

# GUJARAT HIGH COURT

Panchmahals Steel Limited

Vs.

Universal Steel Traders

Company Application Nos. 32 and 56 of 1975 in Company Petition no. 32 of 1975

(D.A. Desai, J.)

05.08.1975

## JUDGMENT

### **D.A. Desai, J.**

1. By these two applications, a new dimension is being added to the varied jurisdiction enjoyed by a company judge in company matters, and a question of considerable importance and magnitude has been raised, which, on investigation, is found to be not hedged in by any precedent. A brief statement of facts relevant to the topic would be sufficient to focus the attention not only on the legal, but also economic, social and sociological aspect of the question raised herein.

2. Panchmahals Steel Limited, hereinafter referred to as the company, was incorporated under the Companies Act, 1956, on 12th September, 1972, initially as a private limited company, but has been subsequently deemed to be a public limited company, limited by shares. The registered office of the company is situated at G.I.D.C. estate, Kalol, district Panchmahals. The authorized capital of the company is Rs. 15 lakhs divided into one lakh equity shares of Rs. 10 each and 5,000 cumulative redeemable preference shares of Rs. 100 each. The issued, subscribed and paid up capital of the company is Rs. 12,40,000 consisting of 76,000 equity shares each of Rs. 10 fully paid, out of which 3,580 equity shares each of Rs. 10 fully paid were allotted for consideration other than cash; 51,428 equity shares of Rs. 10 each fully paid were allotted to the promoters for payment to wards the expenses incurred by them prior to incorporation, and 4,800 9 1/2 % redeemable cumulative preference shares of Rs. 100 fully paid held by the Gujarat Industrial Investment Corporation Ltd. (hereinafter referred to as GIIC) Gujarat State Financial Corporation (hereinafter referred to as GSFC) has advanced a dig loan. Amongst various objects, the principal object for which the company was formed was to set ups modern mini-steel plant having rolling mills plant for producing steel and alloy ingots, etc. Selection of the site for the location of the mini-steel plant was motivated and purposive, namely, to push the pace of

industrialization into rural areas so as to provide job opportunities to the local rural population. The Government of India, in order to diffuse and decentralise large industries, gave subsidy to this company, so as to encourage it to set up a plant in the area largely inhabited by members of Scheduled Castes and Scheduled Tribes. With this most laudable object in view, the plant was set up at Kalol in Panchmahals district, largely inhabited by the members of Scheduled Castes and Scheduled Tribes. Accordingly, this company set up a most modern rolling mill and commenced business. It so happened that there was a marked change in the market condition for the products of this company, and gradually the company started making losses while pursuing its commercial activity. Ancillary measures for strengthening economy undertaken by the Central Government had a direct impact and adverse effect on the sale of the products of this company. To illustrate, the ban imposed on construction of multi-storeyed buildings, luxury buildings, cinema and commercial buildings coupled with the shortage in the supply of cement, adversely affected the sales of the company. Consequently, the prices fell and the company was forced to sell at a loss. In short, by the end of the financial year 30th September, 1974, the accumulated loss was Rs. 26,82,608.01 and it may as well be stated in passing that the figure must have swollen up by the time we come to the stage when the company closed its manufacturing activity on 18th May, 1975. It may be mentioned here that GIIC and GSFC between themselves have advanced on the first equitable mortgage of the plant of the company a sum of Rs. 46 lakhs. The State Bank of India has advanced a loan of Rs. 38,50,000 for facility on the hypothecation of stocks and current assets under the personal guarantee of two of the directors both of whom admittedly are non-resident Indians. There are sundry creditors. Interest liability and other standing charges are piling up. Admittedly, on 18th May, 1975, the wheels came to a stand-still and the production stopped and workers since then are unemployed.

3. Messrs. Universal Steel Traders, hereinafter referred to as petitioning creditor, claiming to be unsecured creditor of the company to the tune of Rs. 6,27, 511.50 served a notice under section 434 of the Companies Act on 25th March, 1975, calling upon the company to pay the amount within 21 days, failing which a petition for an order for winding up the company would be filed in the High Court of Gujarat. The company failed to pay the amount as also neglected to reply to the statutory notice, whereupon the creditor filed Company Petition No. 32 of 1975 on 24th April, 1975, under section 433 read with section 439 praying for an order for winding up the company.

4. When the winding-up petition came up for admission, a notice under rule 96 of the Companies (Court) Rules was ordered to be served upon the company before giving any direction for advertisement of the petition. In response to the notice, the company appeared through one Kumar Vithalbai Patel, the constituted attorney of the company, who is also the works manager of the plant on June 16, 1975, and filed a detailed affidavit opposing the admission of the petition. But simultaneously another development took place of which notice must be taken here. On the very day, the constituted attorney of the company, on behalf of the company, at the instance of one Shri Ram Lubhaya R. Malhotra, the proprietor of Sri Hind Rolling Mill, Odhav Road,

