Prerna Rex Pvt. Ltd. Vs Industrial Reconstruction Bank of India and Others

Court: Calcutta High Court

Date of Decision: Sept. 22, 1999

Acts Referred: Industrial Reconstruction Bank of India Act, 1984 â€" Section 40

Citation: 104 CWN 835

Hon'ble Judges: S.N. Bhattacharjee, J; Ruma Pal, J

Bench: Division Bench

Judgement

Ruma Pal, J.
These several appeals and applications are proceedings arising out of the same series of facts. All the proceedings have a

basic issue in common namely, the propriety and validity of the sale of premises No. 14A. Canal Street, Calcutta (referred to hereafter as the

premises). The parties involved in all the proceedings are also the same. The matters were heard analogously and are being disposed of by this

judgment. The premises are owned by Nigam Brothers. The premises were leased out by M/s. Nigam Brothers to Dwarka Industrial Development

Pvt. Ltd. (hereinafter referred to as Dwarka) for a period of 99 years commencing from 1st October, 1963. Prerna Rex Pvt. Ltd. (referred to as

Prerna) claims to have been granted a tenancy by Dwarka of 7,2000 Sq. ft. in the ground floor of the premises with the knowledge and

concurrence of M/s. Nigam Brothers. According to Prema it carried on business there along with its associate firms including Bharat

Pharmaceuticals.

2. On the allegation that Dwarka was liable to make payment of a sum of Rs. 1,05,08,767.00 on account of amounts lent and advanced by IRBI

to Dwarka an application was filed by IRBI u/s 40 of the Industrial Reconstruction Bank Act, 1984 (referred to as the IRBI Act).

3. According to IRBI Dwarka had secured the advances made to it by IRBI by mortgaging and creating a charge in respect of petitioner''s

properties and assets the particulars of which were given in annexures L.M.N. and O to the application u/s 40. Annexure L'' included premises

14A. Canal Street along with other immovable properties at Sonarpur where the factory of Dwarka operated. Annexure ''M'' contained a list of 44

machines. Annexure ''N'' related to movable assets of Dwarka except current assets and Annexure ''O'' referred to current assets including raw

materials, goods under process, semifinished and finished goods. The Indian Bank which is involved in these proceedings has filed proceedings

before the Debt Recovery Tribunal against Dwarka for Rs. 1,15,14,398.51 which are pending. The Indian Bank has first charge over the current

assets of Dwarka.

4. In the application u/s 40 the IRBI made Dwarka and Indian Bank parties. IRBI prayed for inter alia:

(a) Assets mentioned in the Schedule annexed hereto as Annexure ''L'', ''M'', ''N'' and ''O'' be sold.

(b) Ad-interim order of Injunction be passed restraining the respondents, their agents, servants and men from removing or alienating or

encumbering or transferring the properties and assets mentioned in Schedules Annexed hereto as Annexures ''L'', ''M'', ''N'' and ''O''

(c) A receiver be appointed over the properties and assets mentioned in Schedules annexed hereto Annexures ''L'', ''M'', ''O'':

(d) A notice be issued to the respondents to show cause why-

(i) An order for sale shall not be made in terms of prayer (a) hereinabove;

(ii) The order of Injunction issued in terms of prayer (b) hereinabove shall not be made absolute;

(iii) The order of Receiver issued in terms of prayer (c) hereinabove shall not be made absolute;

(e) If necessary, an order of adjudication be passed in respect of the properties described in the Schedules annexed hereto as Annexures ''L'',

''M'', ''N'' and ''O'':

(f) After hearing the cause shown, if any, by the respondents:

(i) The properties mentioned in the Schedule annexed hereto as Annexures ''L'', ''M'' and ''O'' be sold;

(ii) The order of injunction, Receiver and attachment be made absolute;

(g) The sale proceeds be applied for the discharge of the dues of the IRBI as mentioned in paragraphs 21 and 22 hereinabove together with costs

of the present properties;

(h) Ad-interim order in terms of prayers (a) to (e) hereinabove;

(i) Such other or further order or orders be passed as this Hon''ble Court may seem fit and proper.

5. An order was passed on 21st February, 1997 appointing Mr. Roop Chand Chakraborty, an Advocate of this Court as Receiver for taking

symbolical possession of the assets scheduled in L, M, N, O and also making of an inventory of the same within a fortnight. The Receiver was

directed not to interfere with the working of the assets by Dwarka or Indian Bank. If necessary the Receiver was to take police help. An injunction

was also passed restraining Dwarka and Indian Bank from any way parting with the possession disposing of or alienating or otherwise

encumbering of any of these assets.

6. During the pendency of the application u/s 40 of the IRBI Act, on 20th June, 1998, IRBI had the assets of Dwarka at the premises valued and

inventorised. The valuer''s report which is dated 26.8.98 noted that the area of land at 14A, Canal Road under lease by M/s. Nigam Brothers to

Dwarka was 13 katta 13 Chatak 20 sq. fit. Under a paragraph entitled ""present occupancy"", the valuer noted that he had found several business

organisations operating from the premises the names of some of which as collected during his visit were given as:

Indo-Japanese Industries Ltd.

Gulati and Co.

Span Medical Ltd.

Premee Roy (P) Ltd.

Bharat Pharmaceuticals.

7. According to Prema ""Premee Roy"" was a misspelling of Prerna Rex (P) Ltd. It is also stated that the Gulati family were 100% share holders and

Directors of Prerna and Gulati & Co., Span Medical Limited and Bharat Pharmaceuticals were concerns of the Gulatis.

8. The valuation report noted that the entire ground floor having plinth area of 8600 sq. ft., (approx) was rented to M/s. Gulati and Co. and its

sister concern at rental of Rs. 4200 per month. The mezannine floor was stated to be in the absolute possession of Dwarka. In the first floor about

an area of 6500 sq. ft. had been rented out to Indo-Japanese Industries Ltd. It was also stated that M/s. Indo-Japanese Industries Ltd. paid Rs.

1,100 per month. The second floor comprising 3000 sq. ft. was in absolute possession of Dwarka. The valuer evalutaed the premises by

comparable sales rates method for the covered area under the direct occupancy of Dwarka and partly by rental system for the area under

occupancy of the tenants paying rent. The monthly rents receivable both from M/s. Gulati and Co. and M/s. Indo-Japanese Industries Pvt. Ltd. (in

liquidation) were mentioned as Rs. 4.200 and Rs. 1.100/- respectively. The premises at Sonarpur was valued at Rs. 38,82,400/-. the premises at

14A, Canal Street at Rs. 26,21,800 and the total assets hang at Sonarpur and Canal Street were valued at Rs. 65,04,200/-.

9. On 23rd July, 1998 an application (referred to as the workers'' first application) was made by Sudhir Sarkar and four others claiming to be

workmen of Dwarka and also claiming to be the constituted attorneys of 140 other workmen of Dwarka for leave to intervene in the Section 40

application and for sale of the assets of Dwarka to one Jatin Surana (hereinafter referred to as Surana) or his nominee and/or nominees ""at the

price fixed by the valuer who has already been appointed by IRBI for valuing the assets of the IRBI or at such other price which may be fixed by

the Court"". The workers also prayed that:

(c) Assets of the respondent No. 1 (Dwarka) be sold subject to the condition that said Shri Jatin Surana will re-start the factory and employ all

eligible workers in accordance with the MOU entered into by and between the said Shri Jatin Surana and the workmen and employees of the

respondent No. 1.

(d) A sum of Rs. 26 lakhs be ordered to be paid to the workmen and employees of the respondent No. 1 out of the sale proceed of the assets of

the respondent No. 1 in full and final settlement of their claim amounting to more than Rs. 51 lakhs.

(e) An interim order in terms of prayers (a) to (d) above.

(f) Such order or other orders as this Hon''ble Court may think fit and proper.

10. On 23rd July, 1998 an order was passed on the workers'' first application by P. C. Ghosh. J. directing IRBI to appoint a valuer if not

appointed. IRBI was directed to place the valuation report and all the records before the Court on the returnable date which was dated 29th July,

1998. No leave to intervene was however granted to the workers. On 29th July, 1998 directions were given by P.C. Ghosh, J. for filing of

affidavits. No further order was passed.

11. On 8th October, 1998, during the long vacation of this Court, a second application was moved by the said workers before the Vacation

Judge, viz. Lala J. for the following reliefs:

(a) The application moved by the applicants on 23rd July, 1998, copy of which is annexed hereto as annexure ""A"" be heard and disposed of by

the Hon''ble Vacation Bench, in view of the extreme urgency of the matter as mentioned above;

(b) The fixed assets of this respondent No. 1 be sold to Mr. Jatin Surana of 2. Church Lane, Suit No. 403B, 4th Floor. Calcutta 1 or his nominee

or nominees at Rs. 82 lacs, out of which Rs. 56 lacs to be paid to IRBI and Rs. 26 lacs to the workmen and employees of the respondent No. 1 in

accordance with the Memorandum of Understanding entered into by and between the applicants and the said intending purchasers;

(c) Ad-interim orders in terms of prayers (a) and (b) above;

(d) Such other or further order or orders as this Hon''ble Court may think fit and proper.

12. It has been stated in the second application that the valuation report produced by IRBI showed the value of fixed assets of Dwarka at Rs. 65

lakhs. It was further stated that Surana had been persuaded to pay Rs. 65 lakhs to IRBI and 26 lakhs to the workmen. It was further said that the

Indian Bank had a charge over the current assets of Dwarka and that this was clear from the search report of the Indian Bank which had been

annexed to the application filed by Indian Bank to its application before the Debt Recovery Tribunal, Calcutta u/s 19 of the Recovery of Debts

Due to Bank and Financial Institutions Act, 1993. It was further said that the workmen were in a terrible financial problem and unless the factory

was restarted and all the workmen are re-employed many of them and their family members would die because of starvation and non-availability of

medical treatment. The application was affirmed on 7th October, 1998.

13. The second application was moved the day after its affirmation and on 8th October, 1998 an order was passed disposing of the workers''

second application. The order which forms the basis of the challenge in the proceeding before us is set out verbatim.

