

UNITED BANK OF INDIA
v.
THE OFFICIAL LIQUIDATOR AND ORS.

OCTOBER 6, 1993

[KULDEEP SINGH AND S.P. BHARUCHA, JJ.]

Companies Act, 1956, Section 535—Intent and meaning of—To protect the creditors of the company in liquidation—Onerous covenants imposing heavy burden upon company—Court to satisfy itself about the existence of such covenants before granting leave to disclaim them—Purchaser claiming diminution in price on ground of defect in title or description of property—Not to be allowed—Official liquidator sells property under orders of court—He does not hold out any guarantee or warranty in respect of such property

The appellant—Bank filed a suit against a company in liquidation for a decree in the sum of Rs. 1,81,07,623.64 owed to it by the company with interest. Upon the application of the appellant the official liquidator was appointed receiver of the goods, stock and assets hypothecated by the company in liquidation to the Bank and all immoveable property including the said land the factory premises which stood upon it, which had been mortgaged to the Bank.

The High Court in the winding up proceedings, directed the sale of the property and assets of the company in liquidation. The sale was to be effected by the official liquidator as directed by the Court. Public advertisements were issued consequent upon such directions and sealed offers were received. The Trust, being the lessor of the said Land opposed the sale and took out a Judge's summons asking the High Court to direct the official liquidator under Section 535 of the Companies Act to disclaim the said land because it as burdened with onerous covenants. The Company Judge directed the official liquidator to return the offers to the parties who had made them. The Company Judge further made the Judge's summons absolute and directed the official liquidator to disclaim the said land and hand over possession thereof to the Trust.

The appeal preferred by the Bank was dismissed by the Division Bench.

- A Being aggrieved by the High Court's decision the appellant-Bank preferred the present appeal.

Allowing the appeal, this Court

- B HELD: 1.1 The intention of Section 535 of the Companies Act, 1956 is to protect the creditors of the company in liquidation and not mulct them by reason of onerous covenants. The power under Section 535 is not to be lightly exercised. Due care and circumspection have to be bestowed. It must be remembered that an order permitting disclaimer, while it frees the company in liquidation of the obligation to comply with covenants, puts the party in whose favour the covenants are to serious disadvantage. The Court must, therefore, be fully satisfied that there are onerous covenants, which impose a heavy burden upon the company in liquidation, before giving leave to disclaim them. [10-A-C]

- D 1.2. In the instant case, the High Court ought to have appreciated that it was rather unlikely that the party who had the benefit of onerous covenants would apply for disclaimer and ought to have viewed the official liquidator's application to disclaim made pursuant to the Trust's letter to him in that behalf in that light. It is difficult to see how such a large area of land leased to the company in liquidation for 99 years with the option of renewal for a further 99 years for the meagre rent of Rs.1200 per annum can be said to be land burdened with onerous covenants. The High Court was not justified in debating and holding in proceedings under Section 535 that the lease of the said land had been validly terminated so that the official liquidator became liable to pay *mesne* profits to the Trust; and that this coupled with arrears of rent, in five figures, made the lease onerous.
- F The Bank's offer to pay the arrears of rent to the Trust should have been accepted by the High Court. The Bank to protect and keep alive its security, had put official liquidator in funds in regard to other matters and was eager to meet this liability. Had this been done, valuable property of the company in liquidation could have been retained so that its undertaking, which stood on the said land, could have been sold as a running concern, as has been done upon intervention of this court, for the benefit of its creditors. [10-C-F]

- H 2. When the official liquidator sells the property and assets of a company in liquidation under the orders of the court he cannot and does not hold out any guarantee or warranty in respect thereof. This is because

he must proceed upon the basis of what the records of the company in liquidation show. It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he proposes to purchase. He cannot after having purchased the property on such terms claim diminution in the price on the ground of defect in title or description of the property. The case of the official liquidator selling the property of a company in liquidation under the orders of the court is altogether different from the case of an individual selling immovable property belonging to himself. [11-F-H; 12-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 405 of 1986.

From the Judgment and Order dated 17.6.1985 of the Calcutta High Court in Appeal No. 302 of 1983.

G.L. Sanghi, S.K. Mehta, Dhruv Mehta and Aman Vachher for the Appellant.

