ petition during the pendency of the winding up before the Patna High Court and experimented with adopting various alternative schemes for rehabilitation of that industry with the help of the BIFR and after keeping the winding up proceeding in abeyance for years together, concluded that inspite of the best efforts the object to revive the company does not appear feasible and held that in these circumstances, the future course of action and while bringing end to the proceedings directed, the winding up proceedings before Patna High Court be resumed, Sri Meena concluded that in view of the facts and circumstances enumerated by him and in view of Rohtas Industries experiment, the Court may order winding up of UPSCCL rather than entertaining similar rehabilitation scheme, as were submitted before the Board and were not found viable by the Board.

5. In his aforesaid affidavit Sri K.L. Meena also submitted that since 1992 the State Government has directed sales tax deferment to the sick company for a period of 5 years with a benefit of approximately 50 crores as financial assistance which did not include latest payment of Rs. 11.25 crores given to the corporation as an aid for payment of wages/salaries to employees for a period of 4-1/4 months. The company is not paying the taxes, royalties and that no measure whatsoever, has been taken by the State to recover the same. It has been provided electricity and other facilities, for which the company is not making payment for the last several months. It was categorically mentioned that the State Government is neither in a position to invest hundred of crores rupees in the present sick company, and thus experiment without surety of rehabilitation of the company. He stated that the State Government had communicated to BIFR about the State Government's decision of not being in a position to invest huge amount of hundred of crores of rupees which was proposed by the Operating Agency; that the decision of the State Government was never reversed and that the State Government has not been in a position to further invest huge amount as required by the Operating Agency. At present there are no assets whatsoever, what to say about the surplus assets free from encumbrances of the company and all assets of the company are mortgaged with the financial institutions and banks, including the Industrial Development Bank of India, against the loans taken by the sick company. Neither the corporation nor the State Government has control whatsoever on the realization arising but of the assets, as first charge on these assets vests with financial institutions/banks. He thereafter submitted that

fallacy in the report of Chartered Accountant based on the valuation of report of M/s. S.K. Ahuja and Associates, Kanpur and Valuation Report of A.F. Fargusan and Company, in which the findings were contradictory. It was mentioned that S.N. Singh and Company has further estimated figures of the assets and the justification to calculate value of the school building which are to run as Government Institutions and valuation of land are high in the backward area. This affidavit running into 113 paragraphs given by Sri K.L. Meena, Special Secretary, Industrial Development Government of U.P. summarized the position of the State Government and its objection to the rehabilitation proposals of the Cement Corporation Unit.

6. Writ Petition No. 15134 of 1998, was dismissed by this Court on 8-12-1999 with observations that in case the assets of company are sold, the workers will be given first priority in payment. The operative portion of the order is quoted as below :

"In the last, the learned counsel for the petitioner submitted that the workmen had been working in the sick unit. They are entitled to Wages till the winding up order is passed. This submission was also raised before the Board and it noted the submission in the meetings held on 26-9-1996 and observed as follows :

In case the State Government decide to wind up the corporation they should do so and pay all the dues of the labour. The present Government has different policy regarding sick P.S.U.s as compared to the previous Government and the workers are hopeful that a favourable view will be taken in this case.

There is no reason why the workers be not paid their salary. In view of the above discussion the writ petition is dismissed against the recommendation of the Board dated 6-2-1997, and the order of the appellate authority dated 19-2-1998. The Writ Petition, in so far as the direction in the nature of mandamus commanding respondent No. 4 to make payment of all dues to the workmen for the period till today, is allowed. In case respondent No. 4 is not able to pay the amount on winding up of the corporation, the payment shall be made to the workers prior to making any payment to any person in accordance with Section 539A of the Companies Act, 1956. The writ petition, as against the other reliefs claimed in the writ petition, is hereby dismissed."

The Cement Workers Union and others filed SLP No. 7796 of 2000, between Cement Workers Union (CITU) v. Board Industrial Finance and Reconstruction, against the orders of this Court which was dismissed by Hon"ble Supreme Court on 9-5-2000.

7. The workers also filed objections to the winding up of the company in this company petition. These objections were considered by the Court. After finding that the writ petition has been dismissed based on the same ground on which the objections were filed, the Court concluded that the opinion of BIFR does not suffer from any illegality. Accepting the opinion of BIFR the corporation was directed to be wound up by order passed on 8-12-1999, with a direction to the official liquidator to take appropriate action in accordance with law. A Special Appeal No. 38 of 2000 filed

by Cement Workers Union and others against winding up order was dismissed on 31-7-2000.

8. The Statement of affairs of the company in pursuance of Section 454 of the Companies Act, 1956, on Form 157 verified by Sri Yashpal Sharma, the company secretary on 6-3-2000, was submitted to official liquidator with a copy to the Registrar of the Companies on 22-3-2000.

9. An application No. 11 of 2001 was filed by Allahabad Bank praying that the Court may exempt the properties, detailed in annexures 2 and 3 of the application for winding up/liquidation proceeding on the allegation that it had given loan and credit facility to the corporation and the company had hypothecated certain properties with it under an agreement dated 31-3-1981. The application was dismissed by the Court on 8-12-1999 with the following observations :

Application No. 11.

"This is an application filed by Allahabad Bank, praying that the Court may exempt the properties detailed in annexures 2 and 3 of the application from winding up/liquidation proceedings, on the allegation that it has given loan and credit facility to the corporation and the corporation has hypothecated certain properties with it under an agreement dated 31-3-1981.

The applicant claims to be secured creditor. A secured creditor is entitled to preference for realization of its amount u/s 529A of the Companies Act, 1956. The secured creditor cannot claim that the properties which have been hypothecated should be exempted from winding up. The winding up order is not to be passed in relation to a particular property. It consists of the whole assets of the company. The applicant has a right to submit its claim before the official liquidator. The application is accordingly dismissed."

10. Application (A-16) filed by employees (thirty seven in number) of the company (in liquidation) was also disposed of with the observation that these applicants can claim such relief for appropriate proceedings before the appropriate authority. Applications A-21 and A-22 filed by Balaji Trading Company was disposed of on 13-4-2000 by giving permission to the applicant to continue the arbitration case before the arbitrator Mr. Justice G.B. Singh (retired) in proceedings in O.S. No. 281 of 1999.

11. At this stage, the subject application No. 47788 of 2001 (A-31) was filed on 17-5-2001 by the State Government with a prayer to direct official liquidator for taking appropriate steps in the light of the order dated 8-12-1999 passed by this Court after giving due consideration, and considering the offer made by Grasim Industries Company, and IDBI, so that the liability of the company may be discharged/paid, and the interest of the labour and other staff of the cement corporation may be protected. It is opposed by Allahabad Bank in its application No.

50506 of 2001 filed on 24-5-2001 with the prayer that the application for permission to sell the assets of the corporation be dismissed.

12. The application filed by the State Government is supported by affidavit of Sri Hari Krishna, the Secretary, Heavy Industries, Government of U.P. Lucknow. He has stated that the official liquidator was required to take immediate steps after winding up order. However, no effective results have been achieved in pursuance of the directions given by this Court as such the State Government in order to assist official liquidator to expedite the matter and for ensuring compliance of Court's order dated 8-12-1999 and to save public money, and since the Labour Union and other staff of the U.P. State Cement Corporation Ltd., were continuously pressing for payment of its wages etc., published an advertisement in newspapers inviting tenders for taking over Cement Plants of the U.P. State Cement Corporation Ltd. In the said advertisement it was mentioned that company is being wound up by the High Court of Judicature at Allahabad, on the recommendation of BIFR, hence the said tender would be subject to the clearance by the High Court and BIFR. A copy of the advertisement made in the newspaper "The Economic Times" dated 10-2-2001, and the newspaper "Business Standard" dated 12-2-2001 has been filed as Annexure A-4. In the said advertisement the last date for the interested parties for submitting their bids was 31-3-2001 by 3.00 P.M. The State Government extended the last date for submitting bids with regard to aforesaid matter by 30-4-2002 to get worth while offers, and published it in "Economic Times" on 31-3-2001. In the advertisement published in the newspaper the Government of U.P. announced/declared a number of reliefs and concessions to be granted by the State Government. It is submitted that the State Government adopted a very transparent process by duly advertising which make package of incentive very clear. Three Cement companies initially showed interest, however, finally only one company namely Grasim Industries Ltd. came forward and submitted an offer on 30-4-2001 which was otherwise also valid as per tender notice. The bid submitted by Grasim Industries Ltd. was in two parts, which was opened by the concerned committee constituted for the purpose. The note of the committee has been annexed as Annexure A-6, which shows that the committee consisted of following officials:

1. Commissioner Industrial Development - Chairman
2. Secretary, Small Industries Development - Member
3. Secretary, Finance Department - Member
4. Secretary, Heavy Industries - Member
5. Managing Director, UPSIDC - Member

The committee opened single tender on the stated reasons that the unit has closed production, its machinery is diminishing, five thousands and more employees are facing uncertainty and that such a big production capacity is suffering loss, and further that after two advertisements only one tender has been received.

13. The tender is in two parts namely qualifying offer of first part of Rs. 195 crores, towards settlement of dues of Banks and Financial Institutions and with employees, and part II of the said bid contains a proposal of Rs. 35 crores towards VRS scheme of the staff of State Cement Corporation Ltd. and Rs. 11 crores as over and above the amount given in the bid. The total offer of Grasim Industries Ltd. was found to be of Rs. 241 crores. In para 15 of the affidavit it has been stated that the advertisement was made subject to sanction given by the High Court, and as such the Secretary, Heavy Industries along with communication letter sent by A.P. Singh, Industrial Development Commissioner/Principal Secretary, Government of U.P. personally met official liquidator on 3-5-2001, and tendered copy of the said communication along with other relevant documents. The official liquidator did not accept the said communication, and required it to be submitted before the Court. It has been stated that the communication of the State Government was to assist the official liquidator so that on one hand in compliance of the order dated 8-12-1999 passed by this Court should be ensured and the staff of U.P. State Cement Corporation, Financial Institution as well as public money can be saved. Paragraph 17 of the affidavit, relates to the dues of the financial institution. It is stated that the Secretary, Industrial Development Government of U.P. met the Chairman and Managing Director IDBL In this meeting it was indicated that the financial institutions will be willing to settle the dues against UP State Cement Corporation on payment of principal amount. In support of this averment the affidavit encloses a note of Secretary, Industries Development which has been marked as Annexure A-8. The said note is not enclosed with the original affidavit, instead minutes of the committee dated 30-4-2001, on the date of opening of the tender has been annexed with the affidavit.