Ahmadabad, moved Company Application No. 33 of 1975 under section 391(1) of the Act proposing a scheme of compromise and arrangement between different classes of creditors and different classes of members of the company and the company, and requested the court to give necessary directions for convening meetings of different classes of creditors and members, with a view to their considering the proposed scheme of compromise and arrangement, and if thought fit, to approve with or without modification the same. Simultaneously, on that very day, the company, at the instance of Mr. Malhotra, filed Company Application No. 32 of 1975 in Company Petition No. 32 of 1975 (winding-up petition) praying for a direction that the company be directed to hand over either by way of lease or licence or any other mode, as considered proper by the court, the plant of the company, with all its accessories to Mr. Malhotra for running the plant during the period, the scheme application is being processed through various stages in the court and for a period of two months thereafter, on his agreeing to pay compensation as offered by him or as determined by the court, simultaneously undertaking to the court to return possession if the scheme of compromise and arrangement as proposed on his behalf is not sanctioned or at any time as ordered by the court. The court directed a notice of Company Application No. 32 of 1975 to the petitioning creditor in Company Petition No. 32 of 1975, as also to issue a public notice in the newspapers Sandesh and Indian Express setting out therein briefly the fact that an application proposing therein a scheme of compromise and arrangement has moved and Mr. Malhotra has taken out a judge's summons for taking over the plant with a view to working it during the period the scheme application is processed in the court. The hearing of this summons was adjourned to 23rd June, 1975. On 23rd June, 1975, a number of advocates appeared for different persons and to mention only a few of them, M/s. V. S. Parikh for the State Bank of India, G. N. Shah for GSFC and GIIC, J. K. Mehta for Gujarat Electricity Board, M. D. Pandya for staff and workmen of the company and M/s. J. C. Patel, M. A. Trivedi, S. B. Majumdar, M. V. Chokshi, B. H. Mehta and Miss Kusum M. Shah appeared for different unsecured creditors and Mr. C. C. Gandhi for the petitioning creditor. They urged that they have no idea of the scheme and they had little time to probe the implication of the summons taken out by Mr. Malhotra and that they must have time to consider the full ramifications of the situation and that the matter should be adjourned. In order to give everyone time to examine the implications of the summons, the matter was adjourned to 30th June, 1975. Before adjourning the matter the court took on record the affidavit filed by Shah Ramjilal Rampratap and also an additional affidavit of Mr. Malhotra. When the matter was called out on 30th June, 1975, one Girish J. Trivedi, legal adviser to GSFC, filed his affidavit in which it was in terms stated that GSFC and GIIC are secured creditors of the company and have decided to remain outside the winding up. Both the creditors specifically opposed the summons taken out by Mr. Malhotra for handing over the plant to him. It was also stated in para 9 of this affidavit that in case the court wants to pass an order in favour of Mr. Malhotra, taking into account the interest and depreciation, the compensation to be paid by him would be to the extent of Rs. 2.50 lakhs per month. They questioned the jurisdiction of the court to make the order. On that very day Mr. Malhotra filed his affidavit in rejoinder contesting the averments made by Mr. Trivedi in the affidavit-in-reply and an affidavit in rejoinder also came on behalf of the original petitioning

creditor. The summons then came to be adjourned to 1st July, 1975. On that day, the managing director of the GIIC filed an affidavit in which it was stated in categorical terms that both GSFC and GIIC were vitally interested in the revival of the plant. It was further stated that Steel Corporation of Gujarat Limited (shortly stated as SCGL) which is a hundred per cent. subsidiary company of GIIC, would be interested in restarting the plant, and that steps have been taken to ascertain the situation, and that the executive committee of the GSFC and GIIC, both of which were to meet on 10th July, 1975, were likely to approve the proposal of SCGL to take over the plant for running pending finalization of the scheme of compromise and arrangement that may be proposed on behalf of the SCGL. The affidavit set out in its paragraph 5 the broad salient features of the scheme under contemplation. The court inquired from Mr. G. N. Shah as to what compensation the SCGL would offer in case its proposal to take over the plant for operation, pending finalization of the scheme, is accepted by the court. The answer in categorical and unambiguous terms was that SCGL would offer Rs. 1 lakh per month as compensation and pay the arrears of salary of the staff and other employees of the company. The court was very favorably impressed with this proposal and, therefore, directed Mr. G. N. Shah to put this offer on record by a proper summons and affidavit, and in order to enable him to take out the summons and draw up affidavit and put it on record, the matter was adjourned to 2nd July, 1975. When the matter was taken up on 2nd July, 1975, Mr. G. N. Shah had taken out judge's summons in Company Application No. 48 of 1975, in Company Petition No. 32 of 1975, for and on behalf of GIIC, seeking direction of the court that the company be directed to give possession of the plant to SCGL and/or GIIC on payment of a fair rate of compensation and on such other terms and conditions as the court may deem proper to prescribe. It was supported by an affidavit of the managing director of GIIC. In the affidavit it was stated that on the court granting the summons, the GIIC with SCGL will undertake to start the plant and factory of the company within 15 days and the plant will be run at least for a period of four months or till the scheme to be submitted by GIIC/SCGL is finally sanctioned by the court and SCGL will re-employ entire staff and workers of the company with benefit of continuity of service without any break and arrears of salary of the staff and workers of the company will be paid in such manner as may be determined by the court. It was further stated that compensation that GIIC/SCGL would offer would be at a rate which would be 20 per cent. higher than the compensation that may be offered by Mr. Malhotra. When the matter was being heard a specific offer was made on behalf of the GIIC/SCGL that a scheme of compromise and arrangement will be moved, the compensation will be offered at the and rate of one lakh of rupees per month and payment will commence from the date of possession being handed over to GIIC/SCGL. The court directed a responsible officer to give an undertaking to the court and if such undertaking is forthcoming, the court was willing to examine the motion for adjournment for two weeks within which time a properly drawn up scheme of compromise and arrangement may be moved for consideration of the court under section 391. An undertaking to that effect was filed by the managing director of GIIC on the same day. I would revert to this undertaking at an appropriate stage. The matter was then adjourned to 3rd July, 1975. On that day a summons was taken out by Mr. Malhotra, applicant in Company Application No. 33 of 1975, for a permission to make certain modifications in the scheme

