

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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**CO.PET. 204 of 2003**

NEW CAWNPORE FLOUR MILLS LTD. .... Petitioner

Through: None

versus

BAKEMANS INDUSTRIES P. LTD. .... Respondent

Through: Mr. Vikas Pahwa, Sr. Advocate with  
Abhinit Das, Adv. for ex-Management  
of Respondent

Mr. Rajiv K. Garg, Mr. Ashok Rana &  
Ms. Kavita Rawat, Advs. for Applicant  
(CA No.1367 of 2005)

Mr. P.S. Bindra & Ms. Shweta  
Priyadarshini, Advs. for IFCI in CA  
No.1547 of 2012

Mr. Atul Sharma, Adv. for IDBI

Mr. Jayant K. Sud, AAG, Punjab with  
Ms. Tara V. Ganju, Ms. Etti Sharma,  
Mr. Vishal & Mr. Chigra Khurana,  
Advs. for PSPCL

Ms. Rama Ahluwalia, Adv. for Sales  
Tax Department, State of Maharashtra

Mr. Jay Salva & Ms. Amrita Mishra,  
Advs. for SICOM

Mr. C.A. Sundaram, Sr. Advocate with  
Ms. Rohini Musa, Ms. Aanchal Yadav  
& Ms. Sara Sundaram, Advs. for  
Ceylon Biscuit Ltd.

Mr. Anoop Bagai, Sr. Advocate with  
Mr. Amitesh Kumar, Adv. in CA  
No.1367 of 2005.

Mr. Rajiv Bahl, Adv. for OL.

**CORAM: JUSTICE S. MURALIDHAR**

**ORDER**

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**08.01.2013**

**Co.App. No.1156 of 2012, 1280 of 2012, 1399 of 2012, 1940 of 2012, 1547 of 2012, 1623 of 2012, Co.App. 105 of 2011, Co. App.1005 of 2011, CA No.1212 of 2010, CA No.1547 of 2012, Co.App. 2367-68 of 2012 and C.A. No. (by CBL) (to be numbered)**

***Background***

1. The background to these applications is that, in 2003, 16 separate winding up petitions were filed by the creditors of Bakemans Industries Pvt. Ltd. ('BIPL') under Section 433(e) read with Section 433(f) and Sections 434 and 439 of the Companies Act, 1956 ('Companies Act'). By an order dated 6<sup>th</sup> April 2004, the petition filed by New Cawnpore Flour Mills Ltd. ('NCFML') was admitted and the citations were directed to be published. Prior to this, one of the secured creditors, State Industrial Corporation of Maharashtra Limited ('SICOM'), had issued notice under Section 29 of the State Financial Corporation Act, 1951 ('SFC Act') on 22<sup>nd</sup> January 2003. After the winding-up petitions were filed in this Court, a second notice was issued by SICOM on 6<sup>th</sup> June 2003 under Section 29 of the SFC Act.

2. The disputes between BIPL and one NRI lead Bank was referred to the arbitral Tribunal ('AT') pursuant to an agreement entered into by BIPL with the said Bank. An Award was rendered on 16<sup>th</sup> August 2003 in which

SICOM, IDBI, IFCI and some other banks and State Financial Corporations were impleaded as parties. Relying on the Award, BIPL took possession of the factory premises on 14<sup>th</sup> September 2003. Upon an application made by SICOM in the execution petition following the Award, an order was passed by the Court on 15<sup>th</sup> September 2003 directing the *status quo* to be maintained.

3. In the execution proceedings Ceylon Biscuits Ltd. ('CBL'), a Sri Lankan company, filed an application expressing its willingness to submit a bid for the land and plant and machinery of BIPL in Patiala, Punjab. It made an offer of Rs. 12.5 crores and deposited the earnest money of Rs. 25 lakhs in US Dollars ('USD'). In view of the winding-up proceedings, the proceedings before the execution Court were directed to be placed before the Company Court.

4. By an order dated 17<sup>th</sup> July 2004, CBL's bid of Rs. 12.5 crores was accepted by the Company Court and the sale in its favour was confirmed. Meanwhile, an application had been filed by BIPL in the Company Court for a direction to SICOM not to sell the property and for maintaining *status quo* in respect thereof. The appeal filed by BIPL against the order dismissing the said application was dismissed by the Division Bench ('DB'). Thereafter an appeal was filed in the Supreme Court.

### ***Judgement of the Supreme Court***

5. By a judgment dated 16<sup>th</sup> May 2008 in ***Bakemans Industries Private Limited v. New Cawnpore Flour Mills (2008) 15 SCC 1*** the Supreme Court *Co. Pet. 204 of 2003*

held that the Company Court erred in effecting the sale of the property in favour of CBL by treating SICOM as an agent. It was held that the Company Court was under a statutory obligation to comply with the provisions of the Companies Act and the rules framed thereunder before selling the property. It was held that the High Court could not have ignored the Official Liquidator ('OL') only on the ground that the Provisional Liquidator ('PL') had been appointed. The Court noted that in the meanwhile the factory had started operations and the Court had to take into consideration the fate of not only the workers, but also those who had claims against BIPL. While allowing the appeal, the Supreme Court requested the Company Judge "to go into the question afresh in accordance with the provisions of the Companies Act and hold a fresh auction". It was further held that CBL's offers would also be considered and the Company Judge would consider the question of granting some preference to it. It was emphasized that the auction should follow a proper valuation of the assets of BIPL, both movable and immovable. It was also left to the Company Court to consider the question of framing an appropriate scheme if it was found that there was a possibility of reviving the company.

