

(1993) 07 BOM CK 0032

In the Bombay High Court

Case No : Company Application No. 41 of 1992 in Company Petition No. 203 of 1985

Indian Textiles and another

APPELLANT

Vs

Gujarat State Financial Corporation and others.

RESPONDENT

Date of Decision : 14-07-1993

Acts Referred:

Companies Act, 1956 — Section 456(2), 529A
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (1994) 2 BomCR 178 : (1994) 81 CompCas 599

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : B. Meena, J.K. Majmudar, T.N. Subramaniam and Sunil D'Souza, for the Appellant; D.V. Merchant and S.S. Joshi, for the Respondent

Judgement

D.R. Dhanuka, J.—The official liquidator as liquidator of Ajanta Rubbers Pvt. Ltd. (in liquidation) has submitted his report to this court for a direction to the Gujarat State Financial Corporation to hand over the possession of the assets of the company in liquidation situate at Bharuch to the official liquidator and for issue of such other and further directions as this court deems fit and proper having regard to the facts of the case summarised in the said report dated March 19, 1993. The Gujarat State Financial Corporation took over possession of the said assets much after the company was ordered to be wound up and the official liquidator was appointed as liquidator of the company in liquidation in purported exercise of its powers u/s 29 of the State Financial Corporation Act, 1951, i.e., on September 7, 1989, without the leave of the company court. By an order dated March 25, 1986, passed by this court in Company Petition No. 203 of 1985 filed by Indian Textiles (i.e., the petitioning creditors of the said petition), Ajanta Rubbers Pvt. Ltd. (in liquidation) was directed to be wound up by and under the supervision of this court and the official liquidator attached to his court was appointed as the liquidator of the said company. By virtue of operation of the provisions contained in section 456 of the Companies Act, 1 of 1956, the official

liquidator is entitled to the custody and control of all the properties, effects and claims to which the company under winding up is entitled. By virtue of the operation of section 456(2) of the said Act, all the properties and effects of the company are deemed to be in the custody of the company court as from the date of the order for the winding up of the company.

2. The company has its registered office in the State of Maharashtra and its factory at Bharuch in the State of Gujarat. The company had obtained large amounts of finance from the Gujarat State Financial Corporation, a corporation incorporated under the State Financial Corporations Act, 1951. The Gujarat State Financial Corporation and the Gujarat Industrial Investment Corporation are two of the secured creditors of the company under liquidation. Both the said Corporations are entitled to a first charge over the factory, land and building belonging to the company under liquidation as secured creditors of the company. Both the said companies are also entitled to a first charge over several other assets of the company on the footing that the said first charge shall rank *pari passu* in favour of the said corporations. The Bank of Baroda is also one of the creditors of the said company. The other creditors of the company under liquidation include, *inter alia*, the workmen of the company and unsecured creditors, etc. The workmen of the company are entitled to a *pari passu* charge over the assets of the company along with all its secured creditors by operation of law u/s 529A of the Companies Act in respect of "workmen's dues". The official liquidator is under an obligation to enforce the said statutory *pari passu* charge for the benefit of the workmen and take all necessary steps to safeguard the securities and their realisation so that the interest of workmen of the company under liquidation is not affected in any manner whatsoever directly or indirectly.

3. One Harkishandas Keshavdas Kothari was a director of the company under liquidation at the time of its liquidation. The said Harkishandas has made an Application No. 41 of 1991 for several directions against the Gujarat State Financial Corporation including the direction to the effect that the Gujarat State Financial Corporation do hand over possession of all the assets of the company under liquidation taken charge of on September 7, 1989, to the official liquidator and, *inter alia*, also for a direction to the effect that the said corporation be restrained from disposing of the assets of the company in the exercise of its purported powers under the State Financial Corporations Act, 1951. The report of the official liquidator, being report dated March 19, 1993, as well as Company Application No. 41 of 1992 in Company Petition No. 203 of 1985, made by Shri Harkishandas Keshavdas Kothari are heard together. The Gujarat State Financial Corporation had made an application to this court, being Application No. 65 of 1990, for a declaration that the said Corporation is in lawful possession of the mortgaged and hypothecated assets described in exhibits "A" and "B" to the application and that the said Corporation is entitled to sell or otherwise dispose of and realise their securities and apply the net sale proceeds thereof towards satisfaction of their claim against the company in liquidation. By the said

