

(2008) 05 AP CK 0006

In the Andhra Pradesh High Court

Case No : Company Application 1457 of 2007

In Re: Crips Laboratories Ltd.

Date of Decision : 02-05-2008

Acts Referred:

Companies (Court) Rules, 1959 — Rule 151, 156, 159, 163, 167
Companies Act, 1956 — Section 447, 463(1), 463(2), 529(1), 529(2)
Industrial Disputes Act, 1947 — Section 33C(2)
Provincial Insolvency Act, 1920 — Section 47, 47(3), 48, 61, 61(6)

Citation : (2008) 145 CompCas 357 : (2008) 4 CompLJ 376

Hon'ble Judges : Ramesh Ranganathan, J

Bench : Single Bench

Advocate : M. Anil Kumar, for the Appellant; P.V. Markandeyulu, for the Respondent

Judgement

Ramesh Ranganathan, J.—The questions which arise for consideration, in this application, are (1) Whether the sum available, from the sale proceeds of the security of a secured creditor, after meeting the principal dues of the secured creditor with interest at the contracted rate till the date of winding up, and the dues of the workmen, can be utilized to pay the secured creditor interest at the contracted rate from the date of winding up till the date of sale of the secured assets or should it be applied for repayment of the principal dues of the unsecured creditors and, only thereafter, for payment of interest at 4% p.a. to all creditors, both secured and unsecured? and (2) the rate of interest payable to the workmen, along with their principal dues, in the absence of an agreement for payment of interest?

2. The company in liquidation availed a loan from State Bank of India, (S.B.I.) for Rs. 160 Lakhs against the mortgage of immovable properties comprising of land and buildings i.e., the fixed assets belonging to the company situated at Pendurthi in Visakhapatnam District. Form Nos. 8 and 13, for registering the charge of land and buildings in favour of S.B.I, were filed with the Registrar of Companies, vide registration No. 3240 dated 24.02.2000. The company under liquidation failed to repay the debt due resulting in S.B.I. filing O.A. No. 739 of

2007 before the Debt Recovery Tribunal, Visakhapatnam on 18.12.2001 for recovery of Rs. 1,69,10,978.62 ps, (the then outstanding dues), and for interest thereon at 15% per annum compounded quarterly from the date of the application till realization, for the sale of the immovable properties of the company under liquidation charged in their favour by way of first charge, and to pay them the sale proceeds.

Industrial Development Bank of India (I.D.B.I) filed O.A. No. 382 of 2001 before the Debt Recovery Tribunal, Hyderabad against the Company under liquidation impleading the guarantors of the sanctioned loan as defendants 3 to 5. S.B.I. was impleaded as the 6th defendant. The Debt Recovery Tribunal, in its order in O.A. No. 382 of 2001 dated 16.12.2003, allowed the application filed by I.D.B.I. subject to the rights of S.B.I.

3. C.A. No. 1457 of 2007 is filed by the Official Liquidator seeking permission of this Court to declare 100% dividend to the secured/preferential creditors, 86.56% divided to the unsecured creditors of the company in liquidation whose claims had been adjudicated and for other consequential reliefs. In the affidavit filed in support of the application it is stated that the assets of the company were segregated into two lots of which the first lot comprised of land and buildings of the Company, and the second-lot comprised of plant and machinery, that the assets were brought to sale in two lots, and the land, buildings, plant and machinery of the company were sold for Rs. 530 lakhs, that the sale was confirmed by the High Court in June, 2006, that pursuant to the order of this Court, in C.A. No. 1400 of 2006 dated 11.10.2006, (whereby the official liquidator was directed to invite claims), the Official Liquidator had invited claims, that 23 claims from various creditors including secured creditors, unsecured creditors, preferential creditors were received and that, on these claims being adjudicated, Form No. 71 was filed which was taken on record by order of this Court in C.A. No. 1276 of 2007 dated 24.07.2007. According to the Official Liquidator he had first completed adjudication of the claims of the secured creditors, that the amount claimed by S.B.I. of Rs. 1,87,24,709.20, (Principal plus interest till the date of the winding up), was admitted in its entirety and treated as secured debt, that I.D.B.I. and S.B.I. were paid their entire secured debt, except for Rs. 709/-, as interim payment, that the claims received from BSNL, the Income Tax Department, the workmen and I. Ramakrishna and sons could not be adjudicated for want of compliance of the procedural requirement under the Companies (Court) Rules, 1959, that Rs. 2,40,16,649/- was available to the credit of the company in liquidation which is to be disbursed to the creditors since all valid claims were adjudicated and placed on the notice board of this Court in accordance with Rules 167 and 169 of the Companies (Court) Rules, 1959, that no appeal was pending in respect of these adjudicated claims and, though the Official Liquidator was not obliged to set apart any amount for future claims, (there being on record some belated claims from governmental authorities), an amount equivalent to such claims for Rs. 37,06,433/- had been kept aside from the proposed dividend distribution and that the Official Liquidator

proposed to disburse dividend at 100% to all secured and preferential creditors and at 86.56% to the unsecured creditors.

