Before K. Kannan, JJ.

SHRI KUNDANMAL DABRIWALA & OTHERS,—*Petitioners*

versus

M/S DABRIWALA STEELS AND ENGINEERING COMPANY LIMITED (IN LIQUIDATION) & OTHERS,—*Respondents*

C. P. NO. 51 OF 2006 (O&M)

2nd March, 2009

Companies Act, 1956—Ss. 391, 393, 394 & 446—Companies (Court) Rules, 1959—High Court ordering winding up a company—Shareholders seeking revival of company after about 11 years—Conflicting claims from various quarters—Objections by secured creditors for approving proposal—OL also making objections—Plant and machinery of company already sold—Residual property merely a vacant piece of land—Whether it could be said to be bona fide claim to revive Company—Held, yes—Most vital thing for starting industry—Availability of property & infrastructure—Land in industrial hub available—Company could devise its plans & induce a financier—No exception to proposal of revival—Petition allowed.

Held, that the avoidance of a decree, which is possible at the instance of the company, becomes complete when a defence is taken that the decree was not executable by virtue of the operation of stay under Section 446(1). The Court exercising jurisdiction when it relieves a party from the obligations of void or voidable contract, has the power under Section 33 of the Specific Relief Act to restore the damage suffered by a party whose contract is found to be void or voidable.

(Para 19)

Further held, that :—

(i) 5th respondent, M/s Saket Steels (P) Ltd. shall be entitled to be paid Rs. 1,00,000 and Rs. 50,000 with

interest @ 12% from the respective dates when the amounts were received by the company.

(ii) The application for confirmation of the sale in favour of M/s Freshness Coatings (P) Ltd. shall have a right of refund of the amount, which is deposited in Court and obtain a solatium of 5% of the amount as bid at the auction and for which the confirmation of sale has been sought.

(iii) The amounts as adjudged by the Official Liquidator and found expressed in the report are approved and the amounts detailed in the report shall become payable by the company.

(iv) Apart from the amount as determined by the OL as payable to the Electricity Board, the HSEB and its successor DHBVNL shall have a remedy that it may independently have in relation to energy charges and the observations of the arbitrator or the Official Liquidator in that regard shall stand vacated.

(v) The amounts as detailed above from out of the amounts in deposit with OL and or any deficiency, the petitioners shall become liable to pay the respective amounts forthwith with interest at 12% p.a. from the date of this order till date of payment. There shall be a charge on the remaining asset of the company for the amount that is due and payable.

(Para 30)

Anand Chhibbar, Advocate and Ranjit Chawla, Advocate and Rakesh Kumar, *Advocate for the petitioner.*

Ms. Sangeeta Dhanda, Advocate *for HSEB.*

Chetan Mittal, Senior Advocate with Deepak Suri, Advocate and Gaurav Kathuria, Advocate *for Auction Purchaser.*

R.K. Battas, Advocate and S.K. Batish, Advocate for *M/s Saket Steels Ltd.*

Kamal Sehgal, Advocate and H.R. Bhardwaj, Advocate *for HSIIDC.*

Neeraj Khanna, Advocate *for Official Liquidator.*

B.B. Bagga, Advocate *for SBI.*

Puneet Gupta, Advocate and Aalok Jain, Advocate *for HFC.*

K. KANNAN, J.

I. <u>Petition for revival and the principal objectors :</u>

(1) The company which was ordered to be wound up in Company Petition No. 31 of 1995 is sought to be revived through the Company Petition No. 51 of 2006, at the instance of the petitioners No. 1 to 6, who claim to be the major equity shareholders of the company. Petitioner No. 7, Shri Sanjay Gulati is represented to be the financier/co-promoter to revive the company. The petition is resisted by several persons and principally by the Official Liquidator, who has moved an application for confirmation of sale of the only remaining items of property namely Industrial Shed in Plot No. 142, Sector 24, Faridabad. M/s Saket Steels Limited has obtained a decree in respect of the very same property for specific performance in a civil suit bearing No. 66 of 1990 and they have sought for execution of the decree before this Court. Haryana State Electricity Board is another principal contender against the proposals for revival on the ground that money claims arising out of same proceedings still remain unsatisfied and the petition for revival cannot be allowed. M/s Freshness Coatings (P) Ltd., which has been the successful bidder and whose sale is sought for confirmation by the Official Liquidator would oppose the petition on the ground that the sale of the property which is being made for favour of Rs. 4.10 crores is now sought to be undone at the instance of another person who is 7th petitioner and it is only a ploy to sell the property to another person and there is no scope for revival of the company itself especially after the plant and machinery of the company which existed at Industrial Shed, Plot No. 136, Sector 24, Faridabad had already been sold and

the revival is sought at the time when only a vacant land in Industrial Shed, Plot No. 142, Sector 24, Faridabad remains undisposed of. The claims and counter-claims emanating from the claims have to be understood in the factual context of how the proceedings are started and how the case has journeyed through all these years till when the last item of property was sold and awaited confirmation and when the petition for revival of the company has been made at the instance of the Ex-Directors of the Company.

II. Factual background :

(2) M/s Dabriwala Steel and Engineering Company Limited (hereinafter called as DSECL) had been incorporated in the State of West Bengal in 1970 and subsequently the registered office of the company was shifted to Faridabad to set up a mini-steel Plant at Plot No. 136, Sector 24, Faridabad being unit No. 1. The company had another unit at Plot No. 142, Sector 24, Faridabad being unit No. 2. The company started its commercial production in the year 1972-73 but failed due to severe financial constraints. The factory was closed on 27th April, 1985 and the company approached the BIFR for rehabilitation under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The reference was registered and after hearing IRBI was appointed as an operating agency. The initial parleys for rehabilitation did not work and ultimately the BIFR recommended for winding-up of the company on the ground that the company had become economically and commercially non-viable. The company resisted the direction for winding-up by preferring an appeal under Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) filed a writ petition before the High Court and all their attempts to stall the winding-up failed. The High Court passed the winding up order in C.P. No. 31 of 1995 on 24th February, 1995 and the Official Liquidator attached to the Court was appointed as the Liquidator for DSECL.

