

Jitendra Nath Singh vs Official Liquidator & Ors on 21 September, 2012

Author: Swatanter Kumar

Bench: S.H. Kapadia, A.K. Patnaik, Swatanter Kumar

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6755 OF 2012
(Arising out of S.L.P. (C) No. 4104 of 2011)

Jitendra Nath Singh
Appellant

...

Versus

The Official Liquidator & Ors.
Respondents

...

JUDGEMENT

A. K. PATNAIK, J.

Leave granted.

2. We have carefully read the learned opinion of our esteemed brother Swatanter Kumar, J. in this case but with great respect we are unable to persuade ourselves to agree with his interpretation of Sections 529 and 529A of the Companies Act, 1956 (for short 'the Companies Act').

3. Before we give our interpretation of Sections 529 and 529A of the Companies Act, we may very briefly state the relevant facts as stated by the appellant. U.M.I. Special Steel Limited (for short 'the company') is a company registered under the Companies Act. The company became sick and went before the BIFR but the BIFR in its opinion dated 08.03.2002 recommended for winding up of the

company. On 05.08.2003, the learned Company Judge of the High Court of Jharkhand passed orders for winding up of the company and appointed the official liquidator as liquidator to conduct the liquidation proceedings in relation to the company and to take over the assets, books and documents of the company. The liquidator then took over the assets of the company and sold some of the assets of the company and paid Rs.93,64,93,586/- to the secured creditors and Rs.8,19,22,371.12p to the workmen representing 50% of their verified claims towards wages. When the liquidator sold some more assets and received Rs.8,51,01,000/-, the appellant filed I.A. No.1511 of 2008 before the learned Company Judge of the High Court contending that the assets of the company situated at Chennai, Pune, Faridabad and Kolkata which have been sold are not properties over which the banks/financial institutions have any charge and therefore, they cannot be treated as secured creditors in respect of these properties and the sale proceeds from these properties should be kept separately and be paid to the workmen first before disbursing any amount to the banks/financial institutions. The banks/financial institutions, which had given loans and advances to the company, on the other hand, contended before the learned Company Judge that claim of the workmen and secured creditors stand pari passu and the Companies Act does not make any difference between the mortgaged property and other properties of the company and, therefore, the entire sale proceeds obtained from the properties of the company should be distributed among the secured creditors and workers on pro rata basis. The learned Company Judge in his order dated 28.11.2008 held that the workmen and secured creditors have pari passu charge over the properties of the company as would be clear from Sections 529 and 529A of the Companies Act and the decision of this Court in Andhra Bank v. Official Liquidator & Anr. [(2005) 5 SCC 75]. Aggrieved, the appellant filed Company Appeal No.10 of 2008 before the Division Bench of the High Court and contended that the secured creditors have pari passu charge with the workmen only on the properties which have been offered by the company to the secured creditors as security. In its order dated 30.09.2010, the Division Bench of the High Court, however, held that the secured creditors have pari passu charge with the workmen over all the properties of the company under sections 529 and 529A and dismissed the appeal. It is this order dated 30.09.2010 of the Division Bench of the High Court of Jharkhand that is challenged in this appeal by way of special leave under Article 136 of the Constitution.

4. We have heard learned counsel for the appellant and the respondents and we are of the considered opinion that the learned Company Judge and the Division Bench of the High Court have not correctly interpreted the provisions of Sections 529 and 529A of the Companies Act. For easy reference, Sections 529 and 529A of the Companies Act, which have to be read together, are extracted hereinbelow:

“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—

(a) debts provable;

(b) the valuation of annuities and future and contingent liabilities; and

(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) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section:

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay his portion of the expenses incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor.

Explanation.—For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security.

(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) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923) rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(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." "529A. Overriding preferential payment.—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."

5. A plain reading of clause (c) of sub-section (1) of Section 529 makes it clear that in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to 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. This would mean that the respective rights of secured and unsecured creditors of an insolvent company, which is being wound

up, will be the same as the respective rights of secured and unsecured creditors with respect to the estates of persons adjudged insolvent as are in force under the law of insolvency. In the State of Jharkhand, the Provincial Insolvency Act, 1920 (for short 'the Insolvency Act') is in force and accordingly the respective rights of secured and unsecured creditors with respect to the assets of the insolvent company being wound up will be the same as in the Insolvency Act. The Companies Act does not define a "creditor" and a "secured creditor" and hence, we have to refer to the Insolvency Act for the definitions of these two words. Section 2(1)(a) and Section 2(1)(e) of the Insolvency Act define the words 'creditor' and 'unsecured creditor' and are extracted hereinbelow:

"2(1)(a) "creditor" includes a decree-holder, "debt" includes a judgment-debt, and "debtor" includes a judgment-debtor." "2(1)(e) "secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor." It will be clear from the definition of 'creditor' in Section 2(1)(a) of the Insolvency Act that it is an inclusive and not an exhaustive definition, whereas it will be clear from the definition of 'secured creditor' in Section 2(1)(e) of the Insolvency Act that it is an exhaustive definition and that a secured creditor means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor. The result is that the expression 'secured creditor' in Section 529(1)(c) would mean a person who holds a mortgage, charge or lien on the property of the company or any part thereof as a security for a debt due to him from the company. Where, therefore, a creditor, such as the bank or the financial institution in this case, does not hold a mortgage, charge or lien on the property of the company or any part thereof as a security for a debt due to it from the company, it is not a secured creditor for the purposes of Sections 529 and 529A of the Companies Act.

6. Sections 45 and 47 of the Insolvency Act, which enumerate the rights of unsecured creditors and secured creditors respectively are extracted hereinbelow:

"45. Debt payable at a future time.- A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted." "47. Secured creditors.- (1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be

entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all shares in any dividend.” On a reading of the two provisions quoted above, we find that an unsecured creditor is entitled under Section 45 of the Insolvency Act to receive dividends equally with the other creditors, whereas the secured creditor has the right under Section 47 of the Insolvency Act to realize the security and to prove for the balance due to him in case on realization of such security he is not able to recover the entire amount due to him. If, however, the secured creditor does not opt to realize his security but relinquishes it for the general benefit of the creditors, then he may prove for his whole debt. Under the Insolvency Act, therefore, the secured creditor has only a right over the particular property offered to him as security and all the creditors have equal rights over the other properties comprising the estate of the person adjudged insolvent.

7. In our considered opinion, therefore, on a reading of the provisions of clause (c) of sub-section (1) of Section 529 of the Companies Act along with the provisions of the Insolvency Act relating to the respective rights of secured and unsecured creditors, a secured creditor of an insolvent company which is being wound up has only a right over the particular property or asset of the company offered to the secured creditor as a security and the unsecured creditors have rights over all other properties or assets of the insolvent company. We may now examine whether the proviso to sub-section (1) of Section 529 of the Companies Act makes any difference to these rights of secured creditors and unsecured creditors of an insolvent company.

