

Bank Of Maharashtra vs Pandurang Keshav Gorwardkar & Ors on 7 May, 2013

Equivalent citations: AIR 2013 SUPREME COURT 2036, 2013 (7) SCC 754, 2013 AIR SCW 2864, 2013 (4) ABR 390, (2013) 2 GUJ LH 268, (2013) 3 SCT 119, (2014) 1 JLJR 112, (2014) 3 CAL HN 100, (2013) 2 BANKCAS 697, (2013) 2 CLR 42 (SC), (2013) 4 CURCC 187, AIR 2013 SC (CIV) 1594, (2013) 2 KER LT 701, (2013) 4 MAD LW 708, (2014) 1 PAT LJR 258, (2013) 114 CORLA 477, (2013) 6 SCALE 716, (2013) 3 CALLT 25, 2013 (4) KCCR SN 331 (SC), (2013) 4 BOM CR 25

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Bench: Madan B. Lokur, J. Chelameswar, R.M. Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7045 OF 2005

Bank of Maharashtra

... Appellant

Vs.

Pandurang Keshav Gorwardkar & Ors.

... Respondents

WITH

CIVIL APPEAL NO. 7046 OF 2005

JUDGMENT

R.M. LODHA,J.

These two appeals from the Bombay High Court came up before a two-Judge Bench (B.P. Singh and R.V. Raveendran, JJ.) on 21.11.2005. While granting leave on that day, the Bench was of the view that the question whether the claims of the workmen who claimed to be entitled to payment *pari passu* have to be considered by the official liquidator or whether their claims have to be adjudicated upon by the Debts Recovery Tribunal (for short, 'DRT') is likely to arise in a large number of cases where recoveries are sought to be made pursuant to the certificates issued by the DRT and, therefore, these appeals required consideration preferably by a Bench of three-Judges. This is how these appeals have come up before us.

2. The appellant in one appeal is Bank of Maharashtra and in the other, Indian Banks Association. As a matter of fact, the main appeal is by Bank of Maharashtra. The Indian Banks Association was not a party to the proceedings before the High Court or before the DRT but it has preferred appeal, after permission was granted, as in its view the impugned judgment if implemented would have far reaching implications on the banking industry as a whole.

3. As will appear, the High Court was concerned with the writ petition filed by the workmen/employees of Paper and Pulp Conversions Ltd. (for short, 'Company') praying therein that direction be issued to the Recovery Officer, Debt Recovery Tribunal, Mumbai III (for short 'DRT III') to recover the amount of Rs. 3 crores from Bank of Maharashtra ('the Bank') which was allowed to be withdrawn being the money realised from the sale of movables of the Company and for issuance of further direction to the Recovery Officer to adjudicate the claims/dues of the workmen/employees as per the list annexed with the writ petition and after adjudication, in priority over all the claims, release the amount due to them. The workmen/employees also prayed in the writ petition for direction to the Central Government to make rules laying down procedure to be followed by the Recovery Officer under Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short, '1993 Act').

4. The facts and circumstances on which the workmen relied before the High Court are these: The Company had taken loan from the Bank somewhere in 1980. In 1984-85, the Company faced liquidity problems. One of the creditors of the Company filed a company petition being Company Petition No. 604/1986 before the Bombay High Court in 1986 for winding up of the Company. On 14.01.1987, the company petition was admitted.

5. The Company was closed in 1992. In the same year, a reference was made by the Company to the Board for Industrial and Financial Reconstruction, New Delhi (BIFR) under Section 15(1) of Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA'). On 1.9.1993, BIFR passed an order for winding up of the Company. The Company challenged the order of the BIFR before the appellate authority but was unsuccessful.

6. In or about 1995, the Bank filed a suit against the Company and its Directors for recovery of a sum of Rs. 25,39,08,282.79 with future interest thereon at the agreed rate and cost in the Court of Civil Judge, Senior Division, Panvel. The suit was transferred to the DRT III in 1999 and was numbered

as original application no. 344/1999.

7. On 19.07.2001, the DRT III allowed the original application made by the Bank by directing the Company and its Directors to pay jointly, severally and personally a sum of Rs. 25,49,91,756.94 with cost and interest at the rate of 6% per annum with quarterly rests from the date of application till its realization. The DRT III further directed in its judgment that in the event of failure of the Company and its Directors to pay the amount to the Bank, as directed, the Bank shall be entitled to sell hypothecated and mortgaged and other immovable and movable properties of the Company and the Directors and the sale proceeds shall be appropriated towards due amount.

8. Consequent upon the Judgment dated 19.7.2001, the DRT III issued recovery certificate on 21.08.2001. In the recovery certificate, it was directed that the Recovery Officer shall realize the amount as per the certificate in the manner and mode prescribed under Sections 25 and 28 of the 1993 Act from the certificate debtors as specified in the certificate. As regards legal heirs of one of the deceased directors, it was directed that they would be liable only to the extent they inherited the property from their predecessor in interest.

9. In the recovery proceedings, the workmen/employees of the Company through their Association made an application on 17.9.2003 and prayed that they be allowed to intervene in the matter and their claims be registered before any auction takes place. The workmen also sent a notice to the Company and its Managing Director requesting them to pay their dues. The Company, however, disputed their claim.

10. On 22.01.2004, the Recovery Officer auctioned the movable properties of the Company and received an amount of Rs. 4,70,55,000/- by way of sale proceeds. Of that amount, Rs. 3 crores were disbursed to the Bank on 10.03.2004 and remaining amount of Rs. 1,70,55,000/- was kept aside towards the likely claim of the workmen of the Company.

11. The workmen made an application in the company petition No. 604/1986 before the Bombay High Court on 19.03.2004 for appointment of Provisional Liquidator and for staying further proceedings before the DRT III arising out of the above recovery proceedings. The Bank opposed the application of the workmen before the Company Court and submitted that any restraint on the sale of the Company's assets would adversely affect the interest of not only the secured creditors but also the workmen.

12. By an order dated 08.10.2004, the Company has been ordered to be wound up by the Bombay High Court and official liquidator has been appointed as liquidator of the Company with the usual powers under the Companies Act.

13. On 18.06.2004, the workmen filed a writ petition before the Bombay High Court for the reliefs as noted above. The Bombay High Court in the impugned Judgment after hearing the parties held that the jurisdiction to determine the payment and its priorities was totally vested with the DRT under the 1993 Act and, therefore, the workmen should approach the DRT for the purpose of determination of their claim and consequential payment in respect thereof. The relevant directions

in the impugned judgment read as follows :

1. The Debt Recovery Tribunal is directed to retain the sum of Rs. 1,17,55,000/- and not to disburse the same either to the 2nd respondent or to any other person till and until the claim of the workers is determined.