(3) Consequent upon the order issued by the Court, the Official Liquidator took possession of the factory premises at Unit No. 1 and 2. The Haryana State Financial Corporation, respondent No. 3 being one of the secured creditors at the bidding of the High Court sold all the movable and immovable assets lying at Plot No. 136 for a total

sale consideration of Rs. 4.10 crores and this Court confirmed the sale on 17th September, 2004 in favour of M/s Excel Buildcon Private Limited. The State Bank of India-respondent No. 2 was a secured creditor in respect of other assets of the company bearing Plot No. 142, Sector 24 and was interested in expediting the process to pay to itself the debts owed by DSECL from it. The State Bank of India had also a second charge over the assets of the factory premises in Plot No. 142, Sector 24 and after a meeting which the Official Liquidator held, the property in Plot No. 142, Sector 24, Faridabad was taken possession of and obtained permission of the Court,—*vide* its order dated 9th February, 2006, for sale of the property in Plot No. 142 in association with the secured creditors by giving wide publicity.

III. Simultaneous efforts by the Ex-Directors to settle claims by OTS :

(4) Simultaneously with the efforts of the Official Liquidator to dispose of the property in Plot No. 142, the Ex-Directors and majority shareholders of the company had initiated for a One Time Settlement with the State Bank of India and Haryana Financial Corporation, as well as settling the claims of the workers. The dues as claimed by the third respondent were paid by the Directors with reservations to challenge the correctness of the demand. The 4th respondent-HSIDC obtained an OTS to be paid its claim to the tune of Rs. 4,99,500. The claims that remained unsatisfied were the claims of the Haryana State Electricity Board and the decree-holder in a suit for specific performance in relation to the very same property. The objections of the Official Liquidator supporting the claim of the purchaser M/s Freshness Coating (P) Limited also survived.

IV. The proffered scheme of revival :

(5) The revival, as worked out by the Directors, has been enumerated in the petition, principally setting out the following facts :—

(a) The price of the industrial plot which was sold has increased manifold since the date of winding-up of the company in 1995 and the circumstance that existed at

the time when the company had moved under BIFR when the liabilities of the company had far out-stripped the assets had changed by the considerable increase in valuation of the immoveable assets of the company.

(b) On a proper reckoning of all the debts due by the company if the claims of creditors had to be reviewed on One Time Settlement basis, it was possible to liquidate all the debts and still save the valuable assets of the company from being sold.

(c) The petitioner No. 7, a financier and co-promotor was willing to fund the company-in-liquidation and its liabilities and the creditors who were only looking for repayment of the debts had expressed willingness for the respective offers of OTS, which was beneficial to the company.

(d) The promoters of Dabriwala had long standing relations with Sanjiv Gulati, the Managing Director of Gulati Industrial Fabrication Private Limited having its Industrial Shed at Plot No. 262-M, Sector 24, Faridabad which was near to Plot No. 142 and they were willing to assist the company to make upfront payments to all the creditors by following the OTS policies floated by public financial institutions.

(e) As a necessary *quid pro quo* the Ex-Directors of the company were willing to cede major shareholding with Mr. Sanjay Gulati who had agreed to revive DSECL by establishing steel and forging unit on the same plot. Elaborate formulations of the shareholding pattern have also been detailed in the petition for revivial under the Mr. Sanjay Gulati, who was to be made the Managing Director. Over 85% of the enquiry shareholdings were to be held with Mr. Sanjay Gulati and 15% of the enquiry shareholding to be retained by Mr. K.K. Dabriwala on behalf of the existing shareholders of the DSECL.

V. The financial reckoning and the basis of objections for revival :

HFC's woes

(6) The objections to the revival of the company have gone through several quarters. The Official Liquidator himself has filed a report giving out the details of the amounts available in the account of the company in liquidation as Rs. 75,37,054 including their FDRs on 31st March, 2008 and setting out the provisions for expenses to the tune of Rs. 10,21,740. The amount of deposit included Rs. 25,00,000 deposited by M/s Freshness Coatings (P) Ltd. for the purchase of property of the company situate at Plot No. 142, Sector 24 and in respect to which confirmation was awaited through the application, C.A. No. 296 of 2006. The valuation fee and professional fee of Chartered Accountant were also to be paid for which the application had been moved in C.A. No. 172-173 of 2008. The objection of Haryana Financial Corporation is to the effect that the demands that had been directed to be made to the State Bank of India had been made in C.A. No. 740 of 2007 without even affording a notice to the secured creditors having first charge over the property bearing Plot No. 136, Sector 24, Faridabad and in respect of which the State Bank of India was only a second charge holder. However, the State Bank of India had been paid not merely an amount due by the company-in-liquidation but also a debt due by M/s Jai Hind Investment and Industries Ltd. The adjustment of dues by M/s Jai Hind Investment and Industries Ltd. was impermissible. The dues to HFC itself are Rs. 85,57,600 with further interest with effect from 1st October, 2007.

Freshness Coating's Objections.