14. Coming to the advertisement made by the State Government in "Economic Times" dated 10-2-2001 and "Business Standard" dated 12-2-2001, it is necessary to quote the advertisement to understand the true nature of the invitation of offer. The advertisement is quoted as below:

U.P. State Cement Corporation

(A Government of U.P. Undertaking under liquidation)

TENDER NOTICE FOR TAKE OVER OF A CEMENT PLANT

Government of Uttar Pradesh invites offer from interested parties for take over of U.P. State Cement Corporation, on the basis of two part bid offer.

First part of bid would contain an Unconditional Acceptance clearing the outstanding workers retrenchment benefits to all the workers and the one time settlement dues for financial institutions and B. The amount expected for this is Rupees One Hundred Ninety Five Crores. This would be qualifying offer part of the bid would be an offer and above the qualifying offer. IIInd part of the bid of only

such bidders be opened who have tendered unconditional acceptance of first part (qualifying bid).

The Highest Bidder of Part II would be awarded the tender immediately

Reliefs and Concessions

Government of Uttar Pradesh would be ready to :

1. Write off all past Government loans with interest of the company.
2. Write off all Electricity/Trade Tax/Royalty dues.
3. Offer Trade Tax exemption to the unit for Ten years.
4. Offer waiver of royalty dues for Ten years.
5. Renew the Lime stone leases in favour of the company.
6. Power load of the new plant would be sanctioned and required power supply ensured.
7. Electricity Duty Exemption would be granted on any captive power generation facility set up by the promoter for this plant.

Properties on Offer

Include the lime stone lease at Ninga & Kajrahat having over hundred million tonnes of lime stone deposits adjacent to the factory site. Report of Director of Geology and Mining regarding quantity and composition of stone shall be attached to the tender form. The existing plants at Chunar and Dalla and all other properties of Corporation are included in the offer, minus the land at Churk plant and lease of Gurma land which would vest the Government of Uttar Pradesh.

Legal Status of the Company

The company is under liquidation under the orders of Hon. High Court, Allahabad on the recommendation of BIFR. Therefore, the above tender would be subject to clearance of Hon. High Court and the BIFR.

Last Date

Interested parties must submit their part bids by 31 -3-2001 by 3.00 P.M. to the Secretary, Industries Development, Government of U.P. Room No. 423, Secretariat Annexe Bhawan, Lucknow-226, Phone No. 0522-239280, Fax: 0522-239235, e-mail: Harry @ upindia or epbup@satyam.net.in.

Tender papers

Tender papers and information memorandum about the company giving complete details of the assets by obtained from the above address on all working days on

payment of Rs. 5,000 through a Bank draft in favour of U.P. Government Tender Form can also be downloaded from the internet from website [www. upindia. com](http://www.upindia.com) or www.epbupindia.com and the requisite fee for the forms can be submitted along with the bid. Site inspection would also be arranged if required.

Earnest Money Deposit

The tendering party would have to submit their bids along with an earnest money deposit (refundable Rupees Five Crore in the form of a Bank draft) in favour of Uttar Pradesh Government, Lucknow.

15. The Memorandum of information (including guidelines for submitting of tenders) titled as invitation for offer for sale to U.P. State Cement Corporation marked as confidential and valued at Rs. 5,000 is enclosed as "appendix 6" to the affidavit. The document gives the background, liabilities statements, history, details of the lease rights to be transferred, details of properties of the corporation, silent features and USP's of this offering, guidelines on submission of offers format for submission of bids and Annexures - Reports of Directorate of Geology and Mining on Kajrahat and Ninga Mines.

16. In the background it has been stated in the memorandum of information that U.P. State Cement Corporation Limited is State Government undertaking registered as a public Limited Company under the Indian Companies Act, 1956. The entire share capital is held by the Government of U.P. through the Governor of U.P. or his nominees. It has the largest installed capacity for manufacturing of cement. The four units of the company are situated at Churk, (wet process) commissioned in 1954 and 1962, installed capacity (i) Clinker 4.56 Lac MT and (ii) Cement 4.80 Lac MT; (2) Dalla (wet process) commissioned in 1971-72 installed capacity (i) Clinker 3.80 Lac MT and (ii) Cement 4.00 Lac MT; (3) Dalla (Clinker Unit) (Dry process) commissioned in 1983-84 installed capacity 8 Lac MT; and (4) Chunar (Grinding Unit) commissioned in 1983-84 with installed capacity of Cement 16.80 (Lac MT). In the Liabilities statement as on 8-12-1999 is shown as share capital of 68.28 crores and total of 879.98 crores towards loans and current liabilities. The break-up of these loans and current liabilities is given as below :

(i) Long term loan from FIs/Banks:

(a) Principal	-	54.20
(b) Interest	-	235.42
(ii) Working Capital Loans	-	4.65
(iii) Loans from State Government	-	165.80

(iv) Current Liabilities :

(a) Salaries and wages etc.	-	106.64
(b) Electricity Dues	-	110.70
(c) Outstanding Sales Tax	-	67.10

(d) Royalty on Lime Stone -	20.10
(e) Suppliers payment etc. -	47.09

17. The offer of Grasim Industries Ltd. have been annexed to the application as "Appendix 2". This offer dated 30-4-2001. Reference Grasim Industries Ltd. as a Aditya Birla Group with turnover for the year ending March 2001 to be more than 5,000 crores. It encloses and demand draft dated 27-4-2001 drawn on State Bank of India payable at Lucknow for Rs. 5 crores and accepts to pay to the Government of Uttar Pradesh, to clear the outstanding dues, retrenchment/VRS benefits to all workers of the corporation and to enter into one time settlement by the Government of U.P. with the financial institution and banks, on the outstanding long-term loans of the corporation, as detailed in Memorandum of Information and offers a total amount agreed towards liability amounting to Rs. 195 crores. The annexure to the bid gives the condition upon the offer. These conditions requires sale transfer of the undertaking to be passed within six weeks or the time mutually agreed from the date of the bid; all claims of secured and unsecured creditors, employees, officers and executors, wages, arrears in PF and ESI retrenchment compensation etc. to be paid out of the consideration price and no liability beyond the bid amount and further the bidder did not assume any obligation for payment of any claims for secured creditors or unsecured creditors, employees, officers, executors etc. including sales tax, Income Tax, excise, royalty tax and all other taxes and any other dues of Central Government and State Government of Indian Railways beyond the bid offer Confirmation from workers, employees and officers or any staff or contract or subject to the re-employment, lease and extension of lease for limestone as listed in Schedule IV of the Memorandum to be granted/renewed in the name of the bidder on the same terms and conditions on which it was granted to UPSCCL without liability of payment of any arrears or other dues and the agreed consideration to be paid as full and final payment with no liability if arises in future beyond the consideration. The final order of the High Court in the condition required to be fully effective and binding and in case any appeal or with or special leave petition, stay order has been understanding to have deemed to have become final until appeal, with or SLP is rejected and the time for filing appeal, writ or SLP has expired. The bidder required evidence/representation from the Governor of U.P. that all dues payable to U.P. Government shall be waived. Sales-tax exemption on sale without any ceiling of amount will be available to the bidder for a period of 10 years from the date of handing over possession and royalty tax exemption on limestone will be available to the bidder for a period of 10 years in case any land has been acquired the permission of State Government u/s 44A of the Land Acquisition Act, 1984 for sale of transfer of the property in favour of the bidder and no additional/ further payment shall be required to be made or if the land has been required by private purchase by UPSCCL to arrive and clear and marketable title free from encumbrances to the land and its weight to transfer the same without requiring any permission/approval or sanction of any statutory or other regulatory

agency and that all taxes including land revenue shall be paid by UPSCCL. The bidder further required evidence of all these payable to the bank and financial institutions, all guarantees, warranties and indemnities of the suppliers of machinery is continued to the value to the bidder, evidence that electricity company, water works and all other utilities shall continue to provide on same terms and conditions. The conditions further continued up to 20 items which need no require further elaboration. In fact the bidder required all reliefs and concessions, guarantees and no liability towards any financial institutions, State Government, Government Department or employees. One more significant condition No. 15, required that on the sale, the bidder has assumed that there remained no amount payable on the deeds of transfer and sale or assets or any other documents and vacant possession of the land, houses, colonies, plant and other assets be given. They also required copies of title deeds of land including copy of mining leases including electricity duty exemption on captive power plant and railway sidings/ agreement or arrangement with UPSCCL and India Railway authorities should continue to Grasim silent assets.

18. Allahabad Bank has filed Civil Misc. Application No. 50568 of 2001 on 24-5-2001 with a prayer that permission of sale of assets of the corporation be dismissed with costs. It is stated that Allahabad Bank is secured creditor of UPSCCL and the State Government of U.P. is guarantor of the whole extent of the debts. The Bank filed claim petition against UPSCCL and State Government of U.P. as guarantor for recovery of Rs. 87,15,71,259.72 as on 22-4-1999 calculated up to that date in the Debt Recovery Tribunal, Jabalpur being claim petition Original Application No. 149 of 1999 which has been transferred to Debt Recovery Tribunal, Allahabad and registered as Transfer Application No. 1464 of 2000. Notices have been served on the Corporation and the State Government but they have not filed and written statement and in the mean time winding up order was made on 8-12-1999. An application for injunction against the Corporation and the State Government for transferring, alienating or otherwise dealing with or dispossessing off any property and assets, is pending before the Tribunal. Notices have been sent to the Chief Secretary of the Government of U.P. and the Corporation, but they have not appeared. They have not filed any counter affidavit and have neglected to appear in the matter, and have instead filed an application for permission/approval for the sale of the assets. It has been submitted that provisions of the Central Act No. 51 of 1993, override the provisions of the Companies Act, 1956, conferring exclusive jurisdiction in respect of the adjudication of the claim and execution of the final order on the Tribunal and the Recovery Officer in respect of the debts payable to the bank, and that there can be no interference of the Company Court in respect of payment due to bank payable before Debt Recovery Tribunal. It is lastly alleged that the application of Government of U.P. and Corporation is mala fide and is not maintainable.

19. Arguments were heard on 25-5-2001. The matter was thereafter directed to be heard after vacations. On 25-7-2001 the Court called for report of the official liquidator with regard to handing over of the possession of the plant and machinery and other assets after preparing inventory. Directions were given that the official liquidator and his staff will be provided security for taking over the possession of the property of the company. The Chief Standing Counsel stated that he is in a position to hand over inventories to the official liquidator.

