

(1995) 04 AP CK 0016

In the Andhra Pradesh High Court

Case No : O.S. Appeal No's. 18 and 19 of 1994

Andhra Pradesh State Financial Corporation

APPELLANT

Vs

Official Liquidator

RESPONDENT

Date of Decision : 21-04-1995

Acts Referred:

Companies Act, 1956 — Section 171, 434(1), 439(1), 446(1), 456
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (1995) 2 ALT 406 : (1996) 86 CompCas 341

Hon'ble Judges : M.N. Rao, J;D.H. Nasir, J

Bench : Division Bench

Advocate : Y. Sivarama Sastry, for the Appellant; P. Ravi Prasad, for the Respondent

Judgement

D.H. Nasir, J.—The appellant, the A.P. State Financial Corporation, (for short "the Corporation"), in O.S.A. No. 18 of 1994, has challenged the order passed on December 10, 1993, by the learned single judge (Sri S. Dasaradharama Reddi J.) of this court in C.A. No. 122 of 1993 in R.C.C. No. 6 of 1991 by which the following conditions were imposed :

1. The petitioner should undertake to discharge its liability due to the workers, if any, u/s 529A of the Companies Act, 1956.
2. The petitioner shall intimate at least 10 days in advance before the date fixed for receipt of tenders, to the official liquidator about the proposed sale of the properties of the company, and
3. The petitioner shall also obtain the permission of the court before finalising the tenders.

2. C.A. No. 122 of 1993 was filed by the corporation u/s 446(1) of the Companies Act, 1956, read with sections 29 and 46B of the State Financial Corporations Act, 1951 (for short "the SFC Act"), read with rule 9 of the Companies (Court) Rules seeking permission to pursue its remedies under the

State Financial Corporations Act, 1951, by staying outside the liquidation proceedings. The company in liquidation in this case is Nagarjuna Papers Limited.

3. Similarly, in O.S.A. No. 19 of 1994, the corporation has challenged the order passed on December 31, 1993, by the learned single judge of this court (Sri S. Dasaradharama Reddi J.) in C.A. No. 97 of 1993, in C.P. No. 20 of 1990, by which permission was granted to the appellant-corporation to take proceedings u/s 29 of the State Financial Corporations Act, 1951, subject to similar conditions as stated above. The company in liquidation in this case is Chandra Pharmaceuticals Limited.

4. Since the conditions imposed in both the orders in appeal are similar and the grounds urged for and against the legality of the same are materially and substantially the same, both the appeals are being disposed of by this common order.

5. In O.S.A. No. 18 of 1994, the case of the corporation is that it sanctioned various term loans to the respondent-company on the strength of hypothecation of plant, machinery, land, etc. As on July 31, 1993, an amount of Rs. 1,24,27,132 was due from the respondent-company to the corporation. The second respondent commenced commercial production in the month of June, 1982, but it could not achieve the production target due to various reasons, apart from ineffective management of the company. Further, according to the corporation, at the request of the directors of the respondent-company, Canara Bank extended various reliefs in the year 1983 for the revival of the unit, however, the respondent-company did not revive its operations, and the working of the unit came to a grinding halt in December, 1984, and, therefore, the Canara Bank file O.S. No. 1155 of 1990, on the file of the Second Additional Judge, City Civil Court, Hyderabad.

6. In the meantime, by an order passed on September 28, 1992, this court directed the official liquidator to take over the assets and liabilities of the borrower company in R.C.C. No. 6 of 1991. The corporation therefore, took steps to seek the permission of this court to stay outside the liquidation proceedings.

7. It is further the case of the corporation that two other financial institutions along with the appellant-corporation were having first charge over the assets of the borrower company in respect of the term loan sanctioned by them. According to the corporation, since the financial facilities granted to the borrower company were fully secured, the appellant corporation was entitled to realise the outstanding dues by proceedings u/s 29 of the state Financial Corporations Act, 1951, without waiting for the result of the winding up proceedings. Further, according to the Corporation, if the current state of affairs of the borrower company persisted indefinitely, the corporation would not be able to realise its dues, and, therefore, permission was sought from this court to enforce the security according to the remedies open to it u/s 29 of the State Financial Corporations Act, 1951.

8. In O.S.A. No. 19 of 1994, the case of the appellant-corporation is that the borrower company, namely, Chandra Pharmaceuticals Limited, approached the corporation for sanction of a term loan for setting up a unit for the manufacture of bulk drugs and it sanctioned initially a term loan of Rs. 30,00,000 on February 12, 1982, out of which an amount of Rs. 29,17,700 was disbursed. However, the management of the borrower company failed to run the unit on sound business principles from its inception and the unit could not honour its commitments in discharging its liability. On a representation made by the borrower company, the appellant-corporation sanctioned an additional loan of Rs. 17,65,000 and an amount of Rs. 12,66,940 was disbursed; however, the borrower company could not function effectively and profitably. In the month of March, 1990, one of the creditors, namely, Priya Chemicals Limited, Hyderabad, filed C.P. No. 20 of 1990, seeking winding up of the borrower company under sections 434(1) and 439(1) (b) of the Companies Act, 1956. The company which was sought to be wound up approached the Board for Industrial and Financial Reconstruction under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, to devise ways and means for the revival of the suit. However, the Board expressed an opinion that it would be just and proper that the borrower company should be wound up. The State level institutions, along with IRBI lost confidence in the management of the borrower company. The opinion of the Board was forwarded to this court for taking action according to law.

9. In the meantime, according to the appellant-corporation, the arrears payable were mounting and in those circumstances, the appellant-corporation issued recall-cum-sale notice u/s 29 of the State Financial Corporations Act, 1951, and seized the unit on December 20, 1991. Accordingly, the appellant-corporation was in possession of the factory and plant belonging to the borrower company. Further, according to the appellant-corporation, a total sum of Rs. 1,04,51,000 was outstanding as on January 31, 1993.

10. With the above background of facts in view we shall now proceed to examine the submissions made by Mr. Y. Shivarama Sastry on behalf of the appellant-corporation and Mr. P. Raviprasad appearing on behalf of the respondent-official liquidator. From the submissions made by them, the main question which emerges for our consideration is whether the right of the secured creditor, to remain outside the winding up proceedings without the leave of the court is absolute. The other question is whether the company court acquired any new jurisdiction by virtue of the amendment of the Companies Act, by which the existing section 529 was amended, and a new section in the form of section 529A was incorporated.

11. The proviso to sub-section (1) of section 529 of the Companies Act, 1956, provides that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen. In a case 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, 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. This is what is provided in the proviso to sub-section (1) of section 529 of the Companies Act. Section 529A, which was introduced by the Amendment Act 35 of 1985, provides that :

"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."

12. Learned counsel for the appellant-corporation has fairly conceded that the charge in favour of the workmen was a *pari passu* charge and in that view of the matter he did not dispute the first condition of the impugned order that the appellant shall undertake to discharge its liability to the workers, if any, u/s 529A of the Companies Act, 1956, but the remaining two conditions continue to be seriously disputed.

13. u/s 29 of the State Financial Corporations Act, 1951, the statutory right to sell the property has to be exercised with the rights of the *pari passu* charge-holder in whose favour the statutory charge is created by the proviso to section 529(1) of the Companies Act, 1956, when the company is in liquidation, and, therefore, such a power could be exercised only with the concurrence of the liquidator, and the official liquidator is required to take permission of the court before giving such concurrence since he is an officer of the court and is required to act under the directions of the court while exercising his powers on behalf of the workers.

14. In the case before us it is evident that the court imposed conditions by the impugned order for effecting sale of the property. The court did not deny altogether the liberty to the corporation to stay outside the liquidation proceedings. If such liberty was denied, the official liquidator would have taken into custody all properties, effects, and actionable claims to which the company in liquidation is entitled as contemplated u/s 456 of the Companies Act. Sub-section (2) of section 456 of the Companies Act provides that all the properties and effects of the company shall be deemed to be in the custody of the court as

from the date of the order for the winding up of the company.

15. However, in the impugned order, the court has merely observed that on September 22, 1993, counsel for the petitioner filed a complete inventory of both movable and immovable assets of the company which was wound up, seized by it on December 20, 1991, and also furnished details as to the guarantees taken from the directors regarding loans. He also furnished the list of names and addresses of the directors of the company. However, the court did not direct that the same should be taken into custody of the official liquidator. Out task, therefore, boils down to examining whether the imposition of condition was lawful.

16. It is true that in the case of M.K. Ranganathan and Another Vs. Government of Madras and Others, , the Supreme Court held that the secured creditor was outside the winding up and he could realise his security without the intervention of the court by effecting a sale of the mortgaged premises by private treaty or by public auction. The court further observed that it was only when the intervention of the court was sought either by putting in force any attachment, distress or execution within the meaning of section 232(1) of the Companies Act, 1956, or proceeding with or commencing a suit or other legal proceedings against the company within the meaning of section 171 of the Companies Act that the leave of the court was necessary and if no such leave was obtained the remedy could not be availed of by the secured creditor.

17. A Division Bench of the Bombay High Court, comprising Smt. Sujata Manohar and Sri N. D. Vyas JJ., in the case of Maharashtra State Financial Corporation, Bombay Vs. Ballarpur Industries Limited, v. The Official Liquidator, High Court Bombay and Liquidator of M/s. Atrois Chemicals Private Limited, , while considering the effect of the above decision of the Supreme Court, observed in para. 7 that (page 347 of 82 Comp Cas) :

"The decision of the Supreme Court undoubtedly supports the appellants. The Supreme Court, however, has dealt with the question at a time when the Indian Companies Act, 1913, was in force. The Indian Companies Act, 1913, did not have any provision equivalent to the amended section 529 or section 529A of the Companies Act, 1956. Hence, the impact of these provisions of section 537 of the Companies Act, 1956, which is similar to section 232 of the Indian Companies Act, 1913, could not have been considered by the Supreme Court."

18. In our case by virtue of the fact that there is a pari passu charge in favour of the workmen, the company court was fully justified in imposing conditions in an application by the secured creditor to stay outside the liquidation proceedings. The conditions laid down by the court, in fact,, save the secured creditor from the fetters of section 537 of the Companies Act, 1956. It is in this context that we have to consider the provisions of section 537 of the Companies Act, under which leave was asked for by the appellant for conducting sale. The decision of the Supreme Court in the case of M.K. Ranganathan and Another Vs.

Government of Madras and Others, , dealt with a situation where there was no pari passu charge and the secured creditor had obtained possession of the property of the company before the company went into liquidation. In such a situation, the Supreme Court upheld the right of the secured creditor to sell the security without the intervention of the court and hence, the leave of the company court was held not necessary u/s 537 of the Companies Act, 1956. But in a situation where the official liquidator, as a representative of the workmen had a pari passu charge on the property of the company over which security was created in favour of the appellant-corporation, it is difficult to appreciate how the secured creditor can sell the property outright ignoring the official liquidator of the court. u/s 537(1)(b) of the Companies Act, 1956, any sale held without the leave of the court of any of the properties or effects of the company after commencing of the winding up is void.

19. u/s 29 of the State Financial Corporations Act, 1951, the financial corporation is conferred with the right to take over the management or profession or both, of the industrial concern as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the financial corporation. Permission to obtain leave of the court would be necessary only if the appellant-corporation acted in exercise of the powers conferred upon it by section 31 of the State Financial Corporations Act, 1951. Section 31 of the State Financial Corporations Act, 1951, provides that any officer of the financial corporation, generally or specially authorised by the board in that behalf may apply to the district judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business, for one or more of the following reliefs, namely : -

(a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the financial corporation as security for the loan or advance; or

(aa) for enforcing the liability of any surety; or

(b) for transferring the management of the industrial concern to the financial corporation; or

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the board, which such removal is apprehended.

20. However, in the instant case, the financial corporation has not proceeded to act in accordance with section 31 of the State Financial Corporations Act, 1951, but in accordance with section 29 of that Act. In our opinion, therefore, it was not at all necessary for the financial corporation to approach this court for permission to stay outside the winding up proceedings. In spite of the same, the financial corporation did venture to make such an application in view of the fact that a pari passu charge was created on the assets of the company for payment of arrears to the workmen of the company by virtue of the amendment to section

529 of the Companies Act, as well as the incorporation of new section 529A by the Amendment Act, 35 of 1985. The whole proviso to sub-section (1) of section 529 of the Companies Act has been added by the Amendments Act Which reads as under :

"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."

21. It could thus be seen that the official liquidator is conferred with the power of representing the workmen and enforcing the pari passu charge in favour of the workmen. For the purpose of ensuring that the duties cast upon the official liquidator for enforcement of the pari passu charge of the workmen, it is absolutely necessary that the official liquidator should be so empowered by the company court as to discharge his function effectively. Reverting to the conditions imposed upon the financial corporation, by the impugned order it is evident that the same have been imposed with a view to enabling the official liquidator to discharge his functions effectively. The first condition calling upon the financial corporation to undertake to discharge its liability due to the workers regarding wages has not been disputed by learned counsel for the appellant-corporation. The second condition imposed, makes it obligatory on the financial corporation to intimate the official liquidator at least 10 days in advance before the date fixed for receipt of tenders for the purpose of selling the properties of the company. The imposition of this condition, by no stretch of imagination, would be treated as a constraint on the power of the financial corporation to realise its security be remaining outside the liquidation proceedings. The condition only facilitates the official liquidator to discharge his duty and to see that pari passu charge in favour of the workmen is not frustrated or truncated in any manner.

22. As far as the third condition is concerned it calls upon the financial corporation to obtain the permission of the court before finalising the tenders. For the purpose it is necessary to take note of the fact that the proviso to sub-section (2) of section 529 of the Companies Act, which was incorporated by the Amendment Act (65 to 1960), lays down 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 for the preservation of security before its realisation by the secured creditor. In the case before us, the property is not reported to be in the custody of the liquidator, but in the custody of financial corporation, and, therefore, the question of the secured creditor's liability to pay his portion of the expenses incurred by the liquidator for the preservation of the security before its realisation by the secured creditor, does not arise. However, what we are trying to emphasise by referring to this proviso to sub-section (2) of section 529 of the Companies Act, is to repeat and reiterate that the secured creditor could be saddled with this liability even if instead of relinquishing his security and proving for his debt, the secured creditor proceeded to realise his security, with a view to ensuring that the expenditure, so incurred on preservation of security was duly and properly reimbursed. A direction in the form of a condition could legitimately be given by the court, even in a case where the secured creditor remains outside the liquidation proceedings.

23. For the purpose of enforcing that *pari passu* charge in favour of the workmen, it is necessary that the liquidator should apply rateably any amount realised by way of enforcement of charge for the discharge of workmen's dues. It is also necessary that so much of the debt due to such secured creditor as could not be realised by him by virtue of the provisions of the proviso to sub-section (1) of section 529 of the Companies Act, or the amount of the workmen's portion in his security, whichever is less shall rank *pari passu* with the workmen's dues. For satisfying the requirement of section 529A of the Companies Act, it is necessary to ensure that clauses (b) and (c) of the proviso to sub-section (1) of section 529 of the Companies Act, 1956, are complied with. With a view to enabling the official liquidator to ensure that the aforesaid requirements are satisfactorily complied with, there could be no constraint on the power of the court to impose suitable conditions of the secured creditors so as to facilitate the official liquidator to discharge his functions effectively. If no such condition is imposed on the secured creditor, there is no other way by which it could be ascertained that this requirement of law is fully complied with and the matter would be totally left to the unfettered discretion of the secured creditor to appropriate the sale proceeds in an arbitrary manner, if one chooses to do so, and, therefore, with a view to ensuring that such a situation is avoided, the condition imposed by the impugned order directing the appellant-corporation to obtain the permission of the court before finalising the tenders cannot be treated as making an undue encroachment on the right of the secured creditor to realise its dues by remaining the liquidation proceedings.

24. We are, therefore firmly of the opinion that the right of the secured creditor emerging from section 29 of the State Financial Corporation Act, 1951, ceases to be an absolute right the moment it comes on the record of the case that there is a *pari passu* charge in respect of the workmen's dues on the assets and properties of the company in liquidation. While allowing the secured creditors to go ahead with the realisation of his security, the imposing of conditions as laid

down in the impugned order could not be treated as an unlawful encroachment on such right of the secured creditor. The position of the official liquidator acquires the status of the charge-holder in respect of the properties sought to be realised by the financial corporation by virtue of clause (1) of the proviso to section 520 of the Companies Act, which entitles the liquidator to represent the workmen and enforce such charge, and reasonable conditions could be imposed by the court on the secured creditor with a view to ensuring that the charge in favour of the workmen is enforced effectively. The insertion of new section 529A in the Companies Act, confers upon the court a duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with the provisions of newly added section 529A of the Companies Act, and the court acquires jurisdiction to impose reasonable conditions for this purpose. If the secured creditor is left free to realise its dues by stating outside the liquidation proceedings, there is an overwhelming possibility that the new rights created in favour of the workmen u/s 529A of the Companies Act may not be dealt with in a judicious manner.

25. Notice is also required to be taken of the facts disclosed in the affidavit filed by the official liquidator in C.A. No. 45 of 1995 that the financial corporation after preferring the present appeals indulged in releasing a tender notice in Eenadu a Telugu daily on March 15, 1995, inviting tenders for the sale of the assets of the company, and it did not inform him about the sale in advance as directed by the court, and that the financial corporation also did not comply with the other conditions imposed by the court. The affidavit further discloses that the tender notice was silent about the status of the company inasmuch as it did not disclose that the company was in liquidation with a view to misleading the people that the company was a going concern. It is further stated in the affidavit that the assets were neither valued nor any upset price was given, which according to him would ultimately open the flood gates for negotiations. At this stage, of course, we are not examining the legality of the tender notice, but several other facts as disclosed in the affidavit such as that the upset price was not given in the tender and that advance intimation was not given to the official liquidator. etc., give us cause for concern that the appellant-corporation might not conduct itself in a judicious manner. It is, therefore, all the more necessary to impose conditions on the secured creditor by allowing him to stay outside the liquidation proceedings so that the official liquidator would be facilitated in ensuring that the conditions imposed by the court are complied with, and that the interests of the pari passu charge-holders are not jeopardised. Learned counsel for the official liquidator also drew out attention to the decision of the Bombay High Court in the case of Maharashtra State Financial Corporation v. Official Liquidator [1995] 82 Comp Cas 342, wherein the court observed in paragraph 19 (at page 352) that like the secured creditor the official liquidator as a pari passu chargeholder also cannot sell the security ignoring the secured creditor. He must, therefore, either obtain concurrence of the secured creditor for the sale and take the court's sanction, or he can apply for the sanction of the court after notice to the secured creditor. The

court further observed that while granting such sanction, it may give appropriate directions regarding the conduct of the sale, the fixing of the reserve bid and distribution of sale proceeds. In fact, it will exercise similar powers and give similar directions as when it sanctions a sale by the secured creditor. In paragraph 23 (at page 354) of the same decision, the court observed that the rights conferred on a financial corporation as a mortgagee u/s 29 of the State Financial Corporations Act, 1951, are not obliterated when the company is in winding up and that it may have to exercise its right to take possession with the permission of the court. The court further observed that the statutory right which was given to a financial corporation u/s 29 of the State Financial Corporations Act, 1951, to sell the property has to be exercised consistently with the right of a pari passu chargeholder in whose favour a statutory charge is created by the proviso to section 529 of the Companies Act, when the company was in liquidation. It was evident that such a power could be exercised only with the concurrence of the official liquidator and the official liquidator was required to take permission of the court before giving such concurrence since he was an officer of the court and was required to act under the directions of the court while exercising his powers on behalf of the workers. These observations made by the Bombay High Court in the aforesaid decision reinforce the views expressed by us earlier that the court was well within its jurisdiction to impose conditions while granting permission to the secured creditor to realise its dues by staying outside the liquidation proceedings.

26. Referring to the arguments of Mr. Y. Shivarama Sastry, learned counsel for the appellant, during the course of his submissions he relied upon a decision of the Rajasthan High Court in the case of Boolani Engineering Corporation v. Asup Synthetics and Chemicals [1994] 81 Comp Cas 872, in which the court has held that the option of a State Financial Corporation, as a secured creditor of a company, to remain outside the winding up of the company was not affected by the insertion of section 529A of the Companies Act. Despite the fact that winding up had commenced, the financial corporation having taken possession of properties, charged to it, in exercise of the powers u/s 29 of the State Financial Corporations Act, 1951, and the charge having been registered by the Registrar of Companies, the corporation was entitled to put properties to sale for realisation of its dues and that section 537 of the Companies Act would not apply, as the sale was not through the intervention of the court. There could be no two opinions about the fact that the financial corporation was entitled to put properties to sale for realisation of its dues u/s 29 of the State Financial Corporation Act, 1951, and that section 537 of the Companies Act would not apply. However, the amendment to section 529 of the Companies Act, and the insertion of new section 529A by the Amendment Act (35 of 1985), made it obligatory upon the liquidator to represent the workmen and enforce the pari passu charge in favour of the workmen and to ensure that the amount realised was applied rateably for the discharge of workmen's dues which made it necessary for the court to intervene and impose conditions which may be found

necessary for the realisation of the pari passu charge in favour of the workers. In that view of the matter, in spite of the fact that the right of the financial corporation to realise its dues u/s 29 of the State Financial Corporations Act, 1951, could not be interfered with, the imposition of conditions to be observed by the financial corporation could not be dispensed with and could not be treated as an illegal encroachment on the right of the financial corporation.

27. Learned counsel for the appellant-corporation also placed reliance on the decision of the Division Bench of the Karnataka High Court in the case of *International Coach Builders v. Karnataka State Financial Corporation* [1994] 81 Comp Cas 19, in which it was held that the permission granted to the Karnataka State Financial Corporation as a secured creditor of the company in liquidation to sell the company's assets, which constituted security for repayment of loans advanced by it to the company and which it had already taken into possession before winding up was ordered and realised its dues subject to payment of the workmen's dues as undertaken by it by standing outside the winding up, was well in accordance with the provisions of section 529 of the Companies Act, as amended, and section 529A, as inserted in the Companies Act, and section 29 and section 46B of the State Financial Corporations Act, 1951. On page 33 in para D of the same decision, it is recorded that the important change brought about by amendment of section 529 and insertion of section 529A by Act 35 of 1985, was of subjecting the security of a secured creditor to a pari passu charge for the workmen's dues and empowering the liquidator to join the secured creditor in enforcing the workmen's charge on the security when the secured creditor proceeds to realise his security by standing outside the winding up. The view that, after the amendment of section 529 in the Act and the insertion of section 529A into the Act by Act (35 of 1985), the secured creditor of a company in winding up could not be permitted to stay outside the winding up to realise his security because of the pari passu charge for the workmen's dues statutorily created respecting such security and the liquidator of the company be permitted to sell such security for realisation of workmen's dues, ignoring the import of various express provisions contained in the amended section 529 of the Companies Act, was not correct, and there was no alternative left except to express disagreement with the same. It is further observed that it was true that the amendment of section 529 of the Act and insertion of section 529A into the Act were brought about by the Amendment Act (35 of 1985), with a view to enabling the workmen of the company under winding up to get the benefit of the dues which such company owed to them, on top priority being ranked with the dues to the secured creditors, but the right expressly conferred on the secured creditor of the company under winding up under the very provisions in the matter of realisation of its security opting to stand outside the winding up subject to sharing of such security with workmen and payment of his portion of the expenses to the liquidator for preserving the security cannot be taken away by any court in its endeavour or anxiety to place a construction on such provisions as could benefit the workmen.

28. We have no dispute in the present case with the proposition of law that the secured creditor was entitled to stay outside the liquidation proceedings and realise its dues even in a case where a pari passu charge of the workmen was found to exist. However, respectfully we are not in agreement with the view expressed in the aforesaid decision of the Karnataka High Court that the security could not be taken away by any court in its endeavour or anxiety to place a construction on such provisions as could benefit the workmen. We have held that reasonable conditions could be imposed simultaneously with allowing the financial corporation to realise its dues by staying outside the liquidation proceedings when the question of discharging the pari passu charge of the workmen emerges for consideration. It is not our intention to say that the conditions could be imposed for the benefit of the workmen, but our anxiety is to ensure that the dues of the workmen which stand, by a legal fiction, on par with the charge of the secured creditor should be allowed to be rateably apportioned and paid. For the purpose of determining the rateable portion of the workmen's dues, even at the cost of repetition, we must recapitulate the factors to be taken into consideration for the purpose of arriving at such rateable distribution. Under the amended portion of section 529 of the Companies Act, the following factors are required to be taken care of (a) that the liquidator should be enabled to enforce the charge of the workmen; (b) that the amount realised by the liquidator by way of enforcement of such charge should be applied rateably for the discharge of the workmen's dues; and that (c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the provisions of new proviso to sub-section (1) of section 529 of the Companies Act, or the amount of workmen's portion in his security, whichever is less, is held to rank pari passu with the workmen's dues for the purpose of section 529A. "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, as defined in clause (c) of sub-section (3) of section 529 of the Companies Act.

29. To be more illustrative, it could be stated that if the value of the security of a secured creditor of a company is Rs. 1,00,000 and the total amount of the workmen's dues is Rs. 1,00,000, and 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 amount of debts due to the secured creditors would be Rs. 4,00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the security, i.e., Rs. 25,000. (See illustration below section 529 of the Companies Act).

30. These are the particulars to be taken care of for the purpose of realising the pari passu charge of the workmen's dues when the secured creditor is permitted to realise its dues by staying outside the liquidation proceedings. In view of this meticulous manner in which the workmen's dues are required to be

determined, it would not be improper or unjust on the part of the court to impose conditions simultaneously with allowing the secured creditor to realise its dues by staying outside the liquidation proceedings so that the requirements of law are judiciously complied with. The conditions imposed by the court in the two impugned orders with which we are concerned in these two appeals are to be viewed with the above perspective and it would render us an immediate cause for recording the satisfaction that such conditions are not outrageous in any manner, and not defying the canons of justice from any point of view.

31. In the above view of the matter, therefore, both the appeals, O.S.A. Nos. 18 and 19 of 1994, are dismissed without costs.