

(2007) 09 CAL CK 0011

In the Calcutta High Court

Case No : C.A. No's. 101, 102 and 109 of 2006 and C.P. No's. 90, 91 and 92 of 2006

Ganapati Commerce Ltd. (In Liquidation) and The Official Liquidator, High Court

APPELLANT

Vs

Recovery Officer, D.R.T.-II and Others

RESPONDENT

Date of Decision : 18-09-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60, 73
Companies (Court) Rules, 1959 — Rule 164, 167, 174
Companies Act, 1913 — Section 232
Companies Act, 1956 — Section 433, 434, 439, 441, 442
Recovery of Debts due to Banks and Financial Institutions (Amendment) Ordinance, 2000 — Section 19(19)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 18, 19, 19(19), 19(2), 19(7)
State Financial Corporations Act, 1951 — Section 29, 31
Transfer of Property Act, 1882 — Section 100, 48

Citation : (2008) 3 BC 36 : (2008) 1 CALLT 175 : (2009) 1 CompLJ 260 : 112 CWN 122 : (2008) 83 SCL 467

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : A.K. Dhandhaniya and M.C. Ghosh and Biswapati Das, for the Appellant; P.C. Sen and Ranjan Bachawat, Rudraman Bhattacharjee, Rajdeep Chowdhary and Samin Ahmed for Respondent No. 2/Bank of Rajasthan, for the Respondent

Judgement

Sanjib Banerjee, J.—A question of some significance as to the authority, and obligation, of the company Court arises in these matters. The official liquidator as custodian of the assets of the three companies in liquidation has applied for a common order passed by the Recovery Officer, Debts Recovery Tribunal - II, Delhi to be set aside. The only contesting respondent in the three applications, a secured creditor at whose behest the company in each case was directed to be wound up, resists the prayers primarily on the ground of lack of the company

Court's jurisdiction to interfere with an order passed by a recovery officer under the Recovery of Debts due to Banks and Financial Institutions Act, 1993.

2. There may be a few dates that may be different in the three matters taken up together and there may be some irrelevant details which may be at variance in the three cases, but the principal matter in issue is the same and such issue does not stand on or fall by the varying dates or minor factual discrepancies in the three matters.

3. Bank of Rajasthan limited is a secured creditor of each of the three companies in liquidation. Such bank instituted proceedings under Sections 433, 434 and 439 of the Companies Act, 1956 for winding up each of the three companies. The three companies were wound up at the bank's behest. Most of the assets of the three companies have been sold off by the official liquidator through Court. The official liquidator holds the sales proceeds for the same to be applied upon creditors dues" being ascertained and priorities assessed. The official liquidator complains of a common order made by the recovery officer by which the official liquidator has been required to transmit the sale proceeds to the recovery officer of the appropriate Debts Recovery Tribunal.

4. The bank asserts that by virtue of the provisions of the 1993 Act, it is the tribunal which has primacy over such matters and the official liquidator must assist the tribunal in the matter of disbursement and the like. The bank claims that there is little role for the company Court or for the official liquidator to bring such a matter as the present one before the company Court, by reason of the wide amplitude of the authority of the tribunal and its officers under the 1993 Act, as laid down by the Supreme Court. The bank exhorts that the company Court need harbour no apprehension as to the rule as to priorities being followed by the tribunal under the 1993 Act or any suspicion that banks and financial institutions, which are generally the secured creditors of a company in liquidation, would be favoured over other creditors by the tribunal. In short, the submission is that the authority of deciding priorities and making disbursements in respect of companies in liquidation which are defendants in proceedings before the Debts Recovery Tribunal, now vests in the tribunal and such matters should no longer detain the company Judge presiding over the liquidation of the concerned company. It is urged that since the company Court no longer retains authority over such matters, there is no "obligatory jurisdiction" to ensure that things do not go amiss before the tribunal.

5. The bank insists that the prayers made by the official liquidator cannot be taken up at all. The principal purpose of these applications, according to the bank, is to annul an order passed by an officer empowered to do so under the 1993 Act. The company Court, it is emphasised, does not exercise superintending or supervisory jurisdiction over the tribunal or any officer under the 1993 Act and, in view of the clear promise u/s 18 of the 1993 Act, the Court should refrain from going into the question urged by the official liquidator as, on the strength of Section 18 and the appeal provisions in the 1993 Act, the

official liquidator would not be altogether without any remedy against the orders challenged in the present proceedings. The bank argues that such challenge cannot be made to the company Court directly and even if the wording of the prayers were to be ignored, such challenge cannot even be maintained collaterally by seeking a direction from the company Court. The bank suggests that rather than the form of the official liquidator's plea in these proceedings, it is the propriety thereof that the bank attacks in the light of the bounds of the company Judge's authority as now prescribed by the Supreme Court.