20. On 6-8-2001, the Court was informed that the financial institution which had finances the company (in liq.) held a joint meeting on 2-8-2001 to consider the proposal of the Government of Uttar Pradesh for one time settlement. The meeting which was attended by officials of Allahabad Bank, State Bank of India, IDBI and the officials of Government of Uttar Pradesh was adjourned on the request of Allahabad Bank and State Bank of India to consider the proposals. The process of taking possession of the assets began on 22-7-2001. On the same date, the court issued notices to all the officers and Workers Union who were petitioners in Civil Misc. Writ Petition No. 1534 of 1998 decided on 8-12-1999, to assert their views on the application (A-30) filed by the State Government. On the next hearing the official liquidator reported that possession of the units at district Mirzapur and Sonbhadra has been taken. The District Magistrate, Mirzapur has accepted the supurdagi of the assets. Mr. V.K.S. Chaudhary, Senior Advocate, appearing for the Allahabad Bank submitted that he has not concluded his preliminary objection to the application filed by the State Government. The State Bank of India reported that the consortium meeting had not reached any decision and that the State Bank of India is not inclined towards the offer of the State Government made to them through IDBI. An application was filed by Bharatpur Nutritional Products Ltd. (Dalmia Industries Ltd.) for staying the consideration of the application filed by the State Government for sale of assets to Grasim Industries Ltd. On this Court observed that injunction order dated 25-5-2001 directing that no sale or transfer of possession of assets of the UPSCCL (including the mortgaged assets) will be made without the leave of the Court making it clear that this injunction will not operate against Recovery Officer of the DRT, if and when the claim of the bank is decreed, was already operative. The Cement Workers Union filed an application through counsel Sri Saumitra Singh supported by affidavit of Sri Laxmi Kant Shukla, representing 15 unions a list of which was included with Vakalatnama. It was found that notice to the employees and workers were dispatched only on 23-8-2001, and thus the matter was adjourned to 19-9-2001. Then the functioning of this court was effected by prolonged strike of Advocates for 75 days, on the issues of a bench in Western U.P. The Court, however, functioned and heard matters, in which personal appearance were put by the litigants. The court has held proceedings in this matter on 10-9-2001, 20-9-2001, 22-9-2001, 3-10-2001, 29-10-2001, 30-10-2001 and 5-11 -2001. In between the official liquidator submitted his report Nos. 113, 114 and 115 of 2001 with regards to various matters, including application of State Government to consider the offer

made by Grasim Industries Ltd. (report No. 114 of 2001), report No. 114 of 2001, was filed in compliance of direction of the Court to find out the views of State Government on possibility of sale of assets by advertising for exploring higher offer made to the official liquidator and report No. 115 of 2001, for giving direction to the District Magistrate, Principal of College, schools, hospitals, employees, workers and officials to deposit the rent of the building occupied by them giving authority to District Magistrate to realize the rent.

21. In pursuance of the orders passed by this Court on 20-9-2001, the official liquidator submitted his report No. 129 of 2001 in which the report to the Court that in response to his letter dated 9-1-2001, sent to the State Government, he has been furnished a reply by the Secretary, Industrial Development Department of Government of U.P. by Fax Message dated 30-10-2001. In this reply the Government of U.P. intimated that it does not support the move for re-tendering through official liquidator due to the reasons, namely, (1) that it will unnecessarily delay the revival of the unit through privatization; (2) idea is to transfer the unit concern and not merely disposal of the assets; (3) there is no guarantee for re-tendering through official liquidator will get a higher bid, and (4) that other institutions have also to agree to this move, and that the reliefs and concluding that the concessions offered by the Government of U.P. can remain valid for the moves, only if the points mentioned above are taken care of. The Court found that the submission of Sri Ashok Mehta, the learned Chief Standing Counsel were not in consonance with the communication sent by the State Government in writing to the official liquidator. The matter was pending since 17-5-2001, based on assumption that the Banks and financial institutions have agreed to one time settlement which was one of the basic conditions of the invitation of offer but inspite several adjournment the time the Banks did not come out with any categorical statement with regard to one time settlement. In the meantime the employees were facing several difficulties and complaints were received with regard to water and electricity supply, transportation, staff of schools, teachers, supply of essential drugs in hospitals. It was made clear that the Government Officials are responsible to provide these facilities inspite of the fact that the company had. been wound up, and that the citizens of this country cannot be deprived of basic amenities on the ground that they are employees the erstwhile wound up Government company. Serious concern was expressed on the complaints against to executing officers, who trying to occupy and to put the properties of the company (in liquidation) to be misused by removing air-conditioners furnitures etc. from the offices and guest house buildings. The standing counsel assured the Court that these complaints were looked into by the State Government. On 22-11-2001, the chief standing counsel filed report of Sri N.K. Agarwal and Associates, Kanpur with regard to revaluation of the land, building, plant and machinery of the company (in liquidation).

22. The State Bank of India filed application giving terms of compromise on which the State Bank of India has agreed to accept compromise proposal. The application

was not supported by affidavit of any officer of the bank and it was submitted that the matter is under consideration with the Board of Director of State Bank of India. Adjournments were sought to file an affidavit supported by approval of the Board of Directors of the Bank. The Court directed that the copy of application filed by State Government shall be circulated to the official liquidator and other financial institutions and Allahabad Bank inviting their comments. The learned chief standing counsel was directed to produce the entire record pertaining to invitation of offer and acceptance of offer by the committee constituted by the State Government for perusal of the Court. On 4-12-2001 an affidavit of Sri Hemant Bansal, Chief Manager of State Bank of India, Ghosia, District Sant Ravidas Nagar was filed confirming the contents of application filed on 29-11-2001 and stating that the condition of settlement of the matter with the Bank are subject to the approval by the Board of State Bank of India and it will take about two weeks time for the Bank to consider the matter. The counsel appearing for the State Government informed the Court that the Secretary Industrial Development has gone abroad and is likely to return back on 6-12-2001 and thus the matter needs re-examination of the proposal submitted by the State Government.

23. The arguments were heard on 10-12-2001, 11-12-2001 and thereafter on 14-12-2001. Upon hearing counsel for the State Government and after examining the record which contained a note submitted to the cabinet for approval, the court found, that inspite of all the departments of State Government including the Department of Finance, Sales-Tax, Electricity and Law, opposed for the move of rehabilitation on the ground that the departments shall not been able to bear any further financial burden.

24. A copy of the note put up before the cabinet was placed by the chief standing counsel and was taken on record. A perusal of this note shows that it was prepared after seeking comments of the Department of Law Industrial Development, Sales-Tax Finance and Electricity. The Principal Secretary, Legal Remembrance, Government of U.P. advised Government of that official liquidator has been appointed through High Court and thus to remove his appointment proceedings should be undertaken u/s 166 of the Companies Act, 1956, and only thereafter according to proposed procedure, the assets of the UPSCCL can be transferred by privatization. He put a query that there is no clarification as to how 254 acres of land and building at Chunar and 564 acres of land at Gurma is left from sale, and it was proposed that the position should be made clear before the cabinet and the decision of the cabinet be obtained. The tax department proposed that if the rehabilitation is to be made by privatization the department has no objection, to exempt the arrears of trade tax on 67.10 crores, but it did not agree for giving 10 years rehabilitation for trade tax as grounds that before the date of approval by the High Court there is no justification to give 10 years rehabilitation. A trade tax is an indirect tax in which the seller collects the tax from purchaser and deposits in the Government Treasury. This benefit will not be passed on to consumer public and

shall be confined to entrepreneur. It was recommended that such incentive is against the agreement with the Central Government and will amount to giving unlimited rights to a private entrepreneur which will exhaust the raw material in the limited period. It found that at present all units are exempted from trade tax on purchase of raw material, and thus the benefit of exemption on finished product is not justified as it will also come in the way of application of VAT system. Industrial Development Commissioner opposed the exemption of arrears of trade tax and full exemption of 10 years on the ground firstly that in the Chief Ministers meeting it was decided that no such benefit will be given to any industry and if such benefit is extended the Central Government may stop giving assistance to such State Government. Secondly, there is no justification to give 10 years exemption from trade tax and from registration fees as there may not be difficulty in selling unit without giving such exemption. Thirdly he stated that exemption may discourage efficiency of sale of cement in the State and that the amount of profit to the promoter which shall not be estimated. He said that this profit can be somewhere between Rs. 300 to Rs. 3000 crores. According to him information regarding the maximum production of cement has not been given by the Industrial Development Department. According to trade tax and Registration Department this will be upto a minimum of Rs. 250 crores in a year on which the promoter shall get benefit of about 30 crores in a year and in 10 years which will amount to Rs. 300 crores, and in case the promoter is not put to any restriction on expansion, they will not to date 12 per cent, the objectivity price may increase capacity after 10 times which will induce to other promoters to give such exemption, and requested for clarification on certain issues, namely, whether the exemption will apply only to finished goods and whether the expansion of the capacity will be permitted. Many other queries were made with a proposal that in case the promoters of UPSCCL are to be exempted, it will require amendment on Trade Tax Act, forgiving such exemption to all the units to be privatized by the State Government and suggested that a minimum exemption should be fixed in rupees rather than period.

25. The Finance Department in their comments observed that the State Government has already taken a decision and communicated it to the BIFR and the Hon"ble Court that it cannot bear any further financial liability in the unit. BIFR found that the rehabilitation is not possible. Liquidator was appointed on the opinion from BIFR and thus it will not be proper to obtain an order from the High Court for taking back the property from official liquidator, and to offer it for privatization. It commented that unless a proposal of rehabilitation is concerned for all assets and the decision is taken at the highest level and the State Government takes approval of BIFR, the application cannot be filed before the High Court. The financial department made a significant comment on clause four of the note to be submitted to the cabinet to consider to remove liquidator and to offer the industry for privatization for seeking approval of the High Court. It did not agree with the proposal on the ground, firstly that in the Chief Minister's Conference. It was agreed that no such exemption is

given to any industry. The financial department, however, agreed with a note of Industrial Development Commissioner to the extent that the proposal shall not have any effect on the liquidation proceedings which may continue. The liquidator is required to find out the purchasers of the assets of the company (in liq.) and that the State Government may take responsibility of finding out the purchaser only to the extent to put mineral assets of the State to their utilization, and for early payment of the dues of the workers which may take a long time without putting any liability or responsibility on the State Government.