The fixed assets, i.e. the immovable properties and plant and machinery of the respondent No. 1 are hereby sold to Sri Jatin Surana or nominees at

or for the consideration of Rs. 82,00,000/- free from all encumbrances, out of which a sum of Rs. 56.00,000/- will be paid by the purchaser

directly to the Industrial Development Bank of India Ltd. formerly IRBI within a period of two weeks from the date hereof.

The IRBI will be entitled to appropriate the said amount towards liquidation of its dues.

The balance amount of Rs. 26.00,000/- will be paid by the purchaser to the workmen and employees of the respondent No. 1 in terms of the

Memorandum of Understanding dated 6th July, 1998.

The IRBI is directed to hand over all documents of title to the purchaser upon payment of the aforementioned sum of Rs. 56,00,000/-.

The Receiver will (hereafter execute the necessary conveyance or conveyance in favour of the purchaser or his nominee or nominees only in

respect of the immovable properties after ascertaining the value thereof on the basis of the valuation report got prepared by the IRBI, they will also

give possession of the plant and machinery by issuing a certificate of sale in favour of the purchaser or his nominee or nominees. After payment of

the sum of Rs. 56,00.000/- to the IRBI, the respondent No. 1 will hand over possession of all the fixed assets sold hereby to the purchaser or his

nominee or nominees after segregating the current assets charged in favour of the Indian Bank. The respondent No. 1 shall upon segregating the

current assets charged in favour of the Indian Bank by way of first charge shall prepare an inventory thereof in presence of any authorised

representative of the Indian Bank.

It is made clear that this order of sale does not cover the current assets of the respondent No. 1 or the immovable properties of the

Directors/guarantors of the respondent No. 1 which are charged in favour of the Indian Bank as and by way of first charge and will not in any

manner affect the proceedings initiated by the Indian Bank before the Debt Recovery Tribunal Calcutta in respect thereof.

The final remuneration of the Receiver is fixed at Rs. 10,000/-which shall be paid by the purchaser or its nominee or nominees immediately upon

the execution of the conveyance or conveyances and the issuance of the certificate of sale. Upon completion of such activities and upon payment of

such remuneration the Receiver will stand discharge.

The Registering Authority shall admit execution and registration of the conveyance of conveyances of the valuation as per the valuation report got

prepared by IRBI and without insisting upon clearance u/s 230A(1) of 269UC of the Income Tax Act or any clearance from the Urban Land

Ceiling Authority. It is made clear that no machinery and the value thereof is not to be added as a consideration for the sale of the immovable

properties. It is also made clear that the purchaser or its nominee or nominees shall be obliged to restart the factory of the respondent No. 1 and to

employ its workmen and employees in terms of the Memorandum of Understanding. For the purpose thereof the purchaser or its nominee or

nominees shall be entitled to avail of the benefits of the West Bengal Incentive Scheme, 1993.

By this order the application filed by IRBI u/s 40 of the IRBI Act and all other pending applications filed in connection therewith are disposed of.

All parties including the Registering Authority and the purchaser are to act on a xeroxed signed copy of this dictated order on the usual

undertaking.

14. The order as minuted shows that order was passed in the presence of the Advocates for the workmen, IRBI. Surana. Indian Bank and

Dwarka.

15. According to Prerna in October, 1998 a signboard was put up in the premises stating that the premises belong to Surana. Prerna forwarded

the months rent for October, 1998 sent to Surana were returned ""not claimed"". Prema has since been depositing the rent in respect of the portion

of the premises which it claims was let out to it by Dwarka, with the Rent Controller.

16. Surana paid Rs. 56 lakhs to IRBI. This was confirmed by IRBI in its letter dated 15th October, 1998 to the Receiver in which IRBI requested

the Receiver to issue a certificate of sale in favour of Surana or his nominees or to execute a conveyance in favour of Surna"s nominees in respect

of the immovable properties of Dwarka lying at different places. A copy of the valuation report in respect of the assets of Dwarka prepared at the

instance of IRBI was forwarded to the Receiver for his guidance.

17. On 8th December, 1998 a Deed of Conveyance was executed by the Receiver in favour of Surana seeking to convey, inter alia, the premises

14A. Canal Street. It is recorded in the recital that Dwarka had obtained loans from Indian Bank and the West Bengal Financial Corporation for

running its business. The land, demised by Nigam Brothers to Dwarka together with all fixed assets thereon was sold to Surana at a price of Rs. 82

lakhs free from all encumbrances and charges on an as is where is basis. The Conveyance mentions that the demised land covered 21 cottahs 14

Chittacks and 20 ft. It does not appear from the conveyance that any portion of the 26 lakhs was paid to the workmen by Surana but the workers

have subsequently admitted receiving Rs. 15 lakhs from Surana. The conveyance provides:

That the purchaser shall pay from time to time and at ail times hereafter peaceably and quietly hold occupy possess and enjoy the said premises

hereby granted, covered, transferred to and assigned and receive and take rents, issues and proceeds thereof for their absolute use and benefit

without any lawful let hindrance, interruption, disturbance suit eviction claim or demand whatsoever from or by the vendor or any person of

persons whosoever;

The conveyance also records:

And the vendor having received the within mentioned consideration in full and admitted acknowledgement thereof as per memorandum of

consideration appended below its delivered peaceful quiet any vacant possession of the demised premises all the said assets more fully described

in the First Schedule above referred to prior to execution of the presents to the purchaser.

18. According to IRB1 no copy of the conveyance nor any draft thereof was even shown to IRBI nor was IRBI aware of the contents of the

same. But according to IRBI only what was mentioned in the valuation report was sold. As already noted the demised land was mentioned as 13

cottahs 13 chittacks and 20 sft.

19. On 1st February, 1999 Prema wrote to Surana stating that it was a tenant of the premises. However, on 5th February, 1999 an order was

passed by Lala. J. on mentioning by the Receiver that the order dated 8th October, 1998 required modification to include the grant of police help

to the Receiver to evict illegal occupants.

The order dated 5th February, 1999 reads:

By an order dated 8th October, 1998, the Receiver appointed thereunder was directed to execute the necessary conveyance or conveyance in

favour of the purchaser or his nominee or nominees only in respect of the immovable properties after ascertain the value thereof on the basis of the

valuation report got prepared by the IRBI.

In compliance with such order when the Receiver wanted to take possession some of the properties of the company at 14A, Canal Street,

Calcutta for this purpose of obtaining physical possession, he found certain illegal occupants occupied the premises which is evident from the

minutes of the meeting dated 8th December, 1998.

Accordingly, the Receiver mentioned this matter for modification of the order only to the extent of police help for the purpose of taking appropriate

steps.

Accordingly the earlier order dated 8th October, 1998 is modified to the extent that the Receiver will be entitled to take appropriate police help

for the purpose of taking physical possession of the properties of the company if such situation arises.

Let the underlined portion be incorporated in the earlier order dated 8th October, 1998.

Copy of the minutes of the meeting of the Receiver dated 8th December, 1998 be kept with the records.

All parties including the Receiver, the Registering Authority and the purchaser are to act on a signed copy of this dictated order on the usual

undertaking.

20. Neither IRBI nor Indian Bank were given any notice either of the mentioning nor were they aware of the order passed on 5th February, 1999.

In fact Indian Bank on the same date had filed an appeal from the order dated 8th October, 1998. According to Prerna the Receiver had never

visited the premises earlier as recorded in the order.

21. On 11th February, 1999 the Receiver went to the premises with police force and labours and directed the removal of the goods and materials

from what Prema Rex claims was its tenancy. The goods included hundreds of boxes of medicines and bales of Rexine. Photographs of huge stack

of boxes on the road side as well as bales of Rexine have been disclosed by Prema. According to Prema it requested the Receiver not to disposes

it and asked the Receiver under what authority this was being done. It was then said by the Receiver. Mr. Roop Chand Chakraborty that he had

been appointed Receiver and pursuant to orders dated 8th October, 1998 and 5th February, 1999, he had been empowered to take physical

possession of the premises. According to Prema no time was given to contact its lawyer but the Receiver handed over photocopies of the orders

dated 8th October, 1998 and 5th February, 1999 to Prerna and thereafter took vacant possession of three rooms on the ground floor of the

premises. The rooms were put under lock and key and keys were handed over by the Receiver to Surana.

22. On the same date Prerna mentioned the matter before Lala. J. who directed the Receiver to stay his hands in respect of the possession of

Prema and the matter was directed to appear on the next day viz. 12.2.99 marked ""To be mentioned"".

23. After receiving the order dated 11.2.99 the Receiver, as recorded in his minutes, requested Surana to return the keys to the three rooms.

Surana refused stating that he had purchased the property free from all encumbrances and that according to the order passed by the Court the

Receiver was to give over possession to Surana with police help.

24. On 12th February, 1999 the matter was listed before Lala, J. He directed the Receiver to file his report. Leave was granted to Prerna to take

out a formal application. In the mean time the Receiver was directed to remain in symbolic possession of the entire ground floor of the premises.

The Receiver was also directed to put back the boxes containing the life savings drugs, if any, but not in the three rooms of which the actual

physical possession had been taken. The minutes of the Receiver dated 13.2.99 record that all the boxes contained life savings materials which

were lying on the open road were put back on the premises under the custody of Mr. Om Prakash Gulati who the Receiver recorded, was ""owner

of Prerna Rex"".

25. On 16th February, 1999 Prerna filed an application pro-interesse suo before Lala, J. and prayed for restoration of possession in respect of the

three rooms. It annexed copies of its tenancy agreement with Dwarka (to which Nigam Brothers was a confirming party), rent receipts granted by

Dwarka, Certificate of Enlistment granted by the Licencing Department of the Calcutta Municipal Corporation to Prerna and its associates to carry

on business in the premises, bills raised by the Water Supply Department on Prerna for supply of water to the premises, together with a map

showing the rooms to which water connection was to be given bills raised by CESC on Prerna for supply of electricity to the premises, Telephone

Bills of Prerna, Sales Tax Registration, Annual Returns filed by Prema with the Registrar of Companies in which its registered office is shown in the

premises, Challans showing supply of medicines to Bharat Pharmaceuticals at the premises. Import documents. Sales Tax Declarations, Excise

Documents, Octroi Bills. Insurance Policies, Bills relating to air-conditioning etc. All this was in aid of its claim that it and its associates had been

carrying on business in the premises and had been wrongfully and forcibly dispossessed from the three rooms.