6. The bank has obtained certificates in its recovery proceedings and is in the process of executing such certificates before the recovery officer. The official liquidator appeared on behalf of the defendants in the three sets of proceedings before the tribunal as custodian of the assets of the three companies in liquidation. Before the tribunal, a Bombay property of one of the companies was declared as being mortgaged to the bank. It appears that from January, 2002, the official liquidator kept the recovery officer informed of the progress made in the liquidation proceedings, of claims received from creditors of the companies and of the sale of assets of the companies in liquidation pursuant to directions of Court. Before the recovery officer, the bank insisted that the adjudication of liability and recovery of the amount by execution of the certificate were within the exclusive jurisdiction of the tribunal and the recovery officer to resist the official liquidator's stand before the recovery officer that the sale proceeds were not required, in law, to be made over to the recovery officer for disbursement thereof. The recovery officer agreed with the official liquidator that the matter could not be dealt with by him without reference to the Court presiding over the liquidation proceedings and ordered accordingly on September 24, 2003:

In the backdrop of the facts and the circumstances explained above the contention of the learned OL as concluded in the report filed with this Tribunal vide letter dated 23-7-2003 appears to be de hors the provisions of the RDDB&FI Act, 1993. Moreover, it is also somewhat repugnant to his earlier report dated 11-1-2002. However, unless the CH Bank approaches the Hon'ble High Court with appropriate application for necessary clarification regarding recoveries out of the assets of the CDs., as per details below and also clarification regarding distribution of the proceeds of such assets, it may not be desirable to proceed further with the assets of the three companies where winding up proceedings are on before the Hon'ble High Court. Therefore, the CH Bank is directed to immediately move proper application before the Hon'ble High Court and file a report before the next date of hearing.

7. The bank was aggrieved by the view taken by the recovery officer and approached the presiding officer of the tribunal in appeal. The presiding officer made an order on May 7, 2004 requiring the recovery officer to proceed with the matter without requiring the bank to take leave of the company Court presiding over the liquidation proceedings. The matter thereafter was, regrettably, reduced to the question as to whether the 1993 Act would prevail over the Companies Act

and, consequently, whether the authority of the tribunal under the 1993 Act would hold sway over the company Court's jurisdiction regarding certificate debtor companies which were in liquidation. Counsel for the bank cautions that the matter should not be viewed by the company Court from the perspective of an apparently inferior forum denuding the company Court of some of its authority; the powers that can be exercised by either forum need to be weighed against the provisions found in the Companies Act and in the 1993 Act.

8. Both the official liquidator and the bank rely on the same Judgments of the Supreme Court for varying purposes. The official liquidator seeks to establish that there is no departure from the established procedure under the Companies Act in liquidation proceedings relating to companies in liquidation which are certificate debtors under the 1993 Act. The bank seeks to demonstrate that the position has completely altered in view of the 1993 Act and pronouncement thereon by the Supreme Court.

9. The apparent conflict between the two provisions of the two special statutes - the Companies Act and the 1993 Act - came to be noticed in the Judgment reported at Allahabad Bank Vs. Canara Bank and Another, . In that matter Allahabad Bank, the appellant before the Supreme Court, obtained a money certificate from the Debts Recovery Tribunal while Canara Bank, a secured creditor of the defendant company, had its claim pending before the same tribunal. Winding up proceedings were instituted against the company before the Delhi High Court which stayed, in course of the winding up proceedings, the application for sale of the company's assets taken out by Allahabad Bank before the tribunal. The Supreme Court noticed that there was neither a winding up order passed against the defendant company nor had a provisional liquidator been appointed. The discussion arose in the context of Canara Bank insisting that Allahabad Bank was obliged to seek leave of the company Court to proceed with its application for sale of the defendant's assets and that the company Court was competent to stay such application. Some of the properties of the certificate debtor company had been sold by the tribunal and Allahabad Bank contended that the tribunal was competent to deal with the question of appropriation of sale proceeds and decide on priorities. At the time that the matter was originally heard by the Supreme Court, the Amending Ordinance (which later became an Act) had not come into effect. It appears that the matter was heard as to the effect of the Amending Ordinance (later, the Amending Act) and in particular Section 19(19) of the 1993 Act. It was argued on behalf of Allahabad Bank that the 1993 Act was a special statute intended for expeditious adjudication and recovery of debts due to banks and financial institutions by which the jurisdiction of all Courts and other authorities, except the Supreme Court and the High Courts exercising powers under Articles 226 and 227, stood ousted by virtue of Section 18 thereof. The overriding effect of Section 34(1) of the 1993 Act was stressed on in support of the contention that the operation of the Companies Act in matters covered by Section 19, thus, stood completely ousted. At paragraph 13 of the report, the Supreme Court framed six questions that fell for

consideration:

13. From the aforesaid contentions, the following points arise for consideration:

(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 u/s 537 before a winding-up order is passed against the company or before provisional liquidator is appointed u/s 446(1) and whether the Company Court can pass orders of stay of proceedings before the Tribunal, in exercise of powers u/s 442?

(3) Whether after a winding-up order is passed u/s 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 u/s 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 (Act) 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 appreciate 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 u/s 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?