26. U.P. Power Corporation submitted its note informing that there is a liability of 110.70 crores to be paid by the company (in liq.) to U.P. Power Corporation. If the unit is rehabilitated by privatization, it will put development of the capacity of cement production and since the rate schedule for this industry is higher than other category of consumer, it agreed in the interest of future realizations, with the proposal to exempt the electricity dues of 110.70 crores, while putting forward to the difficult, to the effect that the financial condition of the power corporation is unsatisfactory and thus it will not be possible to give such exemption, and offered the only option that the dues to be paid by the U.P. Power Corporation to the State Government be reduced to the extent of the dues of the UPSCCL. The Electricity Department, in fact tried to off set their liability to the State Government by reducing the amount of dues to be paid by UPSCCL. It was pointed out that under the U.P. Electricity Reforms Act there is no provision that exemption be given for any special project, and that any assurance to the promoters may be offered for exemption to be provided on electricity duty on the captive generation by the promoters for a maximum period of five years.

27. The Court finds that all the departments consulted, discouraged reliefs and concessions. Clause 4(iv) of the proposal put by the Principal Secretary and Industrial Development Commissioner, provided that the liquidator be removed and the industrial capacity be offered for privatization after obtaining the sanction from the High Court. One of the factors taking into consideration was to effect that it may take more than 20 years for the sale of the assets by the Liquidator causing continuing losses to the assets of the corporation as well as dues of the workmen.

28. A perusal of the aforesaid note which was made part of the record, and it was stated to be accepted by the cabinet, shows that the Principal Secretary and Industrial Development Commissioner proposed the following reliefs to be given by the State Government.

(i) Trade Tax	Rs.
	67.10
	crores

(ii) Limestone Royalty	Rs. 20.10 crores
(iii) Electricity dues to UP Electricity Corporation	Rs. 110.70 crores
(iv) Working capital given by the State Govt. to the Corporation as debt.	Rs. 65.80 crores
	Rs. 363.70 crores

It proposes that new promoters take guarantee for the following:

(i) Arrears of wages, provident fund, gratuity and retrenchment benefit (two weeks pay with every year of service rendered)	Rs. 135 crores
(ii) Payment of principal amounts of Financial Institutions by OTS	Rs. 60 crores
	Rs. 195 crores

It was further proposed that 254 acres of land, building and factory at Churk and 564 acres of land at Gurma will not form part of the assets for sale as limestones is not available at these places and that its ownership will remain with the State Government. It was found these assets is about Rs. 30 crores which can be used for Government purposes and that its decision shall be taken by the State Government separately.

29. The substance of the proposal was to remove official liquidator and to offer the assets of the company (in liq.) to a promoter by privatization after offering the reliefs and concessions to the extent of 663.70 crores, by guarantee offer of only 195 crores and by excluding 254 acres land building and factory at Churk and 564 acres at Gurma valued at about 30 crores. Further reliefs and concessions offered were ten years exemption from trade tax, supply of electricity for 3 years on fix electricity

tariff exemption on electricity duty on captive power generation and peaceful possession of unit to the new promoters.

30. Section 466 of the Companies Act, which is quoted as below :

"Section 466. Power of Court to Stay winding up.--(1) The Court may at any time after making a winding up order, on the application either of the Official Liquidator or of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

(2) On any application under this section, the Court may, before making an order, require the Official Liquidator to furnish to the Court a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed to the Registrar who shall make a minute of the order in his books relating to the company."

31. The Principal Secretary and Legal Remembrancer UP had advised to adopt procedure u/s 446 of the Act. Instead of applying u/s 466 of the Companies Act for standing liquidation to consider the proposed rehabilitation of the unit the State Government has made an application to this Court, after inviting the offers for consideration of the sale of the unit to the only offered Grasim Industries Ltd.

32. The State Government, therefore, against all opposition from all its department accepted recommendation of the Principal Secretary and Industrial Development Commissioner to invite offers for sale of the unit as a going concern. During the course of arguments it was repeatedly put to the Advocate General who appeared on second and third January, 2002, to support the application whether the State Government is making its submissions in support of the prayer u/s 466 or it is making an application to assist the official liquidator in sale of the assets. After seeking instructions, Sri R.P. Goel, Advocate General, made a categorical statement that he does not propose to press Section 466 in support of his application and that it should be treated an application to assist the official liquidator in disposal of assets u/s 457 of the Companies Act, 1956.

Before the Court considered the merits of the application (A-30) filed by the State Government in the aforesaid background, it is necessary to consider the objection of the Allahabad Bank.

33. Allahabad Bank is a secured creditor and that all the assets of the Corporation, have been mortgaged and hypothecated with Allahabad Bank on 22-6-2001. It filed a claim petition against the company (in liq.) and its guarantor on 22-4-1999 for recovery of Rs. 87,15,71,259.72 calculated on date before the Debt Recovery Tribunal, Jabalpur as Original Application No. 149 of 1999 which has been

transferred to the Debt Recovery Tribunal at Allahabad and has been registered as Transfer Application No. 1464 of 2000 between Allahabad Bank v.U.P. State Cement Corporation. An injunction application filed by the Allahabad Bank on 26-2-2000 is still pending. It has objected to the application filed by the State Government and has prayed that the application may be dismissed with cost. The State Bank of India has filed application (A-44) dated 12-7-2001 with the same prayer to dismiss application filed by the State Government of sale of assets of the company (in liq.) to Grasim Industries Ltd. on the ground that the applicant being a secured creditor has first charged over all the assets of the company (in liq.) and that the sale proceeds receive therefrom are liable to be adjusted towards the dues of the State Bank of India. It is submitted in the application that the State Bank of India along with the Industrial Development Bank of India, Industrial Finance Corporation of India, Industrial Credit and Investment Corporation of India Ltd., Life Insurance Corporation of India Ltd. and Allahabad Bank granted a term of Rs. 4700 lacs in a consortium of the company (in liq.). Share of each member of the consortium has been detailed as below:

(i) IDBI	Rs. 230 lacs
(ii) IFCI	Rs. 300 lacs
(iii) ICICI	Rs. 400 lacs
(iv) LIC	Rs. 700 lacs
(v) State Bank of India	Rs. 500 lacs
(vi) Allahabad Bank	Rs. 500 lacs
Total	Rs. 4700 lacs

34, A joint mortgage was created as security towards the aforesaid term loan in respect of the fixed assets of the company (in liq.) in favour of the aforesaid financial institutions and bank on pan passu basis and joint security documents were executed between the borrowers and the creditors. First charge was created over all the hypothecated movable asserts present and future including uncalled capital of the company (in liq.) in favour of State Bank of India by executing the agreement dated 31-3-1981. A general power of attorney in favour of the State Bank authorizing to transfer the assets of the company (in liq.) in addition to above term loan facility, to grant working capital loan the State Bank along with Allahabad Bank formed a consortium for the said purpose on execution of an inter se agreement dated 18-3-1991 executed between the said two banks which were supplemented by an additional agreement dated 1-12-1992. Following credit facilities were granted towards the working capital against hypothecation namely, stocks of raw material, stocks in process, semi-finished and finished goods, stores and spares bills receivable and book debts and all other movables both present and future :

(i)	Cash credit	Rs.
	hypothecation Ltd.	250
(ii)	Letter of credit	Rs.
		195
		lacs
(iii)	Bank guarantee	Rs.
	limit	55
		lacs
	Total	Rs.
		500
		lacs

A working capital consortium agreement dated 18-3-1991, Joint Deed of hypothecation dated 18-3-1991 creating the first charge on all the movable assets of the company as specified in the schedule, was executed. The charge over the fixed and current assets of the company was registered in the office of the company in respect of term loan facility and working capital facilities separately. The application has enclosed the aforesaid documents. The agreement dated 31-3-1981 power of attorney agreement between the Banks dated 18-3-1991 and supplementary agreement dated 1-12-1992 working capital consortium agreement dated 18-3-1991, a joint deed hypothecation certificate dated 18-3-1991 and the charge certificate issued by the registrar of the company. The title deeds of the company were deposited with the Industrial Development Bank of India which was the lead Bank by way of equitable mortgage. A declaration and undertaking dated 8-5-1994 has also been given by the company regarding joint mortgage. The Government of

U.P. guaranteed the above loan by its letter dated 22-10-1980 and 23-12-1991 and also executed guaranteed agreement dated 23-12-1991. To secure credit facilities towards the working capital a second charge over all the immovable properties mortgaged in favour of the State Bank of India and other members of consortium under term loan was also created. After the company (in liq.) was unable to pay its dues and BIFR recommended for winding up of the company and the company was recommended for winding up the State Bank of India filed an application for Rs. 62,68,50,394.53 with pendente lite and future interest at the rate of 17.75 per cent p.a. with quarterly rests before the Debt Recovery Tribunal at Jabalpur which was registered as O.A. No. 249 of 1999 and was transferred and is pending before the Debt Recovery Tribunal at Allahabad. It is alleged that the total dues of State Bank of India as on 30-6-2001 comes to Rs. 69.48 crores approximately. The State Bank of India has stated that before inviting the offers for sale the State Bank did not consult with the Bank. Both Allahabad Bank and State Bank of India have submitted that the provisions of Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, override the provisions of the Companies Act, 1956. Sections 17 and 25 of the Act confer exclusive jurisdiction in respect to claim and execution of the Final order of the Tribunal and of the Recovery Officer in respect of the debts payable to the Bank and that the Company Court cannot interfere in respect of the debts due to the bank pending before Debt Recovery Tribunal, Allahabad. It is further submitted that the State Government is not entitled to sell the assets of the company to any purchaser or sale proceeds be deposited in the account of the State Bank towards the liquidation of its dues, failing which the bank will suffer irreparable loss and injury. In the statement of affairs u/s 454 of the Companies Act, the Directors of the Company (in liq.) have admitted liability of Rs. 258.75 crores to financial institutions and bank and Rs. 106.64 crores towards the dues of employees whereas the total assets of the company (in liq.) have been stated to be worth Rs. 330.42 crores.