8. The first limb of the proviso to sub-section (1) of Section 529 of the Companies Act states 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. Clause (c) of sub-section (3) of Section 529 of the Companies Act states that the “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. Thus, the first limb of the proviso to clause (c) of sub-section (1) of Section 529 of the Companies Act creates a statutory charge over the security of every secured creditor to the extent of the workmen’s portion. In other words, every property or asset of an insolvent company, which is being wound up and which has been offered as a security to a secured creditor is subject statutorily to a pari passu charge in favour

of the workmen to the extent of the workmen's portion by virtue of the proviso to sub-section (1) of Section 529 of the Companies Act. Therefore, the first limb of the proviso to sub-section (1) of Section 529 does not create any pari passu charge in favour of secured creditor over property or asset of the company which has not been given as security by the company to the secured creditor. Rather, the language of the first limb of this proviso makes it crystal clear that the security of every secured creditor created dehors the proviso to sub-section (1) of Section 529 of the Companies Act is statutorily subjected to a pari passu charge in favour of the workmen by the first limb of the proviso to sub-section (1) of Section 529 of the Companies Act.

9. The second limb of the proviso to sub-section (1) of Section 529 of the Companies Act states the consequences which follow where a secured creditor, instead of relinquishing his security and proving his debt, opts to realize his security. These are: (a) the liquidator shall be entitled to represent the workmen and enforce such charge; (b) any amount realized 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 realized 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 of the Companies Act. What is relevant in this case is the consequence in clause (c) which provides that the portion of the debt due to the secured creditor as could not be realized because of the statutory charge created in favour of the workmen on the security of the creditor shall to the extent stated therein rank pari passu with the workmen's portion for the purposes of Section 529A of the Companies Act. Hence, clause (c) of this proviso does not create a pari passu charge over properties or assets of the company which have not been offered to the secured creditor as security, but to the extent of the loss of security suffered by a particular secured creditor because of the statutory charge created in favour of the workmen, the secured creditor is ranked pari passu with the workmen for overriding preferential payment under Section 529A of the Companies Act.

10. Section 529A of the Companies Act states that notwithstanding anything contained in any other provision of the Companies 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 of the Companies Act pari passu with such dues, shall be paid in priority to all other debts. This would mean that the workmen's dues and only the debts due to the secured creditors to the extent such debts rank pari passu with workmen's dues under clause (c) of the proviso to sub-section (1) of Section 529 will have priority over all other debts of the company. The entire object of Section 529A of the Companies Act is to ensure overriding preferential payment of (a) the workmen's dues and (2) 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 the workmen's dues. The effect of the non-obstante clause in the opening part of Section 529A of the Companies Act, therefore, is that notwithstanding anything in the Companies Act and any other law including the Insolvency Act, workmen's dues and dues of the secured creditor which could not be realized because of the pari passu charge in favour of the workmen under the proviso to sub-section (1) of Section 529 and only to the extent such dues rank pari passu with the dues of the workmen under clause (c) of the said

proviso are paid in priority over all other dues.

11. We may now refer to sub-section (2) of Section 529 of the Companies Act which states that all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of Section 529 of the Companies Act. The proviso to sub-section (2), however, states that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realize his security, he shall be liable to pay his portion of the expenses incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor. This provision in sub-section (2) of Section 529 of the Companies Act makes it amply clear that all creditors, secured and unsecured, of the insolvent company are entitled to prove for and receive dividends out of the assets of the company but so far as secured creditors are concerned, they have the option either to relinquish their security in which case they like any unsecured creditor would only be entitled to prove for and receive the dividends out of the assets of the company or to realize the security instead of relinquishing the security in which case they have to pay to the liquidator only expenses for the preservation of the security until they realize the security by appropriate proceedings other than the winding up proceedings.

12. Our conclusions on interpretation of the provisions of Sections 529 and 529A of the Companies Act, therefore, are:

i) a secured creditor has only a charge over a particular property or asset of the company. The secured creditor has the option to either realize 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 realize his security, he is entitled to realize 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 realizes the security.

ii) 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.

iii) where a secured creditor opts to realize the security then so much of the debt due to such secured creditor as could not be realized 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 529A of the Companies Act.

iv) the workmen's dues and where the secured creditor opts to realize 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.

13. In support of our aforesaid conclusions, we may now cite some authorities. In *Allahabad Bank v. Canara Bank & Anr.* [(2000) 4 SCC 406], a two-Judge Bench of this Court speaking through M. Jagannadha Rao, J. discussed these rights of the secured creditors in paragraphs 62, 63, 64 and 65 of the judgment as reported in the SCC, which are extracted hereinbelow:

“62. Secured creditors fall under two categories. Those who desire to go before the Company Court and those who like to stand outside the winding- up.

63. The first category of secured creditors mentioned above are those who go before the Company Court for dividend by relinquishing their security in accordance with the insolvency rules mentioned in Section 529. The insolvency rules are those contained in Sections 45 to 50 of the Provincial Insolvency Act.

Section 47(2) of that Act states that a secured creditor who wishes to come before the official liquidator has to prove his debt and he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors. In that event, he will rank with the unsecured creditors and has to take his dividend as provided in Section 529(2). Till today, Canara Bank has not made it clear whether it wants to come under this category.

64. The second class of secured creditors referred to above are those who come under Section 529-A(1)(b) read with proviso (c) to Section 529(1). These are those who opt to stand outside the winding-up to realise their security. Inasmuch as Section 19(19) permits distribution to secured creditors only in accordance with Section 529-A, the said category is the one consisting of creditors who stand outside the winding up. These secured creditors in certain circumstances can come before the Company Court (here, the Tribunal) and claim priority over all other creditors for release of amounts out of the other monies lying in the Company Court (here, the Tribunal). This limited priority is declared in Section 529-A(1) but it is restricted only to the extent specified in clause (b) of Section 529-A(1). The said provision refers to clause (c) of the proviso to Section 529(1) and it is necessary to understand the scope of the said provision.

65. 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). “Workmen's portion” means the amount which bears to the value of the security, the same proportion which the amount of the workmen's dues bears to the aggregate of (a) workmen's dues, and

(b) the amounts of the debts due to all the creditors. This is explained in the illustration under the said provision. If the workmen's dues in all are, say, Rs.1 lakh and the debt due to all secured creditors is Rs.3 lakhs, the total amount due to all of them comes to Rs.4 lakhs. Therefore, the

workmen's share comes to 25% (Rs 1 lakh out of Rs 4 lakhs). Now if the value of the security of a secured creditor (like Canara Bank) is Rs.1 lakh, the "workmen's portion" will be Rs.25,000 which is the pro-rata amount to be shared by the said secured creditor. By virtue of Section 529-A(1)(b) his priority over all others out of other monies available in the Tribunal is restricted to Rs.25,000 only."