10. The Supreme Court opined that the jurisdiction of the tribunal under the 1993 Act in regard to adjudication was exclusive as was the authority of the recovery officer in matters relating to execution of the certificate granted by the tribunal. The Supreme Court next considered the effect of Sections 442, 446 and 537 of the Companies Act in respect of companies which were defendants or certificate debtors in proceedings under the 1993 Act and held as follows in paragraph 34 of the report:

34. While it is true that the principle of purposive interpretation has been applied

by the Supreme Court in favour of jurisdiction and powers of the Company Court in Sudarsan Chits (I) Ltd. case (1984)4 SCC 657, and other cases the said principle, in our view, cannot be invoked in the present case against the Debts Recovery Tribunal in view of the superior purpose of the RDB Act and the special provisions contained therein. In our opinion, the very same principle mentioned above equally applies to the Tribunal/Recovery Officer under the RDB Act, 1993 because the purpose of the said Act is something more important than the purpose of Sections 442, 446 and 537 of the Companies Act. It was intended that there should be a speedy and summary remedy for recovery of thousands of crores which were due to the banks and to financial institutions, so that the delays occurring in winding-up proceedings could be avoided.

11. The Supreme Court proceeded to take into account the Tiwari Committee Report of 1981 in assessing how priorities among creditors of a company that is a defendant in proceedings under the 1993 Act need to be assessed:

37. Even in regard to "priorities" among creditors, the said Committee stated in annexure I as follows:

The Adjudication Officer will have such power to distribute the sale proceeds to the banks and financial institutions being secured creditors, in accordance with inter se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priorities in the law.

The above recommendations as to working out "priorities" have now been brought into the Act with greater clarity u/s 19(19) as substituted by Ordinance 1 of 2000. Priorities, so far as the amounts realised under the RDB Act are concerned, are to be worked out only by the Tribunal under the RDB Act. Section 19(19) of the RDB Act reads as follows:

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

(emphasis supplied)

Section 19(19) is clearly inconsistent with Section 446 and other provisions of the Companies Act. Only Section 529-A is attracted to the proceedings before the Tribunal. Thus, on questions of adjudication, execution and working out priorities, the special provisions made in the RDB Act have to be applied.

12. The Supreme Court concluded that a view had rightly been taken by some High Courts that the Companies Act was a general statute and that the 1993 Act was a special statute and as such a provision in the special statute would prevail over a provision in the general statute if there was a conflict between the provisions of the two enactments. The matter was tested by treating the Companies Act as a special statute and by arriving at the same conclusion. The

view taken was that as to whether a statute was a general statute or a special statute would depend on the two conflicting statutes being juxtaposed to ascertain whether the one was a general statute and the other was a special statute, in comparison. The analogy used was that a Rent Control Act would be a special statute vis-a-vis the CPC but a Rent Control Act would be a general statute vis-a-vis a statute incorporating special provisions regarding public premises. The Supreme Court found that, whatever may be the status of the Companies Act vis-a-vis the 1993 Act and even if the two were special statutes, the non-obstante clause in the later statute would obliterate the conflicting provisions in the earlier statute or even the non-obstante clause in the earlier enactment. It was on such reasoning that the Supreme Court found, as a proposition of law, that in view of Section 34 of the 1993 Act, the 1993 Act would have overriding effect over the Companies Act.

13. Since it is apposite in the context, in another Judgment cited by the parties reported at ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, , a further approach to interpret statutes has been recognised upon construction of the maxim *generalia specialibus non derogant*. In such case, the special statute that is the Companies Act, was pitted against the general statute that is the Transfer of Property Act. What fell for consideration in that case was the inter se rights of secured creditors and it was held that the rights of the secured creditors do not get blurred by reason of Section 529(1)(c) of the Companies Act and what such provision recognises is the rights of the secured creditors en masse vis-a-vis rights of unsecured creditors. In the Sideo Leathers case the Supreme Court noticed an earlier Judgment of that Court where it had been held that a specific provision dealing with the particular situation in a general statute would override a special law which is inconsistent therewith. At paragraph 46 of the Sideo Leathers report it was found that where the special statute did not contain any specific provision dealing with contractual and other statutory rights between different kinds of secured creditors, the specific provisions contained in the general statute would prevail. The specific provisions that the Supreme Court found in the Transfer of Property Act are laid down by Section 48 thereof.

14. What must not be lost sight of is the context in which the Supreme Court rendered Judgment in the Allahabad Bank case. In view of the legal fiction in Section 441 of the Companies Act, winding up proceedings are deemed to commence on the date of presentation of the petition. Such deeming provision takes effect only upon the company being wound up, for the date of commencement of winding up is irrelevant if the petition is dismissed or permanently stayed. In view of the legal fiction, the other provisions relating to liquidation become applicable upon commencement of winding up proceedings and till such proceedings are alive. The Supreme Court addressed the larger issue as to the conflict of the provisions of the two Acts and held that the 1993 Act would prevail but the Supreme Court's opinion cannot be widened to give Section 19(19) of the 1993 Act any more effect than would appear from such provision. In fact, the Supreme Court used words of limitation in the Allahabad

Bank case that need to be adhered to.

15. Section 19(19) of the 1993 Act does not cover every situation where the principal defendant in a bank claim is a company, though a plain reading of the sub-section would imply otherwise. The expression "company registered under the Companies Act, 1956" appearing in the sub-section has to be construed to imply "company in liquidation" or else the sub-section would carry no meaning. The proceeds from the sale of a secured asset of a company, other than a company in liquidation have to be made over to such company to the extent the same are in excess of the value of the certificate. In such a case there would be no question of distribution of the assets among secured creditors or of priorities being decided in terms of Section 529-A of the Companies Act. It is only when the certificate is against a company in liquidation that the certificate holder has to await the assessment of priorities to receive its share in accordance with the provisions of Section 529-A of the Companies Act. If the certificate debtor company is not in liquidation, the certificate holder bank need not be detained upon the security being sold and its certificate would be discharged from the sale proceeds, if it is enough to meet the amount covered by the certificate.

