

Reportable
IN THE HIGH COURT OF DELHI AT NEW DELHI

WP (C) No. 7272 of 2007

Reserved on : November 12, 2007
Pronounced on : January 18, 2008

M/s. Hargreaves Investments Ltd Petitioner

! **through** : Mr. K.G. Raghavan, Sr. Advocate
with Ms. Joshna Samual,
Mr. Christopher and
Mr. Rahul Sharma, Advocates

VERSUS

\$ The Appellate Authority for Industrial &
Respondents
Financial Reconstruction & Ors.

^ **through** : Mr. Rajiv Nayyar, Sr. Advocate
with Ms. Manisha Dhir, Advocate
for the respondent No.3.
Mr. Parag Tripathi, Sr. Advocate
with Ms. Vismai Rao, Advocate
for the respondent No. 5.
Mr. Arvind Nigam with
Ms. Priya Kumar, Advocates
for respondent No. 6.

CORAM :-

*** THE HON'BLE MR.JUSTICE A.K.SIKRI**
THE HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The Petitioner has filed this Writ Petition under Article 226 of the Constitution of India seeking a writ of certiorari for quashing the order dated 24th September 2007 passed by Appellate Authority for Industrial and Financial Reconstruction, New Delhi (AAIFR) in Appeal No.194 of 2002 along with MA No. 116/2007 dated 24th September 2007 and the order dated 10th October

2006 passed in MA No.210/2006. The effect of these orders is that the land of the Respondent No.3 Sick Company admeasuring about 205 Acres in Khapoli, Maharashtra as been permitted to be sold to Respondent No.5 for an amount of Rs.18 crores, and the application of the petitioner for recall of the said permission has been dismissed. The Petitioner also seeks direction to the AAIFR to accept the bid of Rs.28 crore or in the alternative direct the sale of the said land at Khapoli in District Raigarh, Maharashtra to be carried out in transparent manner by following the procedure prescribed by law.

2. To appreciate the controversy raised in this petition the necessary facts may first be stated. Respondent No. 3, Reliance Silicones (I) Pvt. Ltd. (hereinafter referred to as 'the company') is an industrial company engaged in the business of, *inter alia*, manufacture and sale in India and abroad of various chemicals, generally called 'silicones'. Respondent No. 3 became a sick company. Its case was referred to Board for Industrial Financial Reconstruction and was registered as Case No.30/1996. The AAIFR sanctioned a revival scheme of the company on 29th August 2000 stipulating the settlement of dues of secured creditors, i.e. IDBI, UTI and Central Bank of India (CBI) in the following manner under a one time settlement (OTS) :-

IDBI	:	10.52 crore
UTI	:	1 crore
CBI	:	19.33 crore

3. The aforesaid three financial institutions had a charge over one of the assets of the company situated at Vashi, Maharashtra. The company settled the dues of IDBI and UTI in full and also paid an amount of Rs.15.72 crore to CBI. However, since the

entire amount under the settlement was not paid to CBI, disputes emerged regarding the payment terms and settlement. The CBI proceeded to walk out of the settlement, which was objected to by the company. The BIFR vide its order dated 5th April 2002 restrained CBI from canceling the OTS unilaterally since the company had already made substantial payments. Aggrieved by the aforesaid order of BIFR dated 5th April 2002, CBI preferred appeal No.194/2002 before the AAIFR claiming the entire principal alongwith the interest and damages.

4. During the pendency of the aforesaid appeal, the company entered into negotiations with CBI. CBI agreed to accept an amount of Rs.4.75 crore in full and final settlement of its dues (apart from the amount of Rs.15.72 crore already received by it). The company was the owner of vast tracks of land ad-measuring about 205 acres situated at Khapoli in the State of Maharashtra. It appears that this land was also given a security to other secured creditors namely, Bombay Mercantile Cooperative Bank Ltd., PEN Cooperative Urban Bank Ltd. and UTI Bank Ltd. While the appeal was pending, the company, while negotiating with the CBI, as aforesaid, identified a buyer namely M/s. Karma Infrastructure & Development Company (KIDC), who are Respondent No. 5 herein, for a sale of its aforesaid asset at Khapoli for a total sale consideration of Rs.18.45 crore. The manner of distribution of aforesaid amount of Rs.18.45 crores was mutually agreed between the company and the respondent No. 5 as follows:

CBI, Respondent No. 4	Rs.4.75 crore
Bombay Mercantile Cooperative Bank Ltd., Respondent No. 8	Rs.5.60 crore

PEN Cooperative Urban Bank Ltd., Respondent No. 9	Rs.2.75 crore
UTI Bank Ltd, Respondent No. 7	Rs.4.00 crore