application the said Financial Corporation had sought a direction against the official liquidator to the effect that the official liquidator be directed to allow the Corporation to sell and/or dispose of the said mortgaged and/or hypothecated and/or charged properties and appropriate the sale proceeds thereof towards their claim against the company in liquidation. Unfortunately, the said Application No. 65 of 1990 was dismissed for default by an order passed by Vyas J. on January 28, 1993, and an oral application for restoration of the said Company application No. 65 of 1990 was refused by this court. It is not known as to whether the Gujarat State Financial Corporation adopted any further proceedings in restoration of the said application. I have perused the papers pertaining to the said application in order to get a clear picture of all material facts even though the said application has already been dismissed for default. These proceedings raise interesting questions of law concerning the rights and obligations of secured creditors, particularly the State Financial Corporation on the one hand and the official liquidator and the workmen of the company under liquidation on the other hand.

4. The Gujarat State Financial Corporation has taken possession of mortgaged and hypothecated assets by itself, without obtaining prior leave of this court, on September 7, 1989, invoking section 29 of the State Financial Corporations Act, 1951. The Corporation has made an application to the District Court for sale of the said assets invoking section 31 of the said Act but the said application was withdrawn. The court is informed by learned counsel appearing on all sides including learned counsel for the State Financial Corporation that the Gujarat State Financial Corporation has already disposed of the plant and machinery belonging to the company by sale thereof, some time in the month of December for about Rs. 18 lakhs. The said sale was effected by the Financial Corporation without obtaining the leave of this court. The official liquidator as well as Shri Harkishandas Kothari, ex director of the company, are aggrieved by this action of the Gujarat State Financial Corporation. The official liquidator has contended that the said Financial Corporation has flouted various provisions of the Companies Act, 1 of 1956, by taking "illegal possession" of the mortgaged and hypothecated assets of the company under liquidation without the prior leave of the court and by selling plant and machinery as aforesaid. Shri Harkishandas Keshavdas Kothari has contended, through his learned counsel, Shri J. K. Majmudar, that the State Financial Corporation has committed contempt of this court by taking unlawful possession of the assets of the company under liquidation after the passing of the order of winding up without obtaining the leave of the court and by disposing of plant and machinery in an illegal manner as indicated above.

5. The proceedings are heard at some length. The proceedings, inter alia, involve the following interesting and important questions of law for the consideration of this court :

(a) Whether the State Financial Corporation is entitled to take possession of the mortgaged and hypothecated assets of the company in liquidation without

obtaining the leave of the company court by invoking section 29 of the State Financial Corporations Act, 1951, and sell or otherwise dispose of the same even though the official liquidator of the company under liquidation is deemed to be in custody of all the assets and properties of the company under liquidation ?

(b) Whether the official liquidator is entitled to custody, control and possession of all the assets of the company under liquidation including the assets mortgaged, hypothecated and charged in favour of the State Financial Corporation and dispose of the same keeping the monetary claims of the secured creditors including the State Financial Corporation intact subject to the statutory pari passu charge in favour of the workmen created by operation of law u/s 529A of the Companies Act, 1 of 1956 ?

(c) Whether the Gujarat State Financial Corporation acted illegally in taking possession of the mortgaged and hypothecated assets of the company in liquidation on September 7, 1989, without obtaining the prior leave of the company court and by disposing of plant and machinery in the same manner without the leave of this court ?

(d) Whether any directions should be issued to the Gujarat State Financial Corporation to hand over possession of the assets in question to the official liquidator and whether the official liquidator should be authorised to dispose of the assets by public auction or by private treaty subject to confirmation of sale by the court ?

(e) Whether the Gujarat State Financial Corporation must be directed to hand over the net sale proceeds realised by it from the sale of plant and machinery belonging to the company under liquidation to the official liquidator with or without interest ?

(f) Whether any action should be taken against the Gujarat State Financial Corporation or its office-bearers under the Contempt of Courts Act, 1951, as applied for by Shri Harkishandas Keshavdas Kothari, ex-director of the company under liquidation ?

6. For the reason indicated below, I have arrived at the following conclusions. The said conclusions are summarised first. The reasons for the said conclusions would follow in the later part of this order.