35. Sri Ashok Mehta, Chief Standing Counsel appearing for the State Government submits that in the present case winding up proceedings are being taken u/s 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 read with Companies Act, 1956. The virus of the Sick Industrial Companies (Special Provisions) Act, 1985 has been upheld by Madras High Court as well as Supreme Court in J.M. Malhotra v. Union Bank of India [1997] 89 Comp. Cas. 60 and V.R. Ramaraju v. Union of India [1997] 89 Comp. Cas. 609 . Section 34(2) of the Recovery of Dues to the Banks and Financial Institutions Act, 1993 provides that the provisions of the Act shall be in addition to and not in derogation of the Sick Industrial Companies (Special Provisions) Act, 1985 in the case of Allahabad Bank v. Canara Bank AIR 2000 SC, 1535, the Court has taken into consideration the contention that Section 34(1) give over-riding effect to the provisions of the Act as provided in Section 34(2) amended by Ordinance No. 1/2000, proceedings saves only six statutes from the purview of Section 34(1), The Companies Act, 1956 is not one of them. It is submitted that the judgment in Allahabad Bank's case (supra) is not applicable in the proceedings

arising out of Sick Industrial Companies (Special Provisions) Act, 1985. And that since the present proceedings of winding up are u/s 20(2) of the Act of 1985 read with Companies Act, 1956, the ratio of the judgment is not applicable. In the alternative it is submitted that the Act of 1993 gives jurisdiction to decide for recovery of their debts and that the Tribunal cannot pass any winding up order or take proceedings to liquidate the company, and thus winding up proceedings and any exclusion can only be proceeded with in accordance with the Companies Act, 1958. The Recovery Officer under 1993 Act may apply to the Court in whose custody (including Company Court) the money belonging to defendants for payment in accordance with Act of 1993 is available and thus proceedings for sale of assets, under the Companies Act are not barred by the aforesaid Special Acts.

Both Sri V.K.S. Chaudhary appearing for the Allahabad Bank and Sri Ashok Mehta, Chief Standing Counsel appearing for the State Government, have both relied upon Allahabad Bank's case (supra) in support of their contention. In the said case the dispute was between two nationalized banks. Allahabad Bank had obtained a money decree against M.S. Shoes (East) Co. Ltd. from the Debts Recovery Tribunal and Canara Bank's claim as a secured creditor was pending before same Tribunal and against the same company. The Company Judge acts exercising of power under Sections 442 and 537 of the Companies Act in a winding up petition by Ranbaxy Ltd. stayed the sale proceedings taken out by Allahabad Bank before the Recovery Officer under 1993 Act. The applications for winding up were pending, and no winding up order had been passed, nor any provisional liquidator was appointed as contemplated by Section 446(1). It was submitted by the Canara Bank that Allahabad Bank is to seek leave of the Court under Companies Act, 1956, and that the Company Court can stay and proceedings under Sections 442 and 537 for the purpose of deciding the priorities in the even of a winding up order, or other order appointing a provisional liquidator being passed u/s 446(1) of the Companies Act, 1956. After the decree in favour of Allahabad Bank, some properties of the company were sold by the Recovery Officer and it was contended that the Tribunal can deal with the appropriation of sale proceeds in respect of sales of the company properties on the question of Allahabad Bank and that the appellate alone is entitled to all the sums so realized. The Supreme Court after dealing with the arguments and going through the provisions and inter-relation to both the acts namely the Companies Act, 1956, Recovery of Debts due to Bank and Financial Institution Act, 1993, held that the jurisdiction of the Tribunal with regard to adjudication under 1993 Act is exclusive. After the liability of the defendant is adjudicated, it has to issue certificate u/s 19(22). Section 18 of the Act ousts the jurisdiction of any other court of authority which would otherwise have had jurisdiction but for the provisions of the Act. The exclusion does not apply to the jurisdiction of the Supreme Court or of the High Court under article 226/227 of the Constitution of India. The provision of Section 34(1) of 1993 over-rides other laws to the extent of inconsistency and thus prescription of an exclusive Tribunal both for

adjudication is a procedure clearly inconsistent with realization of these debts in any other manner. No other court of authority muchless Civil Court or the Company Court can go into these question namely adjudication of the liability of the defendant and the execution of the decree. The Supreme Court held in para 50 that at the stage of adjudication u/s 17, and execution of the certificate u/s 25, the provisions of the RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to bank 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. In respect of the monies realized under the RDB Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by the Tribunal under Act of 1993, 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 said extent inconsistent with the provisions of the Companies Act, 1956, and the latter Act has to yield to the provisions of the former. This position holds goods during the pendency of the winding up petition against the debtor Company and also after a winding up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceeding under the Act of 1993.

36. The Supreme Court considered the distribution of money to be done by the Tribunal and whether the provisions of Section 73, C.P.C. and Section 529(1) and (2) and Section 530 court also apply apart from Section 529A to the proceedings before the Tribunal under the Act of 1993, and whether in view of provisions of Section 19(2) and 19(1) as introduced by Ordinance 1 of 2000 the Tribunal can permit Allahabad Bank to appropriate the entire sale proceeds realized to the limited extent restricted by Section 529A. It also examined whether secured creditor like the Canara Bank which had not yet got decree in its favour could claim u/s 19(19) any part of the realization made by the Recovery Officer, difference between the cases were the secured creditors opts to stand outside the winding up and where he goes before the Company Court. It was held that in respect of such realization there are two class of secured creditors namely those who desire to go before the Company Court, and those who would like to stand outside the winding up. The first category of secured creditors who by relinquishing their security in accordance with the insolvency rules u/s 529, go before the official liquidator to prove their debts, and in that event rank with unsecured creditors. The other class of creditors are those secured creditors who stands outside the winding up to realize their security. These creditors in certain circumstances can go before the Company Court or Tribunal and claim priority overall other creditors for realization of their money, like in the Company Court. This limited priority declared in Section 529A(1) is restricted only to the extent specified in Clause (b) of Section 529A(1) i.e., confined to the workmen's portion as defined in Section 529(3)(c), and to that extent such secured creditors who stands outside winding up can come up before the Tribunal and claim priority over all creditors, by virtue of Section 529A(1)(b). Supreme Court found that the

Canara Bank has not made it clear whether it wants to come in the category of those creditors who wants to remain outside the winding up. The Canara Bank had not obtained any decree and thus it could not claim any defence at that stage.

37. In a winding up petition an official liquidator was appointed and had taken custody of the assets of the company after preparing an inventory in the presence of secured creditors on an application filed by some other Bank claiming to be secured creditor before the Debt Recovery Tribunal, an Advocate Commissioner was appointed who required the official liquidator to appear before him and upon his failure moved before the Tribunal on which an order was passed by the Tribunal directing the Advocate Commissioner to take inventory of the company assets and in case of non-cooperation by the official liquidator to take assistance of the police to break open the locks.

The official liquidator filed an application on which the company referred the matter to a Division Bench. It was held in this case by Andhra Pradesh High Court in *Pannar Paterson Limited v. State Bank of Hyderabad* [2001] 106 Comp. Cas, 338 that by reason of Section 456, a legal fiction is created by the deeming provision contained in Section 456, and the assets of the company are under custody of the Court from the date of the order of the winding up of the company. The Debt Recovery Tribunal may have exclusive jurisdiction for adjudication and execution but it is another thing to say that such jurisdiction has to be exercised in a particular manner. Although the Tribunal has jurisdiction to be exercised having regard to the provisions laid down therein, the Tribunal is subject to the supervisory jurisdiction of the Court. The jurisdiction of the Tribunal for adjudication and the right of execution as against the Company Court has been determined between *Allahabad Bank v. Canara Bank* but not the mode of recovery. The mode and manner laid down for recovery of the debts due to banking or financial institutions must be adhered to having regard to the provisions contained in Rule 31 of the second schedule to the Income Tax Act, 1961. Even otherwise when the property is in custody, leave of the Court having plenary jurisdiction, keeping in view of the principles adumbrated in order 40 of C.P.C. must be obtained and that such leave was also necessary having regard to Section 10 of the Companies Act, 1956, and in particular the fact that the High Court exercised power of supervision under article 227 of the Constitution of India over its Tribunal and thus the Advocate Commissioner was required to obtain leave of the Company Court. Chief Justice Satyabrata Sinha speaking for the bench of Andhra Pradesh High Court, held that the judgment in *Allahabad Bank v. Canara Bank* was not the authority for the proposition for which the Court was concerned in that case held as follows :

"The liquidator or a provisional liquidator as the case may be is directed to take in to his custody or under the control the property, effects and actionable claims, as the company is not appears to be entitled to by reason of the provisions contained in Section 456, there cannot be any doubt whatsoever that the leave of the Court must

be obtained."

38. In the present case we are concerned with the facts that the company (in liq.) was wound up on 8-12-1999 and that the official liquidator attached to this Court has been appointed and is functioning as liquidator of the company. Allahabad Bank and State Bank of India are secured creditors and both these banks have filed their claim petitions against the company (in liq.) which are pending before the Debt Recovery Tribunal, Allahabad. Their claims have not been adjudicated so far. Both these banks have not exercised their option to remain out side the winding up proceedings. The Debt Recovery Tribunal have exclusive jurisdiction under Act of 1993 for adjudication and thereafter recovery of such adjudicated amount and that the leave of the Court is not required to continue either for adjudication or recovery. The official liquidator is, however, not required to wait. He can proceed with the sale of the assets of the company u/s 457(1)(c), with approval of Court. There is no statutory bar or restriction applicable to the official liquidator under the provisions of the Recovery of Debts due to the Bank and Financial Institutions Act, 1993 with regard to exercise of powers by liquidator over the property of the company which are under the custody of the company Court u/s 456.

It is submitted on behalf of the Allahabad Bank, that the Companies Act, 1956 has not been mentioned in Sub-section (2) of Section 34 and thus the Act of 1993 shall have overriding effect over the provisions of the Companies Act, 1956. This submission has been accepted in Allahabad Bank v. Canara Bank, only to the extent that for the purposes of adjudication and recovery by the Tribunal. In such cases, the provisions of the Companies Act, 1956 shall be applicable only to the extent of Sections 529, 529A and 530. The Act of 1993 is a Special Act as against the Companies Act, 1956, only so far as the adjudication and execution of such decree is concerned. It does not over ride the provisions of the Companies Act, 1956 for all other purposes. The claims of Allahabad Bank and State Bank of India have not been adjudicated so far, and thus the sale of assets to be made by the official liquidator u/s 457(1)(c), shall not in any manner be inconsistent with or effect the right of adjudication of the claims of the Banks. In case the assets are sold, the Bank shall have right over the monies realized in accordance with the provisions of the Companies Act, 1956. The Banks, therefore, do not have a right at this stage to object to the sale of the assets of the company (in liquidation) and thus the application filed by Allahabad Bank, (A-31) and the application of State Bank of India (A-44) have no force and are rejected.

39. The next question to be considered by this Court is the application of the State Bank to consider the offer of Grasim Industries Ltd. made to the State Government in pursuance of its invitation for offer without associating the official liquidator. The State Government was a promoter and hold entire share capital of the company. It has not been able to run the company for the reasons disclosed in detail in the affidavit of Sri K.L. Meena (A-13). The company (in liq.) had accumulated loss of Rs.