16. To start with, the recovery officer under the 1993 Act³ exercises much the same authority as a Court executing a decree. If the certificate holder is a secured creditor of the certificate debtor, it is such security which has first to be sold to ascertain whether the proceeds therefrom are enough to meet the quantum covered by the certificate. If the secured asset does not meet the value of the certificate, the recovery officer as any other Court executing a money decree, would have the power to sell the other assets of the certificate debtor for the certificate claim to be satisfied. Whether or not a certificate debtor is a company or a company in liquidation, the recovery officer will follow the same procedure as to the sale of the secured and other assets of the certificate debtor. But, the expression "the sale proceeds of such company" appearing in Section 19(19) of the 1993 Act limits the distribution contemplated in the words that follow such expression in the sub section. Where the certificate debtor is a company in liquidation, the recovery officer will distribute such proceeds from the sale of the assets of the company in liquidation that the recovery, officer sells. If the company in liquidation has other available assets to be sold upon the secured asset not meeting the certificate claim, the recovery officer can call upon the concerned official liquidator to have such other available assets of the company in liquidation sold under the aegis of the recovery officer and such recovery officer will then distribute, on the basis of the priorities recognised by Section 529-A of the Companies Act, such of the proceeds that have been realised by the sales conducted by the recovery officer. The sub-section does not recognise that the recovery officer will call upon the concerned official liquidator to produce before him all monies realised out of previous sales of assets of the company in liquidation for the recovery officer to be exclusively overseeing the distribution of the entire lot of the sale proceeds.

17. Such view would appear from the careful words used by the Supreme Court in the Allahabad Bank case. At paragraph 37 of the report, the Supreme Court laid down that "priorities, so far as the amounts realised under the RDB Act are concerned, are to be worked out only by the Tribunal under the RDB Act" (emphasis supplied). At paragraph 51 of the report, the Supreme Court reiterated that "the adjudication, execution and distribution of the sale proceeds and working out priorities...so far as the monies realised under the RDB Act are concerned - has to be done only by the Tribunal and not by the Company Court" (emphasis supplied). At paragraph 55, the Supreme Court referred to the applicability of Section 73 of the CPC in the matter of "sharing in the sale proceeds (here, sale proceeds realised under the RDB Act)". At paragraph 56, the position has been clarified in unequivocal terms:

56. The discussion here is confined to sharing the realisations made by the Recovery Officer under the RDB Act where winding up proceedings are pending in the company Court against the defendant company.

18. The same thought is reflected in the opening sentences of paragraphs 58 and 76 of the report.

19. In the three matters, there are secured creditors of the companies in liquidation other than the Bank of Rajasthan. The official liquidator has served notice on the other secured creditors of the three companies in liquidation but such other secured creditors of Ganapati Commerce Limited (in liquidation) and Ganapati Combines Limited (in liquidation) chose not to appear at all and it may be presumed that they do not object to what the official liquidator seeks in these proceedings. Of the twelve secured creditors of Ganapati Exports Limited (in liquidation) other than the Bank of Rajasthan, only one appeared following the official liquidator's notice. State Bank of Bikaner and Jaipur has supported the official liquidator's stand and seeks settlement of claims of the creditors and disbursements by the official liquidator and not by the recovery officer of DRT-II, Delhi.

20. In the Allahabad Bank case, the varying positions of secured creditors who stand outside the winding up and those who come to the company Court for dividend have been discussed. It has been noticed at paragraphs 61 to 64 of the report that the secured creditors who come for dividend to the company Court relinquish their security in accordance with the insolvency rules referred to in Section 529 of the Companies Act and the secured creditors who opt to stand outside the winding up can claim priority over all other creditors for release of the amounts realised out of the sale proceeds.

21. The principal matter in issue in the present proceedings fell for consideration before a single Judge of this Court, though in different circumstances, in an unreported Judgment in C.A. No. 716 of 2001, rendered on July 5, 2002 [In the matter of: Reliance Ispat Industries Ltd. (in liquidation)]. A secured creditor of the company in liquidation in such matter sought a direction from the official liquidator

to deposit the proceeds realised by the official liquidator following a Court sale, with the Debts Recovery Tribunal. The secured creditor in that case relied on the Allahabad Bank Judgment of the Supreme Court. Another secured creditor opposed the application and urged that the Allahabad Bank case was confined to the sale proceeds realised out of the sales conducted by the tribunal. The applicant's contention in that case was not accepted despite the Allahabad Bank case being cited and the application stood rejected.