2. The Presiding Officer of the Debt Recovery Tribunal, Mumbai shall adjudicate upon the claims of the petitioner workers and more particularly of the employees whose names are set out in Exhibit “A” and determine the salaries payable either as and by way of arrears or otherwise to each of the workers.

3. Once the claim of each of the workmen is determined, the Debt Recovery Tribunal shall make payment of the said dues to the workers out of the amount lying with him of the said Rs.

1,17,55,000/- and if there is a short fall, then the Debt Recovery Tribunal will be permitted to call for the said balance amount from the 2nd respondent out of the sum of Rs. 3 crores which has already been withdrawn by the 2nd respondent from the sale proceeds of the auction sale of the movable properties of respondent no. 1.

4. The Debt Recovery Tribunal shall in the meantime deposit the said amount of Rs.1,17,55,000/- in fixed deposit with a nationalized bank initially for period of three months and then renewable for a further period of three months.

14. The High Court in the impugned judgment, inter alia, has also issued certain guidelines to the DRT III while adjudicating the claim of the workmen and other secured creditors for determination of priorities.

15. The main submission on behalf of the Bank in laying challenge to the impugned judgment is two fold, (one) the workmen have no claim or right over the security held by a bank or financial institution. Their dues can only be adjudicated in an appropriate court (e.g. Industrial Tribunal) when the company is not in liquidation and DRT has no competence in this regard and (two) if the debtor company is in liquidation and the security is sold in proceedings before DRT and Recovery Officer, the sale proceeds will be distributed by taking into account the pari passu charge to a limited extent of the “workmen’s portion” as laid down in Section 529(1)(c) proviso read with Section 529A of the Companies Act, 1956 (for short, ‘Companies Act’).

16. Elaborating the above grounds, Mr. Bhaskar P. Gupta, learned senior counsel for the Bank, submitted that under the 1993 Act, DRT has exclusive jurisdiction to entertain and decide applications only from banks and financial institutions for adjudication and recovery of debts due to such banks and financial institutions. The principal purpose of the DRT is adjudication and recovery of dues of the banks and financial institutions. It also has certain ancillary and incidental powers like giving interim orders by way of receiver, injunction, attachment etc. After determination of dues due to banks and financial institutions, the mode of recovery has been provided in Section 25.

However, DRT has not been given any powers to adjudicate the dues of the workmen of the debtor company and none can be read into Section 17 or Section 19 of the 1993 Act. This adjudication is a substantive matter between the workmen and the debtor company (when it is a going concern) and between the workmen and the liquidator when the company is in liquidation. When the debtor company has gone into liquidation, Section 529(1)(c) proviso by a legal fiction creates a *pari passu* charge to a limited extent on the security of the creditor which can be recovered along with the creditor on a priority basis against the sale proceeds of the security under Section 19(19) of the 1993 Act read with Section 529A of the Companies Act. When the debtor company is in liquidation, the dues of workmen can only be determined by the official liquidator including the extent of the deemed charge and the limits. The DRT has neither the competence nor the machinery to adjudicate upon or decide dues of the workmen of the debtor company.

17. Learned senior counsel for the Bank argued that unless an order of winding up was made and the liquidator or the provisional liquidator has been appointed and all the steps as provided in Sections 443 to 450 and 456 are taken, it cannot be said that Company is in winding up and until the Company is in winding up, the workmen of the Company have no claims on the assets of the Company nor do they have any locus to approach the DRT to participate in a proceeding filed by a bank or financial institution; they are not creditors secured or otherwise. The only remedy that the workmen have is to approach the appropriate court e.g., Industrial Tribunal etc., for determination and realization of their dues. Section 19(19) of the 1993 Act and Section 529A of the Companies Act do not help the workmen as they are not secured creditors. However, where the order of winding up has been made and liquidation proceedings started against a Company, Mr. Bhaskar P. Gupta, learned senior counsel would submit that in such a case the liquidator would be in custody and control of all the assets of company. But in view of exclusive jurisdiction conferred on DRT, no leave of the Company Court needs to be taken by DRT for adjudication under Section 17 and execution of the recovery certificate issued under the 1993 Act. In support of his submissions, learned senior counsel placed reliance upon paragraphs 50, 63, 64 to 70 of the decision of this Court in *Allahabad Bank v. Canara Bank & Anr.*[1] . He also referred to *Jitendra Nath Singh v. Official Liquidator & Ors.*[2] which has followed *Allahabad Bank*¹ .

18. Learned senior counsel for the Bank submitted that by virtue of a legal fiction contained in the proviso to Section 529(1)(c) read with Section 529(3)(c), the workmen are entitled to participate along with the concerned creditor to a limited extent in the distribution of the sale proceeds by the DRT under Section 19(19). Otherwise, they can have no claim at all. He would submit that Section 529(1)(c) proviso and Section 529A of the Companies Act form part of a composite scheme and can be brought into play only in the case of a company which is being wound up. In a running company, the dues of workmen are not quantified or determined and, therefore, workmen's portion also cannot be quantified. The workmen have no charge on any asset. By a legal fiction, a *pari passu* charge is created to a limited extent only under Section 529(1)(c) proviso and that too to be determined by the liquidator and none else. Section 19(19) can, thus, have application only if the debtor company is being wound up and not otherwise.

19. Learned senior counsel for the Bank contended that Section 529 of the Companies Act entrusts to the liquidator the competence and responsibility to determine the dues of all creditors who

participate in the winding up and determine the priorities amongst them under the supervision of the Company Court. In support of his submissions, Mr. Bhaskar P. Gupta, learned senior counsel for the Bank also relied upon decisions of this Court in *Andhra Bank v. Official Liquidator and Another*[3], *Radheshyam Ajitsaria and Another v. Bengal Chatkal Mazdoor Union & Ors.*[4] and *Rajasthan State Financial Corporation and Another v. Official Liquidator and Another*[5] .

20. Mr. L. Nageshwar Rao, learned senior counsel for Indian Banks' Association adopted the submissions of Mr. Bhaskar P. Gupta and further submitted that the High Court proceeded on a fundamental misconception that the workmen had a *pari passu* charge at the relevant time. According to Mr. L. Nageshwar Rao at the relevant time of (a) judgment by the DRT-III allowing the Bank's claim on 19.07.2001, (b) issuance of recovery certificate dated 21.08.2001, (c) sale of movables on 22.01.2004 and (d) payment of partial sale proceeds to the bank (secured creditor) on 10.03.2004, no winding up order had been passed under Section 443(d) of the Companies Act qua the Company and Company's properties had not come to the custody of official liquidator in terms of Section 456. In this view of the matter, the workmen did not enjoy any secured charge on the assets of the Company for the purposes of Section 529A. Accordingly, he would submit that workmen cannot claim under Section 19(19) of the 1993 Act when they even cannot claim under the Companies Act. In this regard, Mr. L. Nageshwar Rao relied upon the decision of this Court in *Radheshyam Ajitsaria*4 .

