Andhra Bank vs Official Liquidator And Anr on 14 March, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1814, 2005 (5) SCC 75, 2005 AIR SCW 1608, 2005 CLC 531 (SC), 2005 (4) SRJ 419, (2005) 4 ICC 322, (2005) 30 ALLINDCAS 134 (SC), (2005) 107 FACLR 152, (2005) 3 JT 506 (SC), 2005 (3) SCALE 178, 2005 (3) JT 506, 2005 (4) COM LJ 33 SC, 2005 (3) SLT 167, (2005) 3 MAD LJ 19, (2005) 3 PAT LJR 105, (2005) 3 SCJ 762, (2005) 65 CORLA 258, (2005) 3 CAL HN 1, (2005) 1 BANKJ 760, (2005) 124 COMCAS 453, (2005) 2 BANKCAS 425, (2005) 2 SUPREME 721, (2005) 3 SCALE 178, (2005) 1 WLC(SC)CVL 574, (2005) 3 JLJR 30, (2005) 3 BANKCLR 51

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Bench: N. Santosh Hegde, B.P. Singh, S.B. Sinha

CASE NO.:
Appeal (civil) 1321 of 2003

PETITIONER:
Andhra Bank

RESPONDENT:
Official Liquidator and Anr.

DATE OF JUDGMENT: 14/03/2005

BENCH:
N. Santosh Hegde, B.P. Singh & S.B. Sinha

JUDGMENT:

J U D G M E N T S.B. SINHA, J:

Doubting the correctness of the statement of law contained in paragraph 76 of the judgment of this Court in Allahabad Bank vs. Canara Bank and Another [(2000) 4 SCC 406], a Division Bench of this Court has directed that the matter be placed before a Bench of three Judges.

BACKGROUND FACT :

By a scheme of amalgamation approved by the High Court of Calcutta on or about 317.1984, the assets and properties of Tobacco Division of Duncan Agro Industries Limited were transferred to its subsidiary New Tobacco Limited ('the Company', for short). The company had been obtaining and enjoying diverse credit facilities from

the Appellant-Bank upon hypothecation of all goods, raw materials, stocks of tobacco including movable properties situated at Biccavolu in the State of Andhra Pradesh.

The Appellant herein on or about 15.9.1987 filed a suit in the Calcutta High Court for recovery of Rs.2,69,54,228.15 along with interest at the rate of 18.5% p.a. against the company. In the same year, an application for winding up of the said company was filed before the Company Judge of the Calcutta High Court, which was marked as CP No.621 of 1987. The Appellant in the said suit filed an interlocutory application; whereupon the Joint Receivers were appointed for making inventory of hypothecated goods lying in the factories of the company at Agarpara in the State of West Bengal and Biccavolu. Upon such inventory having been made, the stock of tobacco lying in the godown at Guntur and Biccavolu were ordered by a learned Single Judge of the High Court to be sold by auction and the Joint Receivers were directed to keep separate accounts of the sale proceeds of the goods in the two godowns. The said sale was later on confirmed and the sale proceeds of Rs.135 lacks was directed to be deposited in a fixed deposit with the Appellant. The company was directed to be wound up by the learned Company Judge by an order dated 25.11.1991 and an Official Liquidator was directed to take possession of the assets of the company. The said order dated 25.11.1991 was, however, stayed in view of a scheme for revival of the company which was approved; whereupon a committee of management was appointed by the Calcutta High Court which was directed to reopen and run the factories of the company both at Agarpara and Biccavolu. The said scheme of management, however, ultimately having failed, the assets and properties of the company were directed to be sold by an order dated 23.9.1993 as an on-going concern. By reason of an order dated 12.10.1993, the Company Judge directed the Appellant to pay a sum of Rs.38 lakhs to the Official Liquidator on an ad hoc basis for the purpose of disbursing salaries to the officers, staff and workers of the company before the ensuing Puja vacation.