26. By an order dated 16th February, 1999 Lala. J., gave leave to Prerna to be examined pro-inisresse suo but did not grant restoration of

possession ad-interim measure. Directions were given for filling of affidavits the interim order already granted was directed to continue.

27. Prerna has Sled three appeals. The first appeal, chronologically speaking, was from the orders dated 12th February, 1999 and 16th February,

1999 by which the learned Single Judge had not granted the interim relief sought for on Prerna''s application pro-interesse suo. This appeal was

admitted on 17th February, 1999 and subsequently marked as APO No. 131 of 1999. A stay application (G. A. No. 711 of 1999) was also tiled

in which restoration of possession of the three rooms was prayed. An order was passed on 17th February, 1999 adding Surana as a party to the

appeal and directing him to hand over the keys of the three rooms to the Receiver. The personnel of the receiver was changed. The new Receiver

was directed to put back all boxes which had been removed from the three rooms in the three rooms and to retain custody of the keys. The

Receiver was also directed to remain in symbolic possession of the premises. Directions were also given for filing of affidavits. Affidavits were filed

and the stay application being G.A. No. 711 of 1999 was disposed of on 12th May, 1999 by confirming the order dated 17th February, 1999

and directing expeditious disposal of the appeal. This judgment will therefore dispose of the matter finally as far as this Court is concerned.

28. The second appeal (APOT No. 193 of 1999) was preferred by Prema from the orders dated 8th October, 1998 and 5th February, 1999 on

the basis whereof Prema was dispossessed by the Receiver. An application (G. A. No. 987 of 1999) was also filed by Prema for condonation of

delay u/s 5 of the Limitation Act. This was allowed on 6th July, 1999 by a reasoned judgment and order after the filing of affidavits. The appeal

was also admitted subject to the question of maintainability raised by Surana. The workers who were represented at the hearing were also directed

to be served with a copy of the stay application.

29. On 19th July, 1999 the workers prayed for adjournment of the hearing on the ground that a SLP had been filed before the Supreme Court

from the order dated 6th July, 1999 condoning the delay in filing of the appeal. As no stay had been obtained from the Supreme Court, directions

were given allowing the workers to file an affidavit-in-opposition to the stay application. As the factual issues involved in APOT No. 193 of 1999

were common in all matters an order was passed directing all matters to be listed together and disposed of analogously. Incidentally, the SLP of

the workers from the order dated 6th July, 1999 has been dismissed on 30th July, 1999.

30. The third appeal (APOT No. 194 of 1999) filed by Prerna was from the order passed by S. K. Sinha, J. on 20th February, 1997. An

application u/s 5 of the Limitation Act, 1963 (G. A. No. 986 of 1999) as well as an application for stay (G. A. No. 987 of 1999). It may be noted

at the outset that Prerna has not pressed this appeal at all.

31. Indian Bank has also preferred an appeal from the order of sale dated 8th October, 1998. The appeal was preferred on 5th February, 1999.

The appeal was admitted on 15th February, 1999 subject to the question of maintainability and limitation. An interim order was passed restraining

Surana who claimed to have already paid Rs. 56 to IRBI and Rs. 15 lakhs to the workers, from making any further payment. The workers, and

Surana were added as parties to the Bank"s appeal. Prerna also made an application for being added as a party to the Bank"s appeal. This was

allowed on 22nd April, 1999. The Banks stay application was disposed of on 19th July, 1999 by directing Surana to deposit the balance purchase

price with the Registrar, Original Side who was to invest the amount in a nationalised bank in a short term fixed deposit subject to further orders in

the Bank"s appeal. The appeal itself was expedited and is now being disposed of by this judgment.

Maintainability:

Surana has raised several preliminary objections in respect of each of these proceedings before us. The objections are considered seperately.

APOT No. 193 of 1999

A.1. The first submission of Surana was that the undertakings subject to which the appeal had been admitted were not in order. It is said that the

practice of this Court has been to allow the admission of an appeal without a certified copy subject to the appellant undertaking inter alia to file the

certified copy of the order under appeal within the period of limitation. It is submitted that as no such undertaking had been given, the appeal was

incompetent. Reliance is sought to be placed on the decision of Ananda Sundari Saha vs. Monoharan Saha, AJR 1981 Cal 365 and Shakuntala

Devi Jain vs. Kuntala Kumari & Ors., AIR 1969 SC 575 and Income Tax Commissioner vs. Santosh Debi Chamaria, AIR 1974 Cal 295 (DB) in

this context.

A. 1.1. In this case the relevant prayer in Prerna"s application reads :

(b) Leave be given to your petitioner to prefer an appeal against the order dated 8th October, 1998 read with order dated 5th February, 1999

passed by the Hon"ble Mr. Justice Amitava Lala in G.A. No. 3917 of 198. G. A. No. 2069 of 1998, AIFC No. 1 of 1997 (Industrial

Reconstruction Bank of India & Anr. vs. Dwarka Industrial Development Pvt. Ltd. & Anr.) without certified copies thereof on your petitioner"s

undertaking -

(i) To have the judgment and orders under appeal drawn up. completed and filed within the period of limitation;

(ii) To obtain the certified copies of the impugned judgments and to include the same in the paper book to be filed herein;

(iii) To obtain the certified copy of the order and/or judgments that may be passed herein within the period of limitation and to include the same in

the paper book to be filed herein;

A.1.2. It is argued by Surana that although an undertaking was given to obtain a certified copy of the impugned judgment and order within the

period of limitation there was no undertaking to file it within the period of limitation. It is contended that this being a mandatory provision, the Court

had no jurisdiction to entertain the appeal.

A.2. Prerna has made an application for correction of the prayer (Tender No. 1354 of 1999) in the stay application. Surana''s submission then was

that the application for amendment could not be allowed because the court did not have the jurisdiction to entertain the stay application itself. The

decision in Ramanna vs. Amireddi & Ors., AIR 1931 Mad 67 and Zohra Khatoon vs. Md. Jane Alam & Ors. 82 CWN 51 have been cited as

authorities for this proposition.

A.2.1. It has also been submitted by Surana that the only ground put forward by Prerna in support of the prayer for amendment was the

inadvertence of counsel and that this was an insufficient explanation.

A.2.2. The workers have supported Surana and have submitted that if the appeal is incompetent, amendment cannot be allowed after the period of

limitation.

A.3. The law on the question of maintainability of the appeal in connection with the requirement for filing a certified copy of the order appealed

against had been considered earlier in an unreported Division Bench decision : Dedraj Chowdhury & Anr. vs. Vinod Kumar Agarwalla & Ors.,

(APOT No. 504 of 192 : Judgment dated 22nd May. 197) in which it was said ""On the Original Side of this Court, the procedure relating to

appeal has been laid down in Chapter 31 of the Original Side Rules, Chapter 31 Rule 2 provides:

2. Form of Memorandum-Every Memorandum of Appeal from the Original Side shall be in Form No. 1 and shall be drawn up in the manner

prescribed by Order XLI, Rule 1 of the Code and shall be presented to the Register, accompanied by a copy of the decree or order appealed

from.

32. Order XLI Rule 1 provides that the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appeal Court

dispenses therewith) of the judgment on which it is founded. However, as far as the Original Side of this Court is concerned even the filing of the

copy of the decree may be dispensed with. This power is contained in Chapter 31 Rule 29(b) which reads :

(b) The Appeal Court, or the judge as aforesaid, may also upon application and upon sufficient grounds verified by an affidavit, exempt the parties

(or any of them from the operation of the whole) or any part of these rules and may make such special order as shall appear desirable with regard

to any matter with which these rules are concerned.

33. Rule 9(b) indicates therefore that the procedure prescribed in Rule 2 is not mandatory as the Appellate Court is empowered to dispense with

any or all of the requirements of Rule 2 including the filing of the certified copy of the decree/order.

34. In addition, a practice is prevalent on the Original Side of the Court by which formal leave is sought for to file the appeal without the certified

copy, where the certified copy is not available, subject to the appellant undertaking, inter alia to have the certified copy of the decree and order

appealed from filed with the period of limitation (See: Smt. Ananda Sundari Saha vs. Manoharan Saha, AIR 1981 Cal 365). Such a practice has

been specifically protected under Chapter 40 Rule 3 of the Original Side Rules. The Court then entertains the appeal and the stay application

granting such leave. Occasionally, the court disposes of the appeal itself before the certified copy of the judgment is at all available. In such cases

the court discharges the appellant from the undertakings given. It follows from this also that the requirement for filing a certified copy is not

mandatory on the Original Side of the High Court. It also follows that the non-filing of the certified copy does not affect the maintainability of the

appeal but may at the highest be a ground for dismissing it if the undertakings are not discharged or dispensed with.

35. The position as far as the Original Side of this Court is concerned, has been summarised in Ananda Sundari vs. Monoharan. AIR 1981 Cal

365 para 17 whereof reads as follows:

To my mind. Mr. Sen''s example to the effect that an appeal might be settled before the certified copy of the order or decree appealed from,

would be filed in terms of the undertaking, but still the same does not become a nullity and remains effective, can be explained. Under such

circumstances, by consent of the parties the court has power to act under Rule 29(b) of Chapter XXI and the other connected rules provided in

the Original Side Rules of this Court. In other words, by discharging the appellant of its undertaking the Court gives a total exemption from filing of

such certified copy and on that basis the order made remains a valid and enforceable order and the questions of incompetency or non-

maintainability or being barred by limitation, do not come in the way. It follows, therefore, that the question of filing the certified copy of the decree

or order appealed from, becomes material by virtue of the order is made giving leave to file the memorandum of appeal without the certified copy

of the decree or order appealed from. Once the appellant is discharged of its obligation to perform the undertaking then the other questions, as

aforesaid, cannot arise.

36. In fact the 1976 Amendment to the CPC has also watered down the rigid requirement for filing of a certified copy of the decree with the

memorandum of appeal probably having regard to the inordinate delay normally faced, by the litigant in obtaining it. Order XX Rule 6A of the

CPC which was introduced by the 1976 Amendment provides:

6A. (1) The last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment.