21. Relying upon the decision of this Court in *International Coach Builders Ltd. v. Karnataka State Financial Corporation*[6] and *Rajasthan State Financial Corporation*5, Mr. L. Nageshwar Rao argued that the workmen's claim can only be considered under Section 19(19) of the 1993 Act where winding up order has been made and the liquidator is in the custody of company's assets.

22. Mr. L. Nageshwar Rao argued that the view of the High Court was clearly in error as DRT is a limited Tribunal created by a statute for adjudication of specific disputes for the benefit of banks and financial institutions and not all kinds of persons. DRT is not a civil court of unlimited jurisdiction or a Company Court with elaborate statutory powers to address all disputes that may arise in adjudicating workmen's claims in winding up proceedings. In this regard, he relied upon a decision of this Court in *Nahar Industrial Enterprises Ltd. v. Hong Kong And Shanghai Banking Corporation*[7] and submitted that it would be jurisdictionally improper and entirely incongruous for a DRT to itself examine, determine and decide upon workmen's claims under Section 529A.

23. It may be noted here that General Industries Kamgar Union (for short, 'Kamgar Union') has made an application being I.A. No. 3 of 2005 in one of the appeals praying therein that they may be impleaded as party respondent since it is a registered trade union of the workmen employed in the Company and it represents the entire body of workmen. Having regard to the controversy involved in these appeals, we thought it fit to hear Kamgar Union as it represents the entire body of workmen, including the respondents.

24. Mr. Colin Gonsalves, learned senior counsel for the Kamgar Union, stoutly defended the order of the High Court. He submitted that the argument of the appellants that winding up of a company begins only when the winding up order is made is misconceived as it overlooks Section 441(2) of the

Companies Act which says that in cases other than those covered under sub-section (1) of Section 441, the winding up of a company shall be deemed to commence at the time of presentation of the petition for winding up. In the present case, the winding up of the Company has begun with the order dated 01.09.1993 whereby BIFR recommended winding up of the Company under Section 20 of the SICA. According to learned senior counsel for the Kamgar Union, the present case is a case of a company in winding up as Section 20 of SICA makes it mandatory for the Court to make a winding up order on the recommendation of the BIFR. He also referred to para 50 of the Allahabad Bank¹ in this regard.

25. As regards Section 19(19) of the 1993 Act, learned senior counsel would submit that this provision is not restricted to a situation where company is in winding up; it also covers situations where the company though not in winding up will be rendered an empty shell if the assets of the company are sold and proceeds handed over to the bank and financial institutions. In the latter circumstances, it is the duty of the DRT to anticipate such a situation and if DRT comes to the conclusion that by selling the assets and paying the proceeds to the bank and/or financial institutions there will be nothing left for the payment of the dues to the workmen, it is bound to disburse the proceeds between the banks and financial institutions, other secured creditors and the workmen as if Section 529A of the Companies Act applies. It was submitted on behalf of the Kamgar Union that a close look at Section 19(19) of the 1993 Act will indicate that it is legislation by reference and not legislation by incorporation and therefore it is not required that the company must be in liquidation to attract the provisions of Section 19(19).

26. Mr. Colin Gonsalves heavily relied upon a decision of this Court in Rajasthan State Financial Corporation⁵ and submitted that the issue of jurisdiction of the Company Court and the DRT in respect of companies in liquidation was referred to a three-Judge Bench in view of the apparent conflict between the decisions in Allahabad Bank¹ and International Coach Builders⁶. He particularly referred to paragraphs 16 and 17 of the Report in Rajasthan State Financial Corporation⁵ and submitted that the official liquidator represents the entire body of creditors and also holds a right on behalf of the workmen to have a distribution *pari passu* with the secured creditors. The official liquidator has the duty for further distribution of the proceeds on the basis of the preference contained in Section 530 of the Companies Act under the directions of the Company Court and, therefore, to ensure the proper working out of the scheme of distribution, it is necessary to associate the official liquidator with the process of sale so that he can ensure in the light of the directions of the Company Court that a proper price is fetched for the assets of the company in liquidation. It is the contention of Mr. Colin Gonsalves that when the impugned judgment was passed by the Bombay High Court, Allahabad Bank¹ held the field and based on that the High Court issued guidelines to the DRT. Later, in Rajasthan State Financial Corporation⁵, the basic proposition of Allahabad Bank¹ relating to exclusive jurisdiction cannot be said to hold good. He, thus, submitted that in light of the law laid down in Rajasthan State Financial Corporation⁵ there is no conflict on the question of the applicability of Section 529A read with Section 529 of the Companies Act in cases where the debtor is a company and is in liquidation.

27. Mr. Colin Gonsalves argued that all sale proceeds in respect of assets sold prior to the date of impugned judgment should be brought to the DRT by the banks and financial institutions; all future

sale of assets should be done under the supervision of the High Court; the official liquidator, Bombay High Court should calculate the respective portions of dues of the secured creditors and the workmen in accordance with Section 529A of the Companies Act and the DRT should then distribute the sale proceeds in accordance with the directions of the High Court and in accordance with law.

28. On a careful examination of the record, we find that the submission made by the learned Senior Counsel for the Bank that Company is not in winding up within the meaning of Sections 529 and 529A of the Companies Act is founded on erroneous assumption that no order for winding up the Company has been made. In I.A. 7 of 2013 filed by the respondent no. 1, the copy of the Report dated 01.08.2011 of the official liquidator has been placed on record. It is apparent therefrom that on 08.10.2004, the Company Judge has ordered the Company to be wound up and the official liquidator has been appointed as liquidator of the Company with the usual powers under the Companies Act. There is thus no doubt that on and from 08.10.2004, the Company is in liquidation and the official liquidator stands appointed.

29. In the backdrop of the above factual position, we think that the question framed in the referral order may be examined by us.

30. It is important first to notice some of the provisions of the 1993 Act and the Companies Act. The question can be conveniently answered in light of the statutory provisions.