Dr. A.M. Singhvi, Ashok Sen, Tapas Ray, I. Ghosh, Som Mandal (For M/s Fox Mandal and Co.), S.K. Jain, M.L. Lahoty, Prem Sunder Jha, Ms. Shipra Khanzanchi, M.A. Krishnamurthy, Rathin Das, H.K. Puri, G.S. Chattejee, A.K. Srivastava, Indra Makwana, D.P. Mukherjee, Utpal Mazumdar and Ms. Sarla Chandra for the Respondents.

The Judgment of the Court was delivered by

BHARUCHA, J. The Naskarpara Jute Mills Co. Ltd. was wound up under orders of the High Court at Calcutta on 28 July 1981 and the Official Liquidator was appointed its liquidator.

The company had taken on lease from Bharat Abhyudaya Cotton Mills Ltd a lease of about 7 bighas of land under a deed dated 2nd July, 1931. The lease was for 99 years and permitted renewal on the same terms for another 99 years. The rent under the lease was Rs. 1200 per annum. On 25th September 1935 the lessor's interest in the said land was purchased by Brij Mohan Saraogi who settled the same upon a trust called the Brij Mohan Saraogi Charitable Trust. The company attorned to the Trust as its tenant in respect of the said land. At the time when the winding up petition was filed the company had been in default of rent and consent terms had been arrived at whereunder the company had undertaken to pay the arrears.

A On 13th August, 1981, the United Bank of India filed a suit against the company in liquidation after having obtained the leave of the court under Section 446 of the Companies Act for a decree in the sum of Rs. 1,81,07,623,64 with interest upto 31st July 1981. Upon the application of the Bank the Official Liquidator was appointed Receiver of the goods, stocks and assets hypothecated by the company in liquidation to the Bank and all immoveable property including the said land and the factory premises which stood upon it, which had been mortgaged to the Bank.

C On 8th October 1982 the High Court, in the winding up proceedings directed the sale of the property and assets of the company in liquidation. The sale was to be effected by the Official Liquidator as directed by the court. Public advertisements were issued consequent upon such directions and sealed offers received on 3rd December 1982. The Trust opposed the sale, so that consideration of the offers was deferred. On 25th January, 1982 the Trust wrote to the Official Liquidator asking him to disclaim the said land and surrender its possession to the Trust because it was burdened with onerous covenants. On 31st January, 1983 the Trust took out a Judge's Summons asking the High Court to direct the Official Liquidator under Section 535 of the Companies Act to disclaim the said land because it was burdened with onerous covenants. The Bank opposed the Judge's Summons and pleaded that the said land was a security for the loans that it had advanced to the company in liquidation and that it should be available to the secured the unsecured creditors: the covenants of the lease were not onerous and there was a saleable interest in the said land. On 4th February, 1983 the Company Judge directed the Official Liquidator to return the offer to the parties who had made them. On 7th July, 1983 the Company Judge made the Judge's Summons absolute and directed the Official Liquidator to disclaim the said land and hand over possession thereof to the Trust.

G The Bank appealed against the order of the Company Judge. The Division Bench which heard the appeal dismissed it. It held, inter alia, that the lease of the said land stood forfeited and/or terminated by reason of the Trust's notice dated 25th January, 1983. It held that no notice in writing to the company in liquidation for remedy of the breach was necessary because the Trust did not want to file a suit for ejectment. The Division Bench rejected the contention based upon Section 114 of the Transfer of Property Act because the Official Liquidator was not in a position to apply

for any relief against forfeiture by tendering arrears of rent and interest. As the lease stood forfeited, the said land ceased to be a part of the assets of the company in liquidation and the company in liquidation had from the date of the notice of termination no right or interest therein. It could not therefore, be transferred or sold by the Official Liquidator. Inasmuch as, in spite of forfeiture of the lease, the Official Liquidator was continuing in possession of the said land, he was liable to pay mesne profits for such wrongful possession or occupation. Further, on account of arrears of rent a huge amount was due to the Trust. Therefore, the said land was onerous.

It may be mentioned that the Bank had desired to pay to the Trust the arrears of rent but the Division Bench declined to permit it to do so.