(2) Every endeavour shall be made to ensure that the decree is drawn up expeditiously as possible, and in any case, within fifteen days from the

date on which the judgment is pronounced, but where the decree is not drawn up within the time aforesaid, the court shall if requested so to do by

a party desirous of appealing against the decree, certify that the decree has not been drawn up and indicate in the certificate the reason for the

delay and thereupon-

(a) an appeal may be preferred against a decree without filing a copy of the decree and in such a case the last paragraph of the judgment shall, for

the purpose of Rule 1 of Order XLI. be treated as the decree; and

(b) so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be the decree for the purpose of execution and

the party interested shall be entitled to apply for a copy of that paragraph only without being required to apply for a copy of the whole of the

judgment but as soon as a decree is drawn up, the last paragraph of the judgment shall cease to have the effect of a decree for the purpose of

execution or for any other purpose.

37. This provision also indicates that it is not mandatory to file a certified copy of the decree/order with the appeal.

38. As far as the Original Side of this Court is concerned after a judgment is delivered and signed by the Judge it is filed and the parties are entitled

to obtain office copies ""in the usual manne"" (Chapter XI Rule 2). Apart from this courts permit the parties to obtain what is known as a signed

copy of the operative portion of the judgment. In the case of an order it is minuted in a minute book maintained in the Court by the Assistant

Registrar who is the Principal Officer in attendance. Courts also permit parties to have a signed copy of the minutes of the order. In both the cases

copies are prepared by the Department and signed by the Assistant Registrar of the Court.

39. In this case the minutes of the operative portion of the last paragraph of the judgment certified by Assistant Registrar have been included in the

Paper Book and a certified copy of the judgment dated 3rd July, 1992 certified as a true copy u/s 76 of the Evidence Act, 1872 has also been

filed. Indeed in the decision of the Labour High Court in Reasat Ali Khan vs. Mahfuz Ali Khan (supra) it was held that the word ""copy"" of the

decree and of the judgment in the Code meant copies duly certified under the provisions of the Evidence Act. In any event it is arguable that by

including the signed copy of the operative portion of the judgment and the order the provisions of Order XX Rule 6A have been complied with.

A.3.1. We see no reason to take a different view on the law. The filing of certified copy along with the memorandum of appeal is relevant to the

question of limitation. The undertakings are given on the basis of which the court entertains appeal without a certified copy of the order under

appeal. We have already held in our order dated 6th July, 1999 that there was no question of limitation as far as this appeal is concerned. The

certified copy of the orders dated 8th October, 1998 and 5th February, 1999 are not yet available. On the basis of the law as stated in Dedraj

Chowdhury vs. Vinod Kumar Agarwal and given the facts of this case we are of the view that the defect in the form of undertaking is not one

which would make the appeal itself not mantainable nor deprive the Court of the jurisdiction to entertain the appeal.

The Court can allow the undertakings to be amended or altered at any time before the appeal is disposed of and to also discharge the undertakings

altogether where the appeal is disposed of and the certified copy of the order is not yet available.

A.3.2. No doubt in construing Rule 29(6) of Chapter XXI of the Original Side Rules, the learned Judge in Ananda Sundari vs. Monoharan (supra)

said :

Under the said rule the appeal court has been given powers to make such special order as might appear desirable with regard to any matter with

which the said rules are concerned. There is a long standing practice of this court to grant such exemption but to a limited extent. It is granted

conditionally upon the appellant''s undertaking to court, inter alia to file certified copy of the decree or order appealed from, within the period of

limitation. That time old practice has the force of law under Chapter 40, Rule 3 of the Original Side Rules as set out above.

A.3.3. Their Lordships had not held that a defective undertaking given would affect the maintainability of the appeal. In fact, it was noted that the

Supreme Court in the case of Jagat Dhish Bhargava vs. Jawahar Lal Bhargava, AIR 1961 SC 832 had upheld the decision of the High Court

allowing time to the appellant to file the certified copy of the order appealed against without dismissing the appeal as incompetent. It was Said:

From the trend of the decision of the Supreme Court in the case of Jagat Dhish Bhargava (AIR 1961 SC 832) (supra) it would seem that the

court has power in the facts and circumstances of a particular case to allow the appellant to cure the defeat In procedure in the manner it was done

in an exceptional case in the case before Supreme Court.

A.3.4. Finally, the rule of practice as to the form of the undertaking that the courts require while exercising discretion under Rule 29(b) only

indicates how that discretion is to be exercised. As held in Ananda Sundari''s case (supra) this does not curtail the court''s power to do away with

the undertaking altogether if circumstances so warrant.

A.3.5 The decisions cited by Surana are in the circumstances inapposite as they both dealt with situations where the court lacked the initial

jurisdiction to entertain the appeal.

A.3.6 We therefore reject this preliminary objection.

B. The next preliminary objection raised on behalf of Surana was that Prerna was not competent to appeal from the orders dated 8th October,

1998 and 5th February, 1999. The submission is based on the language of Section 40(2) of the Industrial Reconstruction Bank of India Act, 1984

which provides:

Any party aggrieved by an order under sub-section (3). Subsection (7) or Sub-section (9) may, within 30 days from the date of the order, prefer

an appeal.....

B.1.1 Section 40(12) of the IRBI Act according to Surana, limited the right of appeal to a party to the order and therefore the appeal was not

maintainable at the instance of Prerna.

B. 1.2 Section 40(12) does not exclude the operation of clause 15 of the Letters Patent which provides for the appealability of all judgments

passed by a Single Judge [See : Vinita M. Khanolkar vs. Pragna M. Pal. (1998)1 SCC 500].

B.2 It was then said that the proceedings were only between IRBI and Dwarka. As Prerna was not a party, it was not bound by any order passed

in those proceedings, it had therefore, not suffered any legal injury. According to Surana this was the principle of res inter alios acta. Several

decisions were cited which are illustrative of the application of this principle. It is contended that the order should not be confused with the action

taken pursuant to the order.

B.2.1 There can be no doubt that an order cannot in law affect the interest of persons who were not parties to the proceedings. The submission

overlooks the well established principle that a person, though not a party to a proceeding, may prefer an appeal from such proceeding with the

leave of the Court.

B.2.2 In our view the statement of law in Smt. Kanwar Golcha vs. Golcha Properties Private Limited (In liquidation). AIR 1971 SC 374 is

applicable to the case:

The Official Liquidator as well as the learned Company Judge were bound by the rules of the natural justice to issue a notice to the appellant and

hear her before making order appealed against. If there was default on their part in not following the correct procedure it is wholly

incomprehensible how the appellant could be deprived of her right to get her grievance redressed by filing an appeal against the order which had

been made in her absence and without her knowledge. It would be a travesty of justice if a party is driven to file a suit which would involve long

and cumbersome procedure when an order has been made directly affecting that party and redress can be had by filing an appeal which is

permitted by law. It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate court and such

leave should be granted if he would be prejudicially affected by the judgment.

B.2.3 In the case before us, the court, exercising its jurisdiction u/s 40 of the IRBI Act decided the status of the persons in occupation of the

premises as illegal in their absence. Worse still, the court directed their eviction by the Receiver with police help without giving them any

opportunity of being heard. No distinction can be drawn in this case between the order and the action of the Receiver. It is not Surana''s case that

the Receiver acted de hors the order.

B.2.4 The Division Bench of this Court in United Commercial Bank vs. Hanuman Synthetics. AIR 1985 Cal 96 also considered the law in the

subject and applied the following dictum of Lindley LJ. In Securities Insurance Company. (1894)2 CL 410:

I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave,

and that a person who is not a party is either bound by the order or is aggrieved by it. or is prejudicially affected by it. cannot appeal without leave.

It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a prima facie case why he

should have leave he will get it; but without leave he is not entitled to appeal.

B.2.5 Prerna has asked for leave to appeal. We have already held, in our order dated 17th February, 1999 on the basis of the same facts (albeit in

connection with APO No. 131 of 1999) that Prerna has been able to prima facie establish and that they were in possession of the premises as

tenants and they had been dispossessed wrongly of such possession by the orders dated 8th October, 1998 and 5th February, 1999 in the and on

the basis of the authorities noted earlier. Prerna must be held to be entitled to prefer the appeal from those orders within the leave of the Appeal

Court and the appeal at its instance cannot be dismissed in limine as not maintainable.

C. The last submission on the question of maintainability as far as this proceeding is concerned, was that Prema could not prefer one appeal against

two separate orders. It was submitted that the orders were distinct as the doctrine of merger of one order with another took place only on review

or on appeal and since the order dated 5th February, 1999 had not been passed either on review or appeal of the order dated 8th October, 1998,

the two orders were separate.

C.1 The submission is misconceived. The learned Single Judge, had by the order dated 5th February, 1999 expressly modified the order dated 8th

October, 1998 and directed the modifications to be incorporated in the order dated 8th October, 1998.

C.1.2 Furthermore, the decisions cited viz. Aditya Kumar Bhattacharjee vs. Abinash Kumar Mukhopadhyaya, 34 CWN 1002 and Gojer

Brothers vs. Raton Lal, AIR 1974 SC 1380 relate to the question of merger apropos a decree and are authorities for the proposition that when a

decree is reviewed, or appealed against, the original decree merges in the second. It is debatable whether this limitation is applicable to

interlocutory orders, passed in the same proceeding. In any event, given the express direction of the learned Single Judge any further discussion on

the issue would be academic.

D.1 IRBI contended that the interest of Prerna was not affected as the sale of the premises under the order dated 8th October, 1998 was made

free from encumbrances. Encumbrances according to IRBI meant mortgages, hypothecation and charge and not tenancies. The decision in District

Bank Ltd. vs. Webb. (1958) 1 AER 126 has been relied on to contend that therefore Prerna''s tenancey was not affected.

D.1.1 If that is the position in law, it underlines the illegality of Prerna''s dispossession and the appeal should be entertained on this ground alone.

But Danckwert J. in his judgment cited merely said ""It is true that in certain circumstances a lease may be regarded as an encumbrance, but it

seems to me that an encumbrance, normally, is something in the nature of a mortgage and not something in the nature of a lease or tenancy.