An appeal preferred thereagainst by the Appellant was dismissed by a Division Bench of the High Court by an order dated 23.11.1993 directing the Joint Receivers to draw the said sum of Rs.38 lakhs from the fixed deposit made with the Appellant and pay the same to the Joint Special Officers in terms of the order of the learned Single Judge.

Two Special Leave Petitions were filed by the Appellant before this Court which were marked as S.L.P. (Civil) No.20833 of 1993 and 20834 of 1993 against the said orders of disbursal whereupon by an order dated 14.1.1994, an interim order of stay was passed. In the year 1995, an application was filed by the workers before the High Court for a declaration that they are entitled to a sum of Rs.19,57,77,408/- towards their past dues.

The said application is still pending decision before the Company Judge. The assets and properties of the company were directed to be auctioned by the Joint Special Officers in June 1995 and by an

order dated 29.6.1995, the sale thereof in favour of M/s R.D Industries Limited for Rs.23 crores was confirmed. It is stated that, in the meantime, an agreement was entered into by and between the Appellant herein and the said Duncan Agro Industries Limited to underwrite the dues of the company on the condition that the amount would be repaid to the extent it was able to recover its dues from the company. Allegedly, the said agreement has been performed by Duncan only partially.

This Court by an order dated 9.1.1998, requested the High Court to dispose of the pending appeal and directed that the interim stay granted on 14.1.1994 would continue for a period of seven months; whereupon by reason of a judgment and order dated 19.3.2002, the appeal preferred by the Appellant herein was dismissed by the Division Bench, stating :

> "Having regard to the above facts, circumstances, materials on record and the legal aspects as discussed above we find no infirmity in the impugned order passed by the learned Company Judge. There is no merit in the appeal. The appeal is accordingly dismissed. The order under appeal is affirmed subject to the following directions. We direct the Joint Receivers to draw the sum of Rs.38 lakhs from the fixed deposit made with the appellant Andhra Bank and pay the amount to the Joint Special Officers in terms of the order dated 12th October, 1993 passed by the learned Single Judge for disbursement of salary to the officers, staff and workers of New Tobacco Co. Ltd. The Joint Receivers are directed to encash the fixed deposit receipts only after their maturity, if the same have not already matured and will continue to hold the balance amount with interest in further short term deposit account until further orders to be obtained from any appropriate forum. The Joint Special Officers are directed to disburse the money within one month from the date of receipt of the money from the Joint Receivers in terms of the direction contained in the order dated 12th October, 1993. No order as to costs."

In the meantime, the suit filed by the Appellant was transferred to Debts Recovery Tribunal on 25.7.2000.

SUBMISSIONS :

> Mr. L. Nageshwar Rao, the learned Senior Counsel appearing on behalf of the Appellant, assailing the judgment and order passed by the Division Bench of the High Court, would contend : (1) that the assets of the company having been sold as a going concern and the purchaser having been permitted to enter into a settlement as regard past salaries of the workmen, the High Court could not have passed the impugned order as the workmen could approach only if such amount was not sufficient to pay the entire dues of the workmen; (2) the impugned order which was ad hoc in nature could not have been passed by the High Court particularly in view of the fact that the Appellant was outside the purview of the winding up proceeding as it filed the suit upon obtaining leave of the learned Company Judge in terms of Section 446 of the Companies, 1956; and (3) the workers' dues could not be held to have any precedence over all secured and unsecured creditors as has been held by this Court in Allahabad

Bank (supra) and reliance thereupon by the High Court is unsustainable.

Drawing our attention to a judgment of this Court Allahabad Bank (supra), the learned counsel would contend that although in earlier paragraphs therein this Court has correctly interpreted the provisions of Sections 529 and 529-A of the Companies Act, the observations made in paragraph 76, being contrary thereto in relation to the secured creditors standing outside the winding up proceeding, was not correct.

The learned counsel would contend that the learned Single Judge of the High Court while passing the order dated 12.10.1993 did not apply his mind to the question as regard its jurisdiction in passing an ad hoc order. The Division Bench of the High Court also, Mr. Rao would submit, committed a manifest error in passing the impugned judgment relying on or on the basis of the said observations made by this Court in Allahabad Bank (supra).