proposed and offered by him and pending with the court. The matter then came to be adjourned to 7th July, 1975. On that day, Mr. G. N. Shah possibly voiced a feeling that GSFC/GIIC/SCGL any not be in a position to propose the scheme of compromise and arrangement and a question arose whether contempt proceeding may have to be taken against the managing director pursuant to the undertaking given by him on 2nd July, 1975. The matter was then adjourned to 8th July, 1975, when learned Advocate-General, Mr. J. M. Thakore, and Mr. C. T. Daru appeared for GIIC/SCGL and tried to persuade the court than as the executive committee of the GSFC as well as the executive committee of GIIC were not in favour of moving the scheme, the managing director may be discharged from the undertaking given by him to the court on 2nd July, 1975, and they offered to make all amends; but I could not persuade myself to agree to it, more so because of the offer made on behalf of GIIC/SCGL. Mr. I. M. Nanavati on behalf of the company and Mr. Malhotra had orally moved the court seeking permission to withdraw his offer to run the plant. I clearly indicated to them that law would take its own course when a suggestion was made by learned Advocate-General that as the matter is being adjourned right from 23rd June, 1975, only at the instance of GSFC/GIIC, GIIC would be willing to deposit Rs. 60,000 for payment to the staff who have remained unpaid and unemployed and that the court may give them time of about two weeks to contact someone who could propose another scheme. It is quite interesting to note at this stage that Mr. I. M. Nanavati, smelling the situation, wanted to improve the bargaining lever of his client and, therefore, again threatened to withdraw his offer. The court did not pass orders upon the motion and adjourned it and ultimately this has turned out to the better advantage of Mr. Nanavati's client, which I would presently point out. However, a situation did develop on account of the action or inaction of both the corporations wherein had Mr. Nanavati's client been permitted to withdraw his offer, and summons in Company Application No. 33 of 1975, the court would have been left with no option but to proceed with the winding up petition, leading to the civil death of the company, which again, it would be presently pointed out, is neither to the benefit nor to the advantage of anyone either interested in the company or all interests represented in the company, or connected with the company. Anyway, sensing the fickle attitude of these corporations, the court did not permit Mr. Nanavati to withdraw his offer and ultimately to the advantage of all concerned. Pursuant to the statement made by learned Advocate General, the court made an order that on the GIIC depositing Rs. 60,000 with the official liquidator appointed as court officer by an order made by me on 2nd July, 1975, for making inventory of the assets and books of accounts of the company, for the purpose of paying off one month's salary to the employees, and staff of the company, the matter would be adjourned for two weeks.

5. The matter again came up before the court on 22nd July, 1975. Now, in the meantime on 21st July, 1975. Gujarat Iron & Steel Co. Ltd. (hereinafter referred to as GISCO) had taken out a judge's summons in Company Application No. 55 of 1975, proposing a scheme of compromise and arrangement between various classes of creditors and various classes of members of the company and the company, requesting the court to give directions for convening meetings of the various classes of creditors and various classes of members to consider and if thought fit, to

approve with or without modification, the scheme of compromise and arrangement proposed by the applicant. The summons was moved before the court on 22nd July, 1975, when it came to be adjourned to 23rd July, 1975, as the court wanted those who had appeared in Company Application No. 32 of 1975 also to appear in this application. But there happened something on 23rd July, 1975, of which a specific note should be taken.

6. GISCO which proposed a scheme of compromise and arrangement in Company Application No. 55 of 1975 had also taken out judge's summons simultaneously in Company Application No. 56 of 1975, praying for a direction that the company be directed to hand over the plant of the company to the applicant on the terms similar to those offered by Mr. Malhotra with variations here and there. Accordingly, there were two schemes of compromise and arrangement before the court in respect of the same company, one moved by the company at the instance of Mr. Malhotra, and another moved by GISCO, and as both desired to take over the plant of the company, pending consideration of the rival schemes, a situation to the total advantage of the company, its staff, its secured creditors and unsecured creditors developed unexpectedly. To exploit the situation to the best advantage of those who were otherwise to suffer of the company were to be wound up, the court directed on 23rd July, 1975, that both Mr. Malhotra as well as GISCO, the proponents of two rival schemes, will be entitled to bid in an open auction in the court as to the terms and conditions on which they would be willing to take over the plant of the company for the purpose of running it pending the processing and finalisation of the rival schemes of compromise and arrangement. And lo and behold, Mr. Nanavati always using his skill to receive maximum advantage for his client had started with a miserly low offer of compensation of Rs. 35,000 per month which would not have been sufficient to pay off running interest, leave aside the penal interest of the two secured creditors, meaning there by the court would permit a party to use the assets of the company with the liability of interest piling up will no chance of reducing it even if the plant of the company is working, raised his offer in the open auction to the respectable figure of Rs. 1,70,000 per mensem payable every month in advance. It would also be necessary to recall here that GIIC/GSFC had offered through the undertaking given by the managing director of GIIC compensation at the rate of Rs. 1 lakh per month payable in advance, other conditions being those to be approved by the court. Now, therefore, the court suggested that a bid of less than Rs. 1 lakh of compensation per month would not be countenanced, and there started a process of outbidding each other and in the process Mr. Nanavati who once posed to withdraw his offer but the court did not grant the motion, outbid the other opponent by offering and agreeing to pay Rs. 1.70 lakhs per month as compensation. One can appreciate, albeit reluctantly, the commercial judgment of this gentleman who had started with a meagre sum of Rs. 35,000 per mensem raising the bid to Rs. 1.70 lakhs. Anyway, this reinforces the belief that truth reasserts itself in any given situation and it is to the advantage of all interested in the company including those who claim to be secured creditors. GSFC and GIIC who claim to be secured creditors say that the interest payable to them works out at Rs. 35,000 per mensem. Add to it the interest that may be payable to the State Bank of India and yet there would still be a substantial residue for unsecured creditors because the arrears of the wages and pay of the staff are being taken care of by me separately. Now, the way in which the plant was