31. Section 2(d) of the 1993 Act, defines 'bank', which, inter alia, means a banking company. Under Section 2(e) 'banking company' has the meaning assigned to it in clause (c) of Section 5 of the Banking Regulation Act, 1949. 'Financial institution' is defined in Section 2(h). The 'tribunal' established under Section 3 is known as Debts Recovery Tribunal. Under Section 17, the tribunal (DRT) has been conferred jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Section 18 bars the jurisdiction of all other courts and other authorities except the Supreme Court and High Court exercising jurisdiction under Articles 226 and 227 of the Constitution in relation to the matters specified in Section 17.

32. Section 19 provides a comprehensive procedure before the DRT for making an application where a bank or a financial institution has to recover any debt from any person. It also enables DRT to issue certificate of recovery, its execution and all such orders and directions as may be necessary to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. Omitting the unnecessary clauses, to the extent Section 19 is relevant for the purposes of consideration of these appeals the same is reproduced as under:

“Section 19. Application to the Tribunal.—(1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction—

19) Where a certificate of recovery is issued against a company registered under the Companies Act, 1956 (1 of 1956) the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of section 529A of the Companies Act, 1956 and to pay the surplus, if any, to the company.

... .. (22) the Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

... .. (25) The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.”

33. Section 22, inter alia, empowers the DRT to regulate its own procedure. It is not bound by the procedure laid down by the Code of Civil Procedure, 1908 (‘CPC’) but is guided by the principles of natural justice and subject to the provisions of the 1993 Act and the rules framed thereunder. It has same powers as are vested in a civil court under the CPC in respect of the matters set out in Section 22(2).

34. Section 25 provides the modes of recovery of debts. The Recovery Officer on receipt of the copy of the recovery certificate is required to proceed to recover the amount of debt specified in the certificate by one or more of the modes set out in that Section which includes attachment and sale of the movable or immovable property/properties of the certificate debtor. Under Section 28, the Recovery Officer may recover the amount of debt under the certificate by one or more of the modes provided thereunder without prejudice to the modes of recovery specified in Section 25. Section 28(4) provides that the Recovery Officer may apply to the court in whose custody there is money belonging to the certificate debtor for payment to him of the entire amount of such money, or if it is more than the amount of debt due an amount sufficient to discharge the amount of debt so due.

35. Section 34 gives the 1993 Act overriding effect. Sub-section (1) thereof provides that the provisions of the 1993 Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law or in any instrument having effect by virtue of any law. Sub- section (2) of Section 34 provides that the provisions of the 1993 Act or the rules made thereunder shall be in addition to and not in derogation of the enactments stated therein.

36. Section 36 empowers the central government to make rules to carry out the provisions of the 1993 Act. In exercise of the powers conferred under Section 36, the central government has framed the Debts Recovery Tribunal (Procedure) Rules, 1993.

37. The Companies Act has undergone substantial amendments by the Companies (Second Amendment) Act 2002 (11 of 2003) but no notification has been issued so far bringing Act 11 of 2003 into effect. Though Section 441 has been substituted by Section 56 of the above Amendment Act but since it has not come into force, we reproduce Section 441 as it stood prior to amendment:

“441. Commencement of winding up by Court--(1) Where, before the presentation of a petition for the winding up of a company by the Court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.”

38. Section 443 provides for powers of Court on hearing petition which, inter alia, enables it to make an order for winding up the company and also make an interim order that it thinks fit.

39. The effect of the winding up order is provided in Section 447. Accordingly, an order for winding up a company operates in favour of all the creditors and all the contributories of the company as if it has been made on the joint petition, of a creditor and of a contributory.

40. The appointment of official liquidator so far as it relates to winding up of a company is dealt with in Section 448. Section 451 deals with general provisions as to liquidators. Inter alia, it provides that the liquidator shall conduct the proceedings in winding up the company and perform such duties in reference thereto as the court may impose.

41. Section 456 provides that where a winding up order has been made or where a provisional liquidator has been appointed the liquidator or the provisional liquidator, as the case may be, shall take into his custody or under his control all the properties, effects and actionable claims to which the company is or appears to be entitled.

42. Section 457 empowers the liquidator to do acts stated in paragraphs (a) to (e) of sub-section (1) with the sanction of the court. In a winding up by the court, the liquidator has power to do all acts set out in clauses (i) to (v) of sub-section (2).

43. Section 529, to the extent it is relevant, reads as follows:

“Section 529 - Application of insolvency rules in winding up of insolvent companies.
– (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-

.....;

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,-

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of section 529A.] (2)

(3) For the purposes of this section, section 529A and section 530,-

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:-

(i) to (iv)

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of-

(i) the amount of workmen's dues; and

(ii) the amounts of the debts due to the secured creditors.

Illustration. – The value of the security of a secured creditor of a company is Rs. 1,00,000. The total amount of the workmen's dues is Rs. 1,00,000. The amount of the debts due from the company to its secured creditors is Rs. 3,00,000. The aggregate of the amount of workmen's dues and of the amounts of debts due to secured creditors is Rs. 4,00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the security, that is Rs. 25,000."

44. Section 529A is crucial for consideration of these appeals and it is reproduced as it is:

"Section 529A - Overriding preferential payment.-- (1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company-

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues, shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub- section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.”

45. It may be immediately observed that 1993 Act has not only conferred exclusive jurisdiction upon DRT for determination of the matters specified in Section 17 but has also ousted jurisdiction of all other courts and other authorities in entertaining and deciding such matters. The powers of the Supreme Court and the High Court under Articles 226 and 227, however, remain unaffected. The applications for recovery of debts due to banks or financial institutions can be decided by DRT alone after coming into force of the 1993 Act and no other forum. In other words, the jurisdiction of DRT in regard to matters specified in Section 17 is exclusive.

46. DRT has also been vested with power, on adjudication of the application for recovery of debts due to banks or financial institutions, to issue certificate of recovery. On issuance of certificate of recovery, the exclusive jurisdiction has been conferred upon the Recovery Officer in regard to its execution. A complete procedure has been laid down in the 1993 Act for recovery of the debt as per the recovery certificate issued by DRT. Accordingly, adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of DRT and the Recovery Officer and no other court or authority can go into the said questions, except as provided in 1993 Act.

47. In Allahabad Bank¹, the issues relating to the impact of the 1993 Act on the provisions of the Companies Act fell for consideration before this Court. In that case, the following six points were framed for determination:

(1) Whether in respect of proceedings under the RDB Act at the stage of adjudication for the money due to the banks or financial institutions and at the stage of execution for recovery of monies under the RDB Act, the Tribunal and the Recovery Officers are conferred exclusive jurisdiction in their respective spheres?