The Bank thereupon filed a Special Leave Petition to appeal against the judgment and order of the Division Bench.

There are several orders of this Court in the proceedings which need to be referred to. Special leave to appeal was granted on 27th January, 1986 and the judgment under appeal was stayed. On 28th January, 1987 learned counsel appearing for the various workers union of the company in liquidation said that the unions wanted to explore the possibility of taking over the interest of the Trust with the object of running the mills of the company in liquidation. They stated that their clients would explore the possibility of buying the interest of the trust for about Rs. 30 lacs. On 30th April, 1987 the court passed an order which said, inter alia, this:

We have heard this matter in part today. In order to arrive at a proper adjustment of the rights to the parties judicially we direct that the land and assets of Baskar Para Jute Mills Company Limited (in liquidation) and as also the lease hold land which is the subject matter of this appeal be sold by the Liquidator as a going concern as quickly as possible by 31st August, 1987. The Official Liquidator of High Court Calcutta should take immediate steps to implement this order and out of the sale proceeds, after meeting the expenses of sale which are financed by the appellant Bank, the Liquidator will pay for the time being subject to adjudication of all the rights of the parties, a sum of Rs. 7.5 lacs to Brij Mohan Saraogi charitable trust (respondents No.2 and 3 the Trustees of the said Trust) in respect of their rights, claimed over the 7 bighas and 15 kattas of land. The said lesae hold property

- A shall be sold free of lease hold rights alongwith the other entire assets of the company consisting of movable and immovables as a going concern without dismantling any portion and on as is where is basis. More than 9 lacs is claimed to have been paid to the official whenever by the Bank. Further amount to be given by the bank to
- B Official dictator/Receiver for conducting the same. These sums are to be paid to the bank at the first instance out of the sale proceeds. After payment to the bank the Liquidator will pay for the time being a sum of Rs.7.5 lacs to the trustees of the said trust in respect of their right claimed over the 7 bighas and 15 kattas of land and the balance sale proceeds to be invested in termed deposit with
- C United Bank of India till determination by this Hon'ble Court.

On 9th May, 1988 the offer of one Shyam Sundar Agarwal to purchase the assets and properties of the company in liquidation was accepted. The Court said:

- D The consideration price will be Rs. 2,60,00,000. Out of which Shyam Sundar Agarwal will pay Rs.30 lacs within two weeks from today with the United Bank of India in the name of the Official Liquidator. The balance amount will be paid in 24 equal monthly instalments. Shyam Sunder Agarwal will furnish Bank Guarantee
- E for Rs. two crores and thirty lacs to the satisfaction of the Liquidator concerned within six weeks from today. All the dues of the workers present and past will be settled by Shyam Sunder Agarwal with the workers who are represented by various Unions by Mr. A.K. Sen and P.R. Banerjee appearing for Unions and they agree
- F to run the mill in adjustment with him as a going concern. The monthly instalments as aforesaid will be deposited with the United Bank of India in the name of the Official Liquidator.

- G Shyam Sundar Agarwal will not be liable for any past liability except in respect of the workers dues. If the State of West Bengal has any rights on land about which there is no adjudication, this order will not prejudice such rights, if any. The appropriate authorities namely the Municipalities concerned and other authorities will render all assistance to the person concerned i.e.. Shyam Sunder Agarwal for restoring all electricity and water
- H connections on payment of such arrears which the Official Liqui-

dator will ensure that such payment is made. The possession will be given to Shyam Sundar Agarwal after depositing Rs. 30 lacs forthwith. In default of making any of the payments or in default of furnishing the Bank Guarantee or in the default of payment of any two instalments in the manner indicated above or in not keeping the Bank Guarantee alive the Official Liquidator will take possession and the amount deposited will stand forfeited. In such a case or in case the mill is not started within a period of eight weeks from today the transaction will fall through and the parties including Dr. L.M. Singhvi's clients and Mr. U.C. Law's clients will be at liberty to apply to this Court for appropriate directions.