being run at least for some time past it shows that there was every month mounting and piling up of losses. Not only that process would be arrested, but would be positively reversed for the time being. Further, if I could be persuaded, the recurring interest can be paid off from the amount of compensation and from the residue the unsecured creditors may be paid and this will progressively lead to reduction in liability. The result was that against the chorus of protests with which the court began this matter, there emerged a wide consensus and everyone has fallen in line by saying that the court should grant the summons in Company Application No. 32 of 1975, by handing over the plant to Mr. Malhotra for running the same on the terms and conditions as the court considers proper, save and except the feeble protest of the two aforementioned corporations, probably chagrined by the hurt ego.

7. Now, frankly speaking, as there is consensus on all sides, including to some extent of the two corporations, the petitioning creditor and other creditors who appeared, Mr. M. D. Pandya on behalf of the staff and workmen and Mr. V. S. Parikh on behalf of the State Bank of India, it would not be necessary for me to make a speaking and reasoned order. But it was dinned into my ears that the attempt at granting the summons is charting a new unexplored, hazardous and venturesome course in company litigation especially when a winding-up petition is pending, I should succinctly express myself in a speaking order.

8. This company is deep down to its neck in debt. Looking to the accumulated losses, its capital is completely wiped off. Number of causes were adumbrated which led to this mess and sorry state of affairs and they may be examined in an appropriate proceeding for finding out why the company met this cruel and unusual destiny. With what aspiration the company was started, one can visualize from the fact that the Government of India encouraged industrialists to go into the backward areas of the nation, called "specified areas". The purpose and motive was to take the pace of industrialization to hitherto rural backward areas so as to reduce pressure on agriculture. There was a two-fold end in view. Such a step would provide local employment and create job opportunities. Secondly, manufacturing-cum-commercial activity on a large scale has the built in potentiality of stirring ancillary industries and provide employment in ancillary industries. To encourage the industrialists to go to such area, the Government of India agreed to give and did give Rs. 4.40 lakhs as subsidy. The two corporations advanced big loans. Performance of the State Bank of India deserves a specific mention in that it claims to have advanced a loan of Rs. 38.50 lakhs on a security of goods not worth Rs. 20 lakhs, a transaction unheard of by this court while dealing with company litigation. The company got the benefit of exemption from payment of electricity duty for a period of five years as also benefit of exemption from sales tax also for five years. With these propitious circumstances and alluring inducements, the mini-steel plant, which again was a step taken in pursuance of the policy decision to set up mini-steel plants all over the country, was set up and yet because of various market forces and conditions the company ran into financial doldrums. If no alternative can be conceived, the inevitable thing to do is to wind up the company. The management has no wherewithal to pay all the secured creditors, unsecured creditors and the amount that may become payable to workman on

retrenchment with recurring loss while operating the plant. The two corporations alone have to recover dues to the tune of Rs. 55 lakhs including the value of the preference shares allotted to GIIC. Add to it Rs. 38.5 lakhs due to the State Bank of India. Arrears of electric consumption charges payable to the Gujarat Electricity Board comes to Rs. 2 lakhs. I would not go further than this except saying that the unsecured creditors would not get a farthing in winding up. Secured creditors, though they are now chastened, are threatening to remain outside the winding-up. Let us conjure up the picture that may emerge if the company is ordered to be wound up, pursuant to the dictum that an unsecured creditor of a commercially insolvent company is entitled to an order of winding up *ex debito justitiae*, which has of course been very much shaken down deep to its foundation in modern times. But whatever little life it has, if it is to be acted upon, the result would be that this court has no option but to wind up the company. The answer once was that the court may not wind up the company but await taking any action on the summons both of Mr. Malhotra as well as of GISCO till such time the rival schemes are examined by those interested persons to whom the schemes are offered, and if the one or the other scheme goes through, the party whose scheme is approved and finally sanctioned by the court may be handed over the company as a whole including the plant. That was the view put forth by Mr. G. N. Shah on behalf of the two corporations.