(7) M/s Freshness Coating (P) Ltd., which had been declared the highest bidder of the auction also opposed the sanction for revival on the ground that the scheme did not spell out any particular method of reviving the company affairs but it was only a ploy to defeat its interest and dispose of the property by private negotiations to another person. The objection comes through the fact that the plant and machinery situate in Plot No. 142, Sector 24, Faridabad had already been sold for Rs. 4.10 crores by Official Liquidator and what remained was only

Plot No. 142, Sector 24, Faridabad which it had purchased. There was no more industrial activity in Plot No. 142, Sector 24 to revive the company. It is also objected by the purchaser that none of the provisions contained under Sections 391, 392 and 394 have been followed for taking action for revival of the company. The application filed by the Ex-Directors suffers from not following the pre-requisites laid down under the Companies Act under the relevant provisions which could not be treated as empty formalities to be thrown to winds at its whims

Electricity Board's objections

(8) The Dakshin Haryana Bijli Vitran Nigam Limited (hereinafter referred to as "Electricity Board") has its objections in the shape of claims against the company-in-liquidation which, according to it, has been wrongly adjudicated by the Official Liquidator. The complaint of Electricity Board is that the company did not pay the energy charges regularly with the result that huge arrears worth serveral lacs of rupees had accumulated that resulted in an adjudication before an Arbitrator. The Award of the sole Arbitrator was passed on 2nd March, 1987 granting relief of demand charges assessed at Rs. 10.4 lacs and a net penalty of Rs. 6.4 lacs but after deduction of the claim by the company for a sum of Rs. 6.4 lacs, a net amount of Rs. 4 lacs alone awarded in favour of the Electricity Board. It was not satisfied with the Award passed by the Arbitrator for the fact that the Arbitrator had purportedly acted beyond his jurisdiction and waived off energy charges from November, 1979 to 2nd March, 1987, which was not within the ambit of the reference before the Arbitrator. According to the Electricity Board, the amount recoverable from the company was to the tune of Rs. 42,43,621 and the reduction of the amount of Rs. 4 lacs was on account of non-application of cogent mind and reasonable basis. This Award had been challenged before the Senior Sub-Judge, Faridabad by petition dated 31st March, 1987 and the Award of the Arbitrator had also been upheld. The order passed by the Additional District Judge which accepted the claim of the Electricity Board to the tune of Rs. 10.4 lacs was however not accepted by the Official Liquidator in view of the fact that leave of the High Court had not been obtained for pursuing the remedy before the Additional District Judge. The Electricity Board had, therefore, filed their complete claims before the Official

Liquidator for adjudication. The Official Liquidator had submitted a report on 8th April, 2008 which only upheld the claim as awarded by the Arbitrator and accepted the claim to the tune of Rs. 6.61 lacs against the claim of Rs. 85,20,844. This order of the Official Liquidator is also challenged by the Electricity Board and the Electricity Board now has sought for including the claim for energy charges. According to the Electricity Board neither the Aribitrator nor the Court which dealt with it had the power to decide against energy charges because it had been kept out of arbitral reference but the Official Liquidator was bound to see whether outstanding claim of Electricity Board for Rs. 35,63,685 had been paid or not. The waiver awarded by the Arbitrator in relation to the energy charges and electricity duty was without jurisdiction and the Official Liquidator ought to have considered the said claim in its proper perspective. The response of the Ex-Directors of the Company to the claim of the Electricity Board is that there was no default in the payment of the energy charges and hence, no amount as claimed by the Electricity Board was payable. Further the Award of the Arbitrator itself has become a rule of the Court and therefore, it was not possible for the Electricity Board to set up its claim for any amount more than that what was adjudicated.

M/s Saket Steels' decretal claims

(9) M/s Saket Steels Limited had acquired a decree in a suit for specific performance against the company-in-liquidation before the Additional Civil Judge (Sr. Divn.) Faridabad on 19th April, 1996. It was an *ex parte* decree arbitrarily passed the order of liquidation which was made on 24th December, 1985. The contention on behalf of the decree-holder is that facts of the matter before the Company Court had themselves not been apprised to the Civil Court before the passing of the decree. The decree is not illegal or void but at best voidable at the instance of the company and the same having not been set aside, the decree-holder was entitled to have the decree directed to be executed before the Company Court. Taking notice of the fact that the property had been directed to be sold in liquidation, permission was being sought for levying execution against the company in liquidation. This petition had been filed on 6th July, 2006 before the Company Court.

VI. DESCL's response to objections :

(10) The parties have submitted authorities for various issues touching upon the dispute between the parties. The learned counsel appearing for the applicants seeking for revival contends that since all the claims of the creditors have been fully satisfied except the claims of the Electricity Board and HFC, there cannot be any obstruction at the instance of any person for approving the proposal made by the applicants. The learned counsel concedes that he will make any amount that may be determined by the Court as payable by the company to them. There is no need for following any formulations as detailed under Section 391, 393 and 394 in view of the fact that the special procedure is only to apprise the claims of the shareholders and creditors and since all the shareholders have jointly proposed the scheme for revival and since all the major creditors including workers in the company have already been satisfied, the only creditors who remained were the Electricity Board and the HFC and their objections being also heard before the Court, there was no scope for following any procedure laid down under Sections 391, 393 and 394 of the Companies Act.

(11) Elaborate arguments have been made and decisions submitted by the learned counsel essentially on the need to secure the permission of the Company Court for prosecuting any action before any Civil Court. His objections come through Section 446 of the Companies Act which interdicts the commencement of any suit or other legal proceedings if a winding up order has already been passed, except with the leave of the Court. He also points out to the fact that the company had approached the BIFR at the relevant time when the suit for specific performance had been filed and the continuance of the proceedings before the Civil Court and the issuance of a decree in violation of statutory provisions contained under SICA are void ab initio. He refers to a decision **M.V. Janardhan Reddy** *versus* **Vijaya Bank and another (1)** that "since the Official Liquidator was in charge of the assets of the company, he ought to have been associated with the auction proceedings, which was not done". This was stated in the context of the power of the Recovery Officer under the RDB Act. In confirming

(1) 2008(144) Comp Cas 1 (S.C.)

the sale, the Recovery Officer was acting beyond his own powers. **Harihar Nath and Ors.** *versus* **State Bank of India and Ors. (2)** states the effect of Section 22 of SICA and Section 446 of the Companies Act is that an order of winding up casts a duty or obligation on the person who has sued the company to obtain the leave of the court to proceed with his suit. The right to apply for leave accrues not because of the order of winding up but because the suit or proceeding is stayed; so long as the suit or proceeding remains stayed in application for leave can always be filed. The Hon'ble Supreme Court was setting out the law in the context of law of limitation for seeking the leave and held that the right to apply for grant of leave under Section 446(1) accrued every moment the suit remained stayed. According to it, the decree by the Civil Court granting specific performance had been made when the suit remained stayed by virtue of operation of Section 22 of the SICA and when an order of winding up had been passed by the Company Court, sanction ought not to have been obtained before a decree was rendered. It must be remembered that Hon'ble Supreme Court itself has said in the judgment that the objective of Section 446 of the Act was not to cancel or nullify or obtain any claim against the company but merely to protect unnecessary litigation and from multiplicity of proceedings and to further protect the assets for equal distributions amongst the creditors and shareholders. This object was achieved by compelling a creditor or person having a claim against a company to approach the Court for obtaining necessary orders.