(2) Whether for initiation of various proceedings by the banks and financial institutions under the RDB Act, leave of the Company Court is necessary under Section 537 before a winding-up order is passed against the company or before provisional liquidator is appointed under Section 446(1) and whether the Company Court can pass orders of stay of proceedings before the Tribunal, in exercise of powers under Section 442? (3) Whether after a winding-up order is passed under Section 446(1) of the Companies Act or a provisional liquidator is appointed, whether the Company Court can stay proceedings under the RDB Act, transfer them to itself and also decide questions of liability, execution and priority under Section 446(2)

and (3) read with Sections 529, 529-A and 530 etc. of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal?

(4) Whether in case it is decided that the distribution of monies is to be done only by the Tribunal, the provisions of Section 73 CPC and sub-sections (1) and (2) of Section 529, Section 530 of the Companies Court also apply — apart from Section 529-A — to the proceedings before the Tribunal under the RDB Act?

(5) Whether in view of provisions in Sections 19(2) and 19(19) as introduced by Ordinance 1 of 2000, the Tribunal can permit the appellant Bank alone to appropriate the entire sale proceeds realised by the appellant except to the limited extent restricted by Section 529-A. Can the secured creditors like Canara Bank claim under Section 19(19) any part of the realisations made by the Recovery Officer and is there any difference between cases where the secured creditor opts to stand outside the winding up and where he goes before the Company Court?

(6) What is the relief to be granted on the facts of the case since the Recovery Officer has now sold some properties of the Company and the monies are lying partly in the Tribunal or partly in this Court?

48. As regards first point, this Court held in Allahabad Bank¹ that the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of DRT and Recovery Officer and no other court or authority much less the civil court or the company court can go into the said questions relating to the liability and the recovery, except as provided in the 1993 Act. On second and third point, it was held that at the stage of adjudication under Section 17 and execution of the certificate under Section 25, the provisions of 1993 Act confer exclusive jurisdiction on the DRT and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the company court under Section 442 read with Section 537 or under Section 446 of the Companies Act. In respect of the moneys realized under the 1993 Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by DRT and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. To this extent, the Companies Act must yield to the provisions of the 1993 Act. The Court held that this position holds good during the pendency of the winding up petition against the debtor company and also after a winding up order is passed. No leave of the company court was necessary for initiating or continuing the proceedings under the 1993 Act.

49. As regards fourth and fifth point, this Court stated the legal position that it was not correct to say that Section 19(19) of the 1993 Act gives priority to all “secured creditors” to share the sale proceeds before DRT/Recovery Officer. It is only limited class of secured creditors who have priority over all others in accordance with Section 529A. It was also held that under clause (c) of the proviso to Section 529(1), the priority of the secured creditor who stands outside the winding up is confined to the “workmen’s portion” as defined in Section 529(3)(c). This Court agreed with the proposition that the first part of clause(c) of the proviso to Section 529(1) is to be read along with the words “or the

amount of workmen's portion in the security, whichever is less". That is, the priority of the secured creditor is only to the extent that any part of the said security is lost in favour of the workmen consequent to demands made by the Liquidator under clauses (a) or (b) or clause (c) to proviso to Section 529(1).

50. On sixth point, it was held in Allahabad Bank¹ that the "workmen's dues" have priority over all other creditors, secured and unsecured, because of Section 529A(1)(a) and no secured or unsecured creditor, including banks or financial institutions, can be paid before the workmen's dues are paid.

51. The view in Allahabad Bank¹ that the workmen's dues have priority over all other creditors, secured and unsecured, because of Section 529A(1)(a) is no longer a good law and has been held to be so first by a three-Judge Bench in Andhra Bank³ and recently again by a three-Judge Bench in Jitendra Nath Singh².

52. A. P. State Financial Corporation v. Official Liquidator^[8], was a case where the Corporation had made applications under Section 446(1) of the Companies Act read with Sections 29 and 46 of the State Financial Corporations Act, 1951 (for short, '1951 Act') before the Company Judge of the High Court for permission to stay outside the liquidation proceedings. The Company Judge granted conditional permission. One of the conditions was that Corporation will undertake to discharge the liability due to the workmen, if any, under Section 529A of the Companies Act. This Court noted that 1951 Act was a Special Act for grant of financial assistance to industrial concerns with a view to boost up industrialization and also recovery of such financial assistance if it becomes bad; similarly, the Companies Act deals with companies including winding up of such companies. The proviso to sub-section (1) of Section 529 and Section 529A being a subsequent enactment, the non obstante clause in Section 529A must prevail over Section 29 of the 1951 Act. This Court further said that the statutory right to sell the property by Corporation under Section 29 of the 1951 Act has to be exercised with the rights of pari passu charge of the workmen created by the proviso to Section 529 of the Companies Act. Under the proviso to sub-section (1) of Section 529, the liquidator shall be entitled to represent the workmen and enforce the above pari passu charge and, therefore, the conditions imposed by the Company Court were justified. If such conditions were not imposed to protect the rights of the workmen, there was every possibility that the secured creditor might frustrate the pari passu right of the workmen.

53. In International Coach Builders⁶, the question under consideration before this Court was whether the rights of the State Financial Corporation under Section 29 of the 1951 Act to sell and realize the security could be exercised without reference to the Company Court when a winding up order is made against the Company. This Court noticed the provisions of the 1951 Act and Sections 529 and 529A of the Companies Act and the divergent views of Bombay High Court, Andhra Pradesh High Court, Punjab and Haryana High Court and Gujarat High Court. This Court approved the decision of the Bombay High Court in Maharashtra State Financial Corporation v. Ballarpur Industries Ltd.^[9] and held that when the Company was in winding up, the State Financial Corporation to which the assets of the company were charged cannot proceed to realize the security without intervention of the Company Court. It was stated that as a result of amendment in Section 529 a pari passu charge to the extent of the workmen's portion is created on the security of every

secured creditor when he opts to realize security by standing outside the winding up. The Court found no real conflict between Section 29 of the 1951 Act and the Companies Act. Following the decision of this Court in Andhra Pradesh State Financial Corporation⁸, it was observed that even if it was assumed that there was conflict in the above provisions, Section 29 of the 1951 Act cannot override the provisions of Sections 529(1) and 529A of the Companies Act inasmuch as Financial Corporations cannot exercise the right under Section 29 of the 1951 Act ignoring a pari passu charge of the workmen. In para 32 (pg. 498) of the Report this Court concluded its opinion as under:

1. The right unilaterally exercisable under Section 29 of the SFC Act is available against a debtor, if a company, only so long as there is no order of winding up.
2. SFCs cannot unilaterally act to realise the mortgaged properties without the consent of the official liquidator representing workmen for the pari passu charge in their favour under the proviso to Section 529 of the Companies Act, 1956.
3. If the official liquidator does not consent, SFCs have to move the Company Court for appropriate directions to the official liquidator who is the pari passu charge-holder on behalf of the workmen. In any event, the official liquidator cannot act without seeking directions from the Company Court and under its supervision.