9. Assuming that Mr. G. N. Shah is right that such would be strictly the legal course that the company law permits, let me examine the resultant effect thereof. The first effect is that this most modern steel plant set up only two years back in 1973 will remain idle, unused and will rust. The employees and especially technically skilled employees will remain unemployed and in these days of mounting unemployment and shrinking production, starvation would be their only lot. Production will not be forthcoming. Ancillary industries will certainly come to a grinding halt. Law must take note of the existing situation in which problems that arise in law and have a human content have to be disposed of. Law cannot divorce itself off the mores of the day. Philosophy of law is functional and not analytical. Now, if the law takes note of the existing situation in which a problem has been put in the lap of the court, a solution must be sought through a machinery of law. Law cannot be static and its interpretation has to be dynamic. Law cannot operate in vacuum. Either by its pragmatic approach or progressive interpretation, law must find and offer a solution or it must perish. Socio-economic problems of the contemporary times cannot be solved by the arid nineteenth century approach to the provisions of the company laws. Time-honored approach that the company law must safeguard the interest of investors and shareholders of the company would be too rigid a framework in which it can now operate. New problems call for a fresh approach. And in ascertaining and devising this fresh approach, the objective for which the company is formed may provide a guide line for the direction to be taken. As Prof. De Wool of Belgium puts it, the company has a three fold reality - economic, human and public - each with its own integral logic. The reality of the company is much broader than that of an association of capital; it is a human working community that performs a collective action for the common good. In recent years a debate is going on in the world at large on the functions and foundations of corporate enterprise. The "preservationists" and the "reformers" are

vigorously propounding their views on the possible reform of company, the modern trend emphasizing the public interest in corporate enterprise.

10. And what is the modern trend ? Prof. Gower in his "The Principles of Modern Company Law", third edition, at page 634, has dealt with this problem in its true perspective and it is worth quoting :

"One section of the community whose interests as such are not afforded any protection, either under this head or by virtue of the provisions for investor or creditor protection, are the workers and employees of the taken-over company. This is a particularly unfortunate facet of the principles that the interest of the company means only the interest of the members, and not of those whose livelihood is in practice much more closely involved."

11. In the same book in the chapter "The Future of Company Law in a Mixed Economy", the same author has pointedly drawn attention to the reversal of priority as a future modification of the company law and it bears the quotation (page 62) :

"The vexed question of the relationship between the employees and the company which employs them is, in fact, a dominant theme in the current debate which flows over from company to labour law. It is generally accepted that it is unreal for company law to ignore, as at present our law largely does, that the workers are as much, if not more, a part of the company as the members of it."

12. If that is the direction in which the next step has to be taken, what useful purpose would be served in the present situation, if the court accedes to the suggestion of inaction till such time as the scheme petitions are processed especially when two parties are keen and ready to start the plant, which could be put back on steam with hardly two weeks' notice, to keep it idle and in the process deny production and deny employment. By adopting such a course, the goal set by development plans of this country, which has two targets, namely, expansion of job opportunities, and production with a view to bringing down price, both will stand defeated and invested money of the shareholders, secured creditors and unsecured creditors will lie unused, unutilized and idle. It does not require a long intelligible argument to weigh the relative merits of these two options. If yet someone is bold enough to say that you can pay respect to the law of the land by crucifying its spirit, he can say that, let plant lie idle but give no fresh orientation to the legal principle involved. Whether this is an adventure or not, will be presently examined. I am more than certain that it can be put within the four-corners of the strict legal format of the various provisions of company law. But even if one has to chart within two alternative courses, one thoroughly safe but fruitless and negative, and another slightly venturesome, adventures which can be taken by a pragmatic view of law, it is but meet that a bold experiment should be made in other directions even at the cost of being told that it is a bit hazardous. One need not pay respect to a lifeless order but may take in a little disorder in order to rejuvenate the spirit of law and that is the

attempt. However, I have little doubt in my mind that within the four corners of law, this summons can be granted, ought to be granted, and if not granted, it would be a deviation from settled law.

13. There is a petition before the court under section 433 read with section 439 for winding-up the company. On such a petition being filed the court may give a notice before giving directions for advertisement as required by rule 96. Such a notice has been given. Petition for winding up is pending. It is well settled that if a winding-up order is made it relates back to the date of presentation of the petition. If the company is ultimately wound up, the liquidator will step in and has to sell the assets of the company.

Section 457(1) provides that the liquidator in winding-up by the court shall have power with the sanction of the court, inter alia, (a) to carry on the business of the company, so far as may be necessary for the beneficial winding-up of the company; and (b) to sell immovable and movable property, actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate or to sell the same in parcels. Assuming that the winding-up petition goes through, the liquidator after he steps in, will have to sell the immovable property of the company. The liquidator has to make best efforts to obtain maximum price of the assets of the company as part of his duty towards creditors and in the ultimate analysis the contributories, if there is anything left for them. But it is his primary duty, in the case of winding-up order being made, that he must sell the immovable properties of the company. The prophets of doom who believe that the company will have to be wound up, cannot expect anything better than the sale of the company's assets, and anyone connected with the industry knows that a plant which is working efficiently, and is in working condition and working order, would fetch much better price as a going concern than a plant which is allowed to remain idle and rust, only because law does not permit, so says the soothsayers, infusing any life into it till a certain stage in winding-up is reached.

14. Now, taking strictly the view as was once advanced that at this stage, the court has no jurisdiction till the scheme is sanctioned, to either take over possession of the plant, or to hand it over to Mr. Malhotra, would leave the plant high and dry for at least about 6 to 8 months, which an applications for processing the scheme through various stages in the court would take. It would be unwise to accelerate the hearing of the winding-up petition; and on the winding-up order being made, to proceed to sell the immovable property of the company, thereby nipping the scheme petition in the bud. Even if an order for winding-up the company is made, the immovable property of the company cannot be sold off till the court records decision on one or other scheme petitions, because, if one or the other scheme is sanctioned, the entire company, including the plant, will have to be handed over to the person whose scheme is approved and sanctioned by the court. And in order not to render the scheme petition in fruituous, if not abortive, the court cannot proceed to sell off the assets including the plant. And if to those who have proposed the scheme, the court is powerless to hand over the plant, the resultant situation is that the plant must remain idle, unused, unutilized and permit it to rust. The dilemma was so

posed as if it defies any solution. The situation, however, does not appear to be that hopeless as is sought to be pointed out. There is a way out and, in my opinion, the way is strictly legal and falls within the four corners of section 457.