14. In *Andhra Bank v. Official Liquidator & Anr.* (supra), a three-Judge Bench speaking through S.B. Sinha, J. has also discussed in paragraphs 22 and 23 the rights of secured creditors, relevant extracts from which are quoted hereinbelow:

"22. In terms of the aforementioned provisions, the secured creditors have two options (i) they may desire to go before the Company Judge; or (ii) they may stand outside the winding-up proceedings. The secured creditors of the second category, however, would come within the purview of Section 529-A(1)(b) read with proviso (c) appended to Section 529(1). The "workmen's portion" as contained in proviso (c) of sub-section (3) of Section 529 in relation to the security of any secured creditor 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 (a) workmen's due, and (b) the amount of the debts due to all the (sic secured) creditors." "23. The language of Section 529-A is also clear and unequivocal, in terms whereof the workmen's dues or the debts due to the 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 have priority over all other debts. Once the workmen's portion is worked out in terms of proviso (c) of sub-

section (1) of Section 529, indisputably the claims of the workmen as also the secured creditors will have to be paid in terms of Section 529-A."

15. In the present case, the learned Company Judge and the Division Bench of the High Court have held that all secured creditors along with the workmen have *pari passu* charge over all the properties or assets of the company and would be entitled to the dues as secured creditors along with the workmen's dues by way of overriding preferential payments over all other dues under Section 529A of the Companies Act. The learned Company Judge of the High Court has also relied on some observations of this Court in *Andhra Bank v. Official Liquidator & Anr.* (supra) in support of his order. These observations of this Court in *Andhra Bank v. Official Liquidator & Anr.* (supra) were in the context of the observations of this Court in *Allahabad Bank v. Canara Bank & Anr.* (supra) and are quoted as under:

"25. While determining Point (6), however, a stray observation was made to the effect that the "workmen's dues" have priority over all other creditors, secured and unsecured because of Section 529-A(1)(a). Such a question did not arise in the case as *Allahabad Bank* was indisputably an unsecured creditor.

"26. Such an observation was, thus, neither required to be made keeping in view the fact situation obtaining therein nor does it find support from the clear and

unambiguous language contained in Section 529-A(1)(a). We have, therefore, no hesitation in holding that finding of this Court in Allahabad Bank to the aforementioned extent does not lay down the correct law.” The aforesaid observations of this Court in Andhra Bank v. Official Liquidator & Anr. (supra) are, thus, to the effect that workmen will not have priority over the dues of the secured creditor and this is because of the unambiguous language of Section 529A (1) that the workmen’s dues and the dues of the secured creditor to the extent such debts rank under clause

(c) of sub-section (1) of Section 529 pari passu with such dues will have to be paid in priority to all other debts. But as we have held, only where under the second limb of the proviso to clause (c) of sub-section (1) of Section 529 the secured creditor opts to realize the security and is unable to realize a portion of his dues because of the pari passu charge created in favour of the workmen under the first limb of the proviso, he has pari passu charge to the extent indicated in clause (c) of the proviso to sub-

section (1) of Section 529 and only such debts due to the secured creditor which rank pari passu with dues of the workmen under clause (c) of the proviso to sub-section (1) of Section 529 have to be paid in priority over all other debts of the company. The High Court has clearly fallen in error by holding that all debts due to secured creditors will rank pari passu with the workmen’s dues and have to be paid along with the workmen’s dues in priority to all other debts of the company.

16. In the result, the appeal is allowed. The impugned order of the Division Bench of the High Court and the order dated 28.11.2008 of the learned Company Judge in I.A. No.1511 of 2008 are set aside and the matter is remitted to the learned Company Judge to decide the I.A. in accordance with law as laid down in this judgment. There will be no order as to costs.

.....CJI.

(S.H. Kapadia)J. (A. K. Patnaik) New Delhi, September 21, 2012.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.6755 OF 2012
(Arising out of SLP (C) No.4104 of 2011)

Jitendra Nath Singh

Versus

Official Liquidator & Ors.

... Appellant

... Respondents

J U D G M E N T

Swatanter Kumar, J.

1. Leave granted.

2. An important question of law as to the ambit, scope and the legislative scheme of Sections 529, 529A and 530 of the Companies Act, 1956 (for short, 'the Act') arises in the present case.

3. According to the appellant, on the true construction of these provisions, workmen have a preferential claim over all others including the secured creditors, in the matter of payment of dues out of the funds realized from sale of assets of the company in liquidation. It will particularly hold true when such assets are not mortgaged in favour of secured creditors of the company in liquidation. The secured creditors, therefore, have no charge on such unsecured assets as also no consequential, preferential or even pari passu claim over the sale proceeds derived from these assets of the company. To the contra, the contention on behalf of the respondents is that the debts of the secured creditors would rank pari passu with that of the workmen as regards those dues of the secured creditors as could not be realised from the sale of secured assets, for the reason that they have relinquished their security to the extent of workmen's dues in terms of Section 529(1) of the Act. In support of their respective contentions, the appellant has relied upon the judgment of this Court in the case of Allahabad Bank v. Canara Bank and Another [(2000) 4 SCC 406], while the respondents have placed heavy reliance upon the judgment of this Court in the case of UCO Bank v. Official Liquidator, High Court, Bombay & Anr. [(1994) 5 SCC 1]; Andhra Bank v. Official Liquidator [(2005) 5 SCC 75]; and ICICI Bank Ltd. V. Sidco Leathers Ltd. and Others [(2006) 10 SCC 452]. As both the parties to the present lis have relied upon the different decisions of this Court, this Court is now called upon to state the correct exposition of law in view of the divergent views stated in the afore-referred judgments.

4. I may, at the very outset, refer in brief to the facts giving rise to the present appeal. M/s. UMI Special Steels Ltd. (for short, the UMI) is a company incorporated under the provisions of the Act. It possesses assets at different places throughout India. Out of these assets of the UMI, some were mortgaged to the banks and financial institutions while others were not, particularly the assets located at Chennai, Pune, Faridabad and Kolkata. Towards the end of the year 2001, the company became sick. It, thereafter, approached the Board for Industrial and Financial Reconstruction (for short, 'the BIFR') for being declared a sick unit. BIFR, vide its opinion dated 8th March, 2002, opined that UMI should be wound up. On consideration of the opinion of the BIFR, the High Court, vide its order dated 5th August, 2003 passed an order of winding up of UMI and appointed an official liquidator for conducting and completing the liquidation proceedings. This order of the High Court attained finality. In pursuance of this order, the official liquidator took over all the assets of the company. It is the undisputed position before us that the SASF/IDBI, the main secured creditor of UMI, filed an Original Application before the Debts Recovery Tribunal (DRT) being OA No.72 of 2004 for recovery of its debts aggregating to Rs.63.34 crore as on 31st January, 2004. Upon this application, the DRT issued notice on 5th July, 2004 and since then, the matter is pending before the DRT without any further proceedings.