160.13 crores on 31-9-1997 which increased to 448.85 as on 31-3-1998. The efforts made by BIFR for revival of the company by preparation of a scheme to be formulated by the Operating Agency or through workmen could not materialize. An advertisement for change of management issued on 6/8-3-1996 also failed for want of firm commitment from the State Government. The State Government caused delay at every stage. The State Government did not even avail the last opportunity given by the Board on 26-9-1996 to submit their financial proposals to the Board by 7-11-1996 and after having explored all possibility of rehabilitation, the Board formed an opinion to wind up the company. During the pendency of the winding up proceedings the State Government raised objection to the application by the workmen to explore the possibilities of revival and rehabilitation. In the Counter Affidavit of Sri K.L. Meena, Special Secretary, Industrial Development Department, Government of U.P. filed in the year 1998, it was denied that there is any possibility of rehabilitation. The Government denied that there were any surplus assets free from encumbrances and specifically stated that the State Government is not in a position to further invest huge amount to make any scheme viable. Sri K.L. Meena, Special Secretary, Industrial Development Department, Government of U.P. categorically stated in para 76 of the affidavit filed in 1998 that the State Government had communicated to the Board about decision of not being in a position to invest huge amount of thousands crores of rupees, proposed by the Operating Agency and that the decision of the State Government has never been reversed.

40. The State Government was also aware that the company has been wound up and that all its assets are deemed to be in possession of the Court. All the departments of the State Government opposed the sale and for providing exemptions or creating any further liabilities. The opinion given by the legal department was also not in favour of sale of the assets, but to file an application u/s 466 of the Companies Act for rehabilitation. The proposal to the cabinet was based on a consideration that the official liquidator is unable to dissolve companies in liquidation for decades, and it takes more than twenty years to sell the assets of the company during which the workers suffered irreparable hardship. This consideration had no basis whatsoever. The State Government had no material to form such an opinion. The official liquidator attached to the Court has been selling the assets and dissolving the companies in accordance with the provisions of the Companies Act, 1956 and that average period in dissolving a company is not more than two to three years. In the circumstances the Court has every reason to believe that the entire foundation of an anxiety for sale of assets was misplaced and was not supported by any material collected and placed on record.

41. u/s 457(1)(c) the Liquidator has powers, with the sanction of the Court, to sell the movable and immovable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels. The assets can be sold either as a

whole or in parcels. The Court can also explore to sell the assets of the unit as going concern in the interest of the workmen and also to put the resources of the State to re-sale for its optimum utilization. The counsel for the State Government cited Allahabad Bank's case (supra) in support of submissions that an opportunity should be given for selling the unit as a going concern. In the said case the company was wound up on 14-6-1990 and that the order had become final. The company was non-functional for long and that the SLP filed by workers union was also dismissed on 5-12-1997. The Supreme Court in order to give a last try to the found hopes expressed on behalf of the erstwhile workers, gave one more chance within a strict frame of time limit, subject to certain conditions. The official liquidator was directed to proceed with the sale of the assets of the company, firstly by selling plant, machinery and other movables, and thereafter other assets in such a manner to fetch the maximum price, keeping in view the interest of all the creditors.

42. Sri R.P. Goel, Advocate General, pressed the application filed by the State of U.P. for considering the sale of the assets to Grasim Industries Ltd. It is submitted by him that the State Government keeping the interest of workmen and optimum utilization of its natural wealth, initiated the process of sale of assets as going concern by privatization, after obtaining approval from the cabinet, and advertisements were issued in the daily newspaper, a result of which only one valid proposal was received from Grasim Industries Ltd. It was considered by High Powered Committee. Part I of the bid of Rs. 195 crores covers the secured creditors and workmen, Rs. 11 crores was offered as Part II of the bid, and upon negotiation has also agreed to pay Rs. 35 crores towards VRS of the employees of the company (in liq.). The Advocate General agrees that the exercise should have been made by the official liquidator, who has been appointed as the liquidator of the company, after seeking approval from the High Court, but the State Government in right earnest, in public interest made advertisement and have received an offer which complies with the requirements of the Committee for sale, with intentions to avoid further delay for sale of the assets of the company (in liq.).

43. I have already disposed of the objections of Allahabad Bank, State Bank of India to the application of the State Government in the preceding part of this order. Two more objections have been received first by Bharatpur Nutritional Products Limited (formerly known as Dalmia Industries Ltd.) vide application No. 79609 of 2001. It is submitted in February, 1991, on account of recurring loss suffered by company (in liq.), the State Government took a decision to privatize the corporation, and accordingly a memorandum of understanding was incorporated into between Government of U.P. and Dalmia Industries Ltd. on 14-2-1991 under which the Dalmia Industries Ltd. and its nominated company were to purchase 51 per cent shares of the company (in liq.) and take over the management of the corporation with all its assets and liabilities, on as is where is basis. In pursuance to the said arrangement a meeting of the Board of Director of the company (in liq.) was held on 7-3-1991 in which it was resolved to transfer only 49 per cent shares against the

agreed transfer of 51 per cent. Accordingly 49 per cent share was transferred to Dalmia Industries and is nominated company and same were duly registered and recorded in the register of members. Against the agreed deal between the Government of U.P. and the Dalmia Industries Ltd. U.P., State Cement Corporation (Acquisition of shares) Ordinance, 1991 was promulgated taking over the share transferred or agreed to be transferred to Dalmia Industries Ltd. and its nominated company. Subsequently a reference was made u/s 15(1) of the Sick Industries Company (Special Provisions) Act, 1985 and the company (in liquidation) was declared sick on 7-10-1992. The floor price set by the Government for sale in the tender notice dated 20-2-2001 was for Rs. 195 crores. The applicant company or the buyers did not submit offers as the tender notice was bad and illegal. The official liquidator is the only person who has right and power to liquidate under the aegis of the Court. The tender notice was published without involving the official liquidator and taking prior permission of the court. It has further been stated that the offer of Grasim Industries Ltd. with number of exemptions, concessions and right offs is being accepted by the State Government causing stupendous losses to the State exchequer and that the process employed by the Government to sell the assets of the company (in liq.) is vitiated by arbitrariness, unfairness, illegality and wednesbury, unreasonableness. The floor price was to be used only for setting dues of the workmen and creditors, whereas the monetary value of the proposed sale by the Government for assets as well as concessions shows complete lack of commercial viability. According to the objector, the installed capacity of cement plants is Rs. 2.57 million tones, and that the cost of setting up new plant of the said installed capacity, is around Rs. 1300 crores, i.e., at the rate of Rs. Five thousand per metric tone, what is needed in the present old plant is only some repairs and modernization costing rupees two hundred crores. On making deductions on account of such repairs and modernization of the worth of the present plant is about Rs. 11000 crores. The entire share capital of the company (in Liq.) is about 70 crores. Apart from the plants, lime stone lease at Ninga and Kajrahat having over 100 millions tones limestone deposits adjacent to the factory site. The apart, all the properties of the corporation have also been included in the offer. The actual worth of the plants can also be gauged from the fact that (1) company (in Liq.) has large installed capacity (2) strategic advantages of corporation included proximity to limestone deposits at Kajrahat, Ghurma, Rohtas and that markets lie on the forwarded direction via Chunar (3) mining lease have limestone deposits of over 100 million tones. (4) The units are located in the region which is a major market is eastern U.P. and Bihar, for cement and there is no other major cement plant in the region. (5) The units at Dalla and Chunar are well linked by roads and railways. The nearest airport is at Varanasi. Varanasi is 40 Kms. from Chunar and 120 Kms from Dalla accessed by a well maintained Varanasi Shakti Nagar Highway. The nearest major railway station is at Chopan about 8 Kms. from Dalla and is linked by Nilanchal Express with New Delhi and by Triveni Express with Lucknow and (6) in addition to Kajrahat, for which the lease rights are proposed to be transferred, the

area has additional 225 million tones of limestone reserves in Rohtas limestone mines.

44. According to objector the reliefs and concessions granted in the offer which were not available earlier concerning past liabilities of the plants have a considerable impact almost to the tune of Rs. 800 crores on the state Exchequer which include electricity dues of about 110.70 crores, Trade Tax dues of Rs. 76.10 crores, Royalty dues on limestone of Rs. 20.10 crores. Government loans of Rs. 165.80 crores. Loans from financial institutions/banks along with interest of Rs. 289.62 crores, working capital loans Rs. 4.65 crores. Salaries and wages of the workers Rs. 106.64 crores and that is the official liquidator was required to liquidate the assets they would have costed the purchaser more than 1000 crores. In the present offer the State is hardly getting anything. According to objector the cost of bid concessions will put a burden of about Rs. 900 crores on the State Exchequer and this has been quantified by following trade tax exemption for 10 years (Rs. 70 crores per year) worked out on the basis of tax at the rate of Rs. 300 per ton and Waiver of royalty dues for 10 years and other benefits like renewing the limestone lease and electricity duty exemptions on captive power generation. It is submitted that an advertisement should have been published in India and abroad for inviting objections, after consulting and involvement of the official liquidator attached to this Court.

45. The applicant-objector has brought about the objections which are relevant for consideration, but have not shown or indicated their interest in purchasing the assets. The reasons given by them that the sale was not made by the official liquidator after seeking approval from the High Court cannot be said to be sufficient reason for not making an offer.

46. The workmen appearing through Sri Saumitra Singh have filed application to the effect that the offer of Grasim Industries Ltd. be considered favourably to avoid any delay in the matter of sale of the assets. The application filed on behalf of the CITU and 15 others supported by affidavit of Harendra Kumar Pandey have brought on record the number of unions, number of workers/employees per unit the period for which they have not been paid, wages structure, pay in the revised pay-scale, actual number of workmen from the date till which they employed with the corporation and the loan agreement with IDBI and State Bank of India. There are about 37 workers unions in the corporation. Out of these unions sixteen were petitioners in writ petition No. 15134 of 1998. There were about 5143 employees on roll in the company (in liq.) till 13-7-1998, and details giving number of employees grade-wise and designation-wise has been annexed to the supplementary affidavit. Apart from the aforesaid there are about 350 employees who have not been paid their retirement benefits after their retirement prior to 13-7-1998. The total number of employees to whom the dues are payable are approximately 5500. It has been submitted that majority of the employees have been paid their salary upto

12-7-1998. The retirement and statutory benefits to some of the existing and retired employees, retired prior to 12-7-1998 have not been paid. Certain employees have been paid their salary after 12-7-1998 on account of Court Orders. The Managing Director has been paid his salary upto 8-12-1997. Majority of the employees of the inter College at Churk and Dalla are being paid their salary by the State Government, Banks. Under a Scheme known as Gujarat Module, for VRS the employees are getting 45 days wages of each year on completed service of balance period (in terms of months) whichever is lower. A copy of VRS scheme as introduced in UPSMDC has been enclosed to the supplementary affidavit.