54. In the case of Andhra Bank³, a three-Judge Bench framed three questions for consideration. As regards the question, whether the statement of law contained in para 76 of the Judgment of this Court in Allahabad Bank¹ was a good law, this Court answered the question in the negative. Dealing with the question whether the workmen could be directed to be paid on an adhoc basis having regard to their claim of past dues vis-

à-vis the claim of Andhra Bank, this Court observed that when a matter was not pending before the DRT under the 1993 Act, in terms of Section 19(19) thereof, the secured creditors would not get priority per se as language in Section 19(19) is qualified by the words “in accordance with the provisions of Section 529A”. The claims of the secured creditors are thus required to be considered giving priority over unsecured creditors but their claim would be pari passu with the workmen. While dealing with Section 446 of the Companies Act, this Court held in para 31 (pg. 88) of the Report as follows:

“31. Section 446 of the Companies Act indisputably confers a wide power upon the Company Judge, but such a power can be exercised only upon consideration of the respective contentions of the parties raised in a suit or a proceeding or any claim made by or against the company. A question of determining the priorities would also fall for consideration if the parties claiming the same are before the court. Section 446 of the Companies Act ipso facto confers no power upon the court to pass interlocutory orders. The question as to whether the courts have inherent power to pass such orders, in our opinion, does not arise for consideration in this proceeding.....”

55. Rajasthan State Financial Corporation⁵, was a matter that was referred to a three-Judge Bench as the two-Judge Bench before whom the matter came up for consideration was of the view that there was a conflict between the decisions of this Court in Allahabad Bank¹ and International Coach Builders⁶. This Court considered the decisions of some of the High Courts, the decisions in Allahabad Bank¹ and International Coach Builders⁶ and the provisions of Section 29 of the 1951 Act and Sections 529 and 529A of the Companies Act and held that when the assets of the company are sold and the proceeds realized, the debts by way of workmen's dues and debt of the secured creditors have to be paid in full if the assets are sufficient to meet them and if they are not sufficient, in equal proportions. It was expressly noted that there was no inconsistency between Allahabad Bank¹ and International Coach Builders⁶. The legal position was summed up in para 18 (pg. 201) of the Report as follows :

18. In the light of the discussion as above, we think it proper to sum up the legal position thus:

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529- A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation.

56. What is important to be noticed is that in Rajasthan State Financial Corporation⁵ the three-Judge Bench stated in no unambiguous terms that once a winding up proceeding has

commenced and the Liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the banks or financial institutions coming under the 1993 Act or of financial corporations coming under the 1951 Act can only be with the association of the Official Liquidator and under the supervision of the Company Court. It has also been stated that whether the assets are realized by a secured creditor even if it be by proceeding under 1993 Act or the 1951 Act, the distribution of assets would only be in terms of Section 529-A of the Companies Act and by recognizing the right of the Liquidator to calculate the workmen's dues and collected for distribution among them *pari passu* with the secured creditors. By noticing that there is no conflict on the question of applicability of Section 529A read with Section 529 of the Companies Act to cases where the debtor is a company and is in liquidation, it was observed that the conflict, if any, is in the view that DRT could sell the properties of the Company in terms of the 1993 Act and to that extent, the 1993 Act shall prevail over the Companies Act being the general law.

57. In *ICICI Bank Ltd. v. SIDCO Leathers Ltd and Ors.*[10], interpretation of Sections 529 and 529A of the Companies Act fell for consideration but in a different fact situation. This Court with regard to Sections 529 and 529A of the Companies Act expounded that Section 529A was brought in the Companies Act with a view to bring the workmen's dues *pari passu* with the secured creditors but Section 529A of the Companies Act does not *ex facie* contain a provision on the aspect of priority amongst the secured creditors. Whilst holding so, this Court also said that insofar as the amounts realised under the 1993 Act were concerned, the priorities have to be worked out by DRT alone.

58. In *Central Bank of India v. State of Kerala and Ors* [11], a three-Judge Bench of this Court was concerned with the question whether Section 38-C of the Bombay Sales Tax Act, 1959 (for short, "the Bombay Act") and Section 26-B of the Kerala General Sales Tax Act, 1963 (for short, "the Kerala Act") and similar provision contained in other State legislations by which first charge has been created on the property of the dealer or such other person, who is liable to pay sales tax, etc. are inconsistent with the provisions contained in the 1993 Act for recovery of "debt" and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the Securitisation Act") for enforcement of security and whether by virtue of non obstante clauses contained in Section 34(1) of the 1993 Act and Section 35 of the Securitisation Act, the two Central legislations will have primacy over the State legislations. The scheme of 1993 Act was highlighted and it was stated that the said Act facilitated creation of specialized fora i.e. Debts Recovery Tribunals and the Debts Recovery Appellate Tribunals for expeditious adjudication of disputes relating to recovery of the debts due to banks and financial institutions. It was noted that there was no provision either in 1993 Act or the Securitisation Act by which the first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower. With reference to Section 13(9) of the Securitisation Act, this Court said that the legislature has ensured that priority given to the claim of the workmen of a company in liquidation under Section 529A of the Companies Act vis-a-vis the secured creditors like banks was duly respected; the provisions are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the right of the workmen of the Company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof.

59. Then in paragraphs 128, 129, 130 and 131 (pages 141-142) of the Report, this Court in Central Bank of India¹¹ stated the legal position as follows:

128. If the provisions of the DRT Act and the Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14-A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, and Section 529-A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to the Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

131. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis-à-vis Section 38-C of the Bombay Act and Section 26-B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax, etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors.

60. In Jitendra Nath Singh² again interpretation of Sections 529 and 529A of the Companies Act came up for consideration. There was a divergence of opinion among the Judges hearing the matter.

The majority view gave the following interpretation to Sections 529 and 529A of the Companies Act:

16.1. A secured creditor has only a charge over a particular property or asset of the company. The secured creditor has the option to either realise his security or relinquish his security. If the secured creditor relinquishes his security, like any other unsecured creditor, he is entitled to prove the debt due to him and receive dividends out of the assets of the company in the winding-up proceedings. If the secured creditor opts to realise his security, he is entitled to realise his security in a proceeding other than the winding-up proceeding but has to pay to the liquidator the costs of preservation of the security till he realises the security.