5. The aforesaid amounts were to be paid to CBI, (Respondent No. 4), Bombay Mercantile Cooperative Bank Ltd., (Respondent No. 8) and PEN Cooperative Urban Bank Ltd., (Respondent No. 9) in full and final settlement of their dues, whereas the amount to be paid to the UTI Bank Ltd. of Rs.4 crore was in settlement of the dues of UTI Bank Ltd. from out of the said property at Khapoli. Apart from the aforesaid amounts, Respondent No. 5 had also advanced a sum of Rs.15 lakhs to the company. The company and the respondent No.5 entered into a Memorandum of Understanding (MOU) dated 7th September 2006, wherein, *inter alia*, the aforesaid terms were recorded. This Memorandum of Understanding was subject to, *inter alia*, the consent and permission being granted by AAIFR/BIFR for the sale and transfer of the said property.
6. After entering into the aforesaid MOU, the company moved to AAIFR by filing M.A.No. 210/2006 in the aforesaid appeal of the CBI, whereby it sought permission from AAIFR to sell its land situated at Khapoli for making payment of dues to CBI, Bombay Mercantile Cooperative Bank Ltd. and PEN Cooperative Urban Bank Ltd. It appears that the aforesaid MOU was not placed before the AAIFR when the aforesaid application being MA No.210/2006 was filed by the company. It also appears that before the AAIFR Respondent No. 3/company represented that the land at Khapoli was proposed to be sold to Respondent No. 5 for an amount of Rs.18 crore (as opposed to Rs.18.45 crores as agreed under the Memo of Understanding). In its order dated

10th October 2006, the AAIFR while allowing the said application of the company recorded the arrangement proposed by it and the secured creditors as follows:

“At a result of these simultaneous efforts launched by the applicant company the following results have taken place:

- i) under its letter dated 25.8.2006 CBI has arrived at afresh OTS of Rs.475 cr with interest @ BPLR to be paid within a period of one month from the date of sanction.
- ii) BMCBL under its letter dated 7.8.2006 have agreed to:
 - a) the sale of Khapoli land;
 - b) and settlement of their dues of Rs.560 crores.
- iii) PCBL have agreed to the same and has agreed for the settlement of its dues of Rs.275 crores.
- iv) UTI Bank under its letter dated 4.9.2006 has:
 - a) given its no objection to the sale;
 - b) agreed to accept an amount of Rs.4 crores out of the sale of the land and the creation of a charge on the Vashi Plant. This new charge will be created once the charge thereon is released by CBI which will take place once the above stated payment is effected.
- v) A company called M/s. Karma Infrastructure and Development Company has been identified which will buy the land for an amount of Rs.18 crores.

This 18 crore therefore shall be distributed as follows:

<u>Details of payments</u>	<u>Amounts</u> <u>(Rs. In crores)</u>
Central Bank of India	4.75
Bombay Mercantile Cooperative Bank Ltd. (BML)	5.60
PEN Cooperative Urban Bank Ltd.	2.75
UTI Bank Ltd.	4.00
To vendors for claim of land (farmers)	0.90
Total	18 crores”

7. Respondent No. 5 thereafter proceeded to pay the amounts due

under the settlement to CBI, Bombay Mercantile Cooperative Bank Ltd., PEN Cooperative Urban Bank Ltd. in full and final settlement of their respective claims and an amount of Rs.4 crores to UTI in terms of the settlement reflected in the memorandum of understanding. Respondent No. 5 also paid further amounts in discharge of liabilities of Sales Tax and dues of the workman of the company. According to Respondent No. 5, as opposed to an amount of Rs.18 crores payable by it (as represented before the AAIFR), it had paid the following further amounts, thereby making a total amount of Rs.21,80,42,180/- :-

5.	Sales Tax Dues	2,00,00,000
6.	Labour dues to Maharashtra Rajya Rashtriya Kamgar Sangh	85,00,000
7.	Respondent No. 3	15,00,000
8.	Legal expenses of Respondent No. 3	23,00,000
9.	Miscellaneous Expenses	22,50,000

8. We may at this stage itself note that as per the impugned order of the AAIFR, the total amount claimed to have been paid by Respondent No. 5 for the land came to Rs.23.36 crores, which is now computed as Rs.21,80,452,180.
9. While the aforesaid transaction was in the process of being completed, the Petitioner, it appears, came as a bolt from the blue and moved the AAIFR by filing M.A.No.116/2007 claiming itself to be a shareholder of the company to the extent of over 49% shares and seeking recall of the order of the AAIFR dated 10th October 2006 whereby the AAIFR had permitted the sale of the property of the company at Khapoli to Respondent No. 5. The Petitioner stated that it had procured an offer for purchase of the said land at much higher price. While entertaining the

Petitioner's application which was moved on or about 22nd March 2007, the AAIFR did not stay its earlier order dated 10th October 2006 as aforesaid. The Petitioner aggrieved by the refusal to stay its order dated 10th October 2006 by the AAIFR filed W.P. (C) No. 2594/2007 seeking quashing of the said order dated 10th October 2006 with further directions to AAIFR to consider the offers made by third parties for the property at Khapoli and for a hearing before the AAIFR as a shareholder.