4. This Court, in its order dated 3.9.2007, noted the appearance of Sri P.V. Markandeyulu, Learned Counsel for I.D.B.I and issued notice to the other secured creditors. In his affidavit of proof of service dated 14.9.2007, the Official Liquidator stated that notice was served on I.D.B.I. through special messenger and that notice was sent to S.B.I, Visakhapatnam by speed post on 12.9.2007. This Court, in its order dated 25.10.2007, directed that the name of Sri K. Gopalakrishna Murthy, Standing Counsel for S.B.I. be printed in the cause list and posted the application to 29.10.2007.

5. It is necessary to note that S.B.I. had earlier filed C.A. No. 1400 of 2006 requesting this Court to pay them Rs. 1,87,24,709.22, (being the outstanding dues as on the date of winding up ie on 09.04.2002), the balance of Rs. 1,66,84,572.19 ps due and payable by the company under liquidation as on the date of sale of the security i.e on 09.08.2006 and Rs. 5,03,696/- being the sum advanced by S.B.I. This Court, in its order in C.A. 1400/06 dated 2.4.2007, passed the following order:

This application is filed by the applicant Bank seeking a direction to the official for making payment of a sum of Rs. 5,03,696/- towards the expenses of advertisement, watch and ward salary, valuation charge etc., apart from further interest on the loan advanced to the company.

6. In so far as the loan amount is concerned, since the entire principal amount with interest upto the date of winding up order was already paid to the applicant, at this stage, the applicant is not entitled to any further payment. In so far as the amount towards expenses, which according to the applicant is Rs. 5,03,696/- is concerned, the official liquidator is directed to verify and if the said amount was incurred by the applicant-Bank towards the expenses referred to above, the official liquidator is directed to make payment to that extent.

7. The company application is accordingly disposed of" In his report dated 04.04.2008, the Official Liquidator states that S.B.I. had exclusively charge over the land and buildings of the company, that, even before filing the application in C.A. No. 1400 of 2006, claims had been invited by the Official Liquidator, that S.B.I. had voluntarily filed their claim in Form No. 66 on 12.09.2006, as a secured creditor of the company, claiming Rs. 1,87,24,709.22 ps as due and payable as on 09.04.2002 i.e, the date of winding up, that he had not asked them to file the proof affidavit claiming interest only till the date of the order of winding up, that the claim had been filed voluntarily, and not pursuant to any direction, that this Court, by order dated 30.09.2006, had permitted him to pay 70% of the sale realization which exceeded the total amount of debt of Rs. 1,87,24,000/- claimed by S.B.I. before him and hence he had disbursed 100% of the claimed secured debt of S.B.I. for Rs. 1,87,24,000/- from out of the proportionate sale proceeds of the land and buildings of Rs. 446.65 lakhs. He

further states that, subsequently, by order dated 11.10.2006 this Court had directed him to invite claims from the creditors of the company, that claims were invited by way of publication in the newspapers, that 23 claims were received and that neither had S.B.I. submitted a revised claim nor had they made any additional claim before him. The Official Liquidator states that he had issued a notice in Form No. 68 dated 09.01.2007 for investigation of the claims and production of further evidence, that a copy of Form No. 68 was also issued to S.B.I, that the claims were decided on the basis of the proof filed as also the charge particulars available with the Registrar of Companies, that the entire claim of S.B.I. of Rs. 1,87,24,709.22 ps was admitted to proof, that notice of admission in Form No. 70 dated 14.02.2007 was issued to them, that they did not prefer any appeal and as such the adjudication had attained finality. The Official Liquidator would further state that he had filed Form No. 71, in C.A. No. 1276 of 2007, which was taken on record by order dated 24.07.2007 and was notified on the notice board of the High Court. The Official Liquidator further states that the entire claim of S.B.I. was admitted, that they did not chose to seek variation of Form No. 71 even when it was notified on the notice board and that they could not now be heard to state that they still had a claim of Rs. 1,66,84,572.19 ps. (towards interest at the contracted rate of 15% p.a. from the date of winding up till the date of the sale of assets. The Official Liquidator submits that, since S.B.I. had failed to include Rs. 1,66,84,572.19 ps in their claim filed before him on 09.09.2006, had accepted the adjudication without protest and had remained silent even when the settled list of creditors in Form No. 71 was notified in the notice board, they were estopped from contending that they were entitled for the amount claimed in C.A. No. 1400 of 2006, they must be held to have waived their claim for subsequent dues if at all, that the question of the Official Liquidator issuing a notice to them at the time of filing Form No. 71 did not arise since no such notice is contemplated under the Rules, that no creditor had the right to seek payment of dividend unless the High Court approved the proposal for payment of dividend and it is for this reason that none of the creditors, including S.B.I, were arrayed as respondents in C.A. No. 1457 of 2007. The Official Liquidator would reiterate that the applicant was not entitled to raise any claim at this stage.