16.2. Over the security of every secured creditor, a statutory charge has been created in the first limb of the proviso to clause (c) of sub-section (1) of Section 529 of the Companies Act in favour of the workmen in respect of their dues from the company and this charge is pari passu with that of the secured creditor and is to the extent of the workmen's portion in relation to the security of any secured creditor of the company as stated in clause (c) of sub-section (3) of Section 529 of the Companies Act.

[pic]16.3. Where a secured creditor opts to realise the security then so much of the debt due to such secured creditor as could not be realised by him by virtue of the statutory charge created in favour of the workmen shall to the extent indicated in clause

(c) of the proviso to sub-section (1) of Section 529 of the Companies Act rank pari passu with the workmen's dues for the purposes of Section 529-A of the Companies Act.

16.4. The workmen's dues and where the secured creditor opts to realise his security, the debt to the secured creditor to the extent it ranks pari passu with the workmen's dues under clause

(c) of the proviso to sub-section (1) of Section 529 of the Companies Act shall be paid in priority over all other dues of the company.

61. Whilst there was divergence of opinion on certain aspects, as regards the exposition of law in paragraph 76 of the judgment in Allahabad Bank¹ that workmen's dues have priority over all other creditors, secured and unsecured because of Section 529A(1)(a), the Bench was of unanimous opinion that the said statement in Allahabad Bank¹ was not a good law.

62. Section 529A was inserted by Companies (Amendment) Act, 1985. By incorporation of this provision, workmen's dues rank pari passu with secured creditors. In other words, the workmen of the company in winding up acquire the status of secured creditors. Pertinently, while inserting Section 529A in the Companies Act by the Companies (Amendment) Act, 1985, the proviso to sub-section (1) of Section 529 was also inserted which provides that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion.

63. A cumulative reading of Sections 529A and 529(1)(c) proviso leads to an irresistible conclusion that where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is *pari passu* with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the company. This position, in our opinion, is equally applicable where the assets of the company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realised from such sale could be fully and finally disbursed, the company had gone into liquidation. Stated differently, pending final disbursement of the proceeds realised from the sale of security in execution of the recovery certificate issued by the DRT, if debtor company becomes company in winding up, Sections 529A and 529(1)(c) proviso come into operation immediately and statutory charge is created in favour of workmen in respect of their dues over such proceeds.

64. Having regard to the scheme of law, it appears to us that the relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the company is the date of the winding up order and not the date of sale.

65. Where the sale of security has been effected in execution of recovery certificate issued by DRT under the 1993 Act, the distribution of undisbursed proceeds has to be made by the DRT alone in accordance with Section 529A of the Companies Act. It is so because Section 19(19) of the 1993 Act provides that DRT may order distribution of the sale proceeds amongst the secured creditors in accordance with Section 529A where a recovery certificate is issued against the company registered under the Companies Act. The workmen of the company in winding up acquire the standing of secured creditors on and from the date of the winding up order (or where provisional liquidator has been appointed, from the date of such appointment) and they become entitled to distribution of sale proceeds in the ratio as explained in the illustration appended to Section 529(3)(c) of the Companies Act. The question is whether Section 19(19) of the 1993 Act clothes DRT with jurisdiction to determine the workmen's claims against the debtor company? We do not think so for reasons more than one.

66. In the first place, 1993 Act has provided for special machinery for speedy recovery of dues of banks and financial institutions in specific matters. It is with this objective that it provides for establishment of DRT with the jurisdiction, power and authority for adjudication of claims of the banks and financial institutions. 1993 Act also provides for the modes of recovery of the amount so adjudicated by the DRTs. 1993 Act has not brought within its sweep, the adjudication of claims of persons other than banks and financial institutions. DRT has not been given powers to adjudicate the dues of workmen of the debtor company. Section 17 or Section 19 of the 1993 Act cannot be read in a manner that allows such exercise to be undertaken by the DRT. DRT does not possess necessary statutory powers to address all disputes that may arise in adjudicating workmen's claims in winding up proceedings. The adjudication of workmen's claims against the debtor company is a substantive matter and DRT has neither competence nor machinery for that. Certain incidental and ancillary powers given to DRT do not encompass power to adjudicate upon or decide dues of the workmen of the debtor company.

67. Secondly, Section 19(19) of the 1993 Act is a provision of distribution mechanism and not an independent adjudicatory provision. This provision follows adjudication of claim made by a bank or financial institution. It comes into play where a certificate of recovery is issued against a company registered under the Companies Act which is in winding up. Where the debtor company is not in liquidation, Section 19(19) does not come into operation at all. Following Tiwari Committee Report and Narasimham Committee Report, the present Section 19(19) was incorporated in 1993 Act for protection of pari passu charge of secured creditors, including workmen's dues at the time of distribution of the sale proceeds of such company. The participation of workmen along with secured creditors under Section 19(19) is, to a limited extent, in the distribution of the sale proceeds by the DRT and not for determination of their claims against the debtor company by the DRT. Once the company is in winding up, the only competent authority to determine the workmen's dues and quantify workmen's portion is the liquidator. The liquidator has the responsibility and competence to determine the workmen's dues where the debtor company is in liquidation.

68. Thirdly, the expression, 'the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529A of the Companies Act' occurring in Section 19(19) does not empower DRT to itself examine, determine and decide upon workmen's claim under Section 529A. The above expression means that where the debtor company is in winding up, the sale proceeds of such company realized under the 1993 Act are to be distributed among its secured creditors by following Section 529A of the Companies Act. Mention of Section 529A in Section 19(19) is neither a legislation by reference nor a legislation by incorporation. What it requires is that DRT must follow the mandate of Section 529A by making distribution in equal proportion to the secured creditors and workmen of the debtor company in winding up.

69. We are unable to accept the submission of the learned senior counsel for the Kamgar Union that Section 19(19) is not restricted to a situation where the debtor company is in winding up. In our view, Section 19(19) covers situation where a debtor company is in winding up or where a provisional liquidator has been appointed in respect of the debtor company and in no other situation. If the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act.

70. The position stated in Allahabad Bank¹ that priorities, so far as the amounts realized under the 1993 Act are concerned, are to be worked out only by DRT admits of no ambiguity and is legally sound but this statement cannot be read as laying down the proposition that in respect of the amounts realized under the 1993 Act, the DRT has power, competence or authority to determine the workmen's dues of the debtor company. The manner of distribution among secured creditors of the monies realized under the 1993 Act does not clothe DRT to adjudicate the claims of secured creditors other than the banks and financial institutions against the company under Section 19(19). Any statement of law to the contrary in Allahabad Bank¹ must be held to be not a good law.