10. The aforesaid Writ Petition came up for hearing on 4th April 2007 and was disposed of on that day. The relevant extract of the order reads as follows :-

“The main plank of the submissions of Mr. P.V. Kapur, learned senior counsel is that the said sale is sought to be completed without proper valuation of the land in auction being held and is, therefore, detrimental and prejudicial to the interests of the company as it does not secure for the company the realizable value of the assets. He also questions the jurisdiction of AAIFR to have passed the impugned order.

Mr. Kapur states that the petitioners have buyers, who are willing to purchase the said lands for a sum of Rs.28 crores and are willing to make good this offer. Learned counsel for respondent No.3 Ms.Manisha Dhir raised a number of objections to this submission and submitted that it was a malafide attempt to subvert the transaction, which already stood completed inasmuch that after the agreement, the entire amount of Rs.18 crores had been received and paid to the various creditors including the Central Bank of India (CBI)(Rs.4.77 crores), Bombay Mercantile Cooperative Bank (BML) (Rs.5.60 crores), Pen cooperative Bank Ltd. (Rs.2.75 crores), UTI Bank Ltd. (Rs.4.00 crores) and an additional sum of Rs.4.17 crores had also been paid to the Sale Tax Authority for obtaining the 'No Objection Certificate' for the sale. Another sum of Rs.85-90 lacs has been paid to the workers. Therefore, she submits, that the entire sale consideration has been received and directly paid to the creditors bank. In these circumstances, the proposal is a belated one and being made malafide only to subvert the completion of transaction and the plans of the respondent No.3 company to come back on rails.

As regards the completion of transaction, counsel for the petitioner has stated that only possession of about 40 acres appears to have been handed over while possession of remaining land has not been handed over.

Besides, no Conveyance Deed has been executed till date. Counsel for the petitioner also places reliance on "*Divya Manufacturing Company (Pvt.) Ltd. Vs. Union Bank of India & Ors.*" reported at (2000) 6 SCC 69 in support of the contention that intervention by the Court could be made even at the stage of confirmation of sale or beyond that when required in the public interest or in the interests of company. Learned counsel for respondent No.3 submits that the said authority would not be applicable and she fully supports the order passed by the AAIFR. Petitioner, it was contended had deliberately not impleaded the purchaser M/s Karma Infrastructure Development Co. The appeal is stated to be pending before the AAIFR and is listed on 17th April, 2007 including the application for impleadment.

We do not, at this stage, wish to express any opinion on the rival contentions urged before us. The question which the Court is presently considering is the prayer made by the petitioner for preserving and utilization of the assets, to the advantage of the company in the meanwhile. Learned counsel for the petitioner has urged that the offer made by the petitioner is a bona fide one and there should really be no objection to a higher offer being accepted in the interests of the company and which was for the benefit of all. Petitioner states that within one week from today, they would deposit a sum of Rs.28 crores vide a bank draft with the AAIFR to demonstrate the bona fide nature of their offer.

In view of the foregoing and having considered the facts and circumstances as noted above, we are of the view that status quo be retained with regard to the sale of the said lands and assets till 11th April, 2007 when the petitioner has undertaken to make the deposit of Rs.28 crores with the AAIFR. We make it clear that in case Rs.28 crores are deposited on or before 4.00 p.m on 11th April 2007, the present order of status quo shall automatically stand vacated, without reference to the Court.

The order passed today would not come in the way of the AAIFR dealing with the matter on merits and passing appropriate orders after hearing the parties.

The writ petition stands disposed of with the above directions."

11. Consequently, the petitioner was permitted to deposit an amount of Rs.28 crore with the AAIFR within one week, i.e. by the 11th of April 2007. On 11th April 2007, the Petitioner tendered before the AAIFR a Bankers' Draft bearing No.604052 drawn on HDFC Bank for Rs.28 crores, drawn in favour of AAIFR. The Petitioner in its forwarding letter, *inter alia*, stated as follows :-

“It is respectfully submitted that the enclosed Bankers Draft may be encashed simultaneously with the handing over of the possession of land and execution and registration of Conveyance Deed in respect of the total extent of land (ad measuring approx. 205 acres) owned by M/s. Reliance Silicones (I) Pvt. Ltd. and situated at Khapoli in Maharashtra. We would request that the aforesaid process may be kindly expedited.”