22. Before the Allahabad Bank case, the Supreme Court had referred to the provisions of the 1993 Act in the context of Section 446 of the Companies Act in a Judgment reported at Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others, which was rendered by a Bench of same strength as in the Allahabad Bank case. Inter alia, Sections 446 and 537 of the Companies Act were noticed in the Srinivas Agencies case in the context of the right of secured creditors to realise their debts from the assets of a company which is being, or has been, wound up, by approaching for other than the company Court. The opening sentence of the Judgment spells out the issue that was raised before the Supreme Court. Though the matter did not involve the applicability of the provisions of the 1993 Act, such, Act was noticed and thereupon the discretion that has to be exercised by the Court u/s 446(1) of the Companies Act was discussed taking into account the 1993 Act. At paragraph 13 of the report, the law as recognised by the Supreme Court was summarised:

13. We are, therefore, of the view that the approach to be adopted in this regard by the company Court does not deserve to be put in a straight-jacket formula. The discretion to be exercised in this regard has to depend on the facts and circumstances of each case. While exercising this power we have no doubt that the company Court would also bear in mind the rationale behind the enactment of Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, to which reference has been made above. We make the same observation regarding the terms which a company Court should like to impose while granting leave. It need not be stated that the terms to be imposed have to be reasonable, which would, of course, vary from case to case. According to us, such an approach, would maintain the integrity of that secured creditor who had approached the civil Court or desires to do so, and would take care of the interest of other secured creditors as well which the company Court is duty-bound to do. The company Court shall also apprise itself about the fact whether dues of workmen are outstanding; if so, extent of the same. It would be seen whether after the assets of the company are allowed to be used to satisfy the debt of the secured creditor, it would be possible to satisfy the workmen's dues *pari passu*.

23. However, in the Allahabad Bank case, the Srinivas Agencies case was considered and it was held that the reference to the 1993 Act in the Srinivas Agencies case was incidental and not central to the principal question. Paragraph 44 of the Allahabad Bank case distinguished the view taken in the Srinivas Agencies case on the following lines:

44. Learned Counsel for the respondent then relied upon certain observations in a recent case in Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others, made in relation to RDB Act, 1993 and to Sections 529 and 529-A of the Companies Act. That Judgment related to a batch of appeals against the Judgment of the Andhra Pradesh High Court dated 23-8-1989 and certain SLPs (C) Nos. 10101 and 11055 (from Kerala) (the Kerala SLPs were registered as CAs of 1996). (see: here facts i The Industrial Credit and Investment Corporation of India Limited and etc. Vs. Vanjinad Leathers Ltd. and etc.,). It has to be noticed that when the A.P. High Court decided the matter and when the special leave petitions from Kerala were filed in 1991, the RDB Act, 1993 had not yet been enacted. But much later by the time the civil appeals came up for disposal on 22-2-1996, the RDB Act of 1993 had been passed. The above ruling of this Court did not concern itself with the RDB Act directly on facts. The only issue which arose in that case, as stated in para 5 of the Judgment, were viz. (1) when should leave of the winding-up Court be granted to a secured creditor to proceed with the suit after an order of winding-up has been made: and (2) when should a winding-up Court transfer to itself any suit or proceedings by or against the company during the period of the winding-up. It was in that connection that in para 9, a reference was made to an argument by one of the counsel that in the case of suits which were pending before the date of liquidation, the Court could grant leave imposing "reasonable conditions" even against secured creditors so that genuine claims of other secured creditors were not affected. As appears from para 10 of the Judgment, the learned Counsel appearing for one of the parties in that case, appears to have incidentally referred to the provisions of the RDB Act, 1993 which had by then come to be enacted, for contending that while staying suits, the Company Court could impose reasonable conditions, keeping the rationale of the provisions of the RDB Act in mind. In para 12, this Court accepted the submission of counsel and in para 13, it was observed that while granting leave to such secured creditors i.e. in suits, the Company Court "would also bear in mind the rationale behind the RDB Act". In that connection Sections 529 and 529-A were also referred to. The said observations do not, in our opinion, have any bearing on the questions before us relating to the exclusive jurisdiction of the Tribunal/Recovery Officer under the RDB Act. Further, as we shall explain under Points 4 and 5, Section 19(19) of the Ordinance 1 of 2000, refers only to Section 529-A and not to Section 529(1) or (2) and this is one other clear indication that the other provisions of the Companies Act are completely excluded.

24. Though the Judgment reported at International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., pertains to the State Financial Corporations Act, 1951 (SFC Act), the implication of the expression "pari passu" in the context of the rights of secured creditors and workmen and the illusory rights of a secured creditor seeking to stand outside winding up, have been considered. Much of the distinction that had been assiduously built up by Courts as to the status of creditors queuing up before the official liquidator and the status of

creditors of a company in liquidation choosing to stay outside winding up, has been obliterated. Paragraphs 19, 20, 24 and 25 of the report need to be specially noticed:

19. The decision of the Bombay High Court in Maharashtra State Financial Corporation case AIR 1993 Bom 392 gives weighty reasons as to why when the company is under winding-up SFC to which the assets of the company are charged cannot proceed to realise the security without intervention of the Company Court. We already noticed that as a result of the amendment to Section 529 a pari passu charge to the extent of the workmen's portion is created on the security of every secured creditor when he opts to realize a security by standing outside winding-up. "Pari passu" means "with equal steps, equally, without preference" (Jowitt's Dictionary, Vol. II, 1959 Edn., p. 1294). Black's Law Dictionary, 6th Edn., p. 1115 defines it as: "By an equal progress,... Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other." It is also defines as "With equal steps, that is to say proceeding side by side at the same place" (Prem's Judicial Dictionary, Vol. III, 1964 Edn., p. 1217).

