

(2016) 08 JH CK 0136
In the Jharkhand High Court
Case No : Company Petition No. 02 of 2002

B.I.F.R.

APPELLANT

Vs

M/s UMI Special Steel Ltd.

RESPONDENT

Date of Decision : 12-08-2016

Acts Referred:

Companies Act, 1956 — Section 529 (A) (c)

Citation : (2017) 1 AIRJharR 428 : (2017) 1 JCR 392

Hon'ble Judges : Mr. Aparesh Kumar Singh, J.

Bench : Single Bench

Advocate : Mr. Satish Prasad, Advocate, for the UCO Bank; Mr. H.K. Mehta, & Mrs. Manjusri Patra, Advocates, for the Official Liquidator; Mr. Yogendra Prasad, Advocate, for the EPFO; Mr. Ratnesh Kumar, Advocate, for the Central Excise Dept; Mrs. I. Sen Choudhary, Adv

Final Decision : Allowed

Judgement

I.A. No.3369 of 2012

Mr. Aparesh Kumar Singh, J. - This I.A. has been preferred by one of the workmen with a prayer to pass appropriate orders in consonance with the principles laid down by the Hon''ble Supreme Court in its judgment dated 21st September, 2012 passed in Civil Appeal No.6755 of 2012.

2. The background history of the instant matter needs to be referred in brief herein after in order to understand the issues involved. The same workman filed an I.A. No. 1511 of 2008 earlier before the learned Company Judge, a Coordinate Bench of this Court contending that the assets of the company situate 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. The sale proceeds from these properties should be kept separately and be paid to the workmen first before disbursing any amount to the bank/financial institutions. The banks/financial institutions, which had given loans and advances to the

company, on the other hand, contended before this Court 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. 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. On an earlier date the learned Company Judge in his order dated 28th November 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.* reported in [(2005)5 SCC 75] Aggrieved thereof, the workmen/appellant filed Company Appeal No.10 of 2008 before the learned Division Bench of this 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. The learned Division Bench by its order dated 30th September 2010 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. The order dated 30th September 2010 passed by the learned Division Bench of this Court was challenged in appeal before the Apex Court in S.L.P. No.4104 of 2011 which was converted as Civil Appeal No.6755 of 2012. The Hon"ble Supreme Court by its judgment dated 30th September, 2010 has decided the appeal by majority. Thereafter, the workman herein has preferred this interlocutory application for passing appropriate orders in consonance with the principles decided by the Apex Court in the said Civil Appeal.

3. The company in liquidation had availed loan facilities from various banks and financial institutions and for securing the repayment of the same, securities were created over the assets of the company in liquidation in the form of mortgage over the immovables and hypothecation over the movables. Despite the efforts taken by the BIFR, the company failed to revive and as per the provisions of the Sick Industrial Companies Act, 1985 reference was made to this Court for proceeding with the winding up of the company. Accordingly, the winding up order was passed by this Court. The Official Liquidator attached to this Court was appointed to discharge the creditors of the company in accordance with the scheme of the Companies Act.

4. Pursuant to the winding up, secured assets of the company which were mortgaged and hypothecated with the Banks and financial institutions were taken into custody by the Official Liquidator and sold as per the orders of this Court and the respective shares were distributed among the secured creditors. The secured assets of the company were sold for a sum of Rs.108.90 crores and there were certain unsecured assets which were not mortgaged with any Bank or financial institution which were also sold for 8.51 crores. On the sale proceeds of Rs.8.51 crores which were unsecured assets, a dispute arose and the present interlocutory application was filed by the applicant-workers claiming that the sale proceeds arising out of sale of the unsecured assets can only be paid to the

workers who would be preferential unsecured creditors and the secured creditors would not get any share in the same.

5. Thus, the said application was dismissed by the Learned Company Judge on the earlier occasion holding that by virtue of Section 529-A of the Companies Act, the secured creditors and the workers would get equal share in the sale proceeds arising out of all the assets i.e. secured assets as well as unsecured assets. This led to the adjudication of the issue by the Hon''ble Apex Court in the judgment rendered in Civil Appeal No.6755 of 2012 in the case of Jitendra Nath Singh v. Official Liquidator & ors.