12. The matter was taken up by the AAIFR on 25th June 2007 when the following order was passed by it:

“Heard the parties. In pursuance of Hon'ble Delhi High Court's order dated 4.4.2007 in writ petition 2594 of 2007 filed by M/s.Hargreaves Investment Ltd., a deposit of Rs.28 crore by a Banker's Draft No.604052 dated 11.4.2007 was received on behalf of the prospective buyer identified by M/s. Hargreaves Investment Ltd for the purchase of the Khapoli land (205 acres) owned by M/s. Reliance Silicones (I) Pvt. Ltd.

2. AAIFR does not have a Bank Account. Keeping in view the need to prevent loss of interest by consent of the parties we return the Bankers Draft dated 11.4.2007 for Rs.28 crore received from Law Consult Advocates of M/s.Hargreaves Investment Ltd. and direct that the said amount be kept in HDFC Bank Kailash Building, Delhi in a separate interest bearing Escrow Account within one week from the date of this order in the name of M/s. Hargreaves investment Ltd.: - AAIFR – M/s. Reliance Silicones (I) Pvt. Ltd. without prejudice to the parties. We further direct M/s. Hargreaves investment to give an undertaking while opening the Escrow Account that the said amount shall not be withdrawn till a final decision is taken in Appeal 194/02 and MA 116/2007.

3. M.A. No.20/07 is filed by M/s. Vinod Trading Corporation, M.A. No. 116/07 is filed by M/s. Hargreaves investment Ltd. Both these M.A.s were admitted on 20.4.2007.

4. M.A. No. 163/07 and M.A. No. 169/07 filed by Karma Infrastructure and Development Company for direction/impleadment and M.A. No. 233/07 filed by M/s. Achintya Exports (P) Ltd. the prospective buyer of Khapoli Asset are admitted, without prejudice to the rights and contentions of any of the parties.

5. The main appeal No.194/02 alongwith M.A. No. 20/07, 116/07, 163/07, M.A. No. 169/07 and M.A. 233/07 will be heard on 24.7.07.”

13. The Petitioner moved M.A. No.299 of 2007 before the AAIFR to seek extension of time frame for compliance of AAIFR order dated 25th June 2007 by further period of two weeks effective

from 2nd July 2007. The Petitioner had sought extension of time on the ground that on account of the heavy rains in Mumbai, it had not been possible for the Petitioner to open the Escrow account as earlier directed by AAIFR. This application was taken up by AAIFR on 6th July 2007. In the course of the hearing, it was informed to AAIFR that the amount of Rs.28 crores was now lying deposited in the account of the proposed buyers and that there was no loss of interest. The AAIFR consequently, disposed of M.A.No.299/2007 which, *inter alia*, read as under :-

“The Ld. Counsel for the applicant confirmed that the money is now in the account of the proposed buyer and that there is no loss of interest. Since the main appeal 194/02 filed by Central Bank of India is listed for 24.7.2007, we do not consider it necessary to pass any order in the M.A. The M.A.No.299/2007 thus stands disposed of.”

14. Thereafter, the appeal was heard by the AAIFR on different dates and parties also filed written synopsis of their arguments. The AAIFR has vide impugned orders dated 24.9.2007 dismissed the MA No. 116/2007 and disposed of the appeal holding that sine the High Court in its order dated 4.4.2007 had not set aside the earlier order dated 10.10.2006 passed by the AAIFR, there was no question to reconsider the same as AAIFR does not have the power under SICA to review its own orders. The perusal of the impugned judgment would further indicate that the AAIFR has, *inter alia*, taken the view that – (i) it did not have the power to review its own orders; (ii) that the applicant/petitioner has failed to show that the price offered by M/s. Karma Infrastructure & Development Company was unreasonable; (iii) that the petitioner, as a shareholder, had no *locus* to challenge the order permitting the sale; and (iv) that there was no infirmity in the

order and that the applicant/ petitioner had not deposited the sum of Rs.28 crores in terms of the orders dated 4.4.2007 passed by this Hon'ble Court. The AAIFR, accordingly, dismissed MA No. 116/2007 as devoid of merits. Further, appeal No. 194/2002 was disposed of in terms of the settlement arrived at between the company and the Central Bank of India.

15. Assailing this order the present writ petition is preferred by the petitioner. The main thrust is that the order dated 10.10.2006 was obtained by fraud, suppression of facts and that there was no transparency as required under SICA for sale of the properties of the Sick Company. No valuation was carried out; public auction was not conducted and the offer of M/s. Karma Infrastructure and Development Company was not the market value of the property. It was also contended that the order dated 10.10.2006 should be reviewed in view of the orders passed by this Court and in order to secure the highest offer for the company in order to benefit the revival scheme of the Sick Company and its creditors. Further, the petitioner's offer being Rs.10 crores above the offer of the prospective buyer, the same should have been accepted. It is also stressed that if the sale, as permitted under the order dated 10.10.2006, is allowed to take place, the Sick Company would be bound to sell its valuable assets by way of distress sale which would be detrimental to the interest of the Sick Company, its creditors and shareholders thereby affecting the implementation of the Sanctioned Scheme and causing losses to the Sick Company to the tune of almost Rs.10 crores, notwithstanding the fact that the petitioner, being the largest shareholder, would be deprived from participating in

the decision-making of the Sick Company, more particularly with regard to proper implementation of the rehabilitation scheme, keeping in mind the interest of the company, its creditors, shareholders, labour etc.