6. In para 81 of the said order, it was directed by the Supreme Court as under:

"81. Till, however, a final order is passed, Ceylon Biscuits Pvt. Ltd. would continue to function not as an auction-purchaser but as a Receiver of the Company Court. Ceylon Biscuits Pvt. Ltd. shall file all statements of accounts in regard to the amounts which it had invested and all other requisite statements including the valuation of machinery it had taken out of the country before the court. The court may appoint a chartered accountant to verify the said statements. The court,

if it thinks fit and proper, may, apart from the provisional liquidator, appoint another person to supervise the works and functioning of Ceylon Biscuits Pvt. Ltd. as a Receiver of the court. As Ceylon Biscuits Pvt. Ltd. is being appointed as a Receiver, it goes without saying that it shall act strictly under the supervision of the court and abide by the orders which may be passed by it from time to time.”

***Order dated 20<sup>th</sup> December 2010***

7. Following the above order, CBL filed Co. App. No.900 of 2008, BIPL filed Co. App. No.1767 of 2010 and OL filed Co. App. No.495 of 2010 in Co. Pet. No.204 of 2003 in this Court. It was brought to the attention of the Court that CBL had taken possession of the factory premises on 3<sup>rd</sup> March 2005 from SICOM. It had incorporated a subsidiary company, Ceylon Biscuits India Pvt. Ltd. (CBIPL) on 5<sup>th</sup> April 2005 for the purposes of manufacture and for use of the property. After the judgment of the Supreme Court, the factory stopped production on 15<sup>th</sup> September 2008 due to non-availability of funds. It was stated that the property had not been put to any productive use since then. The Court was told that since the inception of taking over of factory, CBL had been incurring losses. CBL sought the return of Rs. 12.5 crores deposited with this Court as an auction price for the property of BIPL and reimbursement of certain other sums incurred by it together with interest.

8. The Court appointed a firm of Chartered Accountants for verifying the statement of accounts submitted by CBL. It was noticed that after taking possession of the factory premises, two manufacturing lines, i.e., lines No.5 and 6, had been dismantled and taken by CBL to its factory in Sri Lanka. One of the issues that arose was what direction should be issued in respect of lines

5 and 6. The second issue was whether CBL was entitled to interest, and if so, at what rate.

9. By a detailed order dated 20<sup>th</sup> December 2010, this Court decided the first issue on the basis of the valuation undertaken by ITCOT Consultancy and Services Ltd., Chennai ('ITCOT'). However, the issue was not further examined since during the course of hearing CBL agreed that the entire plant and machinery, including lines 5 and 6, would be brought back and made operational by CBL at its cost and expense. The Court then ordered that this should be done under the supervision of an expert and further that till such time the plant and equipment including lines 5 and 6 were certified to have been properly installed, a sum of Rs. 4 crores would remain with the Court and kept in a Fixed Deposit ('FD'). The said amount was to be refunded to CBL "after the expert has certified that the plant and equipment, including lines 5 and 6, have been installed and made operational."

10. On the question of interest, the Court held that CBL should be paid simple interest @ 5% p.a. on the entire sum of Rs. 12.50 crores from the date of payment till 10<sup>th</sup> January 2011. It was held that the difference between interest on the FD of Rs.12.5 crores and Rs. 4.5 crores and the 5% interest awarded to CBL would enure to the benefit of BIPL/ex-management of BIPL. CBL was not entitled to any further charges/expenses on account of maintenance, upkeep etc. for restarting the factory for making it operational.

11. The following further directions were issued by the Court:

“45. Rs. 8.5 Crores will be refunded by the financial institutions on or before 10<sup>th</sup> January, 2011 to CBL. The CBL will re-install the Lines 5 and 6 and other equipments, which were taken away to Sri Lanka, within a period of four months. The interest amount and Rs. 4 Crores will be paid to DBL after Lines 5 and 6 and other equipments are re-installed and the expert appointed by the Court has certified that Lines 5 and 6 and other equipments, are in operational condition/state. Till then the CBL will continue to act as a Receiver and maintain the plant and machinery and keep them in operational state but not use them.

46. It is clarified that CBL will continue to be a Receiver till further orders and the possession of the plant and equipment as well as factory belonging to BIPL is with the Court and not with CBL. CBL/CBIPL will be liable to pay the statutory dues and liabilities for the period till the factory was in operation i.e. till 15<sup>th</sup> September, 2008 and workmen's due till they vacate. Payment of Rs. 4 crores and the interest will be released only after the Court is satisfied that the statutory dues and liabilities and workmen's dues have been paid. Rs. 11.20 lakhs on account of missing plant and equipment will be deducted while making payment of Rs. 8.5 crores and no interest will be payable for the same.”