15. When a petition for winding up the company is presented, it is open to the court under section 450(1) to appoint a provisional liquidator. Section 450(1) reads as under :

"450 - (1). At any time after the presentation of a winding-up petition and before the making of a winding-up order, the court may appoint the official liquidator to be the liquidator provisionally." Two termini therein envisaged are : at the one end of the spectrum the date of presentation of the winding-up petition and at the other end, the date on which the winding-up order is made. As soon as a winding-up order is made, it relates back to the date on which the petition for winding up a company is presented. In between these two terminal dates, the court is seized of the matter, and the court has power to appoint the official liquidator as provisional liquidator. Now, merely because a provisional liquidator is appointed, he does not enjoy all the powers of the liquidator and it is open to the court to specify and limit his powers. Section 450(3) in this connection may be referred to. It reads as under :

"450(3). Where a provisional liquidator is appointed by the court, the court may limit and restrict his powers by the order appointing him or by a subsequent order; but otherwise he shall have the same powers as a liquidator."

16. It would clearly appear that while appointing provisional liquidator, it is open to the court to limit or restrict his powers by the order appointing him and a subsequent order can also be made specifying and restricting his powers to those conferred by the court. Undoubtedly, if limitation on the power of the provisional liquidator is not specifically prescribed in the order appointing him or in any subsequent order, obviously the provisional liquidator will have all the powers of a liquidator of the company which is ordered to be wound up. But it is incontrovertible that the court can appoint a provisional liquidator and restrict or limit his powers as deemed proper by the court.

17. Now, section 450(1) specifies the powers of the liquidator in a winding up by the court which he can exercise with the sanction of the court. Amongst others, the liquidator with the sanction of the court has the power to carry on business of the company so far as may be necessary for the beneficial winding up of the company. It is true that the liquidator cannot carry on business for any other purpose except the purpose for which the power is conferred upon him, namely, for the beneficial winding up of the company. He cannot carry on a speculative commercial activity. He cannot carry on any business on the ground that it would be beneficial to the creditors or contributories. The jurisdictional fact which must be ascertained and established for the exercise of the power by the liquidator to carry on business of a company, is that carrying on of business of the company is necessary for the beneficial winding up of the company. In exercise of these

powers, if it is satisfactorily established that the liquidator did carry on business of the company for the beneficial winding up thereof, the law goes so far as to protect the liquidator to give priority to the debts incurred by him during post-liquidation period, for carrying on business of the company over pre-liquidation creditors. That is the ambit and width of his power. The provisional liquidator will have the same powers as the power of the liquidator subject to the order of the court appointing him which might limit or restrict his powers. And assuming that the powers of the provisional liquidator are neither limited nor restricted, the provisional liquidator will have the same power as the liquidator, namely, that he can carry on business of the company so far as may be necessary for the beneficial winding up of the company. Undoubtedly, he can exercise these powers with the sanction of the court.

18. A winding-up petition is before the court, and unless a situation providing alternative to winding up develops, namely, one or the other scheme petition goes through, this company's destiny is writ large on the wall. It must be wound up. It will have to be wound up. There is no alternative. Now, if it is to be wound up ultimately, the next inevitable step must follow as a necessary corollary, namely, the liquidator will have to sell the immovable property of the company is the plant with the structure in which it is housed. If ultimately this plant has to be sold off, it would indisputably fetch better price if it is working at the relevant time, than if the plant is allowed to remain idle and rust. This does not require elaboration and no one questioned it. Therefore, assuming that winding up is the unavoidable destiny of this company, the court in a given case may permit the provisional liquidator to run the business of the company for the avowed object of its beneficial winding up. Granting the permission to run the plant on the terms on which the court is inclined to grant permission would certainly be for the beneficial winding-up of the company. Not to repeat, a running and working plant would fetch better price than an idle and rusting plant. The compensation would ensure against depreciation and provide further assets in the hands of the liquidator. And as an arrangement during the interregnum when the scheme petitions are processed through, it is unquestionable that the proposal to work the plant would considerably contribute to the beneficial winding up of the company. And if winding up is avoided on the sanctioning of one or the other scheme, the arrangement sanctioned by this order is beneficial to every one. I would in this connection refer to *In re Great Eastern Electric Co. Ltd*<sup>1</sup>., The directors of the company made a declaration of solvency and four days thereafter passed a resolution that the company should be wound up voluntarily and appointed Mr. Houston as liquidator. Mr. Houston carried on the business of the company for about a year and two months, when an order was made for compulsory winding-up of the company and a new liquidator was appointed. The assets of the company were then realized and the liquidator sought the directions of the court as to the orders in which the creditors should be paid. A question was also raised challenging the action of the liquidator in carrying on business of the company after the resolution for voluntary winding up of the company was adopted. Simonds J., speaking for the court, observed as under :

"In considering whether the liquidator was properly exercising his statutory power,

<sup>1</sup>(1941) 1 All England Reporter 409 : (1942) 12 Comp Cas 96, 99 (Ch D)