16. The respondent Nos. 3 & 5 have contested this writ petition, whereas respondent No.6, namely, M/s. Achantya Exports Pvt. Ltd., has supported the case of the petitioner by joining the prayer for setting aside of the sale in question.
17. Before addressing the core issue, we may take note of some of the preliminary submissions raised by the respondent Nos. 3 & 5 to the maintainability of this petition. In the first instance, it is stated that there was inordinate delay on the part of the petitioner in approaching the AAIFR for relief, which would show that the petitioner is not interested in the revival of the respondent No.3 company and this petition lacks *bona fide* and is opportunistic. In this behalf, it is contended that the company was declared a sick industrial unit on 27.8.1996. The petitioner who claims to have become a shareholder of the company in or around the year 2003 did not take any steps for the revival or the rehabilitation of the company though it had been going through severe financial crisis and was under liabilities of several secured creditors, sales-tax authorities and its employees. It is also pointed out that the respondent No.5 had issued public notices in Economic Times and Free Press Journal on 3.1.2007 and in a Marathi newspaper, Ratnagiri Times (Taigad) on 5.1.2007, but no objections whatsoever were received from the petitioner in response to those notices. According to the respondent No.5, this shows that the petitioner

had been waiting behind the scene as a masked phantom for the respondent no. 5 to work the sanctioned scheme, settle and clear the dues and the encumbrances affecting the larger land by holding several rounds of meetings, negotiations and discussions with banks and financial institutions and expending considerable time, effort, money and energy. After that is achieved with considerable efforts, the petitioner is now trying to piggy back on the efforts made by the respondent No.5 in making the title of the larger land clear and marketable and free from encumbrances. It is also submitted that the respondent No.5 is the *bona fide* purchaser of the land and in the aforesaid backdrop this Court should not interfere with the order passed by the AAIFR permitting sale of the said land to the respondent No.5 at Rs.18 crores after taking into consideration of the relevant facts.

18. We may say that there are *inter se* disputes between the petitioner and the company about the validity of the petitioner's claim to have become the shareholder of the company and the matter is pending in this behalf in the other forum. Therefore, we are not required to consider the same or comment thereupon. In the present case, we are concerned with the validity of the order dated 10.10.2006 whereby AAIFR has permitted sale of 205 acres of land belonging to the company to the respondent No.5 as well as order dated 24.9.2007 upholding that sale. After the order dated 10.10.2006 passed in MA 210/2006, the petitioner herein had moved application No. 194/2002 on 23.2.2007 challenging that sale and making an offer of Rs.13.65 lacs per acre, i.e. approximately Rs. 28

crores. Therefore, it cannot be said that there was any substantial delay in taking steps to challenge the said order permitting sale of the land of the company to the respondent No.5. No doubt, the application was filed six months after the permission to sale was granted and effect thereof shall be considered by us at the appropriate stage. What is emphasized at this juncture is that the writ petition cannot be dismissed on the ground of alleged delay. It is more so when for want of any orders on the said application, the petitioner had on an earlier occasion filed Writ Petition No. 2594/2007 challenging orders dated 10.10.2006, which was disposed of by this Court on 4.4.2007 directing the AAIFR to deal with the matter on merits after hearing the parties and in view of that order the AAIFR has now passed orders dated 24.9.2007 which is challenged by filing the present petition immediately thereafter on 29.9.2007. Therefore, there is hardly any ground to say that this petition suffers from delays and laches.

19. Learned counsel for the respondent Nos. 3 & 5 have also contended that there was a non-compliance by the petitioner of orders dated 4.4.2007 passed by this Court in Writ Petition No. 2594/2007 as it failed to deposit a sum of Rs. 28 crores with the respondent No.1 to demonstrate its *bona fide* and for this reason also this petition be not taken up on merits.
20. We are not persuaded by this argument as well. We are of the opinion that the petitioner has rightly demonstrated its *bona*

fides in making its endeavour to comply with the said order and there is a substantial compliance thereof. As already noted above, within one week of the said order, i.e. on 11.4.2007, the petitioner had tendered before the AAIFR a banker's draft drawn on HDFC Bank in the sum of Rs. 28 crores. It was the inability of the AAIFR to accept the said bank draft, which is clear from the AAIFR's own order dated 25.6.2007 recording that it does not have a bank account and for this reason, with the consent of the parties, the said draft was returned with direction to keep the amount in HDFC Bank, Kailash Building, Delhi in a separate interest bearing escrow account. No doubt, this amount could not be deposited within the time permitted by the AAIFR and the petitioner had moved MA seeking extension of time. When the matter came up before the AAIFR again on 6.7.2007, it was confirmed that the amount had already been deposited with the account and there was no loss of interest. Taking note of this fact, the AAIFR did not consider it necessary to pass any order on the MA. In view of this, we also do not agree with the observation of the AAIFR in its order dated 24.9.2007 that the petitioner had not deposited the amount in terms of order dated 4.4.2007 passed by this Court in making it one of the reasons to dismiss the MA filed by the petitioner herein.