12. The Court noted that the primary concern of the Company Court was (i) to secure and ensure payment to the creditors on best possible terms and (ii) to get a fair deal for the workers both with regard to the past arrears and future employment. With the above observations, the applications were disposed of.

***Applications by CBL, BIPL and PSPC***

13. CBL filed Co. App. 1156 of 2012 on 29<sup>th</sup> May 2012, seeking the appointment of an expert for carrying out the inspection of Lines 5 and 6 and other equipments that had been installed in the factory premises and permit CBL to handover possession of the property along with all the plant and machinery, equipment and furniture and fixtures after such certification from an expert and direct refund of a sum of Rs. 8,18,02,491.65, being the amount due to it, as set out in Annexure-E to the application. Replies to the said application have been filed by BIPL as well as SICOM. In the reply filed by SICOM it is only stated the equipment stated to have been reinstalled should be inspected by ITCOT which was appointed as an expert by this Court by an order dated 3<sup>rd</sup> October 2008. The OL has filed a reply on the same lines. It is stated that in terms of the order passed by this Court on 20<sup>th</sup> December 2012, CBL/BIPL would be liable to pay the statutory dues and liabilities for the period till the factory was in operation i.e. 15<sup>th</sup> September 2008 and workers' dues till CBL leaves the premises. The OL's stand is that the expenditure of the expert's fees and insurance of plant and machinery for a sum of Rs. 15 lakhs should not be asked to be borne by the OL.

14. On behalf of the ex-management of BIPL, a reference is made to Co. App. No. 1142 of 2009 filed by it seeking the return of sum of Rs.50 lakhs deposited by it in Court to demonstrate its bona fides at a time when it challenged the acceptance of CBL's bid. It is stated that the peaceful possession should be handed over by CBL to the OL after clearing and all statutory dues till date.



15. Co. App. No. 1280 of 2012 has been filed by the Punjab State Power Corporation Ltd. ('PSPC') claiming the electricity dues for the factory premises for the period from 30<sup>th</sup> December 2008 till 14<sup>th</sup> June 2012 for a total sum of Rs.63,77,374. Copies of the bills have been enclosed with the application. In response to this application, it is pointed out by CBL that the bills pertain to period subsequent to 12<sup>th</sup> December 2008 when the electricity to the premises was disconnected. It was only by an order dated 18<sup>th</sup> December 2008 this Court had directed restoration of electricity since the lack of electricity might "imperil the safety and security of the premises as well as the valuable machinery which is located therein". The stand of CBL is that it is not liable to pay the electricity dues for the period subsequent to the stopping of the commercial production from 15<sup>th</sup> September 2008 and in terms of para 46 of the order passed by this Court on 20<sup>th</sup> December 2010. In this connection it is necessary to also refer to Co. App. No. 1940 of 2012 filed by the ex-management of BIPL in which, *inter alia*, it is prayed that the election connection be reduced from the sanctioned load of about 1400 KVA to 15 KVA till further orders.

### ***Satisfactory reinstallation***

16. One of the first issues concerns the satisfactory reinstallation by CBL of the equipments including Lines 5 and 6 by CBL. The Minutes recorded of the inspection of the factory premises which took place on 13<sup>th</sup> September 2012 in the presence of BIPL, OL, SICOM, IDBI, IFCI, CBL, CBIPL and IFCI's technical expert-cum-valuers, *inter alia*, noted that "All parties (secured creditor, Ex-management have been satisfied from (*sic* about) the reinstalled (*sic* reinstallation)and functioning of Lines 5 and 6. Further the ex.

management and secured creditor has stated that the installation of Lines 5 & 6 and other equipments are in working order except the wear and tear minutes recorded at the site.” In a further affidavit dated 7<sup>th</sup> January 2013 filed by CBL, attention is drawn to the Minutes of Inspection of 5<sup>th</sup> December 2012 in the presence of the OL, IFCI, CBIPL and CBL. An inventory prepared by ITCOT as on 2<sup>nd</sup> July 2009 is annexed to the said Minutes. It has been stated “the machinery has been inspected and compared with the inventory by Mr. R.N. Kansal, from ex-management, Bakemans’ Industries (P) Ltd.” The annexure to the Minutes is titled: ‘Assets transferred to CBL group – all machinery and other equipment.’ This includes all the equipments pertaining to Lines 5 and 6 as well as “5 nos. of ‘Kadam on Edge’ packing machines.” The approximate value of the said 5 machines as on 25<sup>th</sup> October 2005 is indicated as Rs. 10,00,000.

17. One of the conditionalities for accepting the prayer of CBL to be relieved as a Receiver is the satisfactory working of the reinstalled Lines 5 and 6. This has been fulfilled as evident from Minutes of inspection dated 13<sup>th</sup> September 2011 and 5<sup>th</sup> December 2012. In the affidavit dated 7<sup>th</sup> January 2013, CBL has stated that without prejudice to its contentions that the EPF Act and the ESI Act would not apply since CBL/CBIPL has been acting only as a Receiver for security and maintenance of premises, CBL is willing to pay the “EPF and ESI dues amounts to Rs. 11,91,190/- and Rs. 2,82,866/- for workers employed for security of the premises.” Additionally, as regard 5 ‘Kadam on edge machines’, which were not found at site, Mr. Sundaram, on instructions, states that any appropriate sum, less than Rs. 10,00,000 to account for

depreciation, may be withheld from the amount payable to CBL in terms of order dated 20<sup>th</sup> December 2010 of this Court.