20. The rights of the pari passu charge-holders would run equally, temporally and potentially, with the rights of the secured creditors. The official liquidator, as the representative of the workmen, to enforce such pari passu charge would have the right of representing the workmen equally with the rights of the secured creditors. Charge is defined u/s 100 of the Transfer of Property Act thus:

100. Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

24. We cannot be unmindful of the fact that every creditor is interested in realizing the security only for his benefit and to the extent necessary for recovery of his outstandings. Prior to 1985 it might have been possible for a secured creditor u/s 529 of the Companies Act, 1956, or its predecessor, Section 232 of the Companies Act, 1913 as interpreted by this Court in M.K. Ranganathan case AIR 1955 SC 604 to opt to stand outside the winding-up and realise the security by bringing it to sale. This was possible because the secured creditor had unrestricted right of standing outside the winding-up and proceeding against the property mortgaged to him. Or, to put it in the words of Lord Wrenbury in Food Controller v. Cork 1923 AC 647 : 192 All ER Rep. 463 (HL) (as quoted in AIR para 15 of M.K. Ranganathan case): (All ER p. 472 E-F).

The phrase "outside the winding-up" is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my

mortgagor is in winding up or not. I remain "outside the winding-up" and shall enforce my rights as mortgagee". This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say, "I will prove in respect of my debt". If so, he comes into the winding-up.

25. Of course, even in such a situation, if the same property was mortgaged to more than one secured creditor, they had to either come to an agreement, or in the event of disagreement, there had to be a suit in which the dissenting mortgagee had to be sued as a necessary party-defendant. No doubt, Section 29 of the SFC Act was intended to place SFCs on a better footing. But, in our view, this better footing is available only so long as the debtor is not a company or is a going company. The moment a winding-up order is made in respect of a debtor company, the provisions of Sections 529 and 529-A come into play and whatever superior rights had been ensured to SFCs under the provisions of the SFC Act are now subjected to and operate only in conjunction with the special rights given to the workmen, who as *pari passu* charge-holders are represented by the official liquidator. We are, therefore, of the view that the unhindered right hitherto available to SFCs to realise their security without recourse to the Court, no longer holds true as the right vested in the official liquidator is a statutory impediment to such exercise and has to be reckoned with. And since the official liquidator can do nothing without the leave or concurrence of the Court, all necessary applications must therefore, come to the Company Court.

25. The parties have also placed the Judgments reported at *Andhra Bank Vs. Official Liquidator and Another*, and *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, . In the *Andhra Bank* case, the law as laid down at paragraph 76 of the *Allahabad Bank* case was reconsidered by a three-member Bench and it was noticed that the observation in the *Allahabad Bank* case that workmen's dues have priority over all other creditors, was not the correct position in law.

26. In the *Rajasthan State Financial Corporation* case, the cases referred to herein were all noticed in the context of the provisions of the SFC Act. After considering the earlier Supreme Court pronouncements, it was found that distribution of sale proceeds of assets whether under the 1993 Act or under the SFC Act could only be with the association of the official liquidator and under the supervision of the company Court. The position was summarised at paragraphs 17 and 18 of the report:

17. Thus, on the authorities what emerges is that once a winding-up proceeding has commenced and the Liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the financial institutions coming under the Recovery of Debts Act or of financial corporations coming under the SFC Act, can only be with the association of the Official Liquidator and under the supervision of the Company Court. The right of a financial institution or of the Recovery Tribunal or that of a

financial corporation or the Court which has been approached u/s 31 of the SFC Act to sell the assets may not be taken away, but the same stands restricted by the requirement of the Official Liquidator being associated with it, giving the Company Court the right to ensure that the distribution of the assets in terms of Section 529-A of the Companies Act takes place. In the case on hand, admittedly, the appellants have not set in motion any proceeding under the SFC Act. What we have is only a liquidation proceeding pending and the secured creditors, the financial corporations approaching the Company Court for permission to stand outside the winding up and to sell the properties of the company-in-liquidation. The Company Court has rightly directed that the sale be held in association with the Official Liquidator representing the workmen and that the proceeds will be held by the Official Liquidator until they are distributed in terms of Section 529-A of the Companies Act under its supervision. The directions thus, made, clearly are consistent with the provisions of the relevant Acts and the views expressed by this Court in the decisions referred to above. In this situation, we find no reason to interfere with the decision of the High Court. We clarify that there is no inconsistency between the decisions in Allahabad Bank Vs. Canara Bank and Another, and in International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., in respect of the applicability of Sections 529 and 529-A of the Companies Act in the matter of distribution among the creditors. The right to sell under the SFC Act or under the Recovery of Debts Act by a creditor coming within those Acts and standing outside the winding up, is different from the distribution of the proceeds of the sale of the security. The distribution in a case where the debtor is a company in the process of being wound up, can only be in terms of Section 529-A, read with Section 529 of the Companies Act. After all, the Liquidator represents the entire body of creditors and also holds a right on behalf of the workers to have a distribution *pari passu* with the secured creditors and the duty for further distribution of the proceeds on the basis of the preferences contained in Section 530 of the Companies Act under the directions of the Company Court. In other words, the distribution of the sale proceeds under the direction of the Company Court is his responsibility. To ensure the proper working out of the scheme of distribution, it is necessary to associate the Official Liquidator with the process of sale so that he can ensure, in the light of the directions of the Company Court, that a proper price is fetched for the assets of the company-in-liquidation. It was in that context that the rights of the Official Liquidator were discussed in International Coach Builders Ltd. The Debts Recovery Tribunal and the District Court entertaining an application u/s 31 of the SFC Act should issue notice to the Liquidator and hear him before ordering a sale, as the representative of the creditors in general.