(12) **Raghunath Rai Bareja and another** *versus* **Punjab National Bank and others (3)** was a case where the Hon'ble Court dealt with a situation when a decree had become time barred and the Court was found not to have jurisdiction to transfer a claim by a Bank of DRT for enforcement under the RDB Act even if equity existed in favour of a Bank to realise its dues and the bank had itself to blame in filing its execution petition beyond the period of limitation. **Chandra Kishore Jha** *versus* **Mahavir Prasad (4)** refers to a general proposition that when a statute provides a thing to be done in particular manner

(2) J.T. 2006 (4) S.C. 241
(3) (2007) 135 Comp Cas 163 (SC)
(4) J.T. 1999 (7) SC 256

then it has to be done in that manner and in no other manner. The learned counsel refers to this proposition to drive home his point that the plaintiff who was pursuing his remedy for specific performance ought to have applied under Section 446 to pursue his claims and if he had not done, the decree itself cannot be said to be validly obtained. **Sudarsan Chits (I) Ltd.** *versus* **G. Sukmaran Pillai (5)** examines the scope ambit in the legislative history of Section 446(2). The decision was rendered to explain the effect of keeping the winding up order in abeyance without anything more. It held that all directions as contemplated under Section 446(2) could be given although winding up of the company is kept in abeyance by the orders of the Court. In **Smt. Bhagwati Devi Bubna and others** *versus* **Dhanraj Mills Private Ltd. and others (6),** a Division Bench of the Patna High Court examined the effect of Section 537 of the Companies Act, to mean that a decree cannot be executed against the effects of the properties of the company in liquidation without leave of the Court and if a suit is continued without leave of the Court under the said Section, the decree is not binding on the Official Liquidator. The Division Bench observed that the matter has to be taken only to the winding up Court for further action and an observation was made by the Executing Court regarding the nature of decree or its executability should be taken as having no effect. **Loil Continental Foods Ltd.** *versus* **Punjab Wireless Systems Ltd, (in liqn) and others (7)** a learned Judge of this Court examined at length the purported applicability of Section 446 of the Companies Act vis-a-vis the various special statutes making provisions for recovery of debts. It held that even an order of attachment made by a Court during the subsistence of proceedings before the Company Court without leave of the Court would be considered as against the terms of the mandate of Section 537 and as such void and does not exist in the eye of law. **Kerala State Financial Enterprises Ltd.** *versus* **Official Liquidator, High Court of Kerala (8)** examined the over-riding effect of SICA where the company, which was engaged in financial activities, was proceeded with under the State Financial Corporations Act and under

(5) (1984) 3 Comp LJ 40(SC)
(6) AIR 1969 Patna 206
(7) (2008) 143 Comp Cas 619
(8) J.T. 2006 (12) S.C. 603

Kerala Revenue Recovery Act and in the meanwhile, the company had gone for voluntary winding up. The High Court refused leave for continuing the recovery proceedings and the Court held that the provisions of the Companies Act would govern the recovery of dues and hence, the High Court was correct in refusing the grant of leave. It said that an order of attachment under the State Financial Corporations Act was passed for achieving the limited purpose and it has to be always understood as susceptible to other orders as well as provisions of other statute.

VII. The objections omnibus in a nutshell :

(13) The opposition for revival comes from a previous successful auction purchaser who obviously expects to take over the assets and obtain a profit through the transaction. Yet another person is a person, who has obtained a decree for specific enforcement of an agreement through a Court process, although not decided on merits after a full fledged adjudication in trial but obtained on default of appearance by the respondent when the company was in liquidation. The Electricity Board which has obtained an Award under the arbitral proceedings but being still not satisfied what it got was pressing forward its disputed claims before a Court in supersession of the Award and the proceedings before the Civil Court having not completed, they have been transported to the Company Court for finalization of the disputes. The Official Liquidator has really no stakes here except to see that the creditors and workers are fully satisfied. Of the secured creditor, the State Bank of India has already walked away with large slice of the cake when the auction in relation to the property in Plot No. 136, Sector 24, Faridabad fetched to it what was more than due from the company. The Official Liquidator is no more interested than to see that the auction that was held in relation to the property in Plot No. 142 in favour of the successful purchaser is completed. It is more to see his own actions coming to full circle and obviously cannot be susceptible to any private interest.