***Objections of SICOM and IFCI***

18. One of the objections raised by both secured creditors, i.e., SICOM and IFCI to CBL's Co. App. No.1156 of 2012 is that during the pendency of the petition, IFCI had issued a notice under Section 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) on behalf of the secured creditors on 8<sup>th</sup> June 2011, calling upon BIPL to pay a sum of Rs. 4,55,9220 due as on 31<sup>st</sup> May 2011. It is averred that pursuant to the said notice, IFCI took 'symbolic possession' on 18<sup>th</sup> August 2011 for and on behalf of itself and other secured creditors and that the other secured creditors, including SICOM, had consented to the said action by filing Co. App. No.1623 of 2011. It is urged by Mr. Savla, learned counsel for SICOM, refers to the judgment dated 17<sup>th</sup> September 2012 of the DB of this Court in Co. App. No. 58 of 2012 (***Kotak Mahindra Bank Ltd. v. Megnostar Telecommunications Pvt. Ltd.***) and submits that the possession of the assets should be handed over to IFCI since the provisions of and the proceedings under the SARFAESI Act would prevail over the proceedings under the Companies Act. It is stated by both Mr. Savla and learned counsel for IFCI that consistent with the said decision, while the plant and machinery and the property should be handed over to them, they would associate the OL in the public auction that may be conducted. It is added that in view of the provisions of Section 13(9) of the SARFAESI Act, the disbursement of the amounts would be in accordance with Sections 529 (1) and 529-A of the Companies Act.

***Clarification Re IA 2482 of 2011***

19. At this stage, it must be noted that, on 4<sup>th</sup> May 2012, this Court had dealt with Co. App. 2482 of 2011 filed by IFCI with a direction to CBL to permit IFCI to inspect the plant and machinery with a view to evaluate the same. However, the order passed by the court wrongly noted the number of the said application as Co. App. No.1623-24 of 2011. Consequently, BIPL has filed Co. App. No.2367 of 2012 to rectify the said order. There is no objection to the said application. It is clarified that what was disposed of on 4<sup>th</sup> May 2012 was Co. App. No.2482 of 2011 and not Co. App. No.1623-24 of 2011 which is pending and is being disposed of by the present order. Co. App. No. 2367 of 2012 is accordingly allowed and the necessary correction is carried out in the order dated 4<sup>th</sup> May 2012 to the effect that the number of the application that was disposed of by the said order should read as Co. Appl. No. 2482 of 2011.

***The SARFAESI Act notice***

20. The Court proposes to consider the submissions of learned counsel for the parties on the question of the applicability of the decision of this Court in the ***Kotak Mahindra Bank Ltd.*** case. At the outset, it must be noticed that in the said case, unlike in the present one, a notice under Section 13(2) of SARFAESI Act was issued by the Bank on 18<sup>th</sup> December 2008. Possession was taken over by the Bank pursuant thereto on 16<sup>th</sup> June 2010. On 23<sup>rd</sup> July 2011, the Bank published notices in the newspapers for auction and sale of the mortgaged property. Thereafter on 3<sup>rd</sup> August 2011 Co. App. No. 62 of 2012 was filed by Magicon Impex Private Limited in which the OL was appointed as the PL. It is in those circumstances the question arose whether

the sale of the property by the Bank way of an auction could have been effected without involving the OL. Relying on the judgment of the Punjab and Haryana High Court in *Haryana State Industrial & Infrastructure Development Corporation (HSIDC) v. Haryana Concast Limited, Hisar (2010) ILR 2 P&H 284* ('*HSIDC case*') the Company Judge held that once the OL had been appointed as the PL, he should have been associated with the auction process and having not been so associated, the sale by the Bank on 24<sup>th</sup> August 2011, pursuant to the notice under the SARFAESI Act, was bad in law. Aggrieved by the above decision, the Bank appealed to the DB of this Court, which set aside the judgment of the learned Single Judge. The DB differed with the decision of the Punjab and Haryana High Court in the *HSIDC* case and took the view that the SARFAESI Act, and the Rules thereunder, constituted a complete code and that there was no need to associate the OL for the sale to be conducted pursuant to the action initiated under the SARFAESI Act. Further, it was held that although the sale of the secured assets of a secured creditor under the SARFAESI Act was without the intervention of the Court, a safety valve was provided under Section 17 of the SARFAESI Act to a person by the measure taken by the secured creditors under Section 13(4) of the SARFAESI Act. It was noticed that in enumerating under Section 31 of the SARFAESI Act the instances in which the SARFAESI Act would not apply, the legislature did not list the instance of a company under liquidation. The order in *Kotak Mahindra Bank Ltd.* is the subject matter of a special leave petition No.36254 of 2011 before the Supreme Court, but has not been stayed.