An order was made on 20th July, 1988, whereby extensions of time were given to the said Agarwal for payment and for furnishing bank guarantees. On 20th September, 1988, some more time was given to him to furnish bank guarantees. On 30th November 1988 time to furnish a bank guarantee and to make the payment of Rs. 10 lakhs was again extended. The said Agarwal not having made payments as directed, contempt proceedings were initiated against him. On 27th August, 1992, bailable warrants were issued to secure his presence in Court since he had not appeared. The Court stated:

It is not disputed that out of the sale price of Rs. 2,60,000,00 (Rupees two crores sixty lakhs) a sum of Rs. 62,000,00 (Rupees sixty two lakhs) has been paid before 31.12.1988. The balance of Rs. 1,98,00,00 (Rupees one crore ninty eight lakhs) is yet to be paid. By this order we give option to the alleged contemnors to deposit the said sum of Rs. 1,98,000,00 (Rupees one crore ninty eight lakhs) with the Registry of this Court by September 16, 1992. The question of interest on the said amount shall be decided with the main case. The entitlement of the bank to receive the amount and the obligation of the contemnors to pay the same shall also be subject to the decision of this Court.

It had transpired that the said Agarwal was acting on behalf of Triputi Jute Industries (hereinafter referred to as 'Triputi') and contempt notices were issued to it and directors. On 20th October, 1992, the Court recorded that the modalities of payment of Rs. 1,98,00,000 and 15% interest had been suggested by counsel appearing on behalf of Triputi which it considered *prima facie* proper. Triputi was permitted to deposit Rs. 30,00,000 in Court

A by the next day. On 21st October, 1992, the court recorded the undertaking given by Triputi, thus:

B The purchaser Triputi Jute Industries Ltd. through their Director namely Shri Ram Ratan Choudhury (one of the contemnors) and their Principal Officer namely Shri Pritam Kr. Jhawar undertake to pay the amount of Rs. 1,98,00,000 in the following manner :

C (a) Ruppes fifteen lakhs have already been deposited in the Registry of this Court today i.e. October 21, 1992. A further sum of Rs. 15,00,000 shall be deposited with the Registry of this Court by 4.00 p.m. tomorrow i.e. October 22, 1992;

D (b) A further sum of Rs. 70,00,000 (either by way of demand draft or cash) to be deposited with the Registry of this Court on or before December 31, 1992. Balance amount of Rs. 98,00,000 would be paid together with interest due on the total amount Rs. 1,98,00,000 @ 15% p.a. with effect from January 1, 1989 in 12 equal monthly instalments. Each instalment shall be deposited before the end of the month i.e. the first instalment shall be paid on or before January 31, 1993 and all subsequent instalments in similar manner.

E We accept the undertaking given to this Court which we have reproduced above. We further direct that the amount of Rs. 1,98,00,000 with interest shall be paid in terms of the above undertaking within the time specified in the undertaking. Simply because one of the Directors (Contemnors) has given the undertaking it would not mean that the other contemnors or the Directors have been discharged from their liability. They shall equally remained responsible personally as well as in their capacity as the Directors of the company to discharge their liability of paying the amount.

G On 22nd October, 1992, the Court noted the contention of learned counsel for the Trust that he was entitled to claim the price of the said land which had been sold to Triputi and his submission that he should be given part payment in respect thereof out of the amount which had been deposited by Triputi. The Court said that it was of the view that the rights of the Trust, as of all other creditors, had to be determined either by the Court or by any other authority under the directions of the Court and that it was not inclined for the moment to go into the question. On 8th September,

1993, the Court noted that pursuant to its order dated 27th August, 1992, the sum of Rs.1 crore 98 lakhs had been deposited in Court by Triputi and that the various contentions raised by the parties were now ripe for final adjudication. A