D.1.2. Surana on the other hand has contended that the word encumber"" in the order dated 8th October, 1998 included tenancies. This according

to Surana, did not make the order bad. It is submitted that at the highest the existence of the encumbrance would affect the rights of the seller and

buyer inter se as it would amount to a defect in title u/s 55(1)(a) of a Transfer of Property Act giving the purchaser the right to avoid the sale. It did

not affect the tenancy right.

D.1.3 The submission is unacceptable. Were it limited to a private transaction between the parties without intervention of the court, this might be

the case. In this case the court has directed sale of the premises free from encumbrances. Parties have acted on that direction as if it affected the

interest of the tenants and occupants of the premises. The interest so affected is sufficient to give such tenants and occupants the right to appeal

from the order.

APOT No. 73 of 1999

E.1 According to Surana, the Bank''s appeal is not maintainable. The bank has preferred an appeal from the order dated 8th October, 1998. The

appeal was preferred on 5th February, 1999 when the second order was passed. On the basis of the decision in Aditya Kumar Bludtacharjee us.

Abinash Chandra Mukhopadhyaya (supra) it is contended that the appeal should have been preferred from the order dated 5th February, 1999 as

it had modified the earlier order passed on 8th October, 1998.

E.1.2 This aspect has been dealt with to some extent in paragraphs C.1 and C.1.2 above. Aditya Kumar Bhattacharjee us. Abinash Chandra

Mukhopadhaya (supra) was followed by this Court in the order dated 6th July, 1999 in connection with the question of limitation. The Division

Bench in that case noted the earlier authorities viz. Joy Kishen Mookhejee vs. Ataoor Ralvnan (ILR 6 Cal 22 (188). Minal Sil vs. Amdar Ali

(1905 9 CWN 605) and Nawaz Ah vs. Allu (1928 ILR 4 Lah 185) as holding that where amendment of the decree was made u/s 206 of the

Code of 1882 (Section 152 of the present Code), the period of appeal should be reckoned from the time of the amendment and preparation of the

decree in pursuance thereof.

E.1.3 In Aditya Kumar Bhattacharjee''s case (supra) on an application for review the original decree was modified. It was therefore held that the

appeal should be preferred from the decree passed on review. Factually, the case is distinguishable. This is not a case of a decree at all. nor was

the second order on a review application. On the other hand, the second order expressly directed that it should be incorporated in the earlier

order. This would mean that the original order dated 8th October, 1998 stood but it will now be drawn up as if the order passed on 5th February,

1999 were incorporated in it. Therefore the appeal from the order dated 8th October, 1998 is competent.

F. According to IRBI since both the Indian Bank and IRBI are public sector undertakings no appeal was maintainable by Indian Bank* unless to

procedure prescribed for resolution of the dispute between public sector undertakings were followed. The decision in Bala India Limited vs.

Superintendent of Central Excise, reported in 1994(70) ELT 45, has been cited in support of this submission.

F.1 In the decision cited, the Supreme Court directed compliance with a memo dated 11th October, 1991 issued by the Cabinet Secretariat to the

effect that all disputes between the Government of India on the one hand and Public Sector Undertakings on the other or between Public Sector

Undertakings inter se be referred to a High Power Committee for resolution of disputes before such parties come to Court. The procedure would

not apply when the interest of others are involved. In Indian Bank''s appeal the dispute is not only between IRBI and the Indian Bank but also

between Indian Bank and Surana and Indian Bank and the workers.

G. According to IRBI, Indian Bank had not opposed IRBI''s application at any stage. It is said that the order dated 8th October, 1998 sufficiently

protected Indian Bank''s interest. It is said that Indian Bank had participated in the Receivers meeting held pursuant to the order dated 8th

October, 1998.

G.1 The submission of IRBI appears to be that Indian Bank had acquiesced in the order. But the order dated 8th October, 1998 which was

passed on the second application of the workers finally disposed of the application on the day that the second application was moved without any

directions for affidavits. No opportunity was given to Indian Bank to record its protest. The order does not record that it was passed with the

consent of the parties. Mere participation in the Receiver''s meetings would be insufficient to infer acquiescence on the part of the Indian Bank.

MERITS

Having held that the appeals before this court are maintainable we now take up the merits of the matter. It would be convenient to dispose of the

Banks appeal first as it attacks the root of the grievances in ail the appeals and its submissions are also supported by Prerna in APOT No. 193 of

1999.

Surana submitted that as far as Prerna was concerned the Court was in fact disposing of an interlocutory application and not the appeal, ft is

submitted that the Court could not dispose of the Appeal itself at this stage except by consent. Counsel for Surana said that he did not consent to

the appeal being disposed of. Reliance has been placed on the decision of the Supreme Court in Gujarat Water Resources Development

Corporation Ltd Pravin Kumar and N. Makwana & Anr., AIR 1993 SC 1611. In that case in an appeal from an interim order passed in an writ

application the Appellate Court disposed of not only the appeal but also the writ petition. It was held that the Appellate Court could not dispose of

the writ petition except with the consent of the parties. The Supreme Court did not hold that the Appellate Court cannot dispose of the appeal itself

on the stay application. If the Court is of the view that no useful purpose would be served in keeping the appeal alive either by reason of the nature

of the point involved or the extensive arguments made or for any other like reason, the Appellate Court can and has very often disposed of the

appeal itself even before the paper books are filed. In this case the matter was argued for several days before this Court-Indian Bank''s appeal

raises the same issues. It would be futile in the circumstances to keep the appeal preferred by Prerna from the orders dated 8th October, 1998 as

modified in 5th February, 1999 alive and its application is disposed of as an appeal.

As much of the debate is centered around the wording of section 40 of the IRBI Act it is necessary to set out the relevant provisions of the section:

40.Enforcement of claims by the Reconstruction Bank (1)(a) Where an assisted industrial concern makes any default in the payment of any dues

to. or in meeting its obligation in relation to any other assistance given by the Reconstruction Bank or otherwise fails to comply with the terms of

agreement with that Bank, or

(b) Where the Reconstruction Bank makes an order u/s 38 requiring the assisted industrial concern to make immediate repayment of any

assistance granted to it and the industrial concern fails to make such repayment then, without prejudice to the provisions of Section 39 of this Act

and Section 69 of the Transfer of Property Act. 1882. any officer of the Reconstruction Bank generally or specifically authorised by the Board in

this behalf may apply to the concerned High Court for one or more of the following reliefs, namely:

(i) for an order for sale or lease of the property assigned, charged, hypothecated, mortgaged or pledged to the Reconstruction Bank as security for

the assistance granted to it. or for sale or lease of any other property, of the industrial concern, or

(ii) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment from the premises

of the industrial concern without the previous permission of the Board, where such transfer or removal is apprehended; or

(iii) for an order for the appointment of a Receiver where there is apprehension of the machinery, equipment or any other property of substantia]

value which has been assigned, charged, hypothecated, mortgaged or pledged to the Reconstruction Bank being removed from the premises of the

industrial concern or of being transferred without the previous permission of the Reconstruction Bank.

(2) An application under sub-section (1) shall state the nature -and extent of the liability of the industrial concern to the Reconstruction. Bank, the

ground on which it is made and such other particulars as may be necessary for obtaining the relief prayed for.

(3) Where an application is for any relief mentioned in sub-clause (i) of sub-section (1) the High Court may,-

(b) pass an order calling upon the person whose property has been assigned, charged, hypothecated, mortgaged or pledged to the

Reconstruction Bank to show cause, on a date to be specified in the notice, as to why an order for the sale of such properly or so much of such

property, as would, on being sold, realise, in its estimation an amount equivalent in value to the outstanding dues of the industrial concern to the

Reconstruction Bank, together with costs of the proceedings taken under this section, shall not be made or

(c) pass an ad interim order attaching any property of the industrial concern which has not been assigned, charged, hypothecated, mortgaged or

pledged to the Reconstruction Bank, or so much of such property, as would on being sold, realise, in its estimation, an amount equivalent in value

to the outstanding dues of the industrial concern to the Reconstruction Bank, together with costs of the proceedings taken under this section, and

pass an order calling upon the industrial concern to show cause on a date to be specified in the notice as to why such order of ad interim

attachment shall not be madiabsolute.

(5) Where an application is for the relief mentioned in sub-clause (iii) of sub-section (1). the High Court shall grant an ad interim injunction

restraining the industrial concern from transferring or removing its machinery or other equipment and issue a notice calling upon the industrial

concern to show cause, on a date to be specified in the notice, as to why such an ad interim injunction shall not be made absolute.

(6) Where an application is for the relief mentioned in sub-clause (iv) of Sub-section (1). the High Court shall pass an ad interim order appointing a

Receiver in respect of the property assigned, changed. hypothecated, mortgaged or pledged and shall issue a notice calling upon the industrial

concern to show cause, one date lo be specified in the notice, as to why the ad interim order appointing the Receiver shall not be made absolute.

(7) If no cause is shown, on or before the date specified in the notice issued by the High Court, the Court shall forthwith-

(a) make an order for the sale of the property which has been assigned, charged, hypothecated or pledged to the Reconstruction Bank or so much

of such property, as would, on being sold, realise, in its estimation, an amount equivalent in value to the outstanding dues of the industrial concern

to the Reconstruction Bank, together with costs of the proceedings taken under this section.

(b) direct the sale of the attached property or the transfer of the management of the industrial concern to the Reconstruction Bank or to its

nominee:

and shall apply the proceeds of such sale for the discharge of the dues to the Reconstruction Bank and the residue of such proceeds, if any, shall

be made over to the person entitled thereto in accordance with his rights and interests.

(c) make the ad interim injunction made under Sub-section (5), and the ad interim order of appointment of the Receiver made under Sub-section

(6), as the case may be, absolute.

(8) if cause is shown, the High Court shall proceed to investigate the claim of the Reconstruction Bank and the provisions of the Code of Civil

Procedure, 1908, shall, as far as practicable, apply to such proceedings.