5. In the meanwhile, the official liquidator invited claims from all the secured creditors and amongst others, the IDBI also filed its claim on 30th July, 2006. The admitted claim of the secured creditors was Rs.1,60,08,43,739/- while that of the workmen was Rs.16,38,44,741.25. It is also not disputed before us that the secured assets of the company were sold separately and a separate account thereof was maintained. Similarly, the unsecured assets were sold separately by the official liquidator, for which again a separate account was maintained. The total sale proceeds from the secured assets were Rs. 108.90 crore, out of which a sum of Rs.93,64,93,586/- was distributed amongst the secured creditors and an amount of Rs.8,19,22,371.12 had been paid to the workmen. The Official Liquidator sold the unsecured properties of the Company for a total sum of Rs.8.51 crores. This included the assets located at different places, which were not mortgaged to any bank or financial institution. The dispute between the parties primarily relates to distribution of this sum of Rs. 8.51 crores. According to the workmen their entire remaining claim of Rs. 8.19 crores and odd should be satisfied in preference to all other claimants, in terms of Section 529A of the Act. However, it is contended on behalf of the secured creditors that they have a pari passu charge even on the sale proceeds of the unsecured assets in terms of the statutory provisions and more particularly , in view of the fact that they had given up their security in favour of the workmen to the extent of Rs.8,19,22,371.12. It is only upon such satisfaction that the sale proceeds can be distributed amongst other creditors in accordance with law. The notice of the O.A. filed by the secured creditors was also issued to the Official Liquidator.

6. One of the workmen, Jitendra Nath Singh, the appellant in the present appeal, filed an application being I.A. No. 1511/2008 in Company Petition No. 2/2002 praying that the sale proceeds from the unsecured assets should first be distributed to the workmen. This IA was rejected by the Company Court vide order dated 28th November, 2008. Against this order, Company Appeal No.10 of 2008 was filed by the workmen before the High Court. Three other workmen also filed an application praying that 50 per cent of their verified claim in respect of wages be paid to them by the official liquidator. The Company Court passed an interim order in Company Appeal No.10 of 2008 dated 24th April, 2009 directing that money be distributed by the official liquidator only after obtaining permission of the Court. In view of this order, the Company Court rejected the claim of the three workmen vide its Order dated 16th April, 2010. Being aggrieved, these three workmen filed Company Appeal No.1 of 2010 before the High Court.

7. Both these appeals were dismissed by the High Court by a common judgment dated 30th September, 2010. Being dissatisfied with the judgment of the High Court, the workman Jitendra Nath Singh has preferred the present appeal against the decision in respect of Company Appeal No. 10/2008.

8. In light of the above facts, the contention of the appellant in the present appeal is that in respect of unsecured assets, the claim of the workmen ranks higher than those of the secured creditors and should be paid in preference to their claims. The rule of distribution pro rata applies only for proceeds from sale of properties bearing a charge of a particular secured creditor. To put it simply, the statutory charge would get priority over any contractual charge.

9. Let us now examine the relevant statutory provisions and their scheme. By way of the Companies (Amendment) Act, 1985, Section 529A, as well as the proviso to Section 529(1) of the Act, were inserted with effect from 24th May, 1985. The purpose of these provisions appears to be that the dues of the workmen may be made to rank *pari passu* with those of the secured creditors and even above the dues of the Government, in the event of winding up of the company. The legislative intent appears to be that the dues of the secured creditors and workmen should be paid in preference to others, however, would remain *pari passu* to each other. It was not the intention of the framers of law to take away or deprive a secured creditor of its dues or charge of the workmen, unless, it was specifically given up by the secured creditor. At this stage, I may refer to the provisions of Sections 529, 529A and 530 of the Act which read as follows :-

1 "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—

(a) debts provable;

(b) the valuation of annuities and future and contingent liabilities; and

(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) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section:

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to 2[pay his portion of the expenses] incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor.

Explanation.—For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security.

(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) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923) rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(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 529A. Overriding preferential payment.- 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.

530. Preferential payments. - (1) In a winding up subject to the provisions of section 529A, there shall be paid] in priority to all other debts-

(a) all revenues taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub-section (8), and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date subject to the limit specified in sub-section (2);

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions payable during the twelve months next before the relevant date, by the company as the employer of any persons, under the Employees' State Insurance Act, 1948 (34 of 1948), or any other law for the time being in force;

(e) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;

(f) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and

(g) the expenses of any investigation held in pursuance of section 235 or 237, in so far as they are payable by the company.

(2) The sum to which priority is to be given under clause (b) of sub-section (1), shall not, in the case of any one claimant, exceed such sum as may be notified by the Central Government in the Official Gazette].

(3) Where any compensation under the Workmen's Compensation Act, 1923 (8 of 1923), is a weekly payment, the amount due in respect thereof shall, for the purposes of clause (e) of sub-section (1), be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

(4) Where any payment has been made to any employee of a company,—

(i) on account of wages or salary; or

(ii) to him, or in the case of his death, to any other person in his right, on account of accrued holiday remuneration, out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee or other person in his right would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(5) The foregoing debts shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

(7) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effect so distrained on, or the proceeds of the sale thereof:

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(8) For the purposes of this section—

(a) any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period;

(b) the expression “accrued holiday remuneration” includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday;

(bb) the expression “employees” does not include a workman; and

(c) the expression “the relevant date” means—

(i) in the case of a company ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound up voluntarily before that date; and

(ii) in any case where sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company.

(9) This section shall not apply in the case of a winding up where the date referred to in sub-section (5) of section 230 of the Indian Companies Act, 1913 (7 of 1913), occurred before the commencement of this Act, and in such a case, the provisions relating to preferential payments which would have applied if this Act had not been passed, shall be deemed to remain in full force."

10. Chapter V of the Act deals with provisions that are applicable to every mode of winding up and in particular, the above provisions deal with the proof and ranking of claims. Section 529 is concerned with the application of insolvency rules to winding up of an insolvent company. The opening language of Section 529 contemplates that in winding up of an insolvent company, the Rules prevalent under the law of insolvency shall be applicable. Thus, the Provincial Insolvency Act, 1920 (for short the “Insolvency Act”), to the extent permissible, would be applicable in regard to the winding up of a company. Section 47 of the Insolvency Act reads as under :

“47. Secured creditors.-

- 1) Where a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.
- 2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.
- 3) Where a secured creditor does not either realize or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.
- 4) Where a security is so valued, the Court may at any time before realization redeem it on payment to the creditor of the assessed value.
- 5) Where a creditor, after having valued his security, subsequently realizes it, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.
- 6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.”