6. That in the aforesaid factual background, it is now important to advert to the decision rendered by the Hon''ble Apex Court on the subject of interpretation of the provisions of Sections 529 and 529-A of the Companies Act. Paras 12 and 13 of the majority judgment rendered by the Hon''ble Chief Justice of India, Hon''ble Mr. Justice S.H. Kapadia and Hon''ble Mr. Justice A. K. Patnaik are being reproduced hereunder:-

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

(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 529-A 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* a two-Judge Bench of this Court speaking through M. Jagannadha Rao, J. discussed these rights of the secured creditors in paras 62, 63, 64 and 65 of the judgment as reported in SCC, which are extracted here in below: (SCC pp. 435-36)

"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 realize their security. Inasmuch as Section 19(19) [of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993] 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. 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."

7. The minority opinion was rendered by Hon"ble Mr. Justice Swatanter Kumar, J. The difference in opinion in the majority and minority judgment is only with respect to the interpretation of Section 529 and 529A of the Companies Act and secured creditor portion with respect to which it enjoys pro rata distribution amongst workers out of the sale proceeds of unsecured assets.

8. The Hon"ble Supreme Court has while dealing with the subject held that a secured creditor has only a charge over a particular property or asset of the company. It 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 his 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. It has further been held that 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. 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. 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. Section 529 and 529A are accordingly reproduced hereunder :-

"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 debts opts to realize his security?

(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 debts 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 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:

Provided that if a secured creditor instead of relinquishing his security and proving for his debts 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.

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 529-A 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. 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."

9. Legal question therefore posed and required to be answered in the present application is as to whether the secured creditors have chosen to relinquish their security like any other unsecured creditor and remained out of the winding up proceedings or have opted to realize their security.

10. On this issue, the counsel for the secured creditor have advanced their submission. The counsel for the workmen have opposed the stand of the secured creditor that they have remained outside the winding up proceeding. The answer to the instant issue would determine the proportionate share of the secured creditor including that of the workmen out of the sale of the unsecured assets of the company, in terms of Section 529A.

11. There are nine secured creditors ? (1) IDBI Bank Ltd./SASF, (2) IFCI (3) UCO

Bank (4) Bank of India (5) HDFC (6) LIC (7) Standard Chartered Bank (8) UTI and (9) Edelweiss Asset Reconstruction Ltd. These secured creditors had submitted proof of debts before the official liquidators before winding up proceeding. There has been unanimity in the stand of all the secured creditors on the question as to whether they have chosen to relinquish their security or to realize it in terms of proviso to Section 47 of the Provincial Insolvency Act which applies also to the instant case. There has been unanimity in their stand that the case of the secured creditors is covered neither under Section 47(1) nor (2) but under Section 47(3) of the Provincial Insolvency Act. Section 47 of the Provincial Insolvency Act is quoted hereunder for better appreciation :-

"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 shares in any dividend."

12. Learned counsel Mr. Shivendra Kumar Roy represents the secured creditors IDBI (SASF), IFCI, International Assets Reconstruction Co. Ltd. which is the securitization company assigned with the dues of IIBI and also in respect of the debts of the ICICI assigned to Standard Chartered Bank which were subsequently assigned to IARC. He has in his submission taken the plea on behalf of these secured creditors that IDBI Bank Ltd. (SASF) had filed an application bearing O.A. No.72 of 2004 before the Debt Recovery Tribunal for recovery of its dues against the companies in liquidation by enforcing the security. However, he submits that due to sale of the secured assets in the liquidation proceedings and realization of certain dues by the secured creditors, they have made a prayer before the Debt Recovery Tribunal, Mumbai for keeping the proceedings in abeyance. Therefore, it should not be construed as relinquishment of their rights over their security. IIBI Ltd. which is the assigner of Edelweiss Asset Reconstruction Co. Ltd. had also filed an application under