(9) On an investigation made under Sub-section (8), the High Court may pass an order.-

(a) for sale of the property which has been assigned, charged, hypothecated, mortgaged or pledged to the Reconstruction Bank or so much of

such property, as would, on being sold, realise, in its estimation, an amount equivalent in value to the outstanding dues of the assisted industrial

concern to the Reconstruction Bank, together with costs of the proceedings taken under this section: or

(b) (sic...)ment and directing the sale of the attached property, or the transfer of the management of the assisted industrial concern to the

Reconstruction Bank or to its nominee: or

(c) varying the order of attachment so as to release a portion of the property from attachment and directing the sale of the reminder of the attached

property:

and shall apply the proceeds of such sale for the discharge of the dues of the Reconstruction Bank and the residue of such proceeds. if any shall be

made over to the person entitled thereto, in accordance with his rights and interests:

(d) releasing the property from attachment, if it is satisfied that it is not necessary in the interest of the Reconstruction Bank; or

(e) confirming or vacating the injunction or the order of the appointment of Receiver:

Provided that when making any order under clause (d). the High Court may make such further orders as it thinks necessary to protect the interest

of the Reconstruction Bank, and may apportion the costs of the proceedings in such manner as it thinks fit :

Provided further that unless the Reconstruction Bank intimates to the High Court that it will not prefer an appeal against any order releasing any

property from any attachment such order shall not be given effect to until the expiry of the period fixed under sub-section (12) within which an

appeal may be preferred, or if an appeal is preferred, unless the court empowered to hear appeals from the decisions of the said High Court

otherwise directs, until the appeal is disposed of.

(10) An order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner provided in the

Code of Civil Procedure, 1908. for the attachment or sale of property in the execution of a decree as if the Reconstruction Bank were the decree-

holder.

I. The Section 40(2) envisages the order for sale being passed by the court on the basis of an application made by IRBI.

II. In this case, the order dated 8th October, 1998 was passed on the application of the workers. No doubt the order dated 8lh October, 1998

also said:

By this order the application filed by IRBI, u/s 40 of the IRBI Act, 1984 and all other pending applications filed in connection therewith are

disposed of.

However, none of these applications were listed before the learned Judge on that day. IRBI"s application neither mentioned Surana nor was any

prayer made for payment of any amount of the sale proceeds to the workers. It is clear therefore that the order was passed at the instance of and

on the application of the workers"

1.2 In the second application the workers had asked for disposal of the first application. In the first application of the workers leave was asked by

the workers to intervene in the proceeding. Such leave was never granted and yet the order was passed in their favour.

1.3 Both the first and the second application of the workers were disposed of without any directions for filing of affidavits at all. As already noted,

it is not as if the order dated 8th October, 1998 were passed by consent. In denying the opportunity to the parties to file affidavits the learned

Judge has acted contrary to one of the basic tenets of justice.

II. Section 40 Sub-section 10 of the IRBI Act, 1984 provides for an order of sale under the section to be carried into effect as far as practicable in

the manner provided in the Civil Procedure Code, 1908 for sale of property in execution of a decree as if IRBI were the decree holder.

II.I The section envisages an order of sale being passed in two circumstances: first when the person whose property is sought to be sold shows

cause pursuant to a notice issued u/s 40(9(a) and second if no such cause is shown u/s 40(7)(a). According to Surana the provisions of CPC apply

only to the first case and not to the second. It is contended that this being a sale u/s 40(7)(a) the provisions of the Code did not apply.

II.2. In our view this is not a correct construction of the provisions of Section 40. When cause is shown in answer to a notice issued to the person

whose property is sought to be sold, the Court is directed to investigate the claim under the provisions of the CPC [vide Section 40(8)]. The court

after investigation may pass an ""order for sale"" of the debtor''s property. [Section 40(9)(a)l If no cause is shown in answer to the notice, the Court

shall forthwith make ""an Order for Sale"" of the debtor''s property [Section 40(7)(a)J. In both cases, the CPC will apply for giving effect to the

order of sale. The words of Section 40(10) refers to

an order of..... sale of property under this section"". No distinction is drawn between the orders passed after investigauon u/s 40(9)(a) and

orders passed where no such investigation tailed for u/s 40(7)(a).

II.3 Section 40(10) also makes it clear that an order of sale u/s 40 is not self effective. It has to be ""carried into effect"". For this purpose the

provisions of the CPC relating to sale in execution of a decree will be applicable. These provisions are contained in Order 21 Rules 36, 64 to 73

and Rules 82 to 106. In terms of the provisions of the Code read with section 40(10) of the 1RBI Act, 1984 only IRBI can put the ""order of sale

into execution as the decree holder.

II.4 The applicability of the Rules of the Code to all orders of sale u/s 40 of the IRBI Act is a mandatory requirement. The word ""shall"" in Sub-

section (10) indicates this. The phrase ""as far as practicable"" in Section 40(10) of the IRBI Act, 1984 connotes that as a general rule the

procedure prescribed in the Code must be followed to the extent possible. This means that although the procedure need not be followed to the

letter the basic procedural requirements must be complied with.

II.5 Order 21 Rule 65 provides for sales in execution of the decree to be conducted by an Officer of the Court or by such of the persons the court

may appoint in this behalf by public auction in the prescribed manner unless ""otherwise prescribed"". Rule 66 provides for the manner of sale after

advertisement, determination of the encumbrances etc. Rule 66 provides for the proclamation of sale.

10.6 None of these provisions were complied with. There was no advertisement of any kind of the proposed sale. No terms and conditions of sale

were fixed. There was no proclamation of sale framed in accordance with Order 21 Rule 66 of the Code determining what in fact was the subject

matter of the sale. Merely because the Receiver was in possession of the property does not mean that the other provisions of the Code could be

ignored.

10.7 Because of the non-compliance with these provisions there in now a dispute between the parties as to what exactly was the subject matter of

sale. According to IRBI what was sold covered an area of about 13 cottahs. The schedule conveyance on the other hand records that what was

conveyed was an area covering 21 cottahs and odd. IDBI''s valuer had submitted a report giving the value of 13 cottahs and odd. If the sale was

on the basis of this

report, only that area could have been sold. Again there was no determination of the encumbrances. As a result according to IRBI the sale was

effected of Dwarka''s interest free from encumbrances but subject to the existing tenancies. According to Surana the phrase ""free from

encumbrances"" included tenancies. These points should have been determined under Order 21 Rule 66 before the sale was in fact held.

10.8 Apart from the specific provisions of IRBI Act read with the relevant provisions of the Code, the Supreme Court has also emphasised the

need for advertisement and for sale by public auction in the case of sales by Financial Corporation effected through Court. Dealing with the duty of

State Financial Corporation under the State Financial Corporation Act, 1951 in Mahesh Chandra vs. Regional Manager, U.P. Finance

Corporation. (1993) 2 SCC 279 the Supreme Court said :

Sale of a unit should always be made by public auction"" and that ""sale by private negotiation should be permitted only in very large concerns

where investment runs in very huge amount for which ordinary buyer may not be available or the industry itself may be of such nature that by

normal buyers may not be available. But before taking such steps there should be advertisements not only in daily newspapers but business

magazines and papers."" (Emphasis supplied)

The view was reiterated in LICA (P) Ltd. (1) vs. Official Liquidator & Anr.. 85 Company Cases 788. 791 :

The purpose of an open auction is to get the most remunerative price and it is the duty of the court to keep openness of the auction so that the

intending bidders would be free to participate and offer higher value. If that path is cut down or closed the possibility of fraud or to secure

inadequate price or underbidding would loom large.

In Chairman and M. D. SIPOT. Madras vs. Contromix Private Limited AIR 1995 SC 1632 the Supreme Court said that even if a public auction

is not held at least advertisements should be issued calling for tenders so that the best possible price is obtained in respect of the sales of the

property because

In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved

only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after

adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price.

No advertisement whatsoever was issued in this case of the proposed sale.

II.9. In every court sale the court has to satisfy itself that having regard to the market value of the property the price offered is reasonable. In this

case, the sale was made on the basis of an agreement between the workers and Surana. No enquiry nor any attempt was made by the learned

Judge to find out whether the price offered by Surana was competitive or the best available. In Navlakha & Sons. vs. Ramanuja Das, 40 Com

Cases 936 (although the decision was given in the context of winding up proceedings), the Supreme Court noted with approval the decision of the

Madras High Court in Gordhan Das Chunnilal vs. T. Sriman Kunthimathinatha Pillai, AIR 1921 Mad 286 which held that even when property is

authorized to be sold by private contract ""it is the duty of the court to satisfy itself that price fixed is the best that could be expected to offer"". The

learned Single Judge did not in fact come to any such conclusion. In the absence of any advertisement of the sale the court could not in any event

determine what the market value of the assets of Dwarka could have been. In fact as stated by the Supreme Court in Allahabad Bank vs. Bengal

Paper Mills Co. Ltd., AIR 1999 SC 1715 ""inadequate publicity necessarily suggests the possibility that a better price could have been obtained"".

II.10 We have already held that Indian Bank had sufficient interest as a creditor of Dwarka to see that the assets of Dwarka were sold at the best

available price. It has been argued by IRBI that the Indian Bank could not complain of the inadequacy of the consideration as it had not challenged

the valuation report prepared by IRBI. However it does not appear that any copy of the valuation report was made available to the Indian Bank

prior to the sale. Besides, the valuation was made on the rental basis. This need not necessarily be the actual market price.

II.11 At the close of the hearing Surana offered that Dwarka''s property could be re-advertised and if an offered came who offered more than

Dwarka had Dwarka would not contest the proceedings. The suggestion is an impracticable one. No offered would come forward to purchase

property which has already been sold under an order of Court and which is the subject matter of litigation. Even if it ultimately transpires that the

price offered by Surana was reasonable, this would not validate the blatant disregard of the provisions of law. As stated in Navalkha & Sons vs.

Ramanuja Das & Ors., 40 Company Cases 936 the prejudice was inherent in the method adopted.