11. The above provision gives different options that are available and can be exercised by a secured creditor. It, however, has to be kept in mind that in terms of section 529 the rules of insolvency shall prevail and be observed but only with regard to debts provable, the valuation of annuities and future and contingent liabilities and the respective rights of secured and unsecured creditors. Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized; or where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for whole of his debt. Still, where a secured creditor does not exercise either of these options, he is entitled to have his debt entered in the schedule and would be entitled to receive the dividend in terms of Section 47(3).

12. It is worthwhile to note that the proviso to Section 529 of the Act creates a deeming fiction in law and makes it clear 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 workman's portion thereunder. This fiction is intended to give the workmen a preferential right to recover their dues. The expression 'workmen's portion' appearing in the proviso to Section 529(1) is explained under clause (c) of Section 529(3) of the Act. The 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 the amount of the workmen's dues and the amount of the debts due to the secured creditors. The workmen's portion is to be computed in terms thereof with the aid of the illustration given in that provision. Thus, the security of every secured creditor, by fiction of law, is subject to a pari passu charge in favour of the workmen to the extent of

the workmen's portion and where the secured creditor, instead of relinquishing his security and proving his debt, opts to realize his security, in that event, so much of the debt due to such secured creditor as could not be realized by him by virtue of the pari passu charge in favour of the workmen 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.

13. Section 529A of the Act opens with non-obstante clause, giving the workmen's dues and secured creditors' dues, as defined under the proviso to Section 529(1), an over-riding effect over the other provisions of the Act as well as any other law in the matter of priority of payment of dues. Application of Section 529A of the Act is not dependent upon any other provision of the Act including Section 529 except to the extent specified in Section 529, proviso (c). So, it is not dependent upon the limitation imposed by any other law for the time being in force, including Section 47 of the Insolvency Act. The non-obstante opening words of Section 529(A) are intended to give precedence to the 'overriding preferential payments' in contrast to the 'preferential payments' as contemplated under Section 530 of the Act. This non-obstante language attains even greater significance as it, in no uncertain terms, provides that Section 529(A) shall have effect notwithstanding anything contained in any other provision of the Act or any other law for the time being in force. No law, including the insolvency law can undermine the application and effect of Section 529 read with Section 529A of the Act. Thus, the provisions are exceptions to all other laws in force.

14. Once the contents of proviso to Section 529 and its clauses (a) to

(c) are satisfied, then the secured creditor would be entitled to invoke the provisions and receive the benefits of Section 529A(i), subject to pari passu charge and in terms of the priority stated therein. The workmen's dues are to get preference in the winding up of a company under Section 529A of the Act. The workmen's dues, however, have not been singularly placed in the preferential clause. The expression used in Section 529A is 'and' meaning thereby that the dues stated under clauses (a) and (b) of the section would remain pari passu. But it is not the entire dues of the secured creditors that will get preference over other dues and remain pari passu with the charges payable to the workmen. Their dues are limited only to the extent of the debts which are due to the secured creditors under clause (c) of the proviso to sub-Section (1) of Section 529 which are pari passu with such dues. The term 'such dues' here refers to the dues of the workmen. The Andhra Bank case has clearly stated that not only the dues of the workmen would be paid in terms of Section 529A in precedence to all others but are pari passu to the amounts due to the secured creditors in terms of Section 529(1) proviso (c). On a plain reading of the language of these two Sections, i.e., 529 and 529A, it is clear that it is not the entire or unrealised amount owed to secured creditors which is protected under the provisions of Section 529A and stands pari passu with the workmen's charges, but it is only the portion or amount relinquished under proviso to Section 529(1), whichever is less that is protected. In other words, the amount which is due to the secured creditors and remains unpaid due to enforcement of the pari passu charge of the workmen under Section 529(1) is the portion of dues of secured creditors that are protected in terms of Section 529A. There is a direct link in the application of both these provisions. In a situation of the present kind, these provisions would have to be applied collectively and that too, upon the correct appreciation of the legislative intent. As far

as Section 530 of the Act is concerned, it simpliciter provides for preferential payments with regard to persons other than those covered under Sections 529 and 529A of the Act. However, in the present case, we are primarily concerned with the application of Sections 529 and 529A.

15. If one analyses the scheme of the above-stated provisions, it is clear that in a winding up petition of an insolvent company, Rules of insolvency would apply to the stated extent. In terms of the proviso to Section 529(1), there is a deemed fiction created in law on the security of every secured creditor to the extent of the workmen's portion therein. The second part of the proviso states that where the secured creditor instead of relinquishing his security and proving his debts opts to realize his security, there the liquidator is entitled to represent the workmen and enforce the said charge in favour of the workmen to the extent of the workmen's dues. From a cumulative reading of the relevant provisions under the Act as well as under the Insolvency Act, it is clear that neither the legislature intended nor can it be comprehended that where an act is done in complete adherence to the relevant statutory provisions, it can lead to two different results merely because such act is done before different forums/courts. That is to say that if a secured creditor realises his security before a forum other than the Company Court strictly in compliance to the provisions of Section 529 of the Act, then favourable consequences of Section 529A would follow but if he acts in identical terms before the Company Court and without prejudice to his remedy outside the winding up and without putting his sale proceeds in the common hotch potch in the winding up proceedings, he would not be entitled to the benefits of Section 529A. It is more so since even the sale of a security by a secured creditor before such other forum cannot be completed without approval of the Company Court. The Company Court has even been vested with the jurisdiction to transfer such proceedings in exercise of its powers under Section 446 of the Act. At this stage, it will be useful to refer to the dictum of this Court in *Andhra Bank* (supra) where the Court noticed, "where the matter is not pending before the Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the RDB Act"), in terms of Section 19(19) thereof, the secured creditors would not get priority per se " to show that mere pendency of proceeding before a Tribunal would not deprive the secured creditor of the statutory benefits. Of course, the situation will be entirely different where the secured creditor does not follow the scheme of the provisions of Section 47(1) of the Insolvency Act read in conjunction with Sections 529 and 529A of the Act but puts the sale proceeds in the winding up proceedings in a common hotch-potch or even relinquishes the security for general benefit of the creditors at large, then the creditor would not be entitled to the benefit of Section 529A and would stand in line with the unsecured creditors of the company. Further, where the secured creditor has been unable to fully realize his dues owing to the taking of share from his security towards workmen's portion in terms of the proviso to Section 529(1), then to the extent specified, the secured creditor is entitled to a charge *pari passu* with the workmen's dues for the purposes of Section 529A.