21. It is also argued by learned counsel for the respondent Nos. 3 & 5 that in its MA No. 116/2007 filed before the AAIFR, the petitioner had failed to disclose its *locus*; it cannot claim any rights in the assets of the company; and the conduct of the petitioner is *mala fide*. These submissions flow on the premise

that though the petitioner claims to be a shareholder, but no documents have been annexed by the petitioner in support of the claim and further that as the petitioner is not a shareholder, it has no right in the assets of the company as well.

22. We state at the cost of repetition that these are the issues which can be adjudicated upon in the appropriate proceedings pending before the Company Law Board. In the present case, we are concerned with the validity of the orders of the AAIFR permitting sale of the land of the company to the respondent No.5. Even if the petitioner was an outsider and had questioned the sale on the ground that it was for an insufficient consideration and the market value of the property was higher, the AAIFR was duty bound to look into this aspect. The company is a sick company and had approached BIFR for its revival. The scheme had been sanctioned. In order to implement the said scheme and pay up the creditors, need was felt to sell the aforesaid land of the company. However, when it is decided to sell the land and permission of the BIFR and/or AAIFR is required for this purpose, it is the solemn duty and obligation of these authorities to ensure that sale to the prospective buyer is done in an appropriate manner and the property of a sick company fetches reasonable price commensurating with market value thereof. The Supreme Court has laid down this principle in the case of ***Divya Manufacturing Co. (P) Ltd. & Anr. v. Union Bank of India & Ors.***, (2000) 6 SCC 69, following its earlier judgment in the case of ***LICA (P) Ltd. v. The Official Liquidator & Anr.*** reported in (1995) 4 CCJ 494 (SC). The principle which would govern the outcome of such

cases is contained in paras 11 to 15 of the Apex Court judgment

in ***Divya Manufacturing***(supra), which are reproduced below :-

“11. In our view, on facts it is apparent that the Division Bench of the High Court has considered all the relevant facts including the fact that at the initial stage, the appellant “Divya” offered only Rs.37 lakhs to purchase the properties. That means, the appellant wanted to purchase at a throwaway price. Thereafter, at the intervention of the Court, the price was increased to Rs. 1.3 crores by the appellant. This indicates that the appellant was keen to purchase the property, however by paying only the bare minimal amount and to take advantage of sale by the Liquidator in the hope that if there are no other purchasers, it would purchase the Company at a price which is abnormally below the market price. It is also true that on 2-7-1998, the offer made by the appellant was accepted and it was ordered that sale in its favour be confirmed, but at the same time, before possession of the property could be handed over, or before the sale deed could be executed in its favour, Respondents 7 and 8 pointed out that the assets and properties could be sold at Rs. 2 crores. For showing their bona fides, they were directed to deposit Rs. 40 lakhs each and also to pay Rs. 70 thousand each as damages to the appellant. Further, the application for setting aside the sale was filed within a few days of the order accepting the bid of the appellant. In this set of circumstances, when correct market value of the assets was not properly known to the Court and the sale was confirmed at a grossly inadequate price, it was open to the Court to set it at naught in the interest of the Company, its secured and unsecured creditors and its employees. The appellant is also duly compensated by payment of Rs. 70 thousand each by Respondents 7 and 8.

12. The law on this subject is well settled. In the case of *Navalkha and Sons*, (1969) 3 SCC 537 after the appellant's offer was accepted, a fresh offer from one Gopaldas Darak for higher amount was received by stating that he could not offer in time because he came to know of the sale only 2 days prior to the date of the application and there was possibility of higher bids. Instead of directing a fresh auction or calling for fresh offers, the learned Judge thought it proper to arrange an open bid in the Court itself on that very day as between M/s. Navalkha and the higher offeror Gopaldas Darak. M/s. Navalkha thereafter offered higher bid at Rs.8,82,000 and its bid was accepted and the learned Judge concluded the sale in its favour with a direction to pay the balance amount. Thereafter an application was filed offering Rs.10 lakhs. A contention was raised that due publicity of the sale of the property was not made, but that application was rejected by the Court. Hence, an appeal was filed by the applicant who made an offer of Rs. 10 lakhs and another by one contributory against the order of confirmation. Both appeals were allowed by the Division Bench and the order passed by the learned Judge

was set aside with a direction to take fresh steps for sale of the property either by calling sealed tenders or by auction in accordance with law. That order was challenged before this Court by M/s. Navalkha. It was contended that there was no justification for the Division Bench to interfere with the order of the learned Single Judge. In that context, after quoting Rule 273 of the Companies (Court) Rules, 1959, the Court observed : (SCC pp. 540-41, para 6)