Drawing our attention to the auditor's report, Mr. Rao would submit that it would appear therefrom that a sum of 6.8 crores has already been paid to the workmen in terms of the settlement arrived at by and between the purchaser and the workmen, and, thus, the High Court must be held to have committed a manifest error in passing the impugned order. As regard the purported agreement entered into by and between the Appellant and the aforementioned Duncan Agro Industries Limited, Mr. Rao drew our attention to the following statements made in the Rejoinder Affidavit :

"With reference to paragraphs 6, 7, 7(a) and 7(b) of the affidavit, it is stated that the same are not germane to the issues in the SLP. It is stated that pursuant to the said agreement dt. 11th December 1996 between M/s Duncan Agro Industries Limited and the petitioner bank, the latter received Rs.135 lakhs on 30th December 1996. The balance amount of Rs.135 lakhs, M/s DAIL have deposited Rs.45 lakhs in a 'No Lien' deposit account in their own name with the petitioner bank. Shares worth Rs.90 lakhs in the year 1996 are also lying deposited with the bank in terms of the said agreement. The value of the said shares is drastically reduced today. The claim of the bank has thus not been settled or even fully secured. After applying interest @ 18.5% p.a. as claimed in the plaint in the bank's suit now pending before DRT at Calcutta on the principal claim amount of Rs.2,69,54,228/- and after adjusting Rs.135 lakhs in the year 1996, there is no due and owing by the said company in liquidation a sum of Rs.35,50,80,103.15 as on 30th June, 2002. In any event clause (5) of the said agreement states as follows :

"That if the Hon'ble Calcutta High Court allows the Bank to receive from the Joint Receivers the whole of Rs.135.00 lacs with or without the interest accrued thereon lying with Joint Receivers being the sale proceeds of hypothecated goods against the dues of NTC to the Bank, the Bank is entitled to appropriate the said amount towards the balance of the suit amount of Rs.135 lacs and interest accrued thereon. In the above event the entire amount of money being in the fixed deposit together with interest thereon referred to in paragraph 3 herein above, will be returned to the company within thirty days from the date of the order."

The petitioner bank is therefore obliged to conduct its suit and enforce its claim in respect of Rs.135 lakhs, being sale proceeds of tobacco lying with Joint Special Officers in the matter. It is denied that the claim of the petitioner bank against the company in liquidation has been settled."

Mr. Dipankar P. Gupta, learned Senior Counsel appearing on behalf of the Respondents, on the other hand, would submit that the High Court has extensive jurisdiction to decide any question arising between the parties or any claim made under the Companies Act in terms of Section 446 thereof, the impugned order was within the jurisdiction of the High Court.

Mr. Gupta would draw our attention to the fact that the learned Single Judge passed the order as far back as 1993, when the judgment of this Court in Allahabad Bank (supra) was not pronounced and even the Debts Recovery Tribunal was not constituted (it was constituted in the State of West Bengal on 27.4.1994), and submit that the impugned judgment should be upheld without reference to the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('the RDB Act', for short) or the decision of this Court in Allahabad Bank (supra). It was urged that keeping in view the fact that the Bank claimed its security only in relation to 135 lakhs whereas the claim of the workmen was more than 19 crores, and having regard to the provisions contained in Section 529 of the Companies Act, the impugned order does not cause any prejudice to the Appellant. In any event, having regard to the purport and object of Section 529 and 529-A of the Act, this Court should not interfere with the impugned judgment. Reliance, in this connection, has been placed on Jay Laxmi Salt Works (P) Limited vs. State of Gujarat [(1994) 4 SCC 1].

Drawing our attention to the following statements made in paragraph 6 of the Affidavit filed before this Court, the learned counsel would contend that the Appellant should not be permitted to take a different stand in its Rejoinder:

> "I also respectfully submit that M/s Duncan Industries Ltd., formerly known as Duncan Agro Industries Ltd., from which the New Tobacco Company was transferred and amalgamated in 1984, the said Duncan Industries Ltd. has also paid the Bank's suit amount of Rs.270 lacs to the Bank with a clause that in the event of adjustment of sale proceeds of Rs.135 lacs is passed which is to be adjusted by the Hon'ble Court, the same amount to be refunded to the Duncan Industries Ltd..."