(14) As regards the objection taken by M/s Freshness Coatings (P) Ltd., the 5th respondent, by its offer of purchase for a sum of Rs. 3.80 crores, it expects the purchase is confirmed by the Court,

having regard to the fact that Official Liquidator moved an application C.A. 297 of 2006 for confirmation and although not a secured or unsecured creditor or even a shareholder of the company, being one of the highest bidders was interested in the assets of company in liquidation. Learned Senior Counsel appearing on behalf of the purchaser relies on the decision in **Meghal Homes (P) Ltd.** *versus* **Shree Niwas Girni K.K. Samiti (9)** which states that "while the court will not sit in appeal over the commercial wisdom of the shareholders, in determing whether winding up should be stayed temporarily or permanently, it will certainly consider whether the scheme genuinely contemplates revival of the whole or a part of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of workers under Section 529 and 529-A of the Companies Act. Court has to see *bona fide* of the scheme and to ensure that the scheme that is put forward is not a ruse to dispose of the assets of the company in liquidation, and whether such a proposal satisfies the elements of public interest and commercial morality. If the Court finds the scheme to be a ruse to dispose of the assets by a private arrangement, then it is its duty to dispose of the properties of the company in liquidation, realise the assets and distribute the same in accordance with law." According to him, there is really no scope for revival of the company for the industrial assets of the company where the business was being run has already been disposed of. As a matter of record Plot No. 136 with the factory was disposed of in pursuance of the order of this Court passed in C.A. No. 321 of 2003 for a consideration of Rs. 4.10 crores and confirmed by this Court by its order dated 17th September, 2004 passed in C.A. No. 110 of 2004 in C.P. No. 72 of 1995 in favour of M/s Excel Buildcon Private Limited, Delhi.

VIII. Revival, always the cherished goal :

Two views are definitely possible : if a company has lost its core assets of the plant and machineries and the residual property is merely a vacant piece of land, could it really be said to be *bona fide* in its claim that it seeks to revive the company ? There could just as

(9) (2007) 7 S.C.C. 753

well be another perception that a company that has lost, during its bad times, the core assets has not after all lost everything. It is still left with valuable piece of land on which the whole new edifice should be brought about. Industries do not come up in thin air. The most vital thing for starting industry is the availability of the property and the infrastructure that goes with it. It is an admitted case that Plot No. 142 is in the industrial hub of Faridabad and has all the necessary infrastructure. As the saying goes, you cannot draw a picture without a canvass nor there could the canvass assumes any significance but for a drawing upon it. It is trans-fixation of plant and machinery on land that makes it a factory and the factory could come only if the land existed. The land is very much available and if the company could devise its plans and induce a financier who could put the company back on its rails by establishing the industry in which it proposes to operate, no exception could be taken to such a proposal. The issue of revival of company moved at the instance of Ex-Directors will have to be seen in the context of conflicting claims arising from various quarters opposing the revival. Evidently, each one has his own axe to grind. The concept of revival itself cannot be opposed for it is only in revival and regeneration that development exists. Winding up is the antithesis of development. Any programme of action that makes way for development will have to be therefore preferred to a fold-up operation.

IX. <u>The answers to the objection by purchaser held by OL :</u>

(15) The answer is to be found in the context of what the Hon'ble Supreme Court has laid down that if the proposal is merely a ruse to dispose of the assets, it has to be seen whether it satisfies the public interest and commercial morality. The Hon'ble Supreme Court was actually dealing with the case where in a meeting convened to draw up a scheme, it had not really contemplated a revival of the company but a scheme to dispose of the company's assets which had vested in the Official Liquidator. The company in liquidation was a mill which had employed large number of workers. Several claims of the creditors had to be satisfied. A property that had become vested with the Official Liquidator, as conceived by the Company Court was that it ought not to be allowed to go back to the company for the sale of

its assets but if at all the sale should be done only through the Official Liquidator which could secure the best price. This order of the Court had been challenged by the major shareholder of the company and the workers union. The Company Court's original order was modified by a Division Bench before it reached the Hon'ble Supreme Court that the scheme of revival must again be considered instead of a direction for sale of the property through the Official Liquidator. The modified scheme contemplated a revival of only one of the activities of the company namely of the spinning unit and for facilitating the same it had contemplated a disposal of the portion of the assets. There were really several proposals coming from several quaters including the secured creditors. Starting a viable industry instead of selling any portion of the land was considered feasible. A re-convening of the meeting of the members of the company to consider the modifications and ensuring their approval seemed to be a necessary imperative for finalising the proposals for revival. It was in this context that the Hon'ble Supreme Court said that a scheme which was merely a proposal for disposal of the assets of the company by private negotiation ought not to be accepted. However, in this case the opposition for revival of the scheme is sought for at the instance of persons who want the only assets of the company to be sold and the sale already held to be confirmed. There are no unsecured creditors whose claims remain unsatisfied. The claims coming from a third party having a decree for specific performance or by the Electricity Board for determination of the amount due to it have themselves no proposal for different scheme for revival. The interest of one person who has obtained a decree is to see that it is executed in full measure and the property held by the company is ceded in its favour. The Electricity Board's interest is to secure what is deemed to be due to it by the sale of the assets. The opposition coming from the highest bidder namely the 5th respondent cannot also be sustained for, there is no right to any person whose sale is not confirmed by the Court to have any legitimate expectation at all times even at the cost of a plea for revival of the company and having his sale confirmed. Compensation in terms of money in such cases to a person whose sale does not come through for no fault of his, ought to be a substantial remedy that would meet the ends of justice.

X. Extent of enforceability of decree :

(16) Company application No. 482 of 2006 has been taken at the instance of M/s Saket Steels Limited, which has obtained an *ex parte* decree on 19th April, 1996 in the court of Additional Civil Judge (Senior Division), Faridabad, admittedly, after the company was ordered to be wound up on 24th February, 1995. The claim by the applicants is on the basis that the pendency of proceeding before the Company Court was not known to the petitioner and the institution of the suit itself was not invalid since it was made on 16th July, 1990, when there was not any action for winding up ever in contemplation. The learned Senior Counsel appearing on behalf of the decreeholder relied on the decision of the Hon'ble Supreme Court in **Indian Bank** *versus* **Official Liquidator, Chemmeens Exports (P) Ltd. and others (10)** to the effect that a decree granted by a competent Civil Court even after the order of winding up could not be treated as void. The only legal requirement under Section 446, according to him, is that he shall have to secure permission from the Court to put the decree in execution in the manner contemplated by a decision of the Hon'ble Supreme Court in **State of J & K** *versus* **UCO Bank and Ors. (11).** According to him, the position of a decree-holder cannot be worse than a secured creditor especially when the pending proceedings had been initiated even before passing of the winding up order. To this proposition, he lays his hand on **Hari Har Nath & Others** *versus* **Union of India (12).** The petitioner concedes that he cannot have any relief before the Executing Court which passed the decree when the winding up Proceedings are before the Company Court and feels constrained to move this Court seeking for permission to execute the decree through the Company Court under Section 446 of the Companies Act. The objection from the counsel appearing on behalf of the Ex-Directors of the company are made under two counts :—

(i) at the time when the decree was passed there had been already proceedings before BIFR and there was a statutory stay of proceedings under Section 22 of the

(10) (1998)5 S.C.C. 401
(11) AIR 2005 (10) SC 31
(12) AIR 2005 (4) SC 457

SICA Act. The decree passed was, therefore, *void ab initio.* The stay of proceedings contemplated under Section 22 operated *eo instante* where the question of knowledge of the proceedings is irrelevant.