21. Apart from the principal distinguishing feature of the *Kotak Mahindra*

*Bank Ltd.* case that the notice under the SARFAESI Act was issued prior to the commencement of the proceedings under the Companies Act, the other distinguishing feature, as far as the present case is concerned, is that in the instant case the attempt earlier made by SICOM to proceed under Section 29 of the SFC Act and take possession of the factory, leading to the sale in favour of CBL, was itself set at naught by the Supreme Court in its judgment dated 16<sup>th</sup> May 2008. It was specifically held that since the sale in favour of CBL did not take place under Section 29 of the SFC Act, the said provision could not have any application. It was further held that “the Company Judge could exercise its jurisdiction only in terms of the Companies Act and not in terms of Section 29 of the 1951 Act.” It was noticed that SICOM had, by participating in the proceedings before the Company Judge, waived the option of invoking the statutory power under the SFC Act. It was only at the instance of SICOM that the auction was held by the Company Judge. With the attempt by SICOM having failed in its attempt at invoking the statutory power under the SFC Act in this very case, the invocation of the statutory power by IFCI under Section 13 (2) of the SARFAESI Act should also be held to be impermissible in law. Also, although the said power was available to be invoked even while the matter was pending in the Supreme Court, it appears that IFCI chose to wait till the conclusion of the proceedings before the Supreme Court and thereafter the order passed by this Court on 20<sup>th</sup> December 2010. In the circumstances, the continuation of proceedings under the SARFAESI Act would apart from being an abuse of the process of law, also lead to multiplicity of proceedings and render at naught the entire proceedings under the Companies Act for nearly a decade. With SICOM participating in the present proceedings throughout, there cannot be any

question of there being an auction sale without intervention of the Court as envisaged under the SARFAESI Act. SICOM's claims, as well as the claims of the other secured creditors, if made, would be dealt with by the OL in accordance with law. Further, Mr. Rajiv Bahl, learned counsel for the OL, has stated that the OL would have no objection to security of the premises being provided in consultation with the secured creditors subjecting to their bearing the expenses thereof. The valuation of the property and the subsequent sale by way of public auction will be done by the OL under the supervision of the Court and to the knowledge of the secured creditors. There can be no cause for concern for the secured creditor by their not being associated with those steps.

22. Consequently, this Court sets aside the said notice dated 8<sup>th</sup> June 2011 issued by IFICI under Section 13 (2) of the SARFAESI Act. C.A. No.1623 of 2011 is allowed accordingly.

***Sum payable to CBL***

23. It must be clarified that pursuant to the order dated 20<sup>th</sup> December 2010, a sum of Rs. 8.5 crores less Rs. 11.20 lakhs as directed by the order dated 20<sup>th</sup> December 2010) has already been paid to CBL. It is stated that of the said sum of Rs. 8.5 crores, while the IDBI paid its share in Asian Currency Units ('ACUs'), IFICI and SICOM paid their respective shares in Indian Rupees which was later converted by CBL into ACU after obtaining orders from the Reserve Bank of India. The claim in the present application is for the balance sum of Rs. 4 crores together with interest payable in terms of para 45 of the order dated 20<sup>th</sup> December 2010. This has been worked out as Rs.

8,18,02,491.65, which, according to CBL, is the amount payable as on 10<sup>th</sup> January 2011. No objection has been raised by any of the parties to the calculation placed on record by CBL.

24. However, there are some apprehensions expressed by the parties to the payment of that entire sum to CBL. The first concerns the statutory dues and the electricity dues. As regards the demand raised by the Office of the Provident Fund Commissioner, Mr. Sundaram has drawn the attention of the Court to a notice dated 11<sup>th</sup> August 2006 by the Regional Provident Fund Commissioner (Recovery), Chandigarh, which, *inter alia*, states that “the establishment, Bakemans Industries Private Limited was in arrears to the tune of Rs. 1 Crore approx. as on 31-03-2006.” CBL has filed Co. App. No.1054 of 2006, seeking stay of the said notice. An order was passed by this court in the said application on 1<sup>st</sup> September 2006, staying the said recovery notice. In its affidavit, as already mentioned earlier, dated 7<sup>th</sup> January 2013, CBL has stated that it is willing to pay its EPF dues amount to Rs. 11,91,190 without prejudice to its rights and contentions that as a Receiver appointed by this Court, it is not liable for those dues. Additionally, the Court notes that there is no dispute that CBL was given possession of the factory premises on 3<sup>rd</sup> March 2005 from SICOM. The factory remained operational only till 15<sup>th</sup> September 2008. The EPF dues prior to 3<sup>rd</sup> March 2005 or for the period subsequent to 15<sup>th</sup> September 2008 cannot obviously be fastened on to CBL. The affidavit of service filed by CBL on 12<sup>th</sup> October 2006 shows that the notice of the aforementioned application was served on the Office of the Regional Provident Fund Commissioner (‘RPFC’) in Chandigarh on 3<sup>rd</sup> October 2006. However, till date no reply has been filed by the RPFC. In the



circumstances, the statement made by CBL in its affidavit dated 7<sup>th</sup> January 2013 is taken on record and an amount of Rs. 11,91,190 on account of EPF dues is directed to be retained with the OL from the sum payable to CBL. Likewise, as regards the workers' dues in terms of the said affidavit, a further sum of Rs. 2,82,866 is directed to be retained by the OL. The further disbursement of this sum would be subject to the further orders of the Court. It would be open to the OL to issue an appropriate notice to the RPFC to lodge any claim this regard with the OL. CBL will file an undertaking in this Court, as directed hereafter, that it will pay any further sums towards ESI and EPF dues or any other statutory dues if so found by the OL.