8. Stressed Assets Stabilization Fund, the assignees of I.D.B.I. of their debt due from the company under liquidation, filed their counter-affidavit stating that it is only because of their opposition to the earlier offers received that finally an auction was held in open Court on 05-06-2006, that the highest offer received was Rs. 5.30 crores which was confirmed by the High Court, that they had submitted proof of their debt in the prescribed Form No. 66 before the Official Liquidator claiming dues as on 09.04.2002 amounting to Rs. 438.66 lakhs, (comprising of Rs. 200 lakhs towards Principal and Rs. 238.66 lakhs towards interest) and that a sum of Rs. 70 lakhs was disbursed pending adjudication of proof of their debt. They would state that they had sanctioned a term loan of Rs. 400 lakhs to the company under liquidation, that the said term loan had to be

secured by way of mortgage of land and buildings and hypothecation of Plant and machinery, ranking pari passu with the mortgage and hypothecation of S.B.I., that the deed of hypothecation of plant and machinery was executed in their favour on 29.10.2007 and presented before the Registrar of Companies, but the mortgage of land and buildings was not created as S.B.I. had not honoured its ceding in principle of the pari passu charge issued earlier, that as such they had reduced the loan to 200 lakhs, that the said amount was disbursed to the company under liquidation, that the Official Liquidator had since adjudicated the claim/proof of debt and had proportionately allotted to them Rs. 83,35,042.72 ps as secured debt and Rs. 1,16,64,957.28 ps as unsecured debt, that they had filed proof of debt for Rs. 438.66 lakhs, (principal outstanding of Rs. 200 lakhs plus Rs. 238.66 lakhs as interest and others), and that the secured claim of S.B.I. had been fully satisfied as on the date of winding up.

Sri K. Gopalakrishna Murthy, learned Standing Counsel appearing for S.B.I., would contend that, since S.B.I. was a secured creditor, and the land and buildings of the company under liquidation had been mortgaged with it, any sum available, after payment of the principal and interest till the date of winding up, had first to be utilized for payment of the interest due to the secured creditor from the date of winding up till the date of sale of the assets and it is only after the principal and interest due to the secured creditor is paid in its entirety, can the balance, if available after discharging the dues of the workmen who are pari passu charge holders along with secured creditor, be utilized for repayment of the dues of the unsecured creditors. Learned Counsel would contend that, while S.B.I. was entitled for the principal plus the contracted rate of interest of 15% per annum from the date on which the debt fell due till the date of sale, the workmen were entitled only for the principal, and for payment of interest at 4% per annum in accordance with Rule 179 of the Companies (Court) Rules, 1959. Learned Counsel would refer to Rule 156 of the Companies (Court) Rules, 1959 to contend that, since no interest is reserved for workmen dues, the workmen are required to prove for interest at a rate not exceeding 4% per annum. He would submit that, under Rule 179, payment of subsequent interest would arise only in the event of there being a surplus after payment in full of all the claims admitted to proof, that the unsecured creditors and workmen must prove their claim to be paid interest from the date of winding up till the date of declaration of dividend and that, in no event, can such claim of interest exceed 4% per annum on the admitted claim. Learned Counsel would rely on M.K. Ranganathan and Another Vs. Government of Madras and Others, ; S.B.P v. Northland Sugar Complex 2004 (121) Comp Cas 347; Haryana Financial Corporation v. PNB Auto Ancilliary (India) Ltd. 1994 (81) Comp Cas 588 (AP) and ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, .

On the other hand, the Official Liquidator would contend that neither the Companies Act, nor the Companies (Court) Rules, 1959, provide for payment of interest subsequent to the date of winding up and that the dues of the secured creditors comprise of the principal and interest only till the date of winding up.

With regards the claim of subsequent interest, from the date of winding up till the date of sale of the assets, the Official Liquidator would state that the secured creditor was entitled, along with the workmen and the other unsecured creditors, for payment of interest at 4% per annum, from the surplus available, if any, after the principal dues of the unsecured creditors have been paid in their entirety. He would submit that, in view of Section 529(1)(c), the statutory provisions of the Provincial Insolvency Act, 1920 would apply in the winding up of an insolvent company. He would rely on Sections 47(3) and 48 of the Provincial Insolvency Act, 1920 to contend that the secured creditor may, at best, prove for interest at a rate not exceeding 6% per annum and that, in any event, they were not entitled for payment of interest at the contracted rate of 15% per annum for the period subsequent to the date of winding up.