First, as to the appeal. We have heard Mr. G.L. Sanghi for the Bank and Dr. A.M. Singhvi for the Trust. Dr. Singhvi is, we think, right in saying that this court's order of 30th April, 1987, really makes the appeal infructuous because, with a view to arriving at a proper adjustment of the rights of the parties judicially, this Court, with the consent of the Trust, directed the Official Liquidator to sell the assets and properties of the company in liquidation, including the said land, and it directed the Official Liquidator to pay to the Trust the sum of Rs. 7.5 lakhs, subject to adjudications of all the rights of the parties, in respect of Trust's rights over the said land. The Court made it clear that the said land was to be sold free of the lease. The surviving issue, therefore, as Dr. Singhvi rightly pointed out, and which Mr. Singhvi did not really dispute, was that if was for the Court to assess what should be paid by the Official Liquidator from out of the funds of the company in liquidation to the Trust as and by way of compensation for its rights in the land. As we have pointed out, the said land, though of a substantial size, is subject to a 99 year lease entered into in July, 1931, with a renewal clause for a further 99 years at a rent of only Rs. 1200 per annum. That the lease extends for another 37 years, that it is liable to renewal for a further 99 years, and all at the meagre rental of Rs. 1200 per annum must substantially depress the value of the lessor's interest in the said land. In our view, therefore, the Trust would be amply recompensed if it received as compensation for the disposal of its rights in the said land and for arrears of rent the sum of Rs. 10 lakhs from the Official Liquidator out of the funds of the company in Liquidation. The Trust having already received the amount of Rs. 7.50 lakhs pursuant to the order dated 30th April, 1987, we shall now direct the Official Liquidator to pay to the Trust the balance amount of Rs. 2.50 lakhs within 12 weeks from today in full and final settlement of the Trust's claims against the company in liquidation of whatsoever nature in respect of the said land. B
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While the aforesaid direction will dispose of the appeal, we would like to say, having heard counsel on the merits of the appeal, that we are not satisfied that the Division Bench appreciated the purpose of the provisions of Section 535 of the Companies Act. Thereunder the High H

- A Court may give leave to the Official Liquidator to disclaim land of any tenure which is part of the property of the company in liquidation if it is burdened with onerous covenants. The intention of Section 535 is to protect the creditors of the company in liquidation and not mulct them by reason of onerous covenants. That power under Section 535 is not to be lightly exercised. Due care and circumspection have to be bestowed.
- B It must be remembered that an order permitting disclaimer, while it frees the company in liquidation of the obligation to comply with covenants, puts and party in whose favour the covenants are to serious disadvantage. The court must therefore, be fully satisfied that there are onerous covenants, covenants which impose a heavy burden upon the company in liquidation,
- C before giving leave to disclaim them.

- We are of the view that the High Court ought to have appreciated that it was rather unlikely that the party who had the benefit of onerous covenants would apply for disclaimer and ought to have viewed the Official Liquidator's application to disclaim made pursuant to the Trust's letter to him in that behalf in that light. We find it difficult to see how such a large area of land leased to the company in liquidation for 99 years with the option of renewal for a further 99 years for the meagre rent of Rs. 1200 per annum can be said to be land burdened with onerous covenants. We do not think that the High Court was justified in debating and holding in proceeding under Section 535 that the lease of the said land had been validly terminated so that the Official Liquidator became liable to pay mesne profits to the Trust, and that this coupled with arrears of rent, in five figures made the lease onerous. We are also of the view that the Bank's offer to pay the arrears of rent to the Trust should have been accepted by the High Court. The Bank to protect and keep alive its security, had put Official Liquidator in funds in regard to other matters and was eager to meet this liability. Had this been done valuable property of the company in liquidation could have been retained so that its undertaking, which stood on the said land, could have been sold as a running concern, as has been done upon intervention of this Court, for the benefit of its creditors.

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- We now consider the contempt proceedings on the one hand and the application on behalf of Triputi on the other for diminution of the sale price by reasons of the fact that, according to Triputi, the Official Liquidator had not been able to hand over to Triputi possession of certain
- H properties that were sold by him to it, which, it is alleged, the company in

liquidation did not own. The amount of Rs. 1 crore 98 lakhs having been paid, what this really boils down to is whether Triputi should be made liable to pay interest at the rate of 15% per annum thereon.