### ***Electricity Dues***

25. The next issue concerns the electricity dues. In para 46 of the order dated 20<sup>th</sup> December 2010, this Court has held that "CBL/CBIPL will be liable to pay the statutory dues and liabilities for the period till the factory was in operation i.e. till 15<sup>th</sup> September, 2008 and workmen's dues till they vacate." Since the factory was not in operation after 15<sup>th</sup> September 2008, the consumption of the electricity thereafter was only for the purposes of lighting and keeping the machines in a working order. From the averment made on behalf of the ex-management of BIPL in its Co. App. No.1940 of 2012, it is apparent that the factory at present does not require the full sanctioned load of 1400 KVA but only 15KVA. Nevertheless the bills raised by PSPC for the period subsequent to 15<sup>th</sup> September 2008 are for the minimum guaranteed amounts in terms of the sanctioned load of 1400 KVA to the factory. At present the factory requires for lighting and for maintenance of machines and

security only a load of 15 KVA. This can be enhanced as and when production recommences.

26. An order was passed by this Court on 7<sup>th</sup> December 2012, wherein it was stated that the CBL, if they so choose, may write to PSPC either to disconnect or reduce the load. In view of the fact that by virtue of this order, the possession of the factory premises is to be taken over by the OL, this Court considers it appropriate to direct PSPC to reduce the sanctioned load to the factory to 15 KVA with immediate effect.

27. It is urged by PSPC, on the strength of the decision in ***Rajasthan Housing Board v. Krishna Kumari (2005) 13 SCC 151***, that since the electricity connection was restored to the factory premises in terms of the order dated 18<sup>th</sup> December 2008 of the Court, the dues of PSPC ought to be directed to be paid straightway by CBL and PSPC should not be relegated to the OL for its dues. The above submission is untenable for more than one reason. As far as CBL is concerned, the order of the Supreme Court makes it clear that it is asked to continue only as a Receiver of the property in question. There was no production or operation of the plant after 15<sup>th</sup> September 2008. Para 46 of the order dated 20<sup>th</sup> December 2010 passed by this Court, which has attained finality, also clearly states that CBL/CBIPL would be liable to pay the statutory dues and liabilities for the period till the factory was in operation, i.e., 15<sup>th</sup> September 2008. The Court, at this stage, is not called upon to decide any claim that PSPC may have. Since the Respondent is under winding-up, PSPC is to necessarily abide by the scheme of the statutory provisions governing the liquidation of companies and apply to the OL as regards its

outstanding dues. Its claim will be processed and decided by the OL, just as it did in other claims filed before the Court in accordance with law. The decision in *Rajasthan Housing Board* case can have no application to the facts of the present case since it had not dealt with the dues of a company under liquidation. Moreover, the history of the litigation in the present case has witnessed several orders which limit the liability of CBL, particularly after 15<sup>th</sup> September 2008.

28. In that view of the matter, the application filed by PSpC is disposed of by directing the OL to decide the claim of PSpC in accordance with law as and when it is lodged before the OL. However, since the Court has directed by this order that the load sanctioned for the factory would be reduced to 15 KVA consistent with the present requirement for the upkeep and maintenance of the factory and equipment, it is further directed that the OL will settle all the current bills raised by PSpC after reduction of the load to 15 KVA as and when the bills are raised. For the past dues, however, the claim will be lodged by PSpC before the OL which will then be decided in accordance with law.

***Cost of Five Packing machines***

29. The next issue that requires to be dealt with is the amount that should be withheld from the amounts payable to CBL towards the five 'Kadam-on-edge' packing machines, the value of which is estimated at Rs. 10,00,000 as on 25<sup>th</sup> October 2005. Although it was urged by Mr. Sundaram that the present value of the five machines would be less after accounting for the depreciation for the past seven years, this Court is not inclined at this stage to determine what the approximate value of the said five machines as on date

should be. It is considered appropriate that a further sum of Rs. 10,00,000 be withheld and kept with the OL, subject to the appropriate valuation thereof by the valuer.

30. An apprehension was expressed by Mr. Pahwa, learned counsel for the ex-management of BIPL, that the assets of the company could have been hypothecated or mortgaged to raise loans, as reflected in the Balance Sheet of CBL. It is stated by Mr. Sundaram, on instructions, that none of the assets of the factory have been hypothecated/mortgaged or charged for any of the loans availed of by CBL which are reflected in its Balance Sheet and Profit and Loss Account.

31. Mr. Pahwa submitted that the estimated value of the said five machines, as on date, is Rs.15,00,000. However, no document is placed on record to substantiate it. It will be open to the ex-management of BIPL to place its submission in this regard before the OL as and when the valuation report is available.