“6. The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the court the offeror does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. *The condition of confirmation by the court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the court to satisfy itself that having regard to the market value of the property the price offered is reasonable.* Unless the court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. In *Gordhan Das Chuni Lal Dakuwala v. T. Sirman Kanthimathinatha Pillai*, AIR 1921 Mad 286 : 24 MLW 35, it was observed that where the property is authorised to be sold by private contract or otherwise it is the duty of the court to satisfy itself that the price fixed is the best that could be expected to be offered. That is because the court is the custodian of the interest of the company and its creditors and the sanction of the court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the company and its creditors as well. This principle was followed in *Ranasami Pillai v. Sabapathy Pillai*, AIR 1925 Mad 318 and *S.Soundararajan v. Khaka Mahomed Ismail Saheb of Roshan & Co.*, AIR 1940 Mad 42 : (1939) 2 MLJ 778. In *A. Subbaraya Mudaliar v. K. Sundararajan*, AIR 1951 Mad 986 : (1951) 2 MLJ 353 it was pointed out that the condition of confirmation by the court being a safeguard against the property being sold at an inadequate price, *it will be not only proper but necessary that the court in exercising the discretion which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud.*”

(emphasis supplied)

13. From the aforesaid observation, it is abundantly clear that the court is the custodian of the interests of the company and its creditors. Hence, it is the duty of the court to see that the price fetched at the auction is

an adequate price even though there is no suggestion of irregularity or fraud. As stated above, in the present case, the sale proceedings have a chequered history. The appellant started its offer after having an agreement with the Employees' Samity for Rs.37 lakhs. This was on the face of it under bidding for taking undue advantage of court sale. At the intervention of the learned Single Judge, the bid was increased to Rs.85 lakhs. Subsequently, before the Division Bench, the appellant increased it to Rs.1.30 crores. At that stage, Respondent 7 "Sharma" was not permitted to bid because it had not complied with the requirements of the advertisement. It is to be stated that on 26-6-1998 the Division Bench has ordered that offers of Eastern Silk Industries Ltd. and Jay Prestressed Products Ltd. would only be considered on 2-7-1998 and confirmation of sale would be made on the basis of the offers made by the two parties. Further, despite the fact that the appellant "Divya" had withdrawn its earlier offer, the Court permitted it to take part in making further offer as noted in the order dated 2-7-1998. In this set of circumstances, there was no need to confine the bid between three offerors only.

14. In *LICA (P) Ltd. (1) v. Official Liquidator*, ((1996) 85 Comp Cas 788 (SC)), this Court dealing with an similar question observed thus :

"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. The court would, therefore, have to exercise its discretion wisely and with circumspection and keeping in view the facts and circumstances in each case."

15. The matter was again brought before this Court and in *LICA (P) Ltd. (2) v. Official Liquidator*, (1996) 85 Comp Cas 792, the Court held :

"Proper control of the proceedings and meaningful intervention by the court would prevent the formation of a syndicate, underbidding and the resultant sale of property for an inadequate price. The order passed by this Court yielded the result that the property which would have been finalised at Rs.45 lakhs, fetched Rs.1.10 crores and in this Court a further offer of Rs.1.25 crores is made. In other words, the property under sale is capable of fetching a higher market price. Under these circumstances, though there is some force in the contention of Shri Ramaswamy that the court auction may not normally be repeatedly disturbed, since this Court, on the earlier occasion, had limited the auction between the two bidders, the impediment will not stand in the way to direct sale afresh. Even today the parties are prepared to participate in the bid."

In other words, the Court was of the opinion that the guiding principle should be to get the most remunerative price and it is the duty of the Court to keep the openness of the auction, meaning thereby the intending bidders would feel free to offer the higher value. Needless to mention, the aforesaid principle has public purpose behind it. When the assets of a company, which has gone into liquidation, are sold, a Liquidator is appointed, who takes charge of assets of the company, and he is to undertake the liquidation process. The duty of the Liquidator is to invite claims from the secured as well as unsecured creditors and to ensure that after the disposal of the assets of the company, these creditors are paid to the maximum extent possible. It, therefore, necessarily follows that the Court is to ensure the most remunerative price for the assets that are being sold. The Official Liquidator, in fact, is the trustee of these assets at his hands. Hence, this is the guiding principle that has to be kept in mind while considering the present case.