71. In Rajasthan State Financial Corporation⁵, this Court propounded the proposition that a DRT acting under the 1993 Act would be entitled to order the sale of the properties of the debtor, even if a

company is in liquidation, through its Recovery Officer but only after notice to the official liquidator or the liquidator appointed by the Company Court and after hearing him. We are in agreement with the above view. Where the winding up petition against the debtor company is pending but no order of winding up has been passed nor any provisional liquidator has been appointed in respect of such company at the time of order of sale by DRT and the properties of the debtor company have been sold in execution of the recovery certificate and proceeds of sale realized and full disbursement of the sale proceeds has been made to the concerned bank or financial institution, the subsequent event of the debtor company going into liquidation is no ground for reopening disbursement by the DRT. However before full and final disbursement of sale proceeds, if the debtor company has gone into liquidation and a liquidator is appointed, disbursement of undisbursed proceeds by DRT can only be done after notice to the liquidator and after hearing him. In that situation if there is claim of workmen's dues, the DRT has two options available with it. One, the bank or financial institution which made an application before DRT for recovery of debt from the debtor company may be paid the undisbursed amount against due debt as per the recovery certificate after securing an indemnity bond of restitution of the amount to the extent of workmen's dues as may be finally determined by the liquidator of the debtor company and payable to workmen in the proportion set out in the illustration appended to Section 529(3)(c) of the Companies Act. The other, DRT may set apart tentatively portion of the undisbursed amount towards workmen's dues in the ratio as per the illustration following Section 529(3)(c) and disburse the balance amount to the applicant bank or financial institution subject to an undertaking by such bank or financial institution to reconstitute the amount to the extent workmen's dues as may be finally determined by the liquidator, falls short of the amount which may be distributable to the workmen as per the above illustration. The amount so set apart may be disbursed to the liquidator towards workmen's dues on ad hoc basis subject to adjustment on final determination of the workmen's dues by the liquidator. The first option must be exercised by DRT only in a situation where no application for distribution towards workmen's dues against the debtor company has been made by the liquidator or the workmen before the DRT.

72. In light of the above discussion, we sum up our conclusions thus:

- (i) If the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act.
- (ii) Where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is *pari passu* with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the debtor company.
- (iii) The above position is equally applicable where the assets of the debtor company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realized from such sale could be fully and finally disbursed, the

company had gone into liquidation. In other words, pending final disbursement of the proceeds realized from the sale of security in execution of the recovery certificate issued by the debt recovery tribunal, if debtor company becomes company in winding up, Section 529A read with Section 529(1)(c) proviso come into operation and statutory charge is created in favour of workmen in respect of their dues over such proceeds.

(iv) The relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the debtor company is the date of the winding up order and not the date of sale.

(v) The conclusions (ii) to (iv) shall be mutatis mutandis applicable where provisional liquidator has been appointed in respect of the debtor company.

(vi) Where the winding up petition against the debtor company is pending but no order of winding up has been passed nor any provisional liquidator has been appointed in respect of such company at the time of order of sale by DRT and the properties of the debtor company have been sold in execution of the recovery certificate and proceeds of sale realized and full disbursement of the sale proceeds has been made to the concerned bank or financial institution, the subsequent event of the debtor company going into liquidation is no ground for reopening disbursement by the DRT.

(vii) However, before full and final disbursement of sale proceeds, if the debtor company has gone into liquidation and a liquidator is appointed, disbursement of undisbursed proceeds by DRT can only be done after notice to the liquidator and after hearing him.

In that situation if there is claim of workmen's dues, the DRT has two options available with it. One, the bank or financial institution which made an application before DRT for recovery of debt from the debtor company may be paid the undisbursed amount against due debt as per the recovery certificate after securing an indemnity bond of restitution of the amount to the extent of workmen's dues as may be finally determined by the liquidator of the debtor company and payable to workmen in the proportion set out in the illustration appended to Section 529(3)(c) of the Companies Act. The other, DRT may set apart tentatively portion of the undisbursed amount towards workmen's dues in the ratio as per the illustration following Section 529(3)(c) and disburse the balance amount to the applicant bank or financial institution subject to an undertaking by such bank or financial institution to reconstitute the amount to the extent workmen's dues as may be finally determined by the liquidator, falls short of the amount which may be distributable to the workmen as per the above illustration. The amount so set apart may be disbursed to the liquidator towards workmen's dues on ad hoc basis subject to adjustment on final determination of the workmen's dues by the liquidator.

(viii) The first option must be exercised by DRT only in a situation where no application for distribution towards workmen's dues against the debtor company has been made by the liquidator

or the workmen before the DRT.

(ix) Where the sale of security has been effected in execution of recovery certificate issued by the DRT under the 1993 Act, the distribution of sale proceeds has to be made by the DRT alone in accordance with Section 529A of the Companies Act and by no other forum or authority.

(x) The workmen of the company in winding up acquire the standing of the secured creditors on and from the date of winding up order (or where provisional liquidator has been appointed, from the date of such appointment) and they become entitled to the distribution of sale proceeds in the ratio as explained in the illustration appended to Section 529(3)(c) of the Companies Act.

(xi) Section 19(19) of the 1993 Act does not clothe DRT with jurisdiction to determine the workmen's claim against the debtor company. The adjudication of workmen's dues against the debtor company in liquidation has to be made by the liquidator. In other words, once the company is in winding up the only competent authority to determine the workmen's dues is the liquidator who obviously has to act under the supervision of the company court and by no other authority.

(xii) Section 19 (19) is attracted only where a debtor company is in winding up or a provisional liquidator has been appointed in respect of such company. If the debtor company is not in liquidation or if in respect of such company no order of appointment of provisional liquidator has been made and merely winding up proceedings are pending, the question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act does not arise.

73. For the above conclusions, we hold, as it must be held, that the claims of the workmen who claim to be entitled to payment pari passu have to be considered and adjudicated by the liquidator of the debtor company and not by the DRT. We answer the question accordingly.

74. The impugned judgment is set aside. The Debt Recovery Tribunal, Mumbai III and the official liquidator of the Company shall proceed further now concerning workmen's dues as indicated in this judgment. The appeals are allowed with no order as to costs. All pending applications stand disposed of.

.....J. (R.M. Lodha)J. (J. Chelameswar)J. (Madan B. Lokur) NEW DELHI MAY 7, 2013.

- [1] (2000) 4 SCC 406
- [2] (2013) 1 SCC 462
- [3] (2005) 5 SCC 75
- [4] (2006) 11 SCC 771
- [5] (2005) 8 SCC 190
- [6] (2003) 10 SCC 482
- [7] (2009) 8 SCC 646
- [8] (2000) 7 SCC 291

- [9] AIR 1993 Bom 392
- [10] (2006) 10 SCC 452
- [11] (2009) 4 SCC 94