I am guided by the words of Sir George Jessel M.R. in *Re Wreck Recovery and Salvage Co<sup>2</sup>*, where, with regard to the identical language of section 95 of the Companies Act, 1862, he said at page 360 : 'Now the word "necessary" means that it must not be merely beneficial but something more, though the necessity must be determined by the court having regard to all the circumstances of the case. It does not, of course, mean that no other course would be possible. Then it must be for the "beneficial winding-up" of the business of the company .... not with a view to its continuance'." It thus appears well established that if once a liquidator was satisfied that it was necessary for the beneficial winding-up of the company that the business of the company shall be carried on, the liquidator has a right to carry on the business for the sole purpose of beneficial winding up. It often happens that the business of the company is its most valuable asset, and in such a case it may be very proper to carry on the business and sell it as a going concern : to stop it would impair, if not destroy, its value (vide Palmer's Company Precedents, Part II, 17th edition, page 256, quoted by A. Ramaiya in Guide to the Companies Act, seventh edition, page 697). That exactly is my approach at present. Before giving in, a last minute attempt was to contend that the power to carry on business for beneficial winding up cannot be exercised when the attempt it to avoid winding up of the company, or to be specific, pending the processing of a scheme petition. Power of such wide amplitude cannot be curtailed or whittled down so as to make it colourless and ineffective. This very power can be exercised pending reconstruction of a company, or for effective transfer. Winding up may or may not precede reconstruction. And a scheme of compromise and/or arrangement may bring about reconstruction. This very power can be resorted to facilitate reconstruction.

19. If incidentally winding-up order is not required to be made, and the scheme goes through, it is all the more better. And that would not deprive me of the jurisdiction for making the present order. In *Willis v. Association of Universities of the British Commonwealth*<sup>3</sup>, Lord Denning M.R. carried the proposition a little further, when he said that :

"Beneficial winding up' referred, he said, to financial benefit. I cannot take this view. Even in an ordinary commercial company the objective of a winding up need not be financial. It may be before reconstruction, and the business can be carried on so as to facilitate the transfer ..... It may be to ensure a smooth take-over by the new chartered company, and that is best achieved by keeping all the activities going until the transfer."

20. To any one having lurking doubt about the court's jurisdiction, this observation of Lord Denning M.R. would provide a complete and satisfactory answer. It need not be stated that the relevant provision of the English company law and our company law on this point is almost in *pari materia*.

21. Apprehension voiced in this approach is that if by continuing the commercial activity by working the plant, further debts are to be piled up, the secured creditors as well as

<sup>2</sup>(1880) 15 Ch D 353 (CA)

<sup>3</sup>(1964) 2 All England Reporter 39 : (1965) 35 Comp Cas 412(CA)

unsecured creditors and in the ultimate analysis the contributories are likely to suffer.

That is a situation one must take into account and possibly guard against. But while running the plant, arrangement is so made, that not only there will be no further piling up of the debt, but by the steps, which the court proposes to take, the debt of the company is likely to be reduced. It could, therefore, be said with confidence that carrying on business of the company is absolutely necessary for the beneficial winding up of the company, and ultimately winding up can be avoided, which everyone must strive to avoid, and if a scheme goes through, certainly, the sponsor of the scheme would be the happiest man, because he gets a healthy working efficient plant as against a carcass. Care must, of course, be taken to see that no unfair advantage is taken by a person to whom plant is given for its working and operation. Care must further be taken to see that no right is created in him which he can set up against the liquidator if ultimately the winding up order is made. Care will have also to be taken to see that in the event one or the other scheme goes through, the sponsor would not experience difficulty in getting possession of the plant. But with this reservation, there is no doubt in my mind that it would be strictly legal and absolutely just and proper that the court should consider the proposal either of Mr. Malhotra or GISCO to run the plant, pending the final decision either on the scheme petition or on the winding-up petition.

22. Question then is which summons deserves to be granted : One of Mr. Malhotra, i.e., Company Application No. 32 of 1975 in Company Petition No. 32 of 1975 or of GISCO in Company Application No. 56 of 1975 in Company Petition No. 32 of 1975. It appeared to be a difficult choice, both of them having sponsored competitive rival schemes. The terms offered by them were attractive in parts only. In this situation, it was but meet that they must be allowed to outbid each other for the ultimate benefit of this company and those interested in the company, such as the creditors - both secured and unsecured - and members. They were directed to give the bid in respect of compensation payable in advance per month in the open court, each having a right to raise the bid. It was in terms an open auction. Starting with an offer of Rs. 35,000 as and by way of compensation per month payable in advance, the highest bid was Rs. 1,70,000 per month payable in advance and after giving the other side time to consider whether he wants to give any higher bid the auction was closed. After the court was informed that GISCO would not go higher, the bid of Mr. Malhotra was accepted. There cannot be any doubt that the bid is the highest and best; and all who appeared in the matter gave their consent that the court should accept the bid of Mr. Malhotra.