Sri P.V. Markandeyulu, learned Counsel appearing for the Stressed Assets Stabilization Fund, would fairly state that, in view of the failure on the part of S.B.I. to cede *pari passu* charge with regards the land and buildings, I.D.B.I, which had initially advanced the loan, was a secured creditor only in respect of the plant and machinery hypothecated to it. Learned Counsel would, however, place reliance on Section 61 of the Provincial Insolvency Act, 1920, which relates to priority of debts, to submit that, since the amount payable to S.B.I, (which is the first charge holder of the land and buildings), was only the principal with interest till the date of winding up, the surplus available thereafter should be utilized for payment of the dues of the unsecured creditors. Learned Counsel would submit that, since the relevant date was the date of winding up, the words "surplus available", as referred to in the Companies Act and the Provincial Insolvency Act, meant that whatever was available, after payment of the principal due to the secured creditors with interest till the date of winding up, and that S.B.I. was not entitled for payment of interest at the contracted rate after the date of winding up. He would rely on *Canara Bank v. Official Liquidator* Vol. 70 (1991) Comp Cas 294 (Mad).

Sri M. Anil Kumar, learned Counsel for the Official Liquidator, while adopting the submissions of the Official Liquidator, places reliance on *Official Liquidator v. Federal Bank Limited (Kerala)* 1996(99) Comp Cas 474 (ker); *Textile Labour Association and Another Vs. The Official Liquidator and Another*, and *A.P. State Financial Corporation v. Mopeds India Limited* 2005 (124) Comp Cas 833 (SC). He would also refer to Section 529(2) of the Companies Act to contend that all persons who are entitled to prove for, and receive, dividend from out of the assets of the company may come in under the winding up and make such claims against the company as they are respectively entitled to make by virtue of the Section.

Section 447 of the Companies Act, 1956 relates to the effect of a winding up order and, thereunder, an order of winding up shall operate in favour of all the creditors and all the contributors of the Company as if it had been made on the joint petition of a creditor and of a contributory. Part-VII, Chapter-V of the

Companies Act, 1956 are the provisions applicable to every mode of winding up. Under the head "Proof and ranking of claims", Section 528 provides for debts of all descriptions to be admitted to proof. Section 529 relates to the application of insolvency rules in the winding up of insolvent companies and, u/s 529(1)(c), in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Under the proviso thereunder, the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein and where a secured creditor, instead of relinquishing his security and proving his debt, opts to 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 debt due to such secured creditor as could not be realized by him by virtue of the provisions of the proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A. u/s 529(2) all persons, who in any such case would be entitled to prove for and receive dividend out of the assets of the company, may come in under the winding up and make such claims against the company as they are respectively entitled to make such claims by virtue of Section 529. Section 529(3)(b) defines "workmen's dues". Section 529(3)(c) defines "workmen's portion" in relation to the security of any secured creditor of the company to mean the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of (i) the amount of workmen's dues; and (ii) the amount of the debts due to the secured creditors.

9. Section 529A relates to overriding preferential payments and, under Sub-section (1), notwithstanding anything contained in any of the provision of the Act, or in 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. Sub-section (2) of Section 529A provides that the debts payable under Clauses (a) and (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.

The Companies (Court) Rules, 1959, made in exercise of the powers conferred under Sub-sections (1) and (2) of Section 643 of the Companies Act, 1956, must be read in accordance with the provisions of the Companies Act, 1956 whereunder they were made and not as repugnant thereto. Rule 156 of the Companies (Court) Rules, 1959 relates to interest and, thereunder, on any debt or certain sum payable at a certain time or otherwise, whereon interest is not reserved or is not agreed for, and which is overdue on the date of the winding up, the creditor may prove for interest at a rate not exceeding four per cent per

annum upto that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time and, if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest would be claimed from the date of demand until the time of payment. Rule 179 relates to payment of subsequent interest and, thereunder, in the event of there being a surplus after payment in full of all the claims admitted to proof, the creditors whose proofs have been admitted shall be paid interest from the date of winding up upto the date of the declaration of the final dividend, at a rate not exceeding 4 per cent per annum, on the admitted amount of the claim, after adjusting against the said amount the dividend declared as on the date of the declaration of dividend.