47. The counsel for the workers submitted that assets may be considered for sale as a going concern for the benefit of employment of the workmen, and that any decision in this regard must be taken as expeditiously as possible.

48. After winding a company under Companies Act, either as creditors winding up petition u/s 443 of the Companies Act or in pursuance of the opinion received from the Board for Industrial and Finance reconstruction u/s 20(1) of Sick Industries (Special Provisions) Act, 1985, which also includes just and equitable cause, the official liquidator may be appointed as liquidator of the company u/s 449 of the Companies Act and after having received possession of the assets and statement of affairs, he is required to sell the movable and immovable property and actionable scheme of property to be auctioned.

He holds property in trust for the creditors, workmen and shareholders to realize debts of the company institution or defend the suit prosecution or other legal proceedings or to carry on business of the companies far as may necessary for the initiation of winding up of the company. He has been given all power u/s 457(2) given in the name of and on behalf of the company and has powered u/s 453 to exercise all his power on the subject to the control of the Court. Once the Court has accepted the opinion of the BIFR that the company is insolvent and is unable to make its net worth positive while meeting all liabilities it is in the interest of all the creditors, workman and shareholders that the assets of the company be sold as early as possible. It is also in public interest to sell the assets so as to save the increasing financial burden on the nonproductive assets and further to save and utilize the natural resources. In the present case the company has been wound up and the order of the winding up of the company has been wound up and the order of the winding up of the company has been upheld upto the Supreme Court. The State Government and all concerned have admitted that there is no possibility of its commercial revival, without reliefs and concessions by the State Government. The BIFR made all attempts to persuade the State to revive but the State Government was not ready to accept any further liability.

49. Rules 172 to 274 of the Companies (Court) Rules, 1959, made by Supreme Court of India, in constitution with High Courts, u/s 643(1) and (2) of Companies Act, 1956 provide for sale by official liquidator in exercise of his power u/s 457(1)(c) of the Act.

Rule 272 and Rule 273 is quoted as below :

"272. Sale to be subject to sanction and to confirmation by Court.--Unless the Court otherwise orders, no property belonging to company which is being wound-up by the Court shall be sold by the Official Liquidator without the previous sanction of the Court, and every sale shall be subject to confirmation by the Court."

"273. Procedure at Sale.--Every sale shall be held by the Official Liquidator, or, if the Judge shall so direct, by an agent or an auctioneer approved by the Court, and subject to such terms and conditions, if any as may be approved by the Court. All sales shall be made by public auction or by inviting sealed tenders or in such manners as the Court may direct."

50. The Court is considering the application of the State Government for sale to Grasim Industries Ltd. and is unable to accept the request for the following reasons:

(1) The State Government was advised by all its department that it is not feasible to bear any financial burden by selling the unit as on going concern by privatization after offering any relief and concession. Clause-4 of the note put up to the cabinet, which was approved by the cabinet, in terms, recommended to offer the unit for sale as a going concern by privatization, after removing the official liquidator. The cabinet approved the recommendation in terms of said clause. The acceptance of this proposal could only result into an application u/s 466 of the Companies Act for standing of winding up. There was no other way to offer the unit for sale by removing the official liquidator. However the acceptance of this proposal was not implemented in its term. The State Government acting contrary to the acceptance of the proposal of the cabinet advertised the unit for sale by inviting offers without approaching the Court for staying the proceeding for winding up and to remove the official liquidator. In invited offers accepted the tender and thereafter made a request to the Court to consider the offer by way of assisting the Court in finding out a purchaser for sale of unit. The Court further finds that the aforesaid cabinet decision was arrived on considerations, which cannot be fully justified. These can be summarized as below:

(a) It was based on a consideration that the Official Liquidator will take more than twenty years to sell the assets. This advice was not based on any material or collection of data, and, in fact, the Official Liquidator U.P. has a record of selling assets of the Company (in liq.) at a much faster schedule of time.

(b) All the department of State Government, namely, Finance Trade Tax, U.P. Power Corporation etc. advised the state Government not to sell the properties as going concern by offering any reliefs and concessions.

(c) It was objected to by the Trade Tax Department and Finance Department that conference of the Chief Ministers had agreed not to offer any tax concession to any entrepreneurs being causing financial burden and in case of any breach, the Central

Government may stop giving financial aid to the State Government.

(d) The Law Department clearly advised that such an action can only be taken u/s 466 of the Companies Act by applying for say of winding up by adopting process of rehabilitation, and not through sale of assets as going concern.

(2) The first part of the bid of Rs. 195 Crores was based on the consideration namely that is workman's dues have been finalized up to date of winding up order and that the financial institutions and the Bank have entered into one time settlement by accepting only the principal amount towards their outstanding dues. The Court finds that workers dues were not calculated and that the official liquidator has reported that these figures are still being processed. The Allahabad Bank has been seriously objected a sale of the assets of the company (in liq.) and is pressing a suit of recovery of Rs. 87,15,71,259.32 crores the State Bank of India has also filed a suit for recovery of Rs. 62,68,50,394.53 crores. These suits are pending before the Debt Recovery Tribunal at Allahabad.

51. The projection made by the State Government for the payment of principle amount financial institutions by one time settlement to be only Rs. 60 crores was based only upon a letter written to IDBI, the leading financial institution, under consortium agreement, to consider one time settlement. In spite of the offer in the joint meeting of the creditors, no consensus was arrived between them to accept one time settlement. Statements were given by the counsel for the Allahabad Bank and State Bank of India repeatedly that the State Government has not even approached them for one time settlement. After some persuasion, the State Bank of India filed an application on 22-11-2001 signed by their counsel without any affidavit stating that the Bank will not oppose for sale provided the amount of Rs. 206 crores offered by the Grasim Industries Ltd. is distributed in a manner that Rs. 135 crores be given to the workmen's dues and Rs. 58.88 crores as one time settlement with financial institution and banks in which the share of State Bank of India is Rs. 7.52 crores and that the surplus of 12.12 crores will go to State Bank of India and Allahabad Bank in the ratio of Rs. 7.13 crores and Rs. 4.99 crores respectively and thus demanded a sum of Rs. 14.65 crores towards the liquidation of the dues lying in the account of the company (in liq.). It imposed further condition to the effect that in case the sale proceeds of the assets exceeds Rs. 206 crores the said excess sale proceeds shall be paid to the State Bank of India over and above the aforesaid amount towards the liquidation of its dues as secured creditors and that sale must take place within six months and that the proceedings before the Debt Recovery Tribunal shall not be affected until the receipt of the sale proceed as above and the guarantees of the State of Uttar Pradesh shall also not stand discharged till the liquidation of bank dues to the extent of Rs. 14.65 crores, or such higher amount as mentioned above, is fully paid. The Bank further reserved its right to recover its dues before the Debt Recovery Tribunal and keeping all its securities fully effective. The last condition, i.e., condition No. 8 is most important in which the State Bank of

India stated as follows :

"8. That the above conditions are subject to the final approval of the Board of the applicant Bank, i.e., State Bank of India."

52. The Court required the application to be supported by affidavit of a responsible Officer of the Bank and granted time for approval of the aforesaid proposal by the Board of the Bank Sri Kush Saxena. Advocate, filed an affidavit of Harendra Bansal, Chief Manager of the State Bank of India, Ghosia Branch, Ghosia, District - Sant Ravi Das Nagar, dated 4-12-2001, reiterating the contents of the application mentioned as above. Till the last date i.e., 3-1-2002 when the orders were reserved, the State Bank of India was unable to bring on record approval of the Board of Directors. The Allahabad Bank was most reluctant to give any commitment and after repeated orders to make its stand clear, an application was filed by Allahabad Bank through its counsel Sri P.N. Tirpathi stating that the State Bank of U.P. is guarantor of the dues of Allahabad Bank and in case the amount realized from the sale proceeds of the assets of the corporation fall short the State Government is liable to make the payment. Paragraphs 4, 5, 6, 7, 8 and 9 of the application of Allahabad Bank are quoted as below:

"(4) The application of the State of U.P. is mala fide because they want to escape their liability by this subterfuge. State of UP First wanted to negotiate with IDBI alone, thereafter they made certain proposals with the State Bank of India alone. No definite proposals have come from the Government. The proposal is peculate. There is no definite terms to peruse us, though we are willing for one time settlement and are waiting for a specific and detailed compromise proposal disclosing the sharing pattern acceptable to all the Financial Institution and Banks, which may be placed before their competent authorities for consideration.

(5) The State of U.P. should also indicate in the compromise proposal its responsibility in case the amount fall short of the amount for One Time Settlement.

(6) So far the amount indicated by the S.B.I., which will be approximate Rs. 12.10 crores for Allahabad Bank, we are willing to accept in principle towards out share out of Rs. 71.00 crores as calculated by the S.B.I. But in case there is any surplus sale proceeds the same should be made available to out bank proportionately and not as claimed by the S.B.I. exclusively.

(7) The aforesaid compromise will not affect the legal right of the Allahabad Bank in the proceedings pending before the D.R.T. Allahabad against the respondents.

(8) Notwithstanding hereinbefore the Bank reserves its right to recover its dues as claimed in the application before the D.R.T. Allahabad and also all its rights vis-a-vis to the securities shall remain fully effective and the charge of the bank over such securities shall continue in favour of the Bank.

(9) Under the circumstances we are unable to make any further comment except to say that the State Government should make a specific compromise proposals with definite terms that can be put before the Board of the Allahabad the competent authority for consideration and approval."