16. The situation may be different where the secured creditor relinquishes his security in favour of or upon realization submits the proceeds in the common hotch-potch in winding up proceedings and for the benefit of the creditors in general. Proviso to Section 529(1) has a very significant role in this entire process for recovery. It has two contents which have to be read conjunctively. First, that creates a *pari passu* charge by legal fiction on the security of a secured creditor in favour of the workmen and, second, where the secured creditor instead of relinquishing his security and proving his debts opts to realize his security. The expression 'and' used in the proviso has to be read and

construed conjunctively and not disjunctively. The word ‘and’ specifies two specific conditions aforementioned for the proviso and sub-clauses (a) to

(c) to become enforceable. Clauses (a) and (b) to the proviso give right of representation to the liquidator for enforcing the statutory right in favour of the workmen to the extent of the portion of the workmen’s dues. Clause (c) of proviso to Section 529(1) provides the mode for recouping the shortfall in the amount which the secured creditor loses upon sale of security and creation of pari passu charge. Of course, as already noticed, such recovery is again pari passu and limited to the extent of the amount of workmen’s dues. The realization of the security may be in the proceedings outside the winding up, i.e., before a special forum or otherwise or it may be in the winding up but not for the benefit of the general creditors but strictly in compliance with the provisions of the proviso to Section 529(1) of the Act. In both such situations, the secured creditor would be entitled to the protection and right of preferential payment contemplated under Section 529A(1) of the Act.

17. Now, I may refer to the judgments of this Court relied upon by the respective parties. In the case of Allahabad Bank (supra) the Allahabad Bank was an unsecured creditor of the company in liquidation in that case and had obtained a simple money decree from the Debts Recovery Tribunal (for short ‘the DRT’) at Delhi against the debtor-company. The Canara Bank was a secured creditor of the debtor-company but its claim was pending before the same Tribunal. The Allahabad Bank had taken out the sale proceedings before the Recovery Officer under the RDB Act. The Company Court, however, stayed these sale proceedings under Sections 442 and 537 of the Act, in a winding up petition by Ranbaxy Ltd. Dissatisfied, the Allahabad Bank had challenged the order of the Company Court before this Court. This Court in that case was primarily dealing with the question whether the amount directed to be realized by sale of assets of the debtor company by the DRT, at the instance of Allahabad Bank, may straightaway be released in its favour, or whether, keeping in view the provisions of Section 19(19) of the RDB Act read with Section 529A of the Act, the other parties such as secured creditors, would still have a charge over the monies so realized. Thus, the question primarily before the Court in that case was the order of priority of discharging debts between a secured and an unsecured creditor, with respect to funds realized from sale of assets of the debtor company. While dealing with this question, the Court made an observation that the workmen’s dues have priority over all other creditors, secured or unsecured, because of Section 529A(1)(a) of the Act. The following paragraphs of this judgment can usefully be referred to at this stage:

“62. Secured creditors fall under two categories. Those who desire to go before the Company Court and those who like to stand outside the winding-up.

XXXX XXXX XXXX XXXX

68. In our opinion, the words “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” obviously mean the amount taken away from the private realisation of the secured creditor by the liquidator by way of enforcing the charge for workmen's dues under clause (c) of the proviso to Section 529(1) “rateably” against each secured creditor. To that extent, the secured creditor — who has stood outside the winding-up and who

has lost a part of the monies otherwise covered by security — can come before the Tribunal to reimburse himself from out of other monies available in the Tribunal, claiming priority over all creditors, by virtue of Section 529A(1)(b).

XXXX XXXX XXXX XXXX

76. The next question is whether the amounts realised under the RDB Act at the instance of the appellant can be straight away released in its favour. Now, even if Section 19(19) read with Section 529A of the Companies Act does not help the respondent Canara Bank, the said provisions can still have an impact on the appellant Allahabad Bank which has no doubt a decree in its favour passed by the Tribunal. Its dues are unsecured. The “workmen's dues” have priority over all other creditors, secured and unsecured because of Section 529-A(1)(a). There is no material before us to hold that the workmen's dues of the defendant Company have all been paid. In view of the general principles laid down in *National Textile Workers' Union v. P.R. Ramakrishnan* (1983) 1 SCC 228 there is an obligation resting on this Court to see that no secured or unsecured creditors including banks or financial institutions, are paid before the workmen's dues are paid. We are, therefore, unable to release any amounts in favour of the appellant Bank straight away.”

18. Firstly, the question now before this Court was not raised on the facts of that case. Secondly, the Court recorded no reasons for making such an observation. It, therefore, was a mere obiter and would not satisfy the essentials of a binding precedent. For it to be a binding precedent, the Court should directly be concerned with such issue. There should be an issue which should be concluded by appropriate reasoning to give it colour of a binding precedent.

19. However, this very question came up for consideration before a three- Judge Bench of this Court in the case of *Andhra Bank* (supra). The facts of that case were that under the scheme of amalgamation the assets and properties of the Tobacco Division of Duncan Agro Industries Ltd. were transferred to its subsidiary New Tobacco Ltd. The subsidiary had been enjoying diverse financial credit facilities from Andhra Bank which was its secured creditor. Andhra Bank had filed a suit for recovery of its dues. A winding up petition was also filed. Finally, the subsidiary company was ordered to be wound up and the assets of the company were ordered to be taken over by the Official Liquidator. Some assets had been sold by Receivers appointed in the said separate suit, but in view of approval of a scheme of revival of the company, the winding up order was stayed. This scheme of revival, however, failed. Thus, the assets and properties of the company were directed to be sold. The Company Court passed an order directing that out of the sale proceeds of the assets of the company, the wages of the employees and the workmen be paid. Therein, the Andhra Bank was a secured creditor, the dues of the workmen were payable under Sections 529 and 529A of the Act and there were also other creditors of the company. The larger Bench considered various judgments and finally, while commenting upon the observations made by the two-Judge Bench of this Court in the case of *Allahabad Bank* (supra), this Court held as under:

“26. Such an observation was, thus, neither required to be made keeping in view the fact situation obtaining therein nor does it find support from the clear and unambiguous language contained in Section 529A(1)(a). We have, therefore, no hesitation in holding that finding of this Court in Allahabad Bank to the aforementioned extent does not lay down the correct law.

27. The Court also wrongly placed reliance on National Textile Workers' Union v. P.R. Ramakrishnan. The question which arose therein was only as regards the right of the workers to be heard in the winding-up proceeding. The said decision was, therefore, not applicable.

Determination

28. By reason of the order dated 12-10-1993, the learned Single Judge while issuing various directions, directed:

“Andhra Bank is directed to pay a sum of Rs 38 lakhs to the Official Liquidator for the purpose of disbursing forthwith the salary to the officers, staff and workers of New Tobacco Co. Ltd., both at Calcutta and Durgapur, before the ensuing Puja. The Official Liquidator will disburse such salary to the officers, staff and workers of New Tobacco Co. Ltd., as aforesaid, before the ensuing Puja.”

29. No reason has been assigned in support of the said direction. The contentions of the parties had not been noticed. What impelled the learned Judge in issuing the said directions is not discernible. The jurisdictional question had also not been addressed.