10. It must be borne in mind that, in the case on hand, S.B.I. was the sole charge holder of the land and buildings of the Company under liquidation and I.D.B.I, whose debts were later assigned to M/s Stressed Assets Stabilization Fund, was the sole charge holder of the plant and machinery and it did not have *pari passu* charge over the land and buildings of the Company under liquidation. The amount realized on the sale of land and buildings, which is in excess of Rs. 446.65 lakhs, is more than sufficient not only to meet the dues of S.B.I. towards their principal with interest thereon till the date of winding up but, even after making such payment, a sum in excess of Rs. 2.26 crores is still lying with the Official Liquidator to the credit of the company under liquidation. The Rules mentioned in Section 529(1) of the Companies Act are those specified in the Provincial Insolvency Act, 1920. Part-III of the said Act relates to administration of property and prescribes the method of proof of debts. Section 47 of the Provincial Insolvency Act, 1920 relates to secured creditors and, under Sub-section (1) thereof, where a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized. We are not concerned with Sub-section (2) in the present case, since S.B.I. has not, nor is there any material on record to show that it has, relinquished its security for the general benefit of the other creditors. Since S.B.I. has neither realized the security u/s 47(1), nor have they relinquished their security for the general benefit of the creditors under Sub-section (2), it is Sub-section (3) of Section 47 which applies and, thereunder, where a secured creditor does not either realize or relinquish his security, he shall, before being entitled to have his debt entered into 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 assessed. It is thus evident that a secured creditor, if he intends to claim any amount in addition to the value of the security, is required to first assess the value of the security and to state the value of the security in his proof. The secured creditor is entitled to receive dividend only in respect of the balance due to him after deducting the value of the security as assessed by him. Where the security is insufficient to meet the debt of a secured creditor, Section 47(3) of the Provincial Insolvency Act, 1920 enables him to claim for the balance. Where, however, the security is sufficient to

meet the dues of the secured creditor, they would be entitled, u/s 47(3) of the Provincial Insolvency Act, 1920, to make a claim only for the balance due after application of the sale proceeds of the security in its entirety for repayment of their debt. Section 48 relates to interest where the debt has been proved. As noted above, a secured creditor is entitled to submit proof of his debt only in cases where the security is insufficient to meet their dues in full. Where a secured creditor submits proof of any amount due to them, after adjusting the value of the security, they would then, u/s 48, be entitled to prove for interest at a rate not exceeding 6% per annum. Payment of interest at 6% per annum would arise only where the security, on its realization, is insufficient to repay the dues of the secured creditor in full i.e. principal plus the contracted rate of interest from the due date till the date of repayment. (Canara Bank⁵). The claim of the secured creditors for repayment of their debt is on the strength of their security, and they are entitled to realize the interest due to them, in terms of the agreement, from the proceeds realized on the sale of the secured assets. However, such realization would be subject to the dues of the workmen. (S.B.P.2). Section 48, which prescribes the rate of interest at 6% per annum, cannot be understood to mean that even where the sale proceeds of the security are more than sufficient to repay the secured creditor's debt in its entirety i.e. principal plus interest at the contracted rate ie 15% per annum from the date the debt fell due till the date of repayment, even then S.B.I. would be entitled to claim interest only at 6% per annum u/s 48 of the Provincial Insolvency Act, 1920 or 4% per annum under Rule 179 of the Companies (Court) Rules, 1959 from the date of winding up, that too only in case a surplus is available after repaying the principal due to all creditors, both secured and unsecured. It is evident, from a conjoint reading of Section 529(1) (c) of the Companies Act and Sections 47(3) and 48 of the Provincial Insolvency Act, 1920, that in cases where a sum is available, on the sale of the security of which the secured creditor is a charge holder, even after the principal with interest at the contracted rate is paid from the date the debt fell due till the date of winding up, it shall be utilized for payment of the interest due to the secured creditor at the contracted rate from the date of winding up till the date of sale of the assets, subject of course to repayment of the dues of the workmen which rank *pari passu* with the debt of the secured creditor. It is only if some amount is still available, after such payment, can it be utilized for repayment of the dues of the unsecured creditors and, thereafter, if a surplus is still available it may be utilized for payment of interest to the unsecured creditors in accordance with Section 48 of the Provincial Insolvency Act, 1920 or Rule 179 of the Companies Court Rules, 1959, as the case may be. It is only if the sum realized on the sale of the security is insufficient to repay the debt of the secured creditor, consisting of the principal with interest from the due date till the date of sale of the assets, would the secured creditor, after the sum realized on the sale of the security is utilized in its entirety for repayment of their debt, and proportionately towards the workmen's dues, be entitled to claim/prove, along with the other unsecured creditors, for the balance. In such a situation the secured creditor would be treated on par

with an unsecured creditor for the balance due to them and, in case of availability of surplus, be entitled for interest, subsequent to the order of winding up, at 6% per annum or 4% per annum, as the case may be.