***Past dues of ITCOT***

32. An issue has been raised by Mr. Bahl as regards the arrears of fees payable to ITCOT for the earlier valuation done by it and according to him, a sum of Rs. 3,35,209, constituting the CBL shares of the said dues, should be directed to be paid by CBL. He further refers to an order dated 13<sup>th</sup> April 2009 passed by the Company Judge.

33. In response, it is submitted by Mr. Sundaram that the order dated 30<sup>th</sup> April 2009 was appealed against by CBL in Co. App. No. 20 of 2009 in which an order was passed on 16<sup>th</sup> September 2009 by the DB, stating that the Company Judge should first dispose of CA No.900 of 2008 and “other issues may be considered after the disposal of this application.” Subsequently, the Company Judge disposed of CA No.900 of 2008 filed by CBL by a detailed order dated 20<sup>th</sup> December 2010. CA No.900 of 2008 was filed by CBL soon after the judgment of the Supreme Court seeking return of the sum of Rs. 12.5 crore paid by it. Notice was issued on the said application on 15<sup>th</sup> September 2008 by the Company Judge. On 1<sup>st</sup> October 2008, the Company Judge took note of the directions of the Supreme Court and on 3<sup>rd</sup> October 2008 ITCOT was appointed as a Valuer. In the circumstances, the stand of CBL, throughout, has been that it cannot be made liable for the fees of the Valuer, which exercise which had anyway to be carried out pursuant to the directions of the Supreme Court.

34. It is contended by Mr. Vikas Pahwa, learned counsel representing the ex-management of BIPL, that the Supreme Court had given CBL the chance of participating in the fresh auction and, therefore, the valuation ordered would also benefit CBL. As rightly pointed out by Mr. Sundaram, by filing Co. App. No.900 of 2008 CBL sought return of the sum of Rs. 12.5 crores thus making it clear that it was not going to participate in the auction as and when it took place. It is for this reason that against the order dated 30<sup>th</sup> April 2009, CBL filed an appeal before the DB in which an order as noticed before was passed.

35. For some reason the question regarding the payment of the past fees of the Valuer was not urged before the Court when it decided CA No.900 of 2008 on 20<sup>th</sup> December 2010. Subsequently, an order was passed by the Company Judge on 9<sup>th</sup> September 2011, directing: “Let the bills of the valuer be cleared in accordance with law within two weeks from today positively.” Against this order, CBL filed CA No. 65 of 2011 which was dismissed as withdrawn by the DB on 17<sup>th</sup> October 2011, with liberty to CBL “to approach the Company Court for any clarification/modification of the impugned order dated 9<sup>th</sup> September, 2011, as he may be advised.” On 28<sup>th</sup> August 2012 CBL filed an application, seeking modification of the said order. The said application is taken on record.

36. The narration of the sequence of events indicates that even prior to the appointment of a Valuer by the Court, on 3<sup>rd</sup> October 2011, CBL has already filed CA No.900 of 2008, making clear its intentions to seek refund of the sum of Rs. 12.5 crore paid by it. It is, therefore, not possible to accept the submission on behalf of the ex-management of BIPL that the Valuer’s report would also be to the benefit of CBL. In any event, a Valuer had to be appointed pursuant to the directions of the Supreme Court in its judgment dated 28<sup>th</sup> May 2008. CBL was in possession of the property only as a Receiver and was not going to benefit from the valuation. Consequently, CBL cannot be asked to pay any amount towards the fees of the Valuer.

37. In the circumstances, the past dues of ITCOT in the sum of Rs. 3,35,209 will now be paid to it by the OL out of the Common Pool Fund within a period of four weeks. CA No.1005 of 2011 is disposed of accordingly.

***Sales Tax dues***

38. It is submitted by counsel for the applicant in CA No. 1399 of 2012, Sales Tax Department, State of Maharashtra that by an order dated 17<sup>th</sup> September 2012 this Court had permitted it to file its claim for Rs.95,55,924 with the OL. It is submitted that the said claim would have precedence and the sales tax dues would constitute a first charge on the assets of BIPL and therefore those dues should be settled first from the sale proceeds of the land of the company. The said submission can be considered at the appropriate stage by the OL in accordance with law. It is premature for the Court to express a view on these submissions at this stage.

***Directions***

39. In the circumstances, the above applications are disposed of in terms of the above and the following directions:

- (i) On or before 21<sup>st</sup> January 2013 CBL will be paid a sum equal to Rs. 8,18,02,491.65 minus Rs. 10,00,000 minus Rs. 11,91,190 minus Rs. 2,82,866 collectively by SICOM, IDBI and IFCI, simultaneous with the handing over of the possession of the factory premises by CBL to the OL, subject to the OL being satisfied about the inventory of the plant and machinery tallying with the report of ITCOT annexed to the Minutes of Inspection dated 5<sup>th</sup> December 2012 (except the five Kadam-on-edge packing machines in respect of

which orders have already been passed hereinabove). IFCI and SICOM will pay their respective shares of the aforementioned amount to IDBI which, in turn, will pay the same along with its share to CBL in ACU.

(ii) It will be open to the OL as well as SICOM and IFCI, to have one expert each of their choice present at the factory premises for verifying that the assets taken over tallies completely with ITCOT report as directed in (i) above. A representative of the ex-management of BIPL is also permitted to remain present. Additionally, PSPC will also depute its representative to remain present in the premises and make an inventory of equipments belonging to it which are in the premises.