30. Whether the workmen could be directed to be paid on an ad hoc basis having regard to their claim of past dues vis-à-vis the claim of the appellants had not been deliberated upon. When a matter is not pending before the Tribunal under the RDB Act, in terms of Section 19(19) thereof, the secured creditors would not get priority per se as it 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.” (Emphasis supplied)

20. The principles enunciated by this Court in the case of Andhra Bank (supra) clearly establish the fact that out of the dues payable, the workmen have a preferential charge, but the dues of the secured creditors, as protected under Section 529A of the Act, have to rank pari passu with the dues of the workmen, without any preference to the latter.

21. Firstly, this being a Bench of equi-strength, I see no reason for not following the view expressed by this Court in the case of Andhra Bank (supra) and secondly, any other interpretation is likely to defeat the legislative balance in the underlying genesis of the amended provisions of Sections 529 and 529A of the Act.

22. It may also be noticed that prior to the pronouncement of the judgment of this Court in the case of Allahabad Bank (supra), the settled view of this Court was that the charge of the secured creditors and that of the workmen would rank *pari passu* within the ambit of Section 529A of the Act. [refer UCO Bank (supra)]. Usefully, reference can also be made to the judgment of this Court in the case of A.P. Financial Corporation v. Official Liquidator [(2000) 7 SCC 291] wherein this Court was dealing with the provisions of Section 29 of the State Financial Corporations Act, 1951 and the question as to whether these provisions could be implemented, ignoring the *pari passu* charge of the workmen as contemplated under Sections 529 and 529A of the Act. The High Court, in that case, had imposed certain conditions in regard to sale of the property under Section 29 of the State Financial Corporations Act to protect the *pari passu* charge contemplated under the provisions of Section 529A of the Act. Besides holding that the provisions of the Act shall prevail, this Court held that the *pari passu* charge has to be maintained and also held as under :

“We are, therefore, of the opinion that the above proviso to sub- section (1) of Section 529 and Section 529A will control Section 29 of the Act of 1951. In other words the statutory right to sell the property under Section 29 of the Act of 1951 has to be exercised with the rights of *pari passu* charge to 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 force (sic enforce) the above *pari passu* charge. Therefore, the Company Court was fully justified in imposing the above conditions to enable the Official Liquidator to discharge his function properly under the supervision of the Company Court as the new Section 529A of the Companies Act confers upon a Company Court the duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with the provisions of the above section. The legislature has amended the Companies Act in 1985 with a social purpose viz. to protect dues of the workmen. If conditions are not imposed to protect the right of the workmen there is every possibility that the secured creditor may frustrate the above *pari passu* right of the workmen.”

23. As per the scheme and the relevant provisions of the Act, it is clear that a secured creditor can relinquish his security, participate in winding up proceedings and file his claim before the official liquidator, as and when invited. In the case of Andhra Bank (supra), this Court has clearly stated the principle that the dues of the secured creditors and of the workmen would rank *pari passu* as regards the order of preference of their discharge. This, of course, is subject to satisfying the conditions as stated in Sections 529 and 529A of the Act. The proviso to sub-section (1) of Section 529, by a deemed fiction, makes the dues of the workmen *pari passu* with that of the secured creditors and creates a charge in favour of the workmen upon the amounts realized from the enforcement of such security, to the extent of the workmen's portion therein. As already noticed, the ‘workmen's portion’ has been explained under sub-section (3)(c) of Section 529 which requires that in relation to the security of any secured creditor of the company, workmen's portion would mean 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 the amount of workmen's dues and the amounts of the debts due to the secured creditors. The illustration to this sub-section provides the mode in which the workmen's portion is to be calculated. Once the workmen's portion is computed, then in terms

of Section 529A, again it has to be treated as a charge *pari passu* to the debts of the secured creditor. In the case of the latter, the charge will be limited to the extent such debt ranks under clause (c) of the proviso to sub-section (1) of Section 529 *pari passu* with such dues for preferential payment. The dues payable to the workmen and the secured creditors have to be paid in priority to all other debts. But the dues payable to the secured creditor will not be more than the amount that remains unsatisfied after the security is relinquished in favour of the workmen under Section 529 of the Act.

24. The relinquishment of security by a secured creditor certainly requires some conscious act on his part more than the mere filing of a claim in response to a public notice issued by the official liquidator. Once the secured creditor takes such further actions like sale of the secured assets through the liquidator and subject to the control of the Company Court in that event, he would be part of the scheme of payment as rationalized under Section 529 and 529A of the Act.

25. In the case of Andhra Bank (*supra*), this Court, after discussing the law in paragraphs 25 and 26, clearly held in paragraph 30 of the judgment that claims of the secured creditors are, thus, to be considered giving priority over the unsecured creditors but their claim would be *pari passu* with the workmen. In my view, this is the correct exposition of law.

26. The learned counsel appearing for the appellant also raised an issue with regard to the secured creditors having stood outside the winding up and, therefore, not entitled to the benefit of *pari passu* charge in terms of Section 529A of the Act. According to respondent No.8, they had taken steps for realizing the security without prejudice to the proceedings initiated by them before the Debts Recovery Tribunal and they had never given up their claim. According to this respondent, they have not been able to realize their entire dues as a result of taking out of the workmen's portion out of their security. It is also their contention that once having obtained the benefit under the Proviso to Section 529(1) of the Act, it is not open to the workmen to disregard the rest of the provisions and deny the benefit to respondent No.8 of the provisions of Section 529A. To the contra, as already noticed, the submission of the appellant is that the secured creditors have given up their security and joined the winding up proceedings and are covered under Section 47(2) of the Insolvency Act. Resultantly the provisions of Section 529A(1)(b) are not applicable.

27. A secured creditor who has a charge over the assets of a company in winding up, merely by instituting an application before the DRT or any other special forum without effectively pursuing that remedy and taking effective steps to realize his security would not stand outside the winding up proceedings. If the sale of secured assets is effected by the Official Liquidator subject to control of the Company Court and such amounts are utilized for discharging the debts of the secured creditor as well as statutory charge of the workmen created under Sections 529 and 529A, then, in effect, the secured creditor would be deemed to have participated in the winding up proceedings and not stood outside the same. It is for the reason that a secured creditor has to take steps by filing petition before any other forum just to protect his legal right and to prevent the claim from getting barred by time. On the contrary, if he realizes his security within the four corners of the company law, i.e., before the Official Liquidator and the Company Court, in that event it would not be possible to hold that such secured creditor has given up his option to participate in the winding up proceedings. However, the matter would be quite different where the secured creditor elects not only to institute a petition

before the specialized forum but also takes effective steps to realize his security and pursues the proceedings effectively, in which event, the conclusion has to be that such secured creditor has stood 'outside the winding up' proceedings.

28. Equally, it can be stated that a secured creditor who, after institution of a claim but without pursuing the remedy outside the provisions of this Act, files claim before the official liquidator, relinquishes his security and agrees to the distribution of the sale proceeds through the official liquidator, subject to jurisdiction of the Company Court, could always be said to be not 'standing outside the winding up' proceedings. However, where he institutes a petition, proceeds with it and seeks realisation of security before a forum outside the Company Court, then he obviously pursues the remedy beyond mere filing of a claim and would be a person 'standing outside the winding up' proceedings and shall be subject to the rights enforced by the official liquidator in terms of the proviso to Section 529 of the Act. As it has also been held by this Court in the case of ICICI Bank (supra), the secured creditor has to take some positive steps to participate in the winding up petition.