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

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation. through its

Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

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

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

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

27. The modes of recovery of debts by a recovery officer under the 1993 Act have been spelt out in Sections 25 and 28 thereof:

25. Modes of recovery of debts.--The Recovery Officer shall, on receipt of the copy of the certificate under Sub-section (7) of Section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:

- (a) attachment and sale of the movable or immovable property of the defendant;
- (b) arrest of the defendant and his detention in prison;
- (c) appointing a receiver for the management of the movable or immovable properties of the defendant.

28. Other modes of recovery.--(1) Where a certificate has been issued to the Recovery Officer under Sub-section (7) of Section 19, the Recovery Officer may, without prejudice to the modes of recovery specified in Section 25, recover the amount of debt by any one or more of the modes provided under this section.

(2) If any amount is due from any person to the defendant, the Recovery Officer may require such person to deduct from the said amount, the amount of debt due from the defendant under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Recovery Officer:

Provided that nothing in this sub-section shall apply to any part of the amount

exempt from attachment in execution of a decree of a civil Court u/s 60 of the Code of Civil Procedure, 1908 (5 of 1908).

(3)(i) The Recovery Officer may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the defendant or to any person who holds or may subsequently, hold money for or on account of the defendant, to pay to the Recovery Officer either forthwith upon the money becoming due or being held or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount of debt due from the defendant or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the defendant jointly with any other person and for the purposes of this sub-section, the shares of the joint holders in such amount shall be presumed, until the contrary is proved, to be equal.

(iii) A copy of the notice shall be forwarded to the defendant at his last address known to the Recovery Officer and in the case of a joint account to all the joint holders at their last addresses known to the Recovery Officer.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post officer, bank, financial institution, or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like to be made before the payment is made notwithstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or the part thereof is not due to the defendant or that he does not hold any money for or on account of the defendant, then, nothing contained, in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Recovery Officer to the extent of his own liability to the defendant on the date of the notice, or to the extent of the defendant's liability for any sum due under this Act whichever is less.

(vii) The Recovery Officer may, at any time or from time to time, amend or revoke any notice under this sub-section or extend the time for making any payment in pursuance of such notice.

(viii) The Recovery Officer shall grant a receipt for any amount paid in

compliance with a notice issued under this sub-section, and the person so paying shall be fully discharged from his liability to the defendant to the extent of the amount so paid.

(ix) Any person discharging any liability to the defendant after the receipt of a notice under this sub-section shall be personally liable to the Recovery Officer to the extent of his own liability to the defendant so discharged or to the extent of the defendant's liability for any debt due under this Act, whichever is less.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Recovery Officer, he shall be deemed to be a defendant in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were a debt due from him, in the manner provided in Sections 25, 26 and 27 and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers u/s 25.

(4) The Recovery Officer may apply to the Court in whose custody there is money belonging to the defendant for payment to him of the entire amount of such money, or if it is more than the amount of debt due an amount sufficient to discharge the amount of debt so due.

(4A) The Recovery Officer may, by order, at any stage of the execution of the certificate of recovery, require any person, and in case of a company, any of its officers against whom or which the certificate of recovery is issued, to declare on affidavit the particulars of his or its assets.

(5) The Recovery Officer may recover any amount of debt due from the defendant by distraint and sale of his movable property in the manner laid down in the Third Schedule to the Income Tax Act, 1961 (43 of 1961).

28. Section 28(4) of the 1993 Act permits a recovery officer to apply to the Court in whose custody there is money belonging to the certificate debtor. Upon a company being wound up, the official liquidator comes to be in custody of all assets and properties of the company in liquidation. Section 456(1) of the Companies Act recognises the authority of the official liquidator as the custodian of all assets and properties of a company in liquidation. The official liquidator functions under the company Court and the Companies Act and Companies (Court) Rules 1959 recognise such position. Section 446(2) of the Companies Act gives authority to the company Court to dispose of, inter alia, any suit or proceedings by or against a company in liquidation; any claim made by or against the company in liquidation; and any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up. The non-obstante clause in Section 446(2) yields to the overriding provisions of the 1993 Act but it is necessary to notice the scope of the company Court's authority over all matters relating to a company in liquidation.

29. The official liquidator attached to a company Court becomes the liquidator of a company wound up by such Court, by reason of Section 449 of the Companies Act. Section 453 of the Companies Act provides that a receiver shall not be appointed over assets in the hands of a liquidator except with leave of the concerned company Court. Section 457 gives wide powers to the liquidator subject to the sanction of the company Court. Section 460 sets down the extent of the liquidator's powers and Sub-section (4) thereof permits the liquidator to apply to the company Court for directions in relation to any particular matter arising in the winding up. Section 460(6) allows any person aggrieved by any act or decision of the liquidator to apply to the company Court and for the company Court to confirm, reverse or modify the act or the decision complained of, and make such further order as it thinks just in the circumstances.