POINTS FOR DETERMINATION :

> In view of the rival submissions made at the Bar, the questions which arise for our consideration are : (i) whether the statement of law contained in paragraph 76 of the judgment of this Court in Allahabad Bank (supra) does not lay down a good law; (ii) whether the impugned judgment could have been passed by way of an ad hoc measure in view of the fact that the company was sold as a going concern and the workers' dues were to be paid from the sale proceeds of the assets of the company; and (iii) whether any payment could be made to the parties to the winding up proceedings only upon considering the claims of all the creditors and in terms of the certificate issued by the Debts Recovery Tribunal under the the RDB Act.

ALLAHABAD BANK :

The Allahabad Bank was an unsecured creditor; it had obtained a simple money decree from the Debts Recovery Tribunal (DRT) against the debtor Company M/s M.S. Shoes (East) Co. Limited, whereas the Respondent therein, Canara Bank, was a secured creditor, but its claim was pending before the DRT at Delhi. A sale proceeding was taken by the Allahabad Bank before the Recovery Officers under the RDB Act. The learned Company Judge in exercise of his power under Sections 442 and 537 of the Companies Act stayed the proceedings. A question arose as to whether the Appellant Allahabad Bank was obliged to seek leave of the Company Court under the Companies Act and the Company Court could stay the said proceedings under Sections 442 and 537 of the Companies Act. for the ultimate purpose of deciding the priorities, in the event of a winding up order or other order appointing a provisional liquidator being passed under Section 446(1) of the Companies Act. The Allahabad Bank contended that the Tribunal under the RDB Act was competent to deal with the question of appropriation of sale proceeds in respect of sales of the company properties held at the instance of the Appellant and the Appellant alone was entitled to all the sums so realized. This Court framed the following issues :

"(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 ?

As regard the first issue, it was held :

"In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to banks or financial institutions. Once the Tribunal passes an order that the debt is due, the Tribunal has to issue a certificate under Section 19(22) [formerly under Section 19(7)] to the Recovery Officer for recovery of the debt specified in the certificate. The question arises as to the meaning of the word "recovery" in Section 17 of the Act. It appears to us that basically the Tribunal is to adjudicate the liability of the defendant and then it has to issue a certificate under Section 19(22). Under Section 18, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Articles 226 or 227 of the Constitution.). This is the effect of Sections 17 and 18 of the Act."

This Court while considering the position of secured creditors standing outside the winding up proceedings, noticed the provisions of Section 529-A and 529 of the Companies Act, holding :

"But the point here is that the occasion for such a claim by a secured creditor (here Canara Bank) against realisations by other creditors (like Allahabad Bank) under Section 529-A read with proviso (c) to Section 529(1) can arise before the Tribunal only if Canara Bank has stood outside winding-up and realised amounts and if it shows that out of the amounts privately realised by it, some portion has been rateably taken away by the liquidator under clauses (a) and (b) of the proviso to Section 529(1). It is only then that it can claim that it is to be reimbursed at the same level as a secured creditor with priority over the realisations of other creditors lying in the Tribunal. None of these conditions is satisfied by Canara Bank. Thus, Canara Bank does not belong to the class of secured creditors covered by Section 529- A(1)(b).

Therefore, the result is that Canara Bank cannot rely on the words in Section 19(19) viz., "to be distributed among its secured creditors" for claiming any amount lying in the Tribunal towards its security nor can it claim priority as against Allahabad Bank. If none of the conditions required for applying Section 19(19) and Section 529-A is, therefore, satisfied, then the claim of Canara Bank before the Tribunal can only be on the basis of principles underlying Section 73 CPC. There being no decree in its favour

> from any court or from any Tribunal, and the other conditions of Section 73 not having been satisfied, no dividend can be claimed out of monies realised at the instance of Allahabad Bank, even if Allahabad Bank is an unsecured creditor."