In our view, the complete answer to Triputi's allegation in regard to the failure of the Official Liquidator to hand over to it possession of certain properties which were sold to it, which, according to it, the company in liquidation did not even own, is contained in clause 2 of the Terms and Conditions of Sale upon the basis of which the property and assets of the company in liquidation were sold by the Official Liquidator to Triputi under the orders of this Court. Clause 2 reads thus :

2. The sale will be as per inventory list on 'as is where it is basis' and subject to the confirmation of the Hon'ble Supreme Court of India. The Official Liquidator shall not provide any guarantee and/or warranty in respect of the immovable properties and as to the quality, quantity or specification of the moveable assets. The intending purchaser must satisfy themselves in all respect as regards the moveable and immovable assets, as to their title, encumbrances, area, boundary, description, quality, quantity, and volume etc. and the purchaser will be deemed to offer with full knowledge as to the description, area etc. of the properties and defects thereof, if any. The purchaser shall not be entitled to claim any compensation or deduction in price on any account whatsoever and shall be deemed to have purchased the property subject to all encumbrances, liens and claims including those under the existing legislation effecting labour, staff etc. The Official Liquidator shall not entertain any complaint in this regard after the sale is over. Any mistake in the notice inviting tender shall not vitiate the sale.

(Emphasis supplied)

When the Official Liquidator sells the property and assets of a company in liquidation under the orders of the Court he cannot and does not hold out any guarantee or warranty in respect thereof. This is because he must proceed upon the basis of what the records of the company in liquidation show. It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he proposes to purchase. He cannot after having purchased the property on such terms then claim diminution in the price on the

- A ground of defect in title or description of the property. The case of the Official Liquidator selling the property of a company in liquidation under the orders of the Court is altogether different from the case of an individual selling immovable property belonging to himself. There is, therefore, no merit in the application made on behalf of Triputi that there should be a diminution in price or that it should not be made liable to pay interest on the sum of Rs. 1 crore 98 lakhs.
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It is true, as was pointed out by Mr. A.K. Sen, learned counsel for Triputi, that on 27th August, 1992, this Court had said that the question of interest on the sum of Rs. 1 crore 98 lakhs would be decided with the main case. What must also be noted is the unequivocal undertaking given on 21st October 1992 by Triputi to Court, which the Court accepted, wherein it was stated, Balance amount of Rs. 98,00,000/- would be paid together with interest due on the total amount Rs. 1,98,00,000/- @ 15 p.a. with effect from January 1, 1989 in 12 equal monthly instalments". We have already referred to the various orders of this Court which indicate quite clearly with what reluctance and over what span of time Triputi paid the sum of Rs.1 crore 98 lakhs; that itself makes the payment of interest thereon appropriate. Coupled therewith is the undertaking aforementioned. We are, therefore, of the view that Triputi must pay interest upon the amount of Rs.1 crore 98 lakhs at the rate of 15% per annum from 1st January 1989 till payment.

E Such payment shall be made within 12 weeks from today. We make it clear that in the event that the amount of interest as aforementioned is not paid within 12 weeks from today, it shall be open to one or more of the aggrieved parties to take appropriate proceedings against Triputi and its Directors.

- F Civil Appeal No.405 of 1986 is disposed of with the following direction: The judgment and order under appeal is set aside. The Official Liquidator shall pay to the Brij Mohan Saraogi Charitable Trust and the Trust shall receive the sum of Rs.10 lakhs out of the funds of the company in liquidation in full and final settlement of its claims against the company
- G in liquidation of whatsoever nature in respect of the said land. The sum of Rs. 7.50 lakhs having already been received by the Trust pursuant to this Court's order dated 30th April, 1987, the Official Liquidator is directed to pay to the Trust the balance amount of Rs. 2.50 lakhs within 12 weeks.

- H Upon Contempt Petition No.53 of 1989 in the aforementioned Civil

Appeal No.405 of 1986 the only order is the Triputi Jute Industries shall pay to the Official Liquidator interest on the sum of Rs. 1 crore 98 lakhs at the rate of 15 per cent per annum from 1st January, 1989 till payment within 12 weeks from today. In the event that such payment is not made within 12 weeks from today, it shall be open to one or more of the aggrieved parties to take appropriate proceedings against Triputi and its Directors.

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The amount of interest as aforesaid shall be paid into the account of the Official Liquidator with the United Bank of India, Calcutta. The amount of Rs. 1 crore 98 lacs and of interest as aforesaid shall be disbursed and/or utilised by the Official Liquidator under the orders of the Company Judge. All further proceedings in liquidation shall be under the directions of the Company Judge.

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All other civil miscellaneous applications and interim applications in Civil Appeal No.405 of 1986 do not survive and are dismissed.

There shall be no order as to costs.

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Appeal allowed.