30. The Rules framed under the Companies Act by the Supreme Court in exercise of powers u/s 643 of the Companies Act, detail the procedure to be adopted by the official liquidator at every stage leading up to the ultimate dissolution of the company in liquidation. Such rules provide expressly that the official liquidator's functions, acts and decisions are subject to the directions of the company Court presiding over the liquidation of the concerned company. The Rules in the section of the Rules appearing under the heading "Debts and Claims against Company" provide for, inter alia, notices being issued by the official liquidator to creditors of the company in liquidation, of such creditors being required to prove their debts and of the official liquidator's acceptance or rejection of proof upon such investigation as he may think necessary. Rule 164 provides for an appeal by any creditor to the company Judge against a decision of the official liquidator in respect of such creditor's debt. Rule 167 requires the official liquidator to submit proofs and list of creditors before the company Judge for the Court to settle the list of creditors under Rule 174. Such rules recognise the rights of all creditors of a company, in liquidation to seek and obtain payment in respect of their dues from the official liquidator and subject to the supervision by the company Court. As much as the provisions of the Companies Act and the said Rules give authority to the company Judge, they cast a duty on the company Judge to ensure that a procedure, the principal concern whereof is fairness to all creditors subject to their respective rights, is followed. The official liquidator, under supervision of the company Judge, has to ensure that the assets of a company in liquidation are realised, sold and the sale proceeds applied in accordance with the rules as regards priorities. The official liquidator, under supervision of the company Judge, seeks to protect the interest of the creditor who ranks last in the list of priorities and has a duty to ensure that the spill-over after satisfying the debts of each ranked in the hierarchy of priorities, is applied to those ranked next and the following, till the last.

31. The official liquidator reports to the company Judge on all matters relating to a company in liquidation. His physical presence in the company Court is indispensable. Debts Recovery Tribunals have been set up under the 1993 Act to receive and deal with claims by banks and financial institutions that may institute

proceedings before the appropriate tribunal in accordance with the rules as to territorial jurisdiction recognised by the 1993 Act. It is not necessary that the tribunal dealing with the claim of a bank or financial institution is next door to the Court premises from where the company Judge functions, or even in the same city or state. There is, sometimes a logistic problem, as in the present matters, where there is considerable distance between the company Court and the concerned tribunal under the 1993 Act. While the company Court in whose jurisdiction the registered office of the company in liquidation is situate, or the official liquidator attached to such company Court, may not be accessible to all creditors of the concerned company in liquidation, it is a time-tested practice that has not caused much inconvenience to creditors of companies in liquidation over the many years. The concerned tribunal under the 1993 Act could, however, be at a far away place that, despite the technological improvements in communication, may make it effectively inaccessible to all creditors. These are some of the matters that could be of concern to the company Court once a recovery officer applies u/s 28(4) of the 1993 Act for receiving the entire amount of sale proceeds held by an official liquidator under the supervision of the company Court. But it is first an application u/s 28(4) of the 1993 Act that has to be made before such matters as to convenience and other relevant facts are taken into consideration. Again, u/s 28(4) of the 1993 Act, the recovery officer can seek such amount as would be sufficient to discharge the certificate under execution and not the entirety of the sale proceeds unless the undischarged value of the certificate exceeds the amount covered by the sale proceeds.

32. The official liquidator has authority, inter alia, u/s 460(4) of the Companies Act to refer a matter of the nature now referred to Court, though the form and the prayers in the summons may be inappropriate. Equally, the recovery officer has a right to apply u/s 28(4) to this Court to seek transfer of the sale proceeds being held by the official liquidator. The matters relevant need to be considered if the recovery officer makes such an application. Since, a direction has been issued to the official liquidator without the concerned recovery officer resorting to Section 28(4) of the official liquidator need not transmit any part of the sale proceeds held by him to such recovery officer.

33. Section 18 of the 1993 Act does not take away the company Court's authority to supervise over all matters relating to a company in liquidation. The Supreme Court pronouncements recognise the authority of the company Court. It would be inappropriate for the company Judge, merely on the strength of Section 18 of the 1993 Act to allow the Debts Recovery Tribunal to deal with all matters relating to the assessment of priorities of creditors of a company in liquidation and the distribution of dividends to creditors without reference to the company Court.

34. Jurisdiction is authority ordained by law. Jurisdiction is not a privilege; for if it were, there would be an element of choice about it. Assumption of jurisdiction follows a command by law. It is a duty cast on the judicial authority that cannot

be abdicated by the whims of such judicial authority. The failure by a judicial authority to exercise jurisdiction vested in it by law is as illegal and as inexcusable as the usurpation of jurisdiction beyond its bounds of authority. The official liquidator need not transmit the sale proceeds held by him to the recovery officer of the DRT-II, Delhi. It will be open to such recovery officer to apply u/s 28(4) of the 1993 Act if he deems it fit.

35. The applications are disposed of on the above basis without any order as to costs. Urgent photostat certified copies of the Judgment, if applied for, be issued to the parties upon compliance with requisite formalities.