53. Sri Vikram Nath, Advocate appearing for IDBI filed a copy of the letter dated 28-11-2001 sent by Deputy General Manager (Legal) IDBI, in response to the order of the Court seeking comments from other bank and financial institutions to the application of the State Government in which it was stated that in joint meeting held on 2-8-2001, the Financial Institutions have agreed to accept Rs. 241 crores offered by Grasim Industries Ltd. To be distributed as follows :

(i) VRS of the workmen	Rs.	35 crores
(ii) Workers dues	Rs.	135 crores
(iii) Financial Institutions/Bank (principal amount)	Rs.	60 crores
(iv) Towards the dues of the Financial Institutions/ Banks proportionate basis)	Rs.	11 crores

Further it is stated in this letter that the working capital limit sanctioned by the S.B.I. are secured by first charge on the assets of the company and it is not secured by first charge and mortgage on all movable and immovable properties of the company, and as such they cannot have claim on the balance claim sale proceeds. The term loan of Rs. 5 crores by SBI is secured by first charge and mortgage on the immovable properties of the company. In view of the above, the claim of the S.B.I. and Allahabad Bank on the balance sale proceeds as well as excess sale proceeds is illogical and untenable. It is stated in the letter that the State Bank of India is misleading the Court and is trying to gain out of same. In view of the above it is observed in the letter that financial institutions shall not agree with the proportion of sharing suggested by SBI and sought adjournment for taking up the matter with senior executives of SBI. The aforesaid application and affidavit and correspondence shows that the Banks and financial institutions have not agreed to the terms put by the State Government and that the Allahabad Bank is still objecting towards the acceptance of the amount towards one time settlement, The matter has not been considered by the Board of State Bank of India and that IDBI is not in favour of the acceptance of the amount set apart for Financial Institutions and Banks in the first part of the bid i.e., Rs. 60 crores and other amount over and above the bid of Part 1, and thus the entire basis of invitation of offer with regard to the settlement of dues with the Financial Institutions and Banks in the first part of the bid i.e., Rs. 60 crores and other amount over and above the bid of Part 1, and thus the entire basis of invitation of offer with regard to the settlement of dues with the Financial Institutions and Banks was unfounded.

(3) The State Government was well aware of the legal position that as a promoter which failed to run the unit, and had also decided and failed to privatize it in the

year 1991, it was no longer open to it to offer the assets of the company (in liq.) for sale by way of privatization as going concern, without seeking prior approval of the Court and that the sale could only be made through official liquidator.

(4) The State Government did not advertise for sale by giving it wider publicity in publication in all leading newspapers as well as inviting offer for sale by global tenders. After liberalization of economy and freedom of trade in investment the assets and the natural wealth is likely to attract foreign participation in sale.

(5) The concession granted by the State Government for exemption from Trade Tax for ten years, waiver of royalties for ten years sanction of power load and electricity duty exemptions for exceeded the offer of Rs. 241 crores made by Grasim Industries Ltd.

(6) The anxiety of the State Government who did not make any response to give financial assistance before BIFR and AAIFR and was more than eager of winding up the company, casts a shadow of doubt on its intention, for accepting its single offer without exploring any possibility of higher offer. It is the duty of the Court which is trustee of the property to look for the highest amount to be received out of the sale of the assets, both in public interest as well as in the interest of the creditors, workmen and the shareholders. The Court is thus not satisfied by the process adopted for the sale of the assets by the State Government.

(7) In spite of repeated queries, the State Government was not able to explain as to why Grasim Industries Ltd. has not made offer directly to the official liquidator and was trying to remain in the shadow of the State Government in making the offer.

(8) The State Government was not willing to offer the reliefs and concessions to any other party. Initially when the Court directed the official liquidator to seek response of the State Government in offering the same concession to any higher offer, the reply given by Sri Pradeep Shukla, Secretary State Government to the Official Liquidator dated 30-10-2001 amounted to refusal. Para 2 of the reply is quoted as below :

"2. The Government of U.P. does not support the move for retendering through the Official Liquidator due to the following reasons :

(1) It will only unnecessarily delay the revival of the unit through privatization.

(2) The ideas to transfer the unit as an ongoing concern and not merely disposal of assets,

(3) There is no guarantee that re-tendering through the Official Liquidator will get a higher bid.

(4) The other institutions have also to agree to this move.

3. The reliefs and concessions offered by the Government of U.P. can remain valid for the move only if the point mentioned above is taken care of."

54. Sri Ashok Mehta, the learned Chief Standing Counsel tried to interpret the aforesaid letter of the State Government dated 30-10-2001 to the official liquidator in a different manner. He submitted that the State Government cannot refuse to offer the same reliefs and concessions to any higher offerer. The Court required him to put it in the form of an affidavit of Principal Secretary Industries. After two adjournments an affidavit was filed by Sri S.N. Shukla, Industries Development Commissioner, U.P. dated 1-1-2002. The contents of this affidavit are very important for arrival at any positive conclusion in this matter, and thus I am quoting at the paragraphs of this affidavit are quoted as below :

"(1) That the deponent is presently posted as Industrial Development Commissioner and Principal Secretary, Government of U.P. Lucknow and as such he is fully acquainted with the facts deposed to below.

(2) That the present affidavit is being filed in compliance with the order dated 20-12-2001 passed in the aforesaid matter, by the Hon''ble Court.

(3) That the State Government's primary concern has been revival of unit at the earliest though privatization in the interest of the workers. The idea is not merely disposal of assets buy their transfer to a purchaser who has the necessary resources, competence and experience to run the unit.

(4) That the offer of M/s. Grasim Industries has been received after open public tender and they are one of the largest cement producers in the country.

(5) That the request made by the State Government to the Hon''ble Court was by way of helping and assisting the Liquidator in the disposal of the Company's property u/s 457(1)(c) to save time instead of initiating the process afresh at his level.

(6) That the State Government has no objection to this Hon''ble Court exploring the possibility of a higher bid and the State Government would in that even extended the same reliefs and concessions as those offered to M/s. Grasim Industries. However, it is submitted that the following concerns of the State Government may kindly be also kept in view while taking a decision in this regard:--

(i) The process of restarting the Unit may not get unduly delayed.

(ii) There is no guarantee for a higher bid and meanwhile we may loose the offer already received.

(iii) Besides, the bid amount, the resources competence, experience and the commitment of the bidder to run the unit also has to be kept in view.

(7) That, however, in case it is decided to retender then the present offer of M/s. Grasim Industries should remain valid and the amount offered by them should be

kept as the minimum reserved price. Moreover in case any higher bid is received in all fairness. Grasim Industries may be given the first option to purchase the property at that price.

(8) That beside the State Government the consent of the Financial Institutions and Banks to extend similar accommodation the new purchaser is also necessary."

55. For the aforesaid reasons the application of the State Government for considering sale to Grasim Industries Ltd. as only offerer, in pursuance of invitation for sale does not find favour of the Court and is accordingly rejected. The Official Liquidator is directed as follows :

1. He shall take steps to sell the assets and for this purpose a committee for sale of the assets of the company (in liq.) is constituted consisting of following members :

(1) Official Liquidator, U.P., Allahabad, a Chairman of the Committee.

(2) A nominee of the IDBI not below the rank of Dy. General Manager.

(3) A nominee of the State Bank of India not below rank of Chief Manager.

(4) Industrial Development Commissioner and Principal Secretary, Government U.P. or his nominee not below the rank of Secretary in the Government of U.P.

2. The sale of assets shall be effected by public offer of sale through sealed tender after advertisement to be carried out in "Times of India", "Statesmen", "Asian Age", "Economic Times", "Financial Express" and "India Today" and such other newspapers or journals as the Committee recommends. The tender shall also be published to reach the global markets for which the committee shall decide the mode of publication. For the purpose of advertisement the Committee shall finalize the draft of advertisement after seeking approval from the Court. The tender document prepared by the State Government shall be considered as a basic document for this purpose, with modification and changes to be considered and proposed by the Committee with approval of the Court.

3. The Committee shall apart from advertising the assets in the aforesaid newspapers, send invitation of offers to all the leading Cement manufacturers in the country. All prospective bidders shall be allowed to inspect on the stipulated date or dates in the presence of the committee or their representative. The bids shall be made in sealed envelop to be received in the office of the official liquidator, to be opened by the committee on the previously specified and notified dates and time in the presence of the bidders or their representative, and shall be open for negotiation between the valid highest offerers for considering their offers subject to their resources, competence, experience, commitment and financial capacity.

4. The reserve price of the entire assets shall be Rs. 271 crores, worked out on the basis of the price offered by Grasim Industries Ltd. of Rs. 241 crores and the price of assets at Churk which were not included in the offer invited by State Government

and valued by State Government in its proposals to cabinet at Rs. 30 crores. The offerer shall be required to deposit earnest money of Rs. 10 crores by Bank Drafts in favour of official liquidator, U.P. at Allahabad. This amount shall be forfeited if the party whose offer/bid is finally accepted, makes default in payment on the terms and conditions of sale, or such negotiated conditions of sale or completing the offered formalities within the due date. If, however, the sale is completed and the conditions are complied with within specified time the earnest money shall be adjusted towards the final sale price without carrying any interest. It will be open to Grasim Industries Ltd. to make an offer to the official liquidator U.P. at Allahabad by depositing the earnest money as above.

5. If the bid is finally accepted by the Court, twenty-five percent of the sale consideration excluding the earnest money shall be paid within a period of 30 days, from the date of intimation regarding the final acceptance of the bid on the notified address of the bidder by registered post (AD) and balance in instalments to be negotiated with the Committee and accepted by Court, which shall not exceed beyond one year, or the total payment. The successive bidder shall, within 30 days of the receipt of the intimation regarding acceptance of his bid, shall furnish the Bank Guarantees for the purpose of payment of balance amount, to the extent of entire balance amount as may be considered satisfactory by the Court, to secure timely payment of consideration for the assets purchased.

6. The earnest money received from the unsuccessful bidders shall be returned to them. The possession of the assets purchased and title thereof shall be transferred to purchaser only on receipt of full payment of the purchase consideration, along with interest @ 18 per cent p.a., for delayed payment, if any, to be accepted with prior approval of the Court.

7. The sale of the mining and tenancy right shall be subject to laws applicable to the State Government of U.P. The reliefs and concessions shall be the same as guaranteed by the State Government in the affidavit of Sri S.N. Shukla, Industrial Development Commissioner and Principal Secretary, Government of U.P. quoted as above.

8. The Court reserves all rights of change or modification in the procedure of sale and accepting or rejecting the sale in its absolute discretion. The entire sale proceeds after deducting expenses incurred by the official liquidator, so far and expenditure made during the sale, shall be deposited with the official liquidator as per provision of the Companies Act 1956. Scales of fees and expenditure shall be allocated in accordance with the relevant provisions of the Companies (Court) Rules, 1959 and the orders to be passed by the Court relating to the liquidation of the company under the Companies Act.

56. The official liquidator is directed to take steps for sale of the assets of the company expeditiously keeping in view the facts and circumstances of the case and

observations made in this order and the reliefs and concessions offered by the State Government to any intending higher offerer. The official liquidator will firstly explore the possibility of sale of the assets "as a whole" as going concern, and in the alternative by sale of assets in such parcels as may be convenient and expedient with the approval of the Court.