29. In the case of ICICI Bank (supra), this Court had taken the view that filing an affidavit or proof of claim with the official liquidator pursuant to notice issued by him does not amount to the relinquishment of his security by a secured creditor in terms of Section 47(2) of the Insolvency Act. In this very judgment, the Court also stated that 'only because the dues of the workmen and the debts due to the secured creditor are treated *pari passu* with each other, the same by itself, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by'. The Court also explained that relinquishment has to be by virtue of a specific act and a conscious decision on behalf of the secured creditor. Similarly, merely filing a proceedings before a special forum to save limitation without taking any effective steps to realize the security there, would not necessarily mean that the secured creditor has stood outside the winding up proceedings.

30. From the respective contentions raised by the parties, one fact is clear that respondent No.8 has realized its security without prejudice to the proceedings taken by it before the Debts Recovery Tribunal. Furthermore, the security was realized strictly within the scope of Section 529(1) and its proviso. That has to be protected in terms of Section 529A(1)(b) because the secured creditor has not relinquished its security for the general benefit of the creditors but realized the same in terms of Section 47(1) of the Insolvency Act. The argument raised on behalf of the appellant in this regard is not well-founded. If this contention is accepted in the facts of the present case, then it would run contra to the principles stated by this Court in the case of Andhra Bank (supra) and ICICI Bank (supra). It has already been noticed that the provisions of Section 529A are not controlled and/or subservient to any other provision of the Act or any other law. Once the twin requirements stated in the proviso to Section 529(1) are satisfied, the scheme contemplated under clause (c) of the proviso to Section 529 read with Section 529A of the Act would come into play. The Court cannot overlook the reality that intention of the framers of law could not have been that the public funds, for instance, the money of secured creditor (like banks), should be completely ignored for the benefit of the creditors in general, despite there being a definite protection in law, more so, when the security may be sufficient for recovery of dues of such secured creditors to a limited extent, if not in entirety.

The scheme of these provisions, thus, has to be understood to make it practicable and in consonance with the accepted commercial principles. It is precisely for these reasons that I am taking the view that the workmen's charges as well as that of the secured creditors have to be paid in preference to all others, but with inter se pari passu charge on the amounts realized from the sale of the security or otherwise.

31. From the above discussion on law and the judgments of this Court, the following principles can be safely deduced :

1. The rules of insolvency or the provisions of the Provincial Insolvency Act, 1920 would apply in the winding up of an insolvent company under the provisions of Section 529 of the Act but it has a limited application as per terms of clauses (a) to (c) of Section 529(1) of the Act.
2. The provisions of the Insolvency Act and even Section 529 of the Act cannot control the scope and application of Section 529A of the Act.
3. Merely submitting of an affidavit or demand by the secured creditor in response to the notice issued by the Official Liquidator inviting claims would not tantamount to effective participation in the winding up proceedings (Ref. ICICI Bank (supra)).
4. Mere institution of a petition by a secured creditor before a court or forum of competent jurisdiction per se will not lead to an inference that the secured creditor has stood outside the winding up proceedings unless it takes some effective steps to pursue those proceedings and realizes its security de hors the specific procedure under the Act.
5. The proviso to Section 529(1) has two prescribed contents which have to be satisfied cumulatively. The expression 'and' appearing therein will have to be read as 'conjunctive' and not 'disjunctive'.

The contents are, firstly, that the provision creates a legal fiction of pari passu charge in favour of the workmen on the security of a secured creditor and, secondly, that the secured creditor should realise its security in contradistinction to relinquishment of his security for recovery of its dues in accordance with law.

6. Relinquishment has to be a conscious act on the part of the secured creditor and is incapable of being construed by implication.

7. The secured creditor and dues of the workmen in the proportion calculated in terms of Section 529A are liable to be paid in preference to all other dues but are pari passu inter se. (Ref. Andhra Bank (supra))

32. Reverting to the facts of the present case, the judgment of the High Court, to the extent it takes the view that the charges of the workmen and secured creditors have to rank *pari passu*, cannot be faulted with. However, where the learned Single Judge as well as the Division Bench of the High Court have fallen in error of law, is the computation and adjustment of the shares between the workmen, on the one hand and the secured creditors, on the other. Particularly, the learned Single Judge directed the amounts recovered from the secured creditors to be distributed between the workmen and the secured creditors in equal proportion of 50 per cent of their respective admitted claims. This order and calculation is opposed to the very scheme of the above provisions, particularly with respect to determination of the workmen's portion. Another error in the calculation that appears from the record is that though the total sale proceeds from the secured assets were Rs.108.90 crore, the Court directed the payment of only Rs.101 crore which is the aggregate of the amount directed to be paid to the workmen and to the secured creditors. Thus, there has been an error of law in applying the statutory provisions in this regard. The High Court erred in not noticing that the Company Court has not made calculation and computation in accordance with law. The Company Court as well as the Appellate Court should have considered the workmen's portion in terms of proviso to Section 529(1) and Section 529(3)(c) along with the illustration appended thereto and thereafter, its over-riding preferential payment vis-a-vis all other unsecured creditors in terms of Section 529A and 530 of the Act. Once that is done, the Court could then have settled the payment received by the Official Liquidator from the sale of the unsecured assets of UMI. The amounts, thus, are required to be recalculated in terms of the above provisions and the law stated herein.

33. In the present case, the secured creditor has realized its security but without putting the security or the receipts thereof in the common hotch potch of the winding up proceedings for the general benefit of the creditors. Thus, in terms of Section 47(1) of the Insolvency Act, the secured creditor in the present case is entitled to the balance due to it, deducting the net amounts realized. If the secured creditor would have participated in the winding up proceedings in its entirety with the security being realised and/or relinquished for the general benefit of the creditors and not restricted to the compliance of Section 529 of the Act, it would not be entitled to the benefit of Section 529A of the Act. As already discussed, it is not the case herein. It may also be noticed that the amounts, by the consent of the parties, have already been disbursed and utilized by the workmen as well as the secured creditors in terms of Section 529 of the Act which obviously, in my view, are subject to adjustment as per the orders of the Court.

34. For the reasons afore-recorded, while reiterating the view expressed in *Andhra Bank* (supra), I am of the considered view that the High Court should re-compute the amounts payable *pari passu* between the secured creditors and the workmen in accordance with the principles stated above.

35. Therefore, I remand the matter to the Company Court to apply the above-stated principles and calculate the amount payable to the respective parties afresh and in accordance with law.

.....J. (Swatanter Kumar) New Delhi;

September 21, 2012