As regard Point No.6, however, this Court at paragraph 76 of the judgment held :

> "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 529-A 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 : 1983 SCC (L&S) 72 : 1983 SCC (Tax)] 2 : AIR 1983 SC 75) 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."

The observations were presumably made having regard to the fact situation obtaining therein as the Allahabad Bank was an unsecured creditor and the Canara Bank although a secured creditor would not come within the purview of Section 529 and 529-A of the Companies Act. The decision in Allahabad Bank (supra) could, thus, be explained but we think it necessary to clarify the legal position having regard to the fact that the matter has been referred to this Bench and particularly when reliance thereupon has been placed by the High Court as a proposition of law as regard interpretation of Section 529 and 529-A of the Companies Act.

Before adverting to the question, we may notice the relevant provisions of Sections 529A and 529 of the Companies Act, which read as under :

> "529-A. Overriding preferential payments. - (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.

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 529-A. (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 :
>
> * * * (3) For the purposes of this Section, Section 529A and Section 530,-
>
> (a) * * *
> (b) * * *
>
> (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."

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 in 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 creditors. The submission of Mr. Gupta is that in a situation of this nature, what was necessary to be considered by the learned Single Judge was to find out the amount in relation whereto the appellant was raising its claim as a secured creditor, namely, 135 lakhs vis- `-vis the aggregate of the amount of the workmen's dues of 19 crores and the claim of any other secured creditor was not required to be taken into consideration. We cannot accept the said contention. The illustration appended to clause (c) of sub-section (3) of Section 529 is a clear pointer to the effect that the amount of debts due to the secured creditors should be taken into consideration for the purpose of ascertaining the workmen's portion of security.

The language of Section 529-A is also clear and unequivocal, in terms whereof the workmen's due 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 claim of the workmen as also the secured creditors will have to be paid in terms of Section 529-A. This Court in Allahabad Bank (supra) held :

> "Learned Attorney General on the other hand submitted 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 the workmen's portion in his security, whichever is less". In other words, 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), (b) or the said proviso to Section 529(1). No such situation has arisen so far. It is contended that where a secured creditor keeps himself outside as stated in the proviso to Section 529(1) and seeks to recover his dues outside the Company Court, if he loses part of his security towards workmen's dues, he gets reimbursed to that extent as a secured creditor, with an overriding priority under Section 529-A(1)(b). He gets priority over all other creditors before the Tribunal, to be compensated for this loss out of the monies that may have been realised at the instance of other creditors before the Tribunal. It is pointed out that Canara Bank has neither realised any amount outside winding-up nor has it lost any part of its security towards workmen's dues. In our view, this contention of the learned Attorney

> General is well founded and is entitled to be accepted.
>
> 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 529-A(1)(b)."

This Court emphasized that whatever secured creditor loses towards the workmen's portion out of the security, he can claim the same amount with priority over such unsecured creditors out of realization made by other creditors whose moneys are lying in the Tribunal.

While determining the Point No.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 the Allahabad Bank was indisputably an unsecured creditor.

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 (supra) to the aforementioned extent does not lay down the correct law.

The court also wrongly placed reliance on National Textile Workers' Union and Others vs. P.R. Ramakrishnan and Others [(1983) 1 SCC 228]. The question which arose therein was only as regard the right of the workers be heard in the winding up proceeding. The said decision was, therefore, not applicable.

DETERMINATION :

> 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 lacs 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."

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.

Whether the workmen could be directed to be paid on an ad hoc basis having regard to their claim of past dues vis-`-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 529-A". 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.

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. Assuming such a power exists, it was imperative that the same should have been exercised on consideration of the factors laid down by this Court in Morgan Stanley Mutual Fund etc. vs. Kartick Das etc. [(1994) 4 SCC 225]. An unreasoned order does not subserve the doctrine of fair play [See M/s. Mangalore Ganesh Beedi Works Vs. The Commissioner of Income Tax, Mysore and Anr. JT 2005 (2) SC 442].