23. It need not be restated that in taking this action, I am not exposing the company to any risk. The liability of the company has become crystallized when it closed down or especially the date

on which a winding up petition is presented. Thereafter, the standing charges are mounting up. They include the claim of the Gujarat Electricity Board, the interest payable to the secured creditors, interest payable to the State Bank of India and workers are idle. There are some very highly skilled technicians in the employ of the company, who if once they leave the company's service, their replacement would be very difficult. The company has been making losses is a statement which need not now be repeated. If the offer of Mr. Malhotra is accepted, he would be paying Rs. 1,70,000 in advance per month. He would be re-employing all the workmen who are prepared to be re-employed. Once the plant is working, the standing charges would be taken care of. One can take care of the interest payable to secure creditors and other claims against the company and there would yet be residue from which the liability of the unsecured creditors can to some extent be reduced. The plant will be worked by Mr. Malhotra on his own personal responsibility. He will be liable and responsible for all debts incurred by him hereafter. Therefore, the company is not at all being exposed to any further risk, except saying that if the plant is working, it is bound to depreciate, but depreciation is being taken care of by the income in the form of compensation. Viewed from any angle, it is just and proper that the offer of Mr. Malhotra should be accepted and the plant should be worked.

24. Accordingly, Company Application No. 32 of 1975 in Company Petition No. 32 of 1975 sponsored by Mr. Ramlubhaya R. Malhotra is granted subject to the following specific conditions :

- (i) In order to facilitate the effective handing over of the plant to Mr. Malhotra, the court would appoint the official liquidator as provisional liquidator, with only restricted and limited power of taking an appropriate deed from Mr. Malhotra, giving him possession and custody of the plant under the overall and continued supervision of the provisional liquidator with liberty to Mr. Malhotra to work the plant as considered proper by him. What is given to him is not the lease of the immovable property of the company, but the factory or the plant for its working and which is held not to be "premises" within the meaning of the expression in Bombay Rents, Hotel and Lodging House Rates Control Act, 1974 (vide *Mangubhai Ranchhodji Desai v. Alibhai*<sup>4</sup>,
- (ii) Mr. Malhotra should also be permitted to use the bungalow which was being used in the past by the managing director as well as office premises. He would be using the factory under the continued and overall supervision of the provisional liquidator and he accepts it under a distinct understanding that he is neither a lessee nor a licensee. It is just a permissive user of the plant in the possession of provisional liquidator. Supervision on behalf of the court is that of the provisional liquidator. However, he is an occupier of the factory premises, office building and buildings of the company for the purpose of the Central Excises and Salt Act.
- (iii) It must be made distinctly clear that Mr. Malhotra fully understands the implication of section 450(2) in that on the appointment of a provisional liquidator, all the property and effects of the company shall be deemed to be in the custody of the court as from the date

of the order of the appointment of the provisional liquidator. Therefore, while taking custody from the provisional liquidator, as if the provisional liquidator is parting with it on behalf of the court, two undertakings filed by Mr. Malhotra, one on 24th July, 1975, and another also on the same day, are to be treated as integral parts of this order and are deemed to have been given pursuant to this order. In other words, Mr. Malhotra should return possession to the court within six weeks after the court directs him to do so without setting up any title as against the provisional liquidator. But it is distinctly understood that Mr. Malhotra is under an obligation to work the plant till either one or the other scheme petition is finally adjudicated upon by this court and sanctioned by this court, or in the event both fail, six weeks after the failure of the

<sup>4</sup>(1961) 2 GLR 102 (Guj))

last of the two petitions at present pending before the court. If Mr. Malhotra fails to work and operate the plant till the decision on the scheme petitions, he would none the less be liable for payment of compensation as provided in this order.

(iv) If the scheme of Mr. Malhotra is rejected and if he proposes to file an appeal, he must seek directions of this court on the question of his continuing use of the factory or the plant of the company.

(v) Every month the amount of compensation of Rs. 1,70,000 is payable by him in advance and deposited with the provisional liquidator.

(vi) The provisional liquidator should take out insurance of the plant and building structures but it will be for Mr. Malhotra to take out insurance if he so desired of the goods under manufacture and stock-in-trade.

(vii) Under the orders of the court dated 2nd July, 1975, inventory of the assets and books of accounts of the company has been made except of the goods which are in the custody of the State Bank of India. Mr. Malhotra will be entitled to verify this inventory with the assistance of the court officer who has now become the provisional liquidator, and it becomes binding on him.

(viii) Mr. Malhotra should return possession subject to normal depreciation as and when he is required to part with the custody of the plant pursuant to the direction given in this order and at that time also, the provisional liquidator should verify the condition in which the plant is returned and it must correspond to the inventory.

(ix) If any vital part of the machinery costing more than Rs. 1,000 is required to be replaced for the efficient working of the plant and has a life of a reasonably long period, replacement should be made after consultation with the provisional liquidator and in the event of the custody of the plant being returned to the provisional liquidator in any of the eventualities herein envisaged, Mr. Malhotra would be entitled to be reimbursed to the proportionate costs of that part subject to normal depreciation.

(x) The provisional liquidator may appoint with the sanction of the court a legal adviser for taking a proper deed from Mr. Malhotra, if it is necessary.

(xi) All the workmen and members of the staff who were working and are in the employment of the company till the last day, if they offer for continued employment, Mr. Malhotra would be under an obligation to engage them without varying or altering their conditions of service in a gradual process of starting of the plant and for that he would give appropriate notice.

(xii) Whatever records are necessary may be given to Mr. Malhotra except the books of accounts and production records.

25. If, while implementing and carrying into operation this order, any difficulty is experienced, the parties are at liberty to move. Subject to this, Company Application No. 32 of 1975 is hereby granted. Parties to bear their respective costs. It is directed that the plant must be on steam latest by 15th August, 1975.

26. In view of the order herein made, Company Application No. 56 of 1975 stands disposed of. Order accordingly.

.