II.12 The learned Judge in the impugned order had also granted exemption from the operation of Section 230A(1) and 269UC of the Income Tax

Act, 1961 as well as the provisions of the Urban Land Ceiling Act. In A Harikrishnan vs. Registrar & Ors. (1991) 192 ITR 391, as well as in

Gopalan & Anr. vs. Sub-Registrar & Ors., (1991) 219 ITR 449. two learned Single Judges of the High Court of Madras were of the view that the

provisions of Chapter XX-C of the Income Tax Act, 1961 did not apply in the case of a court sale or a sale by the Receiver or official assignee

when the sale is by public auction and not on the basis of any agreement. As has been stated in the last mentioned case:

It is not disputed that the sale in favour of the applicants was by public auction and not on the basis of any agreement entered into between them

and the official assignee. From the typed set of papers, it is clear that the auction was conducted pursuant to a notification for the second sale

approved by this court, pursuant to which the auction was conducted. It is not on the basis of any agreement between the parties that the auction

was conducted.

Chapter XX-C of the Act is intended to avoid tax evasion and also to prevent accumulation of unaccounted money. In the case of a court sale, or

a sale by the Receiver or official assignee, and that too by public auction, such a question can never arise. Such sales are distress sales and it is

without the consent of the judgment debtor. So, it can never be the basis of any agreement.

II.12.1 Compliance with the requirements of various statutes relating to transfer of immovable property such as the Income Tax Act, Registration

Act and the Urban Land (Ceiling & Regulation) Act, may be exempted in respect of court sales because such sales are required to be conducted

in a manner which leaves no scope to the concerned parties to resort to any illegality such as tax evasion. That is why the Courts have repeatedly

insisted upon strict compliance with the rules which would ensure this such as (I) the settlement of the terms and condition of sale after valuation

and fixation of minimum price, (ii) the sale by an officer of court, (iii) wide publicity of the sale and (iv) confirmation of the sale. It is debatable

whether the exemption from compliance with the statutory clearance can be granted where none of the normal incidents of a court sale have been

followed particularly where there was no advertisement and where the sale was in effect been pursuant to an agreement as in this case.

II.13. Section 40 provides for discharge of IRBI''s dues out of the sale proceeds of the assets sold. The residue of such proceeds is to be made

over to the persons entitled thereto in accordance with his rights and interests''.

II. 13.1 On what basis did the learned Judge decide that Rs. 26 lakhs was payable to the workers? There was no material whatsoever before him

except the workers'' claim in their application, a claim which was unsupported by any shred of evidence. Furthermore. Dwarka was not in

liquidation. It was not open to the learned Judge to have directed payment to the workers in preference over the other creditors of Dwarka.

According to Indian Bank, Dwarka owes it Rs. 1,51,14,398.12 and proceedings for recovery of the amount are pending before the Debt

Recovery Tribunal. Indian Bank has a first charge over the stock-in-trade and other current assets of Dwarka. It is said by IRBI and Surana that

the order dated 8th October, 1998 sufficiently protects this right. But in the absence of any finding that the current assets of Dwarka, if sold, would

be sufficient to meet the claim of the Indian Bank, the Court could not disregard the claim of the Indian Bank or the other creditors of Dwarka.

II. 13.2 We respectfully adopt the language of the Supreme Court in Allahabad Bank vs. Bengal Paper Mills Co. Ltd., AIR 1999 SC 1715 which

although used in the context of sales by the Official Liquidator is nonetheless relevant:

The learned Single Judge would appear to have been carried away by the prospect that 1700 people would be reemployed. He did not appreciate

that the said company''s ex-employees were only some of its creditors and that they stood on no better footing than its other unsecured creditors.

No order could have been passed that, while it favoured them, took no account of other secured creditors.

10.14. The sale was directed with undue haste. No reason was given by the learned Single Judge as to why the application u/s 40 filed by IRBI

could not have been disposed of in the normal course by the regular bench nor why it was thought necessary to direct sale without filing of

affidavits and short circuiting all normal procedures during the vacation. It was not as if the business of Dwarka was running or had been recently

stopped. Admittedly the business of Dwarka had been closed for some time.

II.15 For all these reasons it is clear that the order of sale dated 8th October, 1998 has been passed contrary to the prescribed statutory and

judicial norms and must be set aside.

III. An order directing delivery of vacant possession of property sold by Court, must be done on notice to the occupants. If the purchaser is

resisted in obtaining possession of property purchased in execution of a decree the. court may pass an appropriate order on an application under

Order 21 Rule 97 of the Code of Civil Procedure.

III.1 Order 21 Rule 36 provides that where a decree is for delivery of any immovable property in the occupancy of a tenant or other person

entitled to occupy the same and not bound by the decree to relinguish such occupancy, the Court:

shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by

beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

This was not done in this case.

III.2. Order 21 Rules 97 and 98 reads:

97. (1) Where the holder of a decree for the possession of immovable property or the puchaser of any property sold in execution of a decree is

resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such

resistance or obstruction.

(2) Where any application is made under sub-rule (1), the court shall proceed to adjudicate upon the application in accordance with the provisions

therein contained.

III.3 In the case before us the order dated 5th February, 1999 was obtained on mentioning by the Receiver without notice to Indian Bank or IRBI.

No application was at all made after the Receiver was allegedly resisted while taking possession. Furthermore, the order dated 8th October, 1998

did not direct the Receiver to make over possession of the property sold. The Receiver was to stand discharged upon execution of the

conveyance. The respondent No. 1 (Dwarka) had been directed to make over possession. The Receiver was not authorized to make over

possession of the property and was in fact functus officio when the alleged first attempt to take possession was made.

III.4 The next step is provided in Order 21 Rule 98.

98. (1) Upon the determination of the question referred to in Rule 101, the Court shall, in accordance with such determination and subject to the

provisions of sub-rule (2). -

(a) make an order allowing the application and directing that the applicant be put into the possession of the property dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the court is satisfied that the resistance or obstruction was occasioned without any just cause by the

judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the

pendency of the suit or execution proceeding, it shall direct that the applicant to be put into possession of the property, and where the applicant is

still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment-debtor, or any person

acting at his instigation or on his behalf to be detained in the civil prison for a terra which may extend to thirty days."" (Emphasis supplied)

III.5 Under these provisions, there must be a determination of the nature of occupancy before the removal of the occupants is ordered.

Furthermore the determination envisaged cannot be ex parte but must be the result of an adjudication after hearing the persons offering such

resistance. Otherwise, how does the court satisfy itself whether the resistence or obstruction was ""without any just cause?"" This is further borne out

by the provisions of Order 21 Rule 105 and supported by the decision in Silver Line Forum Pvt. Ltd. vs. Rajiv Trust &Anr., [1998)3 Supreme

555.

III.5.1 No notice was given to any of the occupants including Prerna before the order dated 8th October, 1998 was modified on 5th February,

1999. Had the provisions of the Code been followed, Prerna could have objected prior to being dispossessed. The determination was exparte.

III.6 The notification made on 5th February, 1999 also gave leave to the Receiver to take police help. As far as the Original Side of this High

Court is concerned, police help may be granted under the provisions of Chapter XVII Rules 14A to 14A provides:

14A. A decree-holder, praying for police help in execution of a decree, shall apply before a judge in Chambers by petition, supported by art

affidavit, stating therein whether such help is required :

(i) because of apprehension of violence or obstruction from the judgment-debtor himself; or

(ii) because the conditions of a general character such as the locality where execution will have to be levied, being a disturbed state or a class of

people similarly situated being likely to make a common cause with the judgment-debtor and resist execution.

III.6.1 No such petition was made before the Court at all by any party before the order dated 5th February, 1999 was passed granting police help

to the Receiver to dispossess the occupants from the premises.

III.7 Serious prejudice has been caused to Prerna and the other occupants of the premises by the failure of the court to act in terms of the

provisions of Order 21 Rules 97. According to Prema by reason of the forcible dispossession it has suffered loss and damages which have been

stated to be about Rs. 5 crores. Had such an opportunity been given, Prerna could have produced then what was produced subsequent to its

dispossession.

III.7.1 The several documents produced by Prerna are more than prima facie sufficient to establish that Prerna was carrying on business from the

premises as tenant and that the three rooms of which the Receiver took forcible possession came within such tenancy. The documents which have

been referred to earlier, are sufficient to establish the right of Prerna to continue, in occupation. The then Receiver''s report dated 11th February,

1999 makes interesting reading in this context:

I have reached here at 12.30 p.m. till the order dated 11th February, 1999 (illegible) served upon me. I have removed some goods and materials

(illegible) but in view of the order passed today the possession of Prerna Rex Pvt. Ltd. is not disturbed. Inside the tenanted portion of Prerna Rex

Pvt. Ltd.. I noticed two companies name Span Medicals and Bharat Pharmaceuticals Ltd. wherein Mr. Mahesh Gulati, who is director of Prema

Rex Pvt. Ltd. are also the director of above two companies.....Bharat Pharmaceuticals wherein Mr. Mahesh Gulati, who is director of Prema

Rex Pvt. Ltd. are now the Director of above two companies..... I have removed those materials from the above named companies i.e. the

Span Medicals Limited and Bharat Pharmaceuticals the three rooms at the same premises.

This clearly shows that possession was taken from ""the tenanted portion"" of Prerna. IRBI''s valuers'' report also states that the entire ground floor

was rented out to ""M/s. Gulati & Co.

III.7.2 The dispossession relates to three rooms. No one other than Prerna and Bharat Pharmaceuticals have laid claim to the 3 rooms. No one

else has come forward to say that the goods which were thrown out of the three rooms by the Receiver, belonged to them. On the other hand, the

voluminous documents produced by Prerna justify its claim to have been in possession of the three rooms. Bharat Pharmaceuticals has claimed to

be an associate concern of Prerna. No material was produced before the learned Single Judge nor indeed before us by either Surana, the workers,

IRBI of Dwarka that Bharat Pharmaceuticals was not an associate of Prema or that Prema was not in occupation of the three rooms of which the

Receiver took forcible possession. The submission of Surana that the tenancy agreement of Prema did not delineate the area covered by the

alleged tenancy is, in the circumstances of the case, of no consequence. The eviction of Prema and Bharat Pharmaceuticals was in the

circumstances illegal and unjust.