Sri P.V. Markandeyulu, learned Counsel appearing for M/s Stressed Assets Stabilization Fund, would, however, place reliance on Section 61(6) to contend that, after the date of winding up, even a secured creditor is entitled only for interest at 6% per annum on par with all other creditors, both secured and unsecured, that too only when there is a surplus. Under the head "distribution of property", Section 61 prescribes the priority of debts. Under Sub-section (5) thereof, subject to the provisions of the Act, all debts entered in the schedule shall be paid rateably according to the amount of such debts respectively and without any preference. As noted above, the question of entering the debt of the secured creditor in the schedule would arise only if any portion of their debt remains due after the security is realized and the proceeds applied in the discharge of their debt. It is only in cases where the security is insufficient to meet the dues of the secured creditor in its entirety, i.e., principal plus interest at the contracted rate from the date the debt fell due till the date of sale of the assets, would the secured creditor be entitled to submit proof of his debt to the extent of the balance due. In such an event, on his debt being admitted to proof and being included in the schedule, such a debt would be paid rateably along with other dues. Once the debt is entered in the schedule that portion of the debt of the secured creditor would be treated as unsecured and would rank *pari passu* along with all other unsecured creditors. It is only in cases where the debt is entered in the schedule, under Sub-section (5) of Section 61, does Sub-section (6) of Section 61 provide that where there is any surplus, after payment of the debts mentioned in Clauses (1) to (5) of Section 61, it shall be applied towards payment of interest, from the date on which the debtor is adjudged insolvent, at the rate of six per cent per annum on all the debts entered in the schedule. Section 61(6) is akin to Rule 179 of the Companies (Court) Rules, except that the latter provides for payment of interest at 4% per annum on the surplus being available after payment in full of all the claims admitted to proof.

11. I find no merit in the contention of the Official Liquidator that, since S.B.I. had submitted its proof only for the principal with interest at the contracted rate till the date of winding up, it must be deemed to have waived its right to claim interest for the subsequent period from the date of winding up till the date of repayment. It is no doubt true, that C.A. No. 1400 of 2006, filed by S.B.I. for payment of Rs. 1,66,84,572.19 ps towards interest at the contracted rate of interest at 15% per annum from the date of winding up till the date of the sale of the land and buildings, was dismissed by order dated 2.4.2007. This Court did not examine the entitlement of S.B.I. for payment of interest at the contracted rate from the date of winding up till the date of sale of the assets, and merely held that at this stage they were not entitled to any further payment.

On a conjoint reading of Section 529(1) and 529-A it is evident that, where the

security of a secured creditor is sufficient to repay their dues in its entirety, (which would include the principal and the contracted rate of interest from the due date till the date of sale of the assets), then, the liquidator is entitled to represent only for the workmen's dues for enforcement of such a charge and not for the other unsecured creditors. It is only if any amount is still due to the secured creditor, even after the sale proceeds of the security has been utilized in its entirety, on account of its ceding pari passu charge to the workmen, shall it rank pari passu with the workmen's dues for the purpose of Section 529-A. Where the security is sufficient to meet the entire debt of the secured creditor, (both principal and interest), the official liquidator's duty is only to protect the interests of the workmen who, by virtue of their dues being ranked pari passu with the debt of the secured creditor, are entitled to be paid their proportionate share. It is only after the dues of the secured creditor and the workmen are paid in full can, any amount available thereafter from the sale proceeds of the security, be utilized for payment of the dues of the unsecured creditors.

Since the provisions of the Companies Act confer such a right on the secured creditor, it needs no emphasis that the Companies (Court) Rules, 1959, made in exercise of the powers conferred u/s 643(1) and (2) of the Companies Act, cannot be so read as to render the provisions of Companies Act, 1956 nugatory. Forms 66, 68, 70 and 71 are the forms prescribed under Rules 151, 159, 163 and 167 respectively of the Companies (Court) Rules, 1959. Rule 151 relates to the contents of proof, Rule 159 to the examination of proof, Rule 163 requires acceptance or rejection of proof to be communicated and Rule 167 requires the proof and list of creditors to be filed in Court. As the secured creditor is required to prove for its debt only to the extent the security, of which it is sole charge holder, is insufficient to meet their dues in its entirety, (principal and interest at the contracted rate from the due date till the date of payment), and, as in the present case, the security, consisting of lands and buildings of which S.B.I. is the sole charge holder, is more than sufficient to meet the debts of S.B.I. in its entirety, inclusive of interest from the due date till the date of sale of the assets, S.B.I is not required, in law, to prove for its debt before the Official Liquidator. The mere fact that it had submitted proof is of no consequence. Accepting the submission of the Official Liquidator would, in effect, mean that the Companies (Court) Rules, 1959, which are made u/s 643 (1) and (2) of the Companies Act can be so read to render Sections 529(1)(c), the proviso thereunder and Section 529-A redundant. A rule is required to conform to the provisions of the Act whereunder it is made, as a subordinate legislation cannot be violative of plenary legislation. Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others,). Any rule which is contrary to the provisions of the Act cannot be given effect to. B.L. Wadhera Vs. Union of India (UOI) and Others, .