(iii) CBL is permitted to take back such office equipment and furniture that may belong to it. If there is any dispute as to any office equipment and furniture which CBL claims belonging to it, then the OL will seek directions from this Court before handing over such office equipment and furniture to CBL.

(iv) ITCOT is appointed as a Valuer and its representatives will remain present at the factory premises on 21<sup>st</sup> January 2013 and any further dates that it might require, subject to the orders of the OL, to make a complete inventory of the plant and machinery. ITCOT will submit a comprehensive valuation report of the land, plant and machinery to the OL within a period of six weeks from today. The



fees of ITCOT is tentatively fixed at Rs. 2,00,000 will be paid which will be paid by the secured creditors, i.e., SICOM, IFCI and IDBI. 50% of the fees will be paid within four weeks and the balance on submission of the valuation report. Any further sum will be paid by the said secured creditors as and when the final bill is received from the Valuer.

(v) The OL will engage a security agency in consultation with the secured creditors for providing security to the factory premises and also retain the minimum number of workers and for upkeep of the plant and machinery. The expenses thereof will be reimbursed by the secured creditors. It will be open to the OL to engage a technically qualified person in consultation with the ex-management of BIPL for the upkeep of the plant and machinery.

(vi) CBL will file an undertaking in this Court by way of an affidavit, within two weeks, stating that in the event that the OL finds that any further statutory dues is found payable for the period between 3<sup>rd</sup> March 2005 and 15<sup>th</sup> September 2008 the said dues will be cleared by CBL forthwith upon intimation to that effect by the OL.

(vii) The application filed by PSPC is disposed of by directing the OL to decide the claim of PSPCL in accordance with law as and when it is lodged before the OL. The load sanctioned for the factory will be reduced to 15 KVA by PSPC at the earliest and not later than 21<sup>st</sup> January 2013. The OL will settle all the current bills raised by

PSPC after such reduction of the load to 15 KVA as and when the bills are raised.

(viii) The past dues of ITCOT in the sum of Rs. 3,35,209 will now be paid to it by the OL out of the Common Pool Fund within a period of four weeks. CA No.1005 of 2011 is disposed of.

(ix) The notice dated 8<sup>th</sup> June 2011 issued by IFCI under Section 13 (2) of the SARFAESI Act and other incidental proceedings are hereby set aside. C.A. No.1623 of 2011 is allowed.

(x) Co. App. No. 2367 of 2012 is allowed and the necessary correction is carried out in the order dated 4<sup>th</sup> May 2012 to the effect that the number of the application that was disposed of by the said order should read as Co. Appl. No. 2482 of 2011.

**Co.App. No.1996 of 2010**

40. This is an application by Bakemans Workers Union, praying for direction to the OL to settle the claims of the workmen as per the claim petition filed on 20<sup>th</sup> April 2005 before the OL. The said claim petition will be disposed of by the OL in accordance with law. The application is disposed of.

**CA No.881 of 2009, Co.App. 47-48 of 2009, CA No.656 of 2012, Co.App. 1268 of 2009**

41. These applications are disposed of as having become infructuous. It will be open to the applicants to lodge their claims if any in accordance with law

before the OL. The OL will issue a fresh public notice inviting claims after obtaining directions from this Court.

**CA No.2322 of 2010**

42. A direction is issued to the Committee appointed by this Court on 7<sup>th</sup> May 2008 to scrutinize the claims of the creditors and the workmen and file a report. The report be submitted to the Court within four weeks. The application is disposed of.

**CA No.2179-80 of 2011**

43. This is an application filed by the ex-management of BIPL to be permitted to take steps for protection of its rights relating to trademarks, copyrights, licenses, goodwill as well as passing off. Since the OL has been appointed as the PL, it will be open to the OL to take all necessary steps for protection of the rights of BIPL relating to trademarks, copyrights, licenses, goodwill as well as passing off. The ex-management of BIPL will hand over to the OL necessary documents and also render necessary assistance whenever the OL pursues such remedies. The application is disposed of.

**CA No. \_\_\_\_\_ of 2011 (by IFCI) (to be numbered)**

44. This is an application filed by IFCI to direct the OL to associate and assist in selling the mortgaged property under SARFAESI Act. The application does not survive and is disposed of in terms of this order.

**Co.App. 2482 of 2011**

45. This application has already been disposed of on 4<sup>th</sup> May 2011.

**Co. App. No.1367 of 2005**

46. This application will be heard on the next date of hearing i.e., 4<sup>th</sup> April 2013. It will be open to SICOM to file its reply in the meanwhile.

**Co. App. No.1142 of 2009**

47. This is an application by the ex-management of BIPL, seeking return of the sum of Rs. 50,00,000 deposited by it in this Court. This application will be considered on the next date of hearing, i.e., 4<sup>th</sup> April 2013.

**Co.App. No.754 of 2011**

48. List on 4<sup>th</sup> April 2013.

**JANUARY 08, 2013**  
**tp/dn**

**S. MURALIDHAR, J**