III.8. It was sought to be contended by the workers and Surana that the tenancy of Prerna had been illegally created : firstly, because no consent in

writing had been obtained from Nigam Brothers by Dwarka to sublet the premises to Prerna and second because it was contrary to the agreement

of mortgage between Dwarka and IRBI.

III.8.1 The submission that the tenancy agreement executed between Dwarka, Nigam Brothers and Prema was not registered and therefore the

occupation of Prerna was illegal does not appear to have much force particularly when Prerna has been paying monthly rent by cheques to

Dwarka and Dwarka has been granting receipts. Dwarka has not disputed Prerna''s tenancy.

III.8.2 The tenancy agreement was a tripartite document between Dwarka. Nigam Brothers and Prerna. While the document not being registered

cannot be taken into consideration as far as the terms of the lease are concerned, it is arguable that the document can be looked into for the

collateral purpose of proving the consent of Nigam Brothers to the sub-letting. In any event what was sold to and purchased by Surana was

Dwarka"s interest in the premises. Just as Dwarka having created the tenancy in favour of Prema, cannot be allowed to contend that the tenancy

was created illegally, the purchaser of Dwarka"s interest also cannot do so. The several decisions cited by counsel for Surana and the workers in

the context therefore are not relevant as they relate to situations where the superior landlords right vis a. vis the sub-tenant were discussed. On the

other hand a similar objection was rejected by the Supreme Court in Samir Sohan

Sanyal vs. Tracks Trade Pvt. Ltd., AIR 1996 SC 2102 with the apposite observation:

We are not impressed with the arguments. At this stage, we are only concerned with his admitted possession of the demised premises. What

rights would flow from a contract between him and his employer is a matter to be adjudicated in his application filed under Order 21 Rules 98 and

99, CPC. At this stage, it is premature to go into the record any finding in that behalf.

III.9. In the circumstances it must be concluded that the modification of the order dated 8th October, 1998 on 5th February, 1999 was wrong.

IV. As we have already held that the order dated 8th October, 1998 as modified on 5th February, 1999 cannot stand it is not necessary for the

Court to decide the question of fraud nor the appeal from the order dated 11th and 16th February, 1999 passed in Prerna"s application pro

interesse suo. However, since elaborate arguments were advanced we deal with the issues briefly.

IV. 1 It was contended by Surana that an application pro interesse suo did not lie to protect other parties. According to Surana, Prerna had

claimed to protect the possession of Bharat Pharmaceuticals. The submission is factually incorrect. Prema has primarily acted for protection of its

tenancy rights. Bharat Pharmaceuticals was in occupation of two of the rooms under Prerna. Bharat Pharmaceuticals was not claiming as sub-

tenant but has prayed to be added as a party and has supported Prerna"s prayer for restoration of possession. As already noted Bharat

Pharmaceuticals has also made an application for interventation in the proceedings pro interesse suo.

IV.2 It was submitted by Surana that the application pro interesse suo was not maintainable before Lala, J., since he did not have necessary

determination on that date. We are unable to accept the submission. The application of Prerna could be made to the Court which passed the order

directing the Receiver to dispossess Prema and the application for recalling the order passed by Lala, J., could only have been before him.

IV.3 It was submitted by the Counsel for Surana that in an application pro interesse suo, the applicant must show title paramount. As far as the title

of Prerna is concerned, IRBI at whose instance the Receiver was initially appointed has not raised the point. Dwarka has also accepted the

tenancy of Prerna.

IV. 4 It was also submitted by Surana that the power to grant relief at the initial stage could only be granted if there was imminent danger or any

other such exceptional case. Having held that the order dated 8th October, 1998 as modified on 5th February, 1999 was wrong, the question is

really academic. However, in a recent judgment of Samir Sahan Sanyal vs. Tracks Trade Pvt. Ltd. AIR 1996 SC 2102 the Supreme Court had to

consider somewhat similar submission. In that case in execution of a decree for specific performance a tenant who was not a party to the suit was

dispossessed. The tenant made an application under Order 21 Rules 98 and 99 of the Code of Civil Procedure. It was contended that no interim

order should be passed directing the tenant to be put back in possession pending disposal of the application. The Supreme Court said :

Since the letter of the law should strictly be adhered to, we find that high-handed action taken by (he respondent Nos. 1. 3 and 6 in having the

appellant dispossessed without due process of law, cannot be overlooked nor condoned. The Court cannot blink at their unlawful conduct to

dispossess the appellant from demised property and would say that the status quo be maintained. If the Court gives acceptance to such high-

handed action, there will be no respect for rule of law and unlawful elements would take hold of the due process of law at random and it would be

a field day for anarchy. Due process of law would be put to ridicule in the estimate of law abdiding citizens and rule of law would remain a

mockery.

The Supreme Court accordingly directed the tenant to be put into possession within 24 hours even before the application under Order 21 Rules 98

and 99 had been disposed of (See also Dorab Cawasji Warden vs. Coomi Sorab Warden & Ors., AIR 1990 SC 867 and Anthony C. Leo vs.

Nandlal Bal Krishnan & Ors.. AIR 1997 SC 1731.

The facts of this case also clearly warranted an ad-interim order being pased in favour of Prerna and the learned Judge erred in not doing so.

IV.6 On the question of fraud, the facts already found are sufficient to sustain a finding of fraud. The conduct of Surana prior and subsequent to the

order dated 5th February, 1999 is particularly relevant in this context.

IV.6.1 The conveyance was executed in favour of Surana by the Receiver even before the entire purchase price was paid. The conveyance

records payment of Rs. 56 lakhs to IRBI. There is no evidence when the sums of Rs. 15 lakhs was allegedly paid to the workers and of course the

balance of Rs. 11 lakhs was not admittedly paid. According to Surana it was sought to be deposited with the Provident Fund Authorities who

allegedly refused to accept it.

IV.6.2 Furthermore, in their haste, the Receiver has also sought to convey the learned Judge to Surana after incorrectly recording that offers other

than Suranas had been obtained in these words:

after considering all the offers received by the said Receiver, the offer of Sri Jatin Surana of No. 2. Church Lane. Cal-700001 for the said of the

assets and properties both moveable and immoveable including the Hon''ble Justice Amitava Lala in favour of the said Jatin Surana or his nominee

or nominees being the purchaser herein at a price of Rs. 82,00,000/-(Rupees eighty two lakhs) only.

IV.6.3 Surana and the Receiver knew that the ground floor of the premises was fully tenanted. Both had been given a copy of the IRBI''s valuation

report under cover of a letter dated 22nd December, 1998. In the valuation report, as already noted, the names of the tenants in the premises have

been mentioned. It has also been mentioned that the entire ground floor area was rented out to M/s. Gulati & Co. and its sister concerns at Rs.

4200/- per month. That is in fact the amount Prema has been paying to Dwarka as is evidenced by the several rent receipts granted by Dwarka to

Prema. Prema had also made payment of rent to Surana. The first payment has been accepted and the second returned. Prerna also wrote a letter

to Surana prior to the order dated 5th February, 1999 being passed in which the fact of its tenancy was set out in some detail. There was no

response to the letter. On the other hand the Receiver mentioned the matter presumably at the instance of Surana and obtained the order for

eviction of the ""illegal occupants"" with police help. To have applied for dispossession of such ""illegal occupants"" without any notice to the

occupants strongly supports the allegation of fraud made by Prerna against Surana.

IV.6.4 The fact that the premises were tenanted was not brought to the notice of the learned Single Judge. The assertion that the premises was in

the occupation of illegal occupants was without any particulars. Which portion of the premises, if at all, was illegally occupied? According to the

IRBI''s valuation report no portion of the premises was occupied by any illegal occupants.

IV.6.5 It is also significant that the Receiver took possession of the property after the appeal of the Indian Bank had already been preferred from

the order dated 8th October, 1998.

RELIEFS

V. Surana has claimed that he has invested money and incurred expenses subsequent to the passing of the order of sale. As observed in the case

of Allahabad Bank vs. Bengal Paper Mills Co. Ltd. (supra) this cannot deter the court from setting aside the order of sale when it was incorrectly

passed, more so when the irregularity has caused prejudice to the appellants.

In the result:

1. APOT No. 73 of 1999-Indian Bank vs. IRBI & Ors. is allowed with costs against IRBI and Surana and the order of sale is set aside.

2. The Application and Appeal in APOT No. 193 of 1999 : Prerna Rex Pvt Ltd. vs. IRBI & Ors. are both allowed. The undertakings are

discharged. In view of this no order is passed on the application for amendment of the undertakings. Surana will pay Prerna the costs of the appeal

and application assessed at 150 GMs.

3. APO No. 131 of 1999 : Prema Rex Pvt Ltd. vs. IRBI & Ors. is allowed by directing the Receiver to immediately restore possession of the

three rooms to Prema. Surana will pay the costs of the appeal to Prema assessed at 150 GMs.

4. APOT No. 194 of 1999-Prerna Rex Pvt Ltd. vs. IRBI & Ors. is dismissed as not pressed.

Consequent upon the setting aside of the order dated 8th October, 1998 as modified on 5th February, 1999, the parties roust be restored to the

status quo ante.

(1) The conveyance dated 8th December, 1998 executed between the Receiver and Surana is cancelled.

(2) IRBI will refund the amount of Rs. 56 lakhs to Surana within a fortnight from date.

(3) The workers shall refund the amount of Rs. 15 lakhs paid to them by Surana within a fortnight from date.

(4) The Registrar. Original Side will hand over the sum of Rs. 11 lakhs deposited with him by Surana together with accumulated interest thereon

less the poundage if any within a fortnight from date.

(5) IRBI may proceed with its application u/s 40 of the Act according to the norms laid down in this judgment.

(6) The Receiver will hand over possession of the three rooms in question to Prerna within 24 hours. The Receiver will remain in symbolical

possession of the premises in terms of the order dated 20.2.97 until the disposal of IRBI''s application u/s 40.

S.N. Bhattacharjee, J.

I agree.

S.N. Bhattacharjee, J.

Prayer for stay made on behalf of the IRBI is refused.

Let a xerox copy of this judgment duly signed by the Assistant Registrar of this court be made available to the parties upon their undertaking to

apply for and obtain certified copy thereof on payment of usual charges.

Ruma Pal, J.

I agree.