12. Viewed from any angle, the entitlement of S.B.I. to be paid interest at the contracted rate of 15% p.a, (from the date of winding up till the sale of assets), from the sale proceeds of the security of which it is the sole charge holder, cannot be denied on the doctrine of estoppel or waiver. It does not stand to

reason that a secured creditor, more so a statutory corporation such as S.B.I, would waive their claim for interest subsequent to the date of winding up, when the quantum of interest claimed exceeds Rs. 1.67 crores. This contention of estoppel and waiver urged by the Official Liquidator must be rejected and, since a sum in excess of Rs. 2.40 crores is still available from the sale proceeds of the land and buildings, even after the principal and interest due till the date of winding up has been paid, S.B.I. must be held entitled to interest at the contracted rate of 15% per annum from the date of winding up till the date of sale of the assets, as the sum realized on the sale of the land and buildings, of which they were the sole charge holder, is more than sufficient to meet their entitlement.

The plant and machinery of the Company under liquidation was hypothecated in favour of I.D.B.I. They assigned their debt later to Stressed Assets Stabilization Fund. Rupees 83.35 lakhs, realized from the sale of plant and machinery, has been paid to them in its entirety. The balance due to them, which is in excess of Rs. 350 lakhs, has necessarily to be treated as unsecured debt and, in accordance with Sections 47(3), 48 and 61(6) of the Provincial Insolvency Act, 1920, read with Rule 179 of the Companies Court Rules, 1959, I.D.B.I. would be entitled for payment of interest at 6% per annum, or 4% per annum, as the case may be, from the date of winding up, in case any surplus is available after payment in full of the principal due to both the secured and the unsecured creditors. The Official Liquidator's request that he be permitted to pay 86.56% to the unsecured creditors, without paying interest at the contracted rate of 15% per annum to S.B.I, (the sole charge-holder of the fixed assets of the company under liquidation and buildings), from the date of winding up till the date of sale of assets must, therefore, be rejected.

13. The next question which arises for consideration is whether S.B.I. is entitled to claim interest subsequent to the date of winding up without any interest being paid to the workmen whose dues are to be paid *pari passu* with that of the secured creditor.

Section 529(1)(c) of the Companies Act, 1956, which provides that the law of insolvency, with respect to the estates of persons adjudged insolvent, shall be observed with regard to the respective rights of secured and unsecured creditors as are in force for the time being, is subject to Section 529A which starts with a non-obstante clause. Section 529-A was inserted by the Companies (Amendment) Act, 1985 to provide that, in the event of winding up of the company, the legitimate dues of the workers shall rank *pari passu* with the secured creditors and above even the dues payable to the Government. The object for which Section 529-A was introduced is to ensure that, in the unfortunate event of the company being liquidated, its resources, which constitute a major segment of the material resources of the community, is so distributed that workers, whose labour and effort constitute an important part of the activities of the company, are not deprived of their legitimate dues.

A combined reading of Sections 529 and 529-A of the Companies Act would show that, notwithstanding anything contained in any other law for the time being in force, or in the Companies Act itself, preference is given for workmen's dues, and debts due to the secured creditors, to the extent such debts rank, under Clause (c) of the proviso to Section 529(1), *pari passu*. Therefore, when the assets of the company are sold and the proceeds realized, the debts by way of workmen's dues, and that of the secured creditors, have to be paid in full if the assets are sufficient to meet them and if they are not sufficient then in equal proportions. 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. The Liquidator represents the entire body of the creditors and also holds a right on behalf of the workers to have a distribution *pari passu* with the secured creditors. (*Rajasthan Financial Corporation v. Official Liquidator, Jaipur Spinning and Weaving Mills Ltd.* (In Liquidation [1997] 88 Comp Cas 192 (Raj))).

The purpose of Section 529-A is to ensure that the workmen are not deprived of their legitimate claims in the event of the liquidation of the company. By this provision, the workmen are statutorily allowed to recover their dues from the securities. If the securities are insufficient, the claims of the workmen and the secured creditor abate in equal proportion. In other words, by Section 529-A, the workmen of the Company in liquidation have been made the secured creditors in respect of their claims against the company, the assets of the company in liquidation remain charged for payment of the workmen's dues and such charge will rank *pari passu* with the charge of the secured creditors. In *Re: Giovanola Binny Ltd.* (In Liquidation);, . The workmen become the secured creditors by operation of law. They have a *pari passu* charge over the security which is held by the secured creditor under the contract. *A. Shanmugham Vs. Official Liquidator, High Court, Madras and others*, . Section 529A overrides even the preferential claims u/s 530. u/s 529A the dues of the workers and debts due to the secured creditors are to be treated *pari passu* and as prior to all other dues. [Textile Labour Association7]

In view of the proviso to Section 529(1), the security of the secured creditor is deemed to be subject to a *pari passu* charge in favour of the workmen also. For all practical purposes, a workman is treated as a co-charge holder along with the secured creditor and would, therefore, be entitled to claim the same rate of interest from the assets of the Company under liquidation as has been contracted to by the secured creditor which, in the present case, is 15% per annum.