In UCO Bank vs. Official Liquidator, High Court, Bombay and Another [(1994) 5 SCC 1], whereupon Mr. Gupta placed strong reliance, this Court although noticed the legislative intent in enacting Sections 529 and 529-A did not lay down the law that the claim of the workers ranked higher in priority than the secured creditors. It merely states that for achieving the purpose for which the said amendment was made, it is necessary that the amended provisions must apply to all available securities which form part of the assets of the company in liquidation on the date of the amendment.

Submission of Mr. Gupta, that the impugned order having been passed by the learned Single Judge in the year 1993, the considerations which prevailed at that time only should be considered, cannot be accepted as it is trite that even the appellate court while passing its order may take into consideration, the subsequent events.

In Rajesh D. Darbar and Others Vs. Narasingrao Krishnaji Kulkarni & Ors. [(2003) 7 SCC 219], this Court noticed:

> "4. The impact of subsequent happenings may now be spelt out. First, its bearing on the right of action, second, on the nature of the relief and third, on its importance to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. Patterson v. State of Alabama [1934] 294 U.S. 600, illustrates this

position. It is important that the party claiming the relief or change of relief must have the same right from which either the first or the modified remedy may flow. Subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage. Lachmeshwar Prasad Shukul v. Keshwar Lal Choudhuri AIR 1941 FC 5 falls in this category. Courts of justice may, when the compelling equities of a case oblige them, shape reliefs - cannot deny rights - to make them justly relevant in the updated circumstances. Where the relief is discretionary, Courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the Court, even in appeal, can take note of such supervening facts with fundamental impact. This Court's judgment in Pasupuleti Venkateswarlu v. Motor & General Traders AIR 1975 SC 1409 read in its statutory setting, falls in this category. Where a cause of action is deficient but later events have made up the deficiency, the Court may, in order to avoid multiplicity of litigation, permit amendment and continue the proceeding, provided no prejudice is caused to the other side. All these are done only in exceptional situations and just cannot be done if the statute, on which the legal proceeding is based, inhibits, by its scheme or otherwise, such change in cause of action or relief. The primary concern of the court is to implement the justice of the legislation. Rights vested by virtue of a statute cannot be divested by this equitable doctrine - See V.P.R.V. Chockalingam Chetty v. Seethai Ache AIR 1927 PC

252."

[See also Board of Control for Cricket, India and Anr. Vs. Netaji Cricket Club and Ors. [JT 2005 (1) SC 235].

Correctness of an equitable order like the impugned one may be judged upon taking into consideration the subsequent events. Subsequent events as pointed out by Mr. Rao, furthermore, are not disputed.

The learned Company Judge in its order dated 8.5.2002 has noticed that a substantive amount has been paid to the workers towards their past dues. Payments have also been made not only to the statutory authorities but also to the secured creditors and the Special Officers. The workmen since the sale of the assets of the company as a working concern, have received substantial amounts towards their past dues and are being paid their current dues. A situation of starvation of the workmen does no longer prevail. The order passed by the learned Single Judge cannot moreover be sustained on amongst others, the ground of not assigning any reason in support thereof. The Division Bench of the High Court also relied on the observation made in paragraph 76 of this Court's judgment in Allahabad Bank.(supra) It did not advert independently to any other contention of the

parties.

The contention of Mr. Gupta that Debts Recovery Tribunal having been established in the West Bengal on 27.4.1994, the dispute has to be resolved without reference to the RDB Act, also cannot be accepted.

The rights and obligations of the parties would only be crystallized after the lis is adjudicated upon.

The question of issuance of any certificate in terms of Section 19 of the RDB Act would arise only upon the conclusion of the proceeding before it.

In view of our findings aforementioned, it may not be necessary for us to consider the question as to whether the claim of the company having been underwritten by the Duncan Agro Industries Limited in favour of the Bank, it has suffered any prejudice or not.

For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.