(ii) The effect of Section 446 was such as to make any other Court incompetent to deal with any matter relating to the affairs of the company otherwise than by resort to the Companies Act. The bar against institution of suit or where a suit is pending at the date of the winding up, the continuation of such proceedings against the company except when the leave of the court was impermissible and the proceedings ought to have been stayed forthwith. The only legitimacy that could obtain to the continuation of proceedings would be when a resort is made under Section 446(2) where the Company Court itself would have jurisdiction to entertain or dispose of any suit or proceeding by or against the company or any claim made by or against the company whether such suit or proceeding had been instituted or where such claim had arisen before or after the order of winding-up of the company.

(i) SICA cannot bar a suit of specific performance.

(17) Adverting to the bar contained in SICA, the learned Senior Counsel appearing on behalf of the M/S Saket Steels Limited points out that Section 22 is not absolute in its operation for stay of proceedings. The stay as contemplated under the Section operates only for "suit for recovery of money or for the enforcement of any security against industrial company, or for any guarantee in respect of any loans or advance granted to the industrial company." A suit for specific performance does not fall within any of the specific instances set forth under Section 22. The several decisions, which the learned counsel appearing for the Ex-Directors of the company has referred. I am not reproducing here, for, I am convinced that a suit for specific performance is not one that will fall to be attracted by the bar contained under Section 22 of SICA. Learned counsel appearing for the Official Liquidator adds

a second string bow, as it were, when he refers to Section 537 of the Companies Act, which reads : "where any company is being wound up by the Tribunal (Court); (a) any attachment, distress or execution put in force, without leave of the Tribunal, against the estate or effects of the company, after the commencement of the winding- up; or (b) any sale held, without leave of the Tribunal, of any of the properties or effects of the company after such commencement, shall be void." Learned counsel refers to decision of this Court **Haryana Financial Corporation** *versus* **M/s Dev Papers Pvt. Ltd. (in liquidation) and others** passed in C.A. No. 14 of 2007 in C.P. No. 197 of 1999 on 11th December, 2008 where this Court held that mere enforcing execution is impermissible under the Section what to say of attachment or sale of such property without the leave of the Court. I am afraid that the said view cannot apply in view of the fact that no attachment, distress or execution is sought to be enforced by the Court that passed the decree in its execution. On the other hand, the decree-holder has approached this Court under Section 446 for leave and for execution of the decree.

(ii) Extent of bar under the Companies Act.

(18) The other objection relating to the executability of the decree is urged by the counsel, Mr. Anand Chhibbar on the ground that Section 446 itself operates to create a stay in respect of any proceeding pending before it and I have no difficulty in accepting the contention of the decree-holder that the decree is not *void ab initio* but will be voidable at the instance of the company for proceeding to grant a decree in spite of the fact that the property had become vested with the Official Liquidator as such by the order of winding-up before the decree had been passed. The suit has been instituted in the year 1990 and I do not think it will be fair to direct the re-trial of the proceeding. Of the voidable nature of a decree, it does not require a person at whose instance it could be avoided should proceed to take independent action for setting it aside. The avoidance is possible even in defence if the company states that the decree obtained against is voidable at its instance. In response, the decree-holder cannot urge that it is still executable. The plea of lack of knowledge of the pendency of proceedings has no meaning when the language of Section 446 is peremptory in its character that the continuation of proceeding in relation to the assets

of the company in the event of winding up has to be stayed. As observed already, the only way of legitimising the proceeding is to secure the sanction of the Court. The decision referred to by the learned senior counsel for the decree-holder does not really answer what is to be decided. **Indian Bank** *versus* **Official Liquidator, Chemmeens Exports (P) Ltd. and others** *(supra)* pointed out that Section 446 did not apply to proceedings pending in appeal before High Court or Hon'ble Supreme Court. This is so by virtue of Section 446(4) which specifically excludes a proceeding pending in appeal before the Hon'ble Supreme Court or High Court. The suit had been actually filed before the Subordinate Court (Senior Division) and pending in that court at the time when the order of winding-up was made. The effect of pendency of a proceeding in appeal in the High Court or Hon'ble Supreme Court was predominantly the issue before the Hon'ble Supreme Court in **Indian Bank's Case** *(supra)* where the suit had been filed for recovery of debt with the leave of the Company Court. The case was defended by the Official Liquidator on a plea that a particular charge which the bank was seeking to enforce had not been registered under Section 125 of the Companies Act. A preliminary decree was, however, passed and it was allowed to become final by the Official Liquidator by not filing any appeal. It was under such circumstances that the Court said that preliminary decree was not rendered void or inoperative. In this case, the Official Liquidator had not been made a party and the decision had not been rendered in his presence. **Harihar Nath & Ors.** *(supra)* cited by the counsel for the decree-holder does not still avail to the decree-holder since the point in issue in that case was the limitation period applicable to proceedings being sought to be initiated with leave under Section 446. There the Court held that in a case of application for leave to initiate fresh proceeding, the period of limitation applicable is to be calculated not with regard to the application seeking for leave under Section 446 but in regard to the suit or proceeding itself that is sought to be initiated. So long as the proceeding for which leave is sought is within time as on the date of the filing of the leave, the application will be entertained. The time spent for obtaining the leave under Section 446 will have to be excluded by applying Section 15(2) of the Limitation Act. In this case more than supporting his contention, it points out to an important thing that the application seeking for sanction

for execution will have to be itself filed within the time. The suit has been decreed on 19th Apirl, 1996 and the petition for sanction has been filed on 3rd July, 2006. The limitation for execution of the decree is 12 years and admittedly the petition for sanction has not ben filed within the period. The question is, could such a permission be granted in view of the fact that at the time when the decree was passed, the company had already been directed to be wound up.

(19) In my view, the avoidance of a decree, which is possible at the instance of the company, becomes complete when a defence is taken that the decree was not executable by virtue of the operation of stay under Section 446(1). The Court exercising jurisdiction when it relieves a party from the obligations of void or voidable contract, has the power under Section 33 of the Specific Relief Act to restore the damage suffered by a party whose contract is found to be void or voidable. The section reads :

> ***Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.***—*(1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.*
>
> *(2) Where a defendant successfully resists any suit on the ground—*
>
> *(a) that the instrument sought to be enforced against him in the suit is voidable, the court may, if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it ;*
>
> *(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been*

competent to contract under Section 11 of the Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

It is seen from the averments in the petition that M/s Saket Steels Limited had entered into an agreement to purchase the property for Rs. 8,50,000 on 14th July, 1987 and the company had paid an advance of Rs. 50,000 and had made payment of further sum of Rs. 1,00,000 on 28th September, 1987. The company shall be liable to repay the amounts from the respective dates when the amount was paid namely on 14th July, 1987 and 28th September, 1987 of Rs. 50,000 and Rs. 1,00,000 at the rate of 12% per annum till the date of payment. This amount as determined shall constitute a charge on the assets of the company.

XI. Regarding objections by the Electricity Board :

(20) Objections of the Electricity Board comes under two counts : (i) by virtue of a resort to proceedings before an Arbitration Tribunal where an adjudication had been sought regarding the liability of the compay for electric connection to the premises concerning "demand charges". The payment of energy charges themselves were not in dispute and hence not referred to arbitration. By an Award dated 2nd March, 1987, that was before the date when the winding up order was made, a liability was fixed on the company for a net amount of Rs. 4 lacs and directed it to be payable within 30 days from the making of the Award. It has some default clauses as well. HSEB was dis-satisfied with the award on the premise that the Arbitrator had gone beyond his jurisdiction in entering upon a reference, which was specifically excluded from him on issue relating to energy charges. The energy charges themselves, according to the Electricity Board, ran to several lacs of rupees and that had never been disputed but wrongly found in the Arbitrator's Award as not claimable. The Award had been originally

challenged in the Court of the Senior Sub Judge, Faridabad by a petition dated 31st March, 1987 who also dismissed it. The order of dismissal was challenged in the appeal before the Additional District Judge where the claim of the HSEB was allowed to the extent of Rs. 10.4 lacs. However, this order was passed during the time when the company had already been directed to be wound up and therefore, HSEB had approached the Offical Liquidator for re-adjudication of the claim. The Official Liquidator himself did not consider the order passed by the Additional District Judge noticing that the order passed by him was subsequent to the order of winding up and restored the amount as awarded by the Arbitrator. Against this adjudication of claim is the application filed by the company in C.A. No. 400 of 2008.

(21) DHBVNL, which is a successor to HSEB is aggrieved that the claim for energy charges had been rejected by the Official Liquidator wrongly. It must be remembered that the issue of energy charges itself was never in dispute and not made a subject of adjudication before the Arbitration Tribunal. If the energy charges itself was not a point of dispute, it is not quite comprehensible as to how HSEB or its successor could have made the claim towards electricity charges as a part of the claim either before the Arbitrator or made it the subject of challenge to the Senior Sub-Judge Court before which the award was challenged or to the District Court before which an appeal had been filed. It may have been possible for the Electricity Board to seek for expunction of any observation relating to energy charges as either payable or not payable as not binding in view of the fact that it was not the subject of arbitral dispute. It would be impermissible for the Electricity Board to contend that Arbitrator could have passed an Award also for the energy charges. I affirm the report of the Official Liquidator determining the amount of Rs. 6.61 lacs as payable to be valid and any observation either in the Arbitrator's Award or in the successive tiers of adjudicatory bodies relating to energy charges shall stand vacated. If the Electricity Board has any independent claim to make with reference to energy charges, it shall be open to them to resort to such action if at all admissible in law. I, however, direct that the amount of Rs. 6.61 lacs

as determined by the Award and adjudicated before the Official Liquidator alone is required to be paid as constituting the demand charges lawfully payable by the company, which includes interest up to the date of the order of winding up.

(22) C.A. No. 454 of 2008 seeking for permission to pursue the revision against the order of the Additional District Judge, Faridabad is disposed of on the above lines that the order of the Additional Judge is without jurisdiction as one passed after the order of winding up but HSEB would still be entitled to the amount as referred to above in the manner determined by the Official Liquidator in confirmation of the amount found by the Arbitrator at the first instance.

XII. Answers as regards objection from HFC and in respect of all other sundry claims :

(23) The objection coming from HFC, who is the third respondent, is with regard to the disbursement of Rs. 4.05 crores to the State Bank of India as including the claim by the State Bank of India against yet another company, even apart the amount due by the company in liquidation to the State Bank of India. The contention by the Ex-Directors of the company that the HFC had itself admitted to OTS at Rs. 2.50 lacs was specifically denied. HFC had made a demand for Rs. 85,57,600 with further interest with effect from 1st October, 2007. The HFC was itself the first secured creditor in respect of the Plot No. 136 and the State Bank of India was only a second secured creditor.

(24) The report of the Official Liquidator records the fact that the Court had directed the disbursement of Rs. 4.05 crores to the State Bank of India as full and final payment of the claims against the company and Rs. 10,82,255 as the amount payable in satisfaction of the award of the claims of the workmen by virtue of order of the Industrial Tribunal/Labour Court-II. Drawing help from the report of the Chartered Accountant M/s A.K. Chadda and Co., the Official Liquidator has examined the claims of HFC,—*vide* its claim dated 26th May, 2005, Income Tax Department,—*vide* its claim dated 23rd March, 2006,

Excise Taxation Office,—*vide* its claim dated 31st March, 2008 and HSEB,—*vide* its claim dated 27th May, 1996. The claim adjudicated has been tabulated as follows :—

Name of the creditor	Amount claimed	Claim Adjudicated
Haryana Financial Corpn.	Rs. 60,69,525	Rs. 13,92,223
Income Tax	Rs. 35,31,993 (The schedule attached to the claim consists of dues of different assessment years are of Rs. 1,56,76,590)	Rs. 7,97,938
Excise and Taxation Office	Rs. 15,89,765	Rs. 15,89,765
Haryana State Electricity Board/Dakshin Haryana Bijli Vitran Nigam Limited	Rs. 85,20,844	Rs. 6,61,000

(25) That the fund available with the office of the Official Liquidator in the account of the company (in liquidation) is as under :—

Fund Available as on 31st March, 2008 Rs. 75,37,054 (including FDRs)

(26) That out of the funds available with the office i.e. Rs. 75,37,054, OL has to make payment of following liquidation expenses :—

Sr. No.	Liquidation Expenses	Amount of Rs.
1	Preliminary Expenses received from the HFC and SBI Rs. 10,000 each	Rs. 20,000
2	Ad hoc Advance received from the Central Government	Rs. 41,000

3	Official Liquidator Commission under account Head 104	Rs. 6,57,992
4	Advertisement expenses due to the advertisement agency namely, M/s Nikita Media Services	Rs. 1,78,555
5	Valuation expenses	Rs. 79,249
6	Professional fees of Chartered Accountant	Rs. 44,994
	Total	**Rs. 10,21,740**

(27) That in addition to the abvoe expenses earnest money for an amount of Rs. 25,00,000 is also lying deposited which was included in the total funds available with this office. The same was deposited by M/s Freshness Coatings (P) Limited in the office of the Official Liquidator on 14th March, 2006 for purchase of the property of the company situated at Plot No. 142, Sector 24, Faridabad and confirmation of the sale in this regard has been pending in this Hon'ble High Court bearing C.A. No. 296 of 2006 and fixed for 10th April, 2008.

(28) That in regard to payment of valuer fees and professional fees of Chartered Accountant this office has already moved an application bearing C.A. No. 172-73 of 2008 seeking permission of this Hon'ble Court to make the payment fee from the sale proceed is also pending and fixed for 25th April, 2008.

(29) That in view of the above, out of the total funds available with this office viz., Rs. 75,37,054, the OL has to make payment of liquidation expenses of Rs. 10,21,740 and also Rs. 25,00,000 lying as Earnest Money. To this amount, I direct that a further sum of 5% on the value of the property as bid by the M/s Freshness Coatings Limited to be paid as solatium for loss of property for no fault of the purchaser. This additional payment is made by applying the principles contained under Order 21 Rule 89 of the Civil Procedure Code, which enunciates a principle of equity for a person who is deprived of the property that

he legitimately expected to buy and took time and resources to participate in the sale and declared the successful bidder.

XIII. Alleged non-compliance of statutory requirements :

(30) Apart from the objections of OL in the shape of his report, the objections in unison from all the respondents to the petition for revival are that the procedure mandated under Sections 391 to 394 of the Companies Act have not been followed and the meetings have not been directed to be held in the manner contemplated under the relevant sections. The provisions under Sections 391 to 394 required due consideration of any arrangement for the proposals at the instance of parties are likely to be immediately affected by such a decision. All the shareholders of the company have themselves filed the petition and therefore, the separate meetings of such shareholders become unnecessary. Similarly the petition that has come, which is propounded for revival has been adjudged by this Court in the petition itself taking into note of the objections of the claimants that have been found referred in the report of the Official Liquidator. There shall be no further necessity for calling any meetings of such Directors. All the secured creditors' claims have been satisfied except the HFC and the claims have also been adjudicated by the Official Liquidator. There could be, therefore, no specific direction for convening of any meeting of secured creditors. The claims of other persons who are affected by the decision have also been adjudicated in this case.

XIV. Final Disposition :

In sum, the dispensation of this Court as regards the various claimants is as follows :—

(i) The petition for revival is ordered as prayed for;

(ii) 5th respondent, M/s Saket Steels (P) Ltd. shall be entitled to be paid Rs. 1,00,000 and Rs. 50,000 with

interest @ 12% from the respective dates when the amounts were received by the company.

(iii) The application for confirmation of the sale in favour of M/s Freshness Coatings (P) Ltd. is disallowed but M/s Freshness Coatings (P) Ltd. shall have a right of refund of the amount, which is deposited in Court and obtain a solatium of 5% of the amount as bid at the auction and for which the confirmation of sale has been sought.

(iv) The amounts as adjudged by the Official Liquidator and found expressed in the report are approved and the amounts detailed in the report shall become payable by the company.

(v) Apart from the amount as determined by the OL as payable to the Electricity Board, the HSEB and its successor DHBVNL shall have a remedy that it may independently have in relation to energy charges and the observations of the arbitrator or the Official Liquidator in that regard shall stand vacated.

(vi) The amounts as detailed above from out of the amounts in deposit with OL and for any deficiency, the petitioners shall become liable to pay the respective amounts forthwith with interest at 12% p.a from the date of this order till date of payment. There shall be a charge on the remaining asset of the company for the amount that is due and payable.

(31) The petition and applications are disposed of in the above terms. No costs.

R.N.R.