This question can be examined from another angle also. The dues payable to the secured creditor, inclusive of the contracted rate of interest, has a bearing on the preferential payment to be made to a workman u/s 529-A of the Companies Act. More often than not, the amounts received by the Official Liquidator, on the sale of the assets of the company in liquidation, is insufficient to meet the entire dues

of the secured creditors and the workmen, necessitating the amount available being paid to them *pari passu*. If the total dues payable to a secured creditor increases, then the proportionate amount available for repayment of the dues of the workmen decreases. Accepting the contention of Sri K. Gopalarishna Murthy, learned standing counsel for S.B.I, would mean that, while the secured creditor would be repaid the principal and interest at the contracted rate till the date of repayment, the dues of the workmen would be restricted only to the principal and they would not be entitled for interest on their dues. The very purpose of inserting Section 529-A, to treat workmen's dues on par with the dues of the secured creditors, would be defeated thereby.

14. It must, therefore, be held that since the workmen are entitled to have their dues ranked *pari passu* with the debts of the secured creditor they shall, on par with the secured creditor, be entitled for payment of interest at the contracted rate of interest which the secured creditor is entitled to claim from the sale proceeds of the assets of the Company under liquidation to the extent to which it holds a charge over such assets. In case a surplus is available, after payment of the dues of the secured creditor, (which consists of the principal along with interest at the contracted rate till the date of winding up), and the workmen dues, (which consists of the principal along with interest, i.e., the contracted rate of interest of the secured creditor, till the date of winding up), then, from the surplus available, both the secured creditor and the workmen are entitled for payment of interest on par with each other from the date of winding up till the date of sale of the assets. Such an interpretation, of Section 529A of the Companies Act, 1956, would further the purposes for which the said Section was introduced which is to protect the interests of the workmen who, but for such protection conferred u/s 529A, would have been treated as an unsecured creditor and would not have been entitled for payment of their dues, more than what has been prescribed u/s 531 (b) and (c) of the Companies Act, 1956.

15. The employees union had filed C.A. No. 1605 of 2006 in C.P. No. 31 of 2000 to direct the Official Liquidator to allocate Rs. 1,08,196/-, along with interest at 12% per annum from 23-06-2000, to the workers credit pending disposal of W.P. No. 5351 of 2002 and this Court, by order dated 09-04-2007, took note of the submission of the Official Liquidator that, though claims were called for, adjudication was yet to be completed. This Court held that the claim of the employees union was premature and, if they had any claim, it was open for them to approach the Official Liquidator by way of a claim petition, but they could not straightaway come before this Court seeking a direction to the Official Liquidator to allocate any amount, that too the claim of the workers which was already rejected by the Labour Court. It is also necessary to note that W.P. No. 5351 of 2002 was filed by the employees union to have the order of the Industrial Tribunal-cum-Labour Court, Visakhapatnam, in M.P. No. 20 of 2000 dated 27-02-2002, quashed after holding the same to be contrary to the judgment of this Court in W.P. No. 5087 of 2000 dated 25-04-2000. The employees union had filed M.P. No. 20 of 2000 before the Industrial Tribunal- cum-Labour Court,

Visakhapatnam claiming wages for the months of April and May, 2000 for Rs. 1,08,196/- and the Industrial Tribunal, in its order dated 27-02- 2002, had observed that the rights and liabilities of the employer and the workmen were to be adjudicated in I.D. No. 18 of 2001 which was pending on the file of the Industrial Tribunal-cum-Labour Court, Visakhapatnam, that the entitlement for wages for the period after issuance of the retrenchment notice was in dispute and that an application u/s 33-C(2) of the Industrial Disputes Act would not lie.

It is not known whether I.D. No. 18 of 2001 has subsequently been disposed of. W.P. No. 5351 of 2002 is, however, still pending. In any event, since the Official Liquidator has not yet completed the process of payment of dividend to all the creditors, it is appropriate that, from out of the surplus available, Rs. 1,08,196/- as claimed by the employees union, which is the subject matter of dispute in W.P. No. 5351 of 2002, be set apart along with interest at 15% per annum from the date on which it fell due i.e. April and May, 2000 till date, before any amount is paid to S.B.I. towards interest at the contracted rate of 15% per annum from the date of winding up till the date of sale of the secured assets. The amount liable to be paid as interest to S.B.I. is required to be computed by the Official Liquidator. It is only thereafter, and after the amount required to be set apart to S.B.I, the workmen and other dues as detailed hereinabove, are determined, would the Official Liquidator be in a position to arrive at the sum still available with him which can, in turn, be utilized for payment of other dues.

Company Application No. 1457 of 2007 is disposed of accordingly.