Though those cases dealt with liquidation proceedings of a company wound up, on the facts of the present case, we are of the opinion that the principles contained therein shall be applicable. For this reason, the arguments of *locus standi et-al* would have no relevance.

23. The main contention of the petitioner is that it is seeking a transparent process for getting maximum consideration for the said land which would be in the interest and benefit of the

company. Mere settlement of the dues of the secured creditors is not the function of the AAIFR. It ought to have made an attempt to generate funds for the rehabilitation of the sick company, but as a result of the sale, the Company is left with no funds for rehabilitation.

24. This, according to us, is the relevant consideration which should have been the prime consideration before the AAIFR and, therefore, it is necessary to deal with the present petition on merits.

25. We may state at the outset that the approach adopted by the AAIFR while dismissing the MA of the petitioner herein is hyper-technical and in the facts of this case, it could not have dismissed the application giving the reason that it did not have the power to review. It is stated at the cost of repetition that vide order dated 10.10.2006 the AAIFR had permitted the sale of the land in question to the respondent No.5 at a specified rate, i.e. Rs. 18 crores, which was proposed by the company in its application. When the petitioner filed the application alleging legal infirmities therein and contended that the sale was not valid and the amount of Rs. 18 crores was much less than the market value, the AAIFR could have gone into this aspect. However, even if we presume that the AAIFR was correct in holding so, this Court, definitely, can go into this issue under Article 226 of the Constitution of India and, therefore, we propose to deal with the validity of the sale on merits.

26. It is not in dispute that the AAIFR had permitted the sale by private treaty between the company and the respondent No.5. It

is also not in dispute that in the application filed seeking permission to sell the land in question to the respondent No.5, amount of Rs. 18.45 crores was stated, which was accepted by the AAIFR without getting the land evaluated and finding as to whether the price quoted represents the fair market value. Such a sale, having regard to the principles explained above, is normally not to be treated as valid.

27. Having said so, the next question which falls for consideration is as to what kind of orders are required to be passed in the present case. This question has arisen in view of certain equitable considerations which weigh in favour of the respondent No.5 and are as follows :
28. As per the petitioner itself, it became shareholder in or around 2003. However it had not taken any steps for the revival or rehabilitation of the company. There were substantial dues payable to various secured creditors, including sales-tax authorities and the employees of the company. In order to make payment thereof, application in question was moved before the AAIFR for sale of the land. This was allowed on 10.10.2006. Pursuant thereto, the respondent No.5 paid the entire amount which was not limited to Rs.18.45 crores. As noted above, since dues ultimately found payable were more than Rs.21 crores, the respondent No.5 paid a sum of Rs.21.80 crores. The petitioner waited this to happen before filing MA for setting aside the sale. In the meantime, the respondent No.5 had admittedly expended considerable time, money, efforts and energy in settling the dues of creditors, statutory authorities and the employees of the company. It also took steps for making the title of the land

clear and marketable.

29. Normally, once the sale is found to be defective, the Court should not go in for fresh sale. However, having regard to the aforesaid facts and more particularly when the steps were taken after seeking due permission of the competent authority, i.e. the AAIFR, we are of the opinion that it would not be appropriate to set aside the sale. It is more so when considerable time has elapsed and in the meantime rates of the property have further risen. At the same time, it would not be appropriate to let the respondent No.5 take away the land in question at the price mentioned in the application and approved by the AAIFR in its order dated 10.10.2006. Since the petitioner in its application filed in March 2007 had offered the price of Rs. 28 crores, even as per the petitioner's valuation, that was the market price of the land in March 2007 and it was willing to give this consideration for the land in question. Therefore, we are of the opinion that the respondent No.5 be allowed to buy this land, but it should be made to pay Rs.28 crores. We are conscious of the fact that the offer of Rs.23 crores was quoted six months after the order dated 10.10.2006 passed by the AAIFR and there is a possibility that during this period the prices of the land might have gone up marginally. However, we are of the opinion that it would be equitable on both sides to allow the sale in favour of the respondent No.5, but at a consideration of Rs.28 crores since the Company has been deprived of the balance amount of Rs.6.20 crores for all this period.

30. This petition is, accordingly, disposed of with the following

observations :-

Order dated 10.10.2006 read with order dated 24.9.2007 are modified to the extent that the consideration for the sale of the land in question in favour of the respondent No.5 shall be Rs.28 crores. The respondent No.5 is also directed to deposit the balance amount of Rs.6.20 crores with the company (i.e. after adjusting the amount of Rs.21.80 crores from the amount of Rs.28 crores, which amount has already been deposited), within a period of four weeks from today.

No costs.

(A.K. SIKRI)
JUDGE

(VIPIN SANGHI)
JUDGE

January 18, 2008
nsk