(a) Section 29(1) of the State Financial Corporations Act, 1951, cannot be invoked by the State Financial Corporation once the debtor company is directed to be wound up and the company court is deemed to be in custody of all the assets of the company by virtue of the operation of section 456(2) of the Companies Act, 1 of 1956. Section 29(1) of the State Financial Corporations Act, 1951, can be invoked by the State Financial Corporation in an appropriate case only before such an eventuality has taken place and not thereafter.

(b) Once a winding up order is passed or the official liquidator or a provisional liquidator is appointed, the official liquidator is deemed to be in custody and

control of all the assets of the company including the assets mortgaged, hypothecated and charged in favour of the secured creditor like the State Financial Corporation. Thereafter, the State Financial Corporation can invoke its powers under the State Financial Corporations Act, 1951, if any, only with the prior leave of the company court which has directed winding up of the debtor company. The State Financial Corporation is not entitled to dispose of such assets by itself without obtaining the prior leave of the company court once the company is directed to be wound up and the official liquidator is appointed. The State Financial Corporation is not entitled to take action u/s 29 of the State Financial Corporation Act or adopt proceedings before the District Court for sale of the securities as contemplated u/s 31 of the State Financial Corporation Act, 1951, without obtaining the prior leave of the company court winding up the company. Prior to the insertion of section 529A in the Companies Act, 1 of 1956, it was settled law that a secured creditor could remain outside the winding up of the company and could realise its securities without the intervention of the court. After the insertion of section 529A in the Companies Act, 1 of 1956, this view no longer holds the field. In view of the insertion of section 529A in the Companies Act, 1 of 1956, the workmen have statutory pari passu charge in their favour for their dues along with the secured creditors of the company and the official liquidator is enjoined by law to protect the interest of the workmen. In this view of the matter, the sale of the securities or the distribution of sale proceeds or the apportionment of the amount of sale proceeds cannot be left to the choice of the secured creditor. In this view of the change in law, the official liquidator steps in when the secured creditor attempt to realise their securities without the intervention of the company court. This view of the court is consistent with the view taken in recent judgments of the High Court of Karnataka, Kerala and Gujarat.

(c) Once the winding up order is passed and the official liquidator is appointed, the official liquidator is deemed to be in custody of all the assets of the company. By virtue of the operation of section 456(2) of the Act, the company court itself is deemed to be in custody of all the assets of the company from the date of passing of the winding up order by the court. On a true and correct interpretation of section 29(1) of the State Financial Corporations Act, 1951, the State Financial Corporation is entitled to take possession, charge, control and management of the assets of the company only so long as the company is itself in possession, control and charge of such assets and not after the said assets are deemed to be in the custody of the company court or the official liquidator by operation of law as aforesaid. In this view of the matter, there is no inconsistency between the provisions contained in section 29(1) of the State Financial Corporation Act, 1951, and the provisions contained in the Companies Act, 1 of 1956. Thus, the question as to whether the State Financial Corporations Act, 1951, has an overriding effect over the provisions contained in the Companies Act, 1 of 1956, does not really arise for the consideration of the court.

(d) The Gujarat State Financial Corporation acted illegally while taking

possession of the mortgaged, hypothecated and charged assets on September 7, 1989, and while disposing of plant and machinery in December, 1991, without obtaining prior leave of this court. If possession of the assets along with the net sale proceeds realised from sale of plant and machinery is handed over to the official liquidator as directed by this order within the time stipulated herein, no proceedings for contempt need be taken against the Gujarat State Financial Corporation or its office-bearers.

(e) The official liquidator is justified in contending that the Gujarat State Financial Corporation has flouted the provisions of section 456 and 537 of the Companies Act, 1 of 1956.

7. Thus, for the reasons discussed in the latter part of the order/judgment, I answer the questions formulated above as under :

(a) . . . No

(b) . . . Yes

(c) . . . Yes

(d), (e) and (f) . . As discussed above and as discussed below and as set out in the operative part of this order.