Section 40 of the International Reconstruction Bank of India Act before this Court. However, IIBI Ltd. has gone in liquidation and therefore application has not been pursued. It is further stated that IFCI Ltd. and ICICI Bank Ltd./ Standard Chartered Bank (predecessor in interest of International Assets Reconstruction Com. Pvt. Ltd.) had not initiated any other proceeding and has participated in the sale proceedings of the secured assets before this Court for realizing its securities. However, before any proceedings initiated by the secured creditors could culminate and the other secured creditors could initiate any proceeding, the secured assets of the company in liquidation were put for sale under the orders of this Court. Therefore, all the banks and financial institutions on invitation of proof of debt by the official liquidator had filed their respective proof of debt mentioning their claim and also the particulars of securities in the schedule will all supporting documents including the charge certificates. This was adjudicated by the official liquidator by issuing notices of admission of proof of debt to the respective secured creditors and the said claims were adjudicated as a secured claim. It is submitted that the secured creditors had filed its claim before the official liquidator as being covered under Section 47(3) of the Provincial Insolvency Act for the purposes of realising their securities before this Court. The secured assets were sold with mortgage meaning thereby that with the sale of the secured assets the said securities of the secured creditors had converted into cash over which the secured creditors had charge and the same could only be utilized for distribution to the secured creditors subject to the statutory charge in favour of the workers to the extent of their portion created under proviso to Section 529(1)(c) of the Companies Act. Reliance has been placed upon the judgment rendered by the Hon"ble Apex Court in the case of ICICI Bank Ltd. v. Sidco Leather Ltd, reported in AIR 2006 SC 2088 These Secured creditors have set up a case on the instant issue that they are falling under the classification as provided in Section 47(3) of the Provincial Insolvency Act i.e. they have neither realized nor relinquished the securities but the moment the sale of the securities are effected the securities convert from securities to cash over which the secured creditors have charge. The sale proceeds arising there from can only be utilized for payment to secured creditors and the workers in whose favour there is a parri-passu statutory charge created under proviso to Section 529(1)(c) to the extent of their portion. The secured creditors to the extent that they have lost towards the workers portion would be entitled to be reimbursed under Section 529-A of the Companies Act. In case the funds arising out of sale of unsecured assets are insufficient then the amount which the secured creditors have lost towards the workers portion and the remaining dues of the workers portion would abate in equal proportion out of funds available on the sale of unsecured assets. The amount thereafter coming to the credit of secured creditors and workers under Section 529-A would be utilized for settling the balance dues of the secured creditors on pro-rata basis and the amount coming to the credit of the workers would be utilized for clearing the dues of the workers proportionately. They have in line with their stand, proposed a formula for calculation of the dues to be paid to the secured creditors as well as the

workmen out of sale of unsecured assets of the company. This in substance is also the stand of the secured creditors like the Bank of India, UCO Bank, as well as LIC.

13. Per contra the workmen have pressed their stand that all the secured creditors i.e. Banks and Financial Institutions are within the Liquidation proceeding and cannot be said to be out of the Liquidation proceedings. They have submitted their affidavits in proof of debt and realized dividends from the Official Liquidator as per order of this Court.

14. There is no decree in favour of any secured creditors. Hence, they are neither creditor nor unsecured creditors in respect of four properties, namely, Chennai, Faridabad, Pune and Kolkata which are not encumbered with these financial institutions or bank. Referring to the affidavit of proof of debts submitted by the individual secured creditors before the Official Liquidator by specific reference to Para-20 of the proof of debts of SASF, it is stated that though they have indicated that it is filing its affidavit without prejudice to the right to remain outside the winding up proceedings and enforce its securities against the companies, but its conduct is otherwise. Even though it had filed an original application bearing O.A. No.72 of 2004 before the D.R.T., Mumbai, but they have themselves kept it in abeyance. In that sense they have by their conduct clearly indicated that they are not outside the winding up proceeding rather are participating in the Liquidation proceedings. It is also pointed out on their behalf that in no other affidavit of proof of debts filed by other secured creditors any such assertion has either been made that the filing of affidavit is without prejudice to their rights to remain outside the winding up proceedings and enforce its securities against the company.

15. Learned counsel for the Workmen has also referred to the details of the claim and amounts adjudicated referred to at page no.2 of Flag 303 dated 22nd July, 2016. That the comparative figure show that the entire claim has not been accepted by the Official Liquidator. They have, however not chosen to realize their security in terms of provisions of Section 47(1) of the Provincial Insolvency Act. All the secured creditors have participated in the court auction and did not press for their secured assets. Even if the claim of the secured creditors is assumingly accepted, none of the secured creditors have any other security in hand to be realized outside the winding up proceedings.

16. Referring to the judgment rendered by the Bombay High Court reported in AIR 1929 (Bombay) 258, it is submitted that relinquishment would also be construed as abandonment by conduct. He has also referred to the claim of the Bank of India as a secured creditor who had also filed the Original Application No.17 of 2003, but again has by its conduct participated in the Liquidation proceeding and not chosen to relinquish the same.

17. Learned counsel for the Workmen has also relied upon the ratio rendered by the Apex Court in the judgment of Jitendra Nath (Supra) quoted herein-above,

and submitted that under Clause (c) of the proviso to Section 529(1), no pari passu charge over properties or assets of the company are created in favour of secured creditors which have not been offered as a security for the purposes of apportionment of the debts in terms of Section 529A of the Companies Act. It only relates to the extent of loss of security suffered by an unsecured creditor because of the statutory charge created in favour of the workmen. The secured creditor rank pari passu for overriding preferential under Section 529-A of the Companies Act and such debts are to be paid in priority to all other debts.

18. Learned counsel for the Workmen has also referred to the other judgments on the point and also referred to in the judgment of the Apex Court in the case of Jitendra Nath (supra) in support of the aforesaid submission. He further submits that Section 529A starts with non-obstante clause and full-meaning thereof should be given effect to.

19. In the background of the contrary stand taken by the secured creditors and the workmen in question in relation to apportionment of the debts arising out of sale of unsecured assets of the company, it is worthwhile to take note of the report of the Official Liquidator filed in compliance of the order dated 5th February, 2016 in regard to the fund position of the company and computation in respect of disbursement of the dividends. The Official Liquidator has given the detail calculation which are as follows:

Rs.

(I) Total Admitted claims of Secured Creditors:

Rs. 163,31,05,351.00

Workers:

Rs. 16,51,74,011.00

(II) Funds position:

Amount realized from sale of secured assets:

Rs. 108,90,00,000

Amount realized from sale of unsecured assets:

Rs. 8,51,00,000

Total amount realized:

Rs. 117,41,00,000(A)

Amount distributed till date as interim dividend:

To Secured Creditors (61.9%):

Rs. 101,08,92,755

To workers (50%):

Rs. 8,24,19,267

Total paid: Rs.

109,33,12,022(a)

Fund available as on 4.1.2016:

Rs. 213,96,46,59.99(b)

Total realization with interest earned on it (a+b):

Rs. 130,72,76,681.99(B)

Total interest earned till 4.1.2016(B-A):

Rs. 13,31,76,681

Interest on Realized value of secured assets: $(108,90,00,000 / 117,41,00,000) * 13,31,76,681$

Rs. 12,35,23,895

Interest on Realized value of Unsecured Assets: $(8,51,00,000 / 117,41,00,000) * 13,31,76,681$

Rs. 96,52,786

Now Realized value of secured assets including interest:

Rs. 121,25,23,895

Now Realized value of unsecured assets including interest:

Rs. 9,47,52,786

20. The Official Liquidator has dealt with the matter of apportionment of dues as would accrue in the alternative circumstances when (1) it is held that secured creditors have opted for realization of its security i.e. do not participate in the liquidation proceedings and (2) When secured creditors have opted for relinquishing his security and proving his debts i.e. have participated in liquidation proceedings.

21. If the first proposition is accepted, the apportionment of the dues of the secured creditors and the workmen out of the sale of unsecured assets of the company would be in the following manner.

(A) Workmen's portion in value of secured assets (defined under Section 529 (3) (c))

= (Total admitted workmen's dues divided by total admitted dues of workers and secured creditors) multiplied by value of secured assets

= (Rs. 16,51,74,011 / 179,82,79,362)* 121,25,23,895=

Rs.11,13,71,703

(67.42% of total admitted claims)

Workers have already been paid =

Rs.8,24,19,267

(50% of total admitted claims)

Balance to be paid from secured assets:

Rs. 2,89,52,436

(B) Distributable amount among secured creditors from secured assets:

=Rs. 121,25,23,895 -11,13,71,703

Rs.110,11,52,192

(67.42% of total admitted claims)

Secured creditors have already been paid=

Rs. 98,89,74,109

(61.9% of total admitted claims)

Balance to be paid from Secured Assets=

Rs. 11,21,78,083

(C) Distributable amount available from Unsecured assets:

Rs. 9,47,52,786

As per the proviso to section 529(1)(c), so much of the debt due to such secured creditors as could not be realized by virtue of foregoing provisions of this proviso (Rs. 163,31,05,351 - 110,11,52,192 = 53,19,53,159) or the amount of the workmen's portion (Rs. 11,13,71,703) in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of section 529A.

Therefore, the workmen's portion being less shall rank pari passu with the workmen's dues and thus the amount of portion of the secured creditors in Distributable Amount available from Unsecured Assets would be as follows: =(Rs. 11,13,71,703 / 16,51,74,011)*9,47,52,786=

Rs. 6,38,88,859

Therefore, the secured creditors would get in totto:

= Rs. 110,11,52,192 + 6,38,88,859

Rs.116,50,41,051

(71.33% of total admitted claims)

yet to be paid

=Rs. 116,50,41,051 - 98,89,74,109 (already paid)=

Rs.17,60,66,942

(D) Amount of portion of the Workers in Distributable Amount available from unsecured assets would be

= Rs. 9,47,52,786 - 6,38,88,859

Rs. 3,08,63,927

Therefore, the Workers would get in tutto:=11,13,71,703 + 3,08,63,927=

Rs. 14,22,35,630

(86.11% of total admitted claims)

Yet to be paid

= Rs.14,22,35,630 – 8,24,19,267 (already paid) =

Rs. 5,98,16,363

22. If the second proposition that the secured creditors are held to have opted for relinquishing their security and proving their debts i.e. have participated in the Liquidation proceedings then the following method of apportionment of debts amongst the secured creditors and the workmen would follow:-

(A) workmen's portion in value of secured assets (under section 529(3)(c)). This amount will remain the same as calculated above. Therefore, workmen's portion in value of secured assets would be &

= Rs. 11,13,71,703

Secured creditors share in value of secured assets would be

= Rs. 110,11,52,192

(B) Distribution of value of unsecured assets: As the secured creditors have participated in the Liquidation proceedings, the benefit of proviso (C) of section 529(1) would not be available with the secured creditors and therefore the workmen's dues would be paid in priority from the value of unsecured assets. The calculation will be as follows:-

(i) Distributable Amount available from Unsecured Assets

: Rs. 9,47,52,786

(ii) Pending claims of Workers :

= Rs.16,51,74,011 - 11,13,71,703

= Rs. 5,38,02,308

(iii) Balance remained after making payment of claims of workers:

=Rs. 9,47,52,786 – 5,38,02,308

= Rs. 4,09,50,478

(This would be available for distribution to Secured Creditors and other creditors)

Therefore, the Workers would get in tutto:

=Rs. 11,13,71,703 + 5,38,02,308

= Rs. 16,51,74,011

(100% of total admitted claims) & the Secured creditors would get in tutto:

=Rs. 110,11,52,192 + 4,09,50,478

= Rs. 114,21,02,670

(69.93% of total admitted claims)

23. I have considered the submissions of the parties on the rival claims made by them including the report of the Official Liquidator and judgment rendered by the Apex Court in the case of Jitendra Nath Singh (Supra) as also other judgments relied upon by them. The legal question posed in the foregoing paragraphs, has to be answered in favour of the workmen for the following reasons and facts.

The secured creditors have not remained out of the winding up proceedings or have opted to realize their security. Their stand that they are covered under the provisions of Section 47(3) of Provincial Insolvency Act and that they have neither released nor relinquished their security, also does not merit acceptance for the reasons recorded herein-after.

24. All these secured creditors have submitted their affidavits in proof of debts and realized dividends from the Official Liquidator as per orders passed by the Court from time to time. Even though, the affidavit in proof of debts filed by SASF at Para-20 indicates that it is without prejudice to their right to remain outside the winding up proceedings and enforce its securities against the Company, but during the entire proceedings, their conduct does not support the stand that they have remained outside the winding up proceedings. At their instance itself, O.A. No. 72/2004 preferred by them before the Debt Recovery Tribunal, Mumbai has been kept in abeyance and no further steps have been taken to prosecute the same. So far as other secured creditors are concerned, they have also participated in the liquidation proceedings and not pressed for their secured assets to be realized outside the winding up proceedings. Reliance of the secured creditors on the judgment rendered by the Apex Court in the case of ICICI Bank Ltd. (Since substituted by Standard Chartered Bank) v. Sidco Leathers Ltd. and others [(2006) 10 SCC 452] also does not come to their aid.

While dealing with the provisions of section 47 of the Provincial Insolvency Act as also attracted by virtue of Section 529 of the Companies Act, the Apex Court had occasion to observe as follows:

53. The expression "relinquish" has a different connotation. In P. Ramanatha Aiyar's Advanced Law Lexicon at p. 4047, it is stated:

"Relinquish. To give over possession or control of; to leave off." It envisages a conscious act i.e. an act where a person was aware of his right and then relinquishes the same. The same must be for the general benefit of the creditors. His action must lead to a conclusion that he, for one reason or the other, intended to stand in the queue for receiving money owed to him. It, however, does not stand obliterated only by the filing of an affidavit or proof of claim with the Official Liquidator. Such a claim had been filed pursuant to a notice issued by the Official Liquidator. If the creditor does not respond to the said notice, he would not be in a position to bring to the notice of the Official Liquidator, the existence of his right.

54. Sub-section (3) of Section 47 clearly envisages the position where he does not either realize or relinquish his security. He, in such a situation, may state in his affidavit or proof, the particulars of the security and value at which he assesses the same. The consequences therefore would ensue. If the Official Receiver proceeds to sell the security, the court first has to pay the amount at which the security was valued to the secured creditor out of the sale proceeds.

55. In Mahindra and Mahindra Ltd. v. Union of India it was stated: (SCC pp. 551-52, para 10)

"That has to be determined on an interpretation of Section 13(2) in the light of the context or setting in which it occurs and having regard to the object and purpose of its enactment. Now, one thing is clear that the power conferred under Section 13(2) is a corrective or rectificatory power and it is conferred in terms of widest amplitude. ? It is left to the discretion of the Commission whether the power should be exercised in a given case and if so, to what extent. But it must be remembered that this discretion being a judicial or in any event a quasi-judicial discretion, cannot be "arbitrary, vague or fanciful": it must be guided by relevant considerations. It is not possible to enumerate exhaustively the various relevant considerations which may legitimately weigh with the Commission in exercising its discretion, nor would it be prudent or wise to do so, since the teeming multiplicity of circumstances and situations which may arise from time to time in this kaleidoscopic world cannot be cast in any definite or rigid mould or be imprisoned in any straitjacket formula."

56. The question came up for consideration before a learned Single Judge of the Karnataka High Court in State Bank of Mysore v. Official Liquidator wherein the law was stated in the following terms: (Comp Cas p. 628)

"It will be thus plain that what Section 47 provides is only for the benefit of the

mortgagee and not to his detriment. He can follow any one of the three procedures suggested in the section. In this case, I do not think it can be validly argued that the mortgagee has relinquished his security. Exhibit B-1 makes it clear that he had no objection if the property is sold free of mortgage but a lien is kept insofar as the value he had assessed is concerned and is preferentially paid out of the sale proceeds. There are no words in Exhibit B-1 which warrant any conclusion that the mortgagee had relinquished his security?.

In fact, sub-section (3) of Section 47 lends support to this method of payment to the mortgagee. If the Official Receiver proceeds to sell the security, the court first has to pay the amount at which the security was valued to the secured creditor out of the sale proceeds. Whatever may be the position in regard to the balance insofar as the value of his assessment is concerned, he can be preferentially paid out of the sale proceeds.

If the sale was valid, I fail to see how the mortgagee could be deprived of his security, particularly when he had not relinquished. The property was sold with a clear understanding that the mortgagee will be paid first from the sale proceeds. This mode of realization of security is not, in my view, derogatory either to Section 47 or to Section 59 of the Act?."

25. By the observations rendered by the Apex Court, the expression "relinquish" envisages a conscious act where a person was aware of his right and then relinquishes the same. His action must lead to a conclusion that he intended to stand in the queue for receiving money owed to him. The said question therefore has to be answered taking into account the overall conduct of the person i.e. secured creditors in the instant case, whether they have consciously by their acts relinquished their claim or have opted to realize their security by remaining out of the winding up proceedings. All these secured creditors have participated in the auction of the assets of the Company under liquidation and never pressed to realize their security in other manner. There are no security left which are not part of the winding up proceedings to be realized by them outside the winding up proceedings. In substance, their conduct leads to the only conclusion that they have not relinquished their security and they have participated in the winding up proceedings and chosen to realize their outstanding dues through the sale of assets of the Company under liquidation. Their equivocal stand relying upon Section 47(3) of the Provincial Insolvency Act therefore, cannot be accepted. Judgment relied upon by the workmen also supports the view taken by this Court that the secured creditors have chosen to be part of the winding up proceedings consciously by their conduct and cannot be said to have remained outside the proceedings. In that view of the matter, their claim cannot be said to rank *pari passu* to the extent that they have lost to the worker's portion for realization of their dues against the sale of secured assets in terms of the provisions of Section 529(1)(c) of the Companies Act, which are to be realized from the sale proceeds of the unsecured assets of the Company under liquidation under section 529(A) on *prorata* basis.

26. In view of what has been held herein-above in the matters of distribution of the value of unsecured assets, since the secured creditors have participated in the liquidation proceedings, the benefit of proviso-c to Section 529(A) could not be available with the secured creditors. Therefore, the workers' dues would be paid on priority basis from the value of the unsecured assets, an exercise which is to be carried out by the Official Liquidator as per what has been held herein-above.

27. The Apex Court in the majority judgment in the concluding paragraph-12 of the Report in the case of Jitendra Nath Singh (Supra), have held that 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 create in favour of the workmen, shall to the extent indicated in Clause (c) of the Proviso sub-section (1) of Section 529 of the Companies Act rank pari passu with the workmen's dues for the purpose of Section 529A of the Companies Act.

28. As has been found herein-above, secured creditors have been found to have participated in the winding up proceedings and therefore, they are not entitled to claim that their unrealized dues in terms of distribution of secured assets under clause-c of section 529(1) shall rank Pari passu with that of the workmen in the matter of apportionment of debts in terms of section 529A of the Companies Act. In view of the detailed discussions and the reasons recorded herein-above, the claim of the applicant and other workmen for payment of their balance outstanding dues on priority basis from the value of the unsecured assets, is accepted. The Official Liquidator is now obliged to carry on computation and make the payment, in accordance with law to the workmen in question. Accordingly, the prayer made in I.A. No. 3369/2012 is allowed.

29. Official Liquidator has however brought to the notice of the Court through a Report at Flage-299 in regard to the fund position of the Company earlier, certain claims of 68 workmen have been rejected in I.A. No. 3376/2012. Similarly, the claim of 147 workmen have also been rejected which is subject matter in Company Appeal No. 4/2015. There has been admission of claim of three workers, referred to in the Report. That any claim of those 25 workers who have not yet given their name, is not made out as their names appear in the Statement of Affairs. It has been submitted that this Court may also keep in mind the other statutory dues in the form of Government Fee, Audit fees, payable from the sale proceeds of the assets of the Company. The Official Liquidator therefore made a request to keep an amount of Rs. 1.00 crore as a reserve. It is also submitted by the learned Official Liquidator that the calculation furnished through the instant Report no. 299 may vary depending upon the time when the fixed deposit could be encashed and the amount could be finally paid. In that view of the matter, after distribution of the debts of the workmen in priority, out of the balance remaining from the sale proceeds of the unsecured assets of the Company, an amount of Rs. 1.5 crores be kept in reserve and rest

be distributed to the secured creditors.

30. Prayer made in I.A. No. 6718/2015 and I.A. No. 4675/2016 shall be considered on the next date. Counsel for the parties may exchange their pleadings on these two I.A.'s in the meantime. A counter affidavit has been filed in I.A. No. 6718/2015 on behalf of Employees Provident Fund. Counsel for the applicant and EPFO may respond to the said counter affidavit before the next date.

31. List the case accordingly on 02.09.2016, by which time, Official Liquidator shall carry out the computation and furnish its report with regard to payments made.

32. Let a copy of the order be given to the counsel for the Official Liquidator.