8. A few more facts are required to be stated before discussing the relevant case law cited at the Bar and dealing with the contentions urged. These facts in brief are as under :

(a) By an agreement dated January 16, 1979, the Gujarat State Financial Corporation agreed to advance a term loan of Rs. 30 lakhs to the company. The company created equitable mortgage over its immovable properties consisting of plot of land forming part of Survey No. 185/2p, 187/p and 184/p. in GIDC Industrial Estate at Bharuch in the registration of district and sub-district of Bharuch in the State of Gujarat on the footing of a first pari passu charge with the Gujarat Industrial Investment Corporation. The Gujarat State Financial Corporation as well as the Gujarat Industrial Investment Corporation advanced large amounts to the company (under liquidation).

(b) Some time in the year 1984, the Bank of Baroda filed Suit No. 28 of 1984 in the Court of the Civil Judge, Senior Division, for recovery of the amounts alleged to be due and payable by the company to the said bank. In the said proceedings, an order for attachment before judgment was passed as contemplated under Order XXXVIII, rule 5 of the Code of Civil Procedure. The Gujarat State Financial Corporation made an application to the Court of the learned Civil Judge, Senior Division at Bharuch, for release of the attached property from attachment. The attached property included factory, land and building as well as plant and machinery therein situate at Bharuch. The official liquidator intervened and opposed the application made by the Gujarat State Financial Corporation invoking the provisions of the Companies Act, 1 of 1956,

and asserting the claim of the official liquidator to custody of all the assets of the company u/s 456 of the Act. The Gujarat State Financial Corporation was fully aware of the fact of the winding up order having been passed by this court in Company Petition No. 203 of 1986 and the official liquidator having been appointed as liquidator of the company. By an order dated August 25, 1989, the Court of the Civil Judge, Senior Division, Bharuch, directed release of the attached properties from attachment levied at the instance of the Bank of Baroda. The learned civil Judge, Senior Division, Bharuch, did not adjudicate upon the claims and contentions raised by the Gujarat State Financial Corporation as well as the official liquidator leaving the Corporation and the official liquidator to pursue their remedies in accordance with law. The Gujarat State Financial Corporation quickly took possession of the assets as stated below.

(c) On September 7, 1989, the Gujarat State Financial Corporation took possession of the factory, land and building belonging to the company (under liquidation) situate at Bharuch along with plant and machinery in purported exercise of its powers u/s 20(1) of the State Financial Corporation Act, 1951, without obtaining leave of this court, even this court as the company court was deemed to be in custody of all the assets of the company by operation of law (sic).

(d) On January 20, 1992, this court granted leave to Mr. Harkishandas Keshavdas Kothari to take out judge's summons (being Company Application No. 41 of 1992) and made the same returnable on January 29, 1992. No ad interim order was passed by the court at this stage. The said judge's summons (Application No. 41 of 1992) appeared before the court on March 5, 1992. On this day, learned counsel for the Gujarat State Financial Corporation made a statement to the court that the Gujarat State Financial Corporation had already sold and delivered the plant and machinery of the company to Mita Machine and Forbes of Bombay. The said sale is supposed to have been effected by the Gujarat State Financial Corporation on or about December 23, 1991, without the leave of this court. Learned counsel for the Gujarat State Financial Corporation further informed the court that the land and building belonging to the company (under liquidation) was still not disposed of by the Corporation. These facts were recorded by the court in the order sheet of proceedings of the court on March 5, 1992. By my order dated March 5, 1992. I directed the Gujarat State Financial Corporation to maintain status quo in respect of undisposed of assets until further orders. The said order of status quo continues to be in force. The immovable properties of the company consisting of factory, land and buildings, etc., situate at Bharuch, are not yet disposed of.

9. Before I discuss the relevant case law cited by learned counsel on either side and summarise my conclusions on the questions arising in these proceedings, it is necessary to refer to some of the provisions of the Companies Act, 1 of 1956, as well as some of the provisions of the State Financial Corporations Act, 1951.

Section 456(1) of the Companies Act, 1 of 1956, reads as under :

"Where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator, as the case may be, shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled."

10. The aforesaid section clearly indicates that the official liquidator is entitled to take charge of all the assets, effects and actionable claims of the company in liquidation. The official liquidator is not merely entitled to the custody of all the assets of the company but is also obliged to take charge thereof for the benefit of all the creditors and shareholders of the company under liquidation.

Section 456(2) of the Act reads as under :

"All the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order for the winding up of the company."

Section 537(1) of the Companies Act, 1 of 1956, reads as under :

"(1) Where any company is being wound up by or subject to the supervision of the court :

(a) any attachment, distress or execution put in force, without leave of the court, against the estate or effects of the company, after the commencement of the winding-up; or

(b) any sale held, without leave of the court, of any of the properties or effects of the company after such commencement, shall be void."

Section 29(1) of the State Financial Corporation Act, 1951, reads as under :

"Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof (or in meeting its obligations in relation to any guarantee given by the Corporation) or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation."

Section 46B of the State Financial Corporations Act, 1951, reads as under :

"The provisions of this Act and of any rules or orders made there-under shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern."

11. It is well-settled by the decisions of the apex court and this court delivered prior to the insertion of section 529A in the Companies Act, 1 of 1956, by the Companies (Amendment) Act, 1985, that a secured creditor could remain outside the winding up and realise his securities without the intervention of the court. By section 529A of the Act it was provided for the first time that "Notwithstanding anything contained in any other provisions of this Act or any other law for the time being in force, in the winding up of a company (a) workmen's dues; and (b) debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues shall be paid in priority to all other debts". By the said section, it was specifically provided that workmen's dues shall rank pari passu with the dues owing by the company to secured creditors as more particularly provided in the said section. The said section has a non obstante clause. The said section operates notwithstanding anything contained in any other provisions of the Companies Act, 1 of 1956, or any other law for the time being in force. Thus, a statutory pari passu charge has been created by operation of law in favour of the workmen of the company (under liquidation) for the workmen's dues on par with the dues of other secured creditors. By the Companies (Amendment) Act, 1985, section 529 of the Companies Act, 1 of 1956, was also amended so as to define the expression "workmen's dues".

12. Mr. Subramaniam, learned counsel for the official liquidator, has submitted that in view of the insertion of the above referred provisions in the Companies Act, 1 of 1956, the State Financial Corporation was not entitled to take custody and possession of the mortgaged or hypothecated assets without obtaining prior leave of the court in purported exercise of its powers u/s 29 of the State Financial Corporations Act, 1951. Learned counsel submitted that it is the bounden duty of the official liquidator to take charge and custody of all the assets of the company including the mortgaged and hypothecated assets in view of the fact that the workmen of the company under liquidation have a pari passu statutory charge over the assets of the company along with other secured creditors. Learned counsel submitted that it is now the responsibility of the official liquidator to realise the securities at a fair market value and then decide the question of apportionment between the secured creditors like the Gujarat State Financial Corporation and others on the one hand and the workmen on the other hand, having regard to their respective claims and the provisions of law applicable to the parties. Learned counsel for the official liquidator further submitted that the High Courts of Karnataka, Gujarat and Kerala have already taken the view for which the official liquidator is canvassing in these proceedings. Learned counsel for the official liquidator submitted that in any event the Gujarat State Financial Corporation could not invoke section 29 of the State Financial Corporations Act against the official liquidator. Learned counsel for the official liquidator made several submissions at the Bar in support of his main submission that the Gujarat State Financial Corporation had violated sections 456 and 537 of the Companies Act, 1 of 1956. Mr. Majmudar, learned counsel for the former

director of the company, Shri Harkishandas Keshavdas Kothari, supported the submissions of Mr. Subramaniam, learned counsel for the official liquidator, and cited several authorities at the Bar. Mr. Merchant, learned counsel for the Gujarat State Financial Corporation, submitted that the State Financial Corporations Act, 1951, was a special Act whereas the Companies Act, 1 of 1956, was a general Act. Mr. Merchant submitted that the provisions contained in the State Financial Corporations Act, 1951, had an overriding effect over the provisions of the Companies Act, 1 of 1956. Mr. Merchant relied on the schemes of the State Financial Corporations Act, 1951, and in particular on section 29, 31 and 46B of the said Act in support of his submissions. Mr. Merchant submitted that the power of the State Financial Corporation to dispose of the property without the intervention of the court as provided in the State Financial Corporations Act, 1951, was analogous to the power of the mortgagee to dispose of the properties without the intervention of the court in cases covered u/s 69 of the Transfer of Property Act. Mr. Merchant relied on two judgments of our High Court as well as the judgment of the Supreme Court in the case of *Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others*, , in support of his submissions urged at the Bar. In the case of *Damji Valji Shah v. Life Insurance Corporation of India*, [1965] 35 Comp Cas 755, the Supreme Court held that the provisions of section 41 of the Life Insurance Corporation Act, being a special provision, prevailed over section 446 of the Companies Act. Learned counsel relied on this case by analogy in support of his contention that section 29 of the State Financial Corporations Act, 1951, like sections 446, 456, 529A and 537 of the said Act. It is not possible to accept the submissions of Mr. Merchant.

13. In the case of *Mysore Surgical Cottons (P.) Ltd. (In Liquidation) v. Karnataka State Financial Corporation* [1988] 1 Comp LJ 63 (Kar), the High Court of Karnataka held that section 456 of the Companies Act, 1 of 1956, enabled the official liquidator (and/or provisional liquidator when appointed before winding up) to take in his custody all the properties, effects and actionable claims to which the company is or appears to be entitled. While deciding this case, the learned single judge of the High Court of Karnataka in terms referred to the submissions made by learned counsel concerning the interpretation of section 46B of the State Financial Corporations Act, 1951, in the context of section 29 of the said Act. After extracting the relevant provisions of the State Financial Corporations Act, 1951, the High Court held that section 29(1) of the Act empowered the Financial Corporation to walk in and take over all the assets available to it only when the company or the industrial concern itself was in charge of any control of assets and not when the industrial concern had lost control over its assets in favour of another like the official liquidator by operation of law. In this case, the High Court construed section 29 of the State Financial Corporations Act, 1951, and held that the Financial Corporation had no right to deprive the official liquidator of his custody or control or deemed custody or control of the assets which had statutorily vested in the liquidator on the passing of the winding up order by operation of law with effect from the date of passing

of the winding up order. The judgment of the Supreme Court in the case of M.K. Ranganathan and Another Vs. Government of Madras and Others, , was in terms cited before the High Court of Karnataka. The High court distinguished the said judgment and held that the said judgment was not applicable to the situation before the High Court. The situation in this case is identical with the situation in the case before the High Court of Karnataka. I agree with the view taken by the High Court of Karnataka and hold that section 29(1) of the State Financial Corporations Act, 1951, empowers the Financial Corporation to take possession, charge and control of the assets from the industrial concern or the company only while such industrial concern or company is itself in possession or control of such assets and not when such assets are deemed to be in the custody of the official liquidator or this court by operation of law. If that is so, the question of inconsistency or repugnancy between the provisions contained in section 29(1) of the State Financial Corporations Act, 1951, and section 456 or 537 of the Companies Act, 1 of 1956, does not arise.

14. Mr. Subramaniam, learned counsel for the official liquidator, relied on the judgment of the High Court of Kerala in the case of Kerala Financial Corporation v. Official Liquidator [1991] 71 Comp Cas 324. In this case, the Kerala Financial Corporation had made an application to the High Court of Kerala for leave of the High Court to initiate proceedings against Prime Wood Products (P.) Ltd. (under liquidation) as provided u/s 29 of the State financial Corporations Act. The High Court of Kerala held that in view of the provisions of law contained in section 529A of the Companies Act, 1 of 1956, the said application could not be granted by the court. The court held that by virtue of the provisions contained in section 529A of the Companies Act, 1 of 1956, the workmen's dues were made a preferential payment on par with the debts due to secured creditors ranking the statutory charge *pari passu* with the dues of secured creditors. The court, in substance, held that section 529A of the Act had an overriding effect over all other provisions. The High Court of Kerala held that the question of apportionment or distribution of the amount claimed by the secured creditors on the one hand and the workmen on the other could not be left to the Financial Corporation. The court held that it was in the best interest of all concerned that the sale of the securities be conducted and held by the official liquidator under the supervision of the company court. In case the State Financial Corporation is allowed to conduct the sale of the mortgaged assets without any control of the company court or without the intervention of the official liquidator, serious consequences would arise. I respectfully agree with the view taken by the High Court of Kerala on this aspect. In my opinion, section 529A of the Companies Act, 1 of 1956, is a salutary provision and the decisions of the apex court or the High Courts in cases decided prior to the insertion of section 529A in the Act cannot be relied upon in a situation where section 529A of the Companies Act, 1 of 1956, is applicable.

15. Mr. J. K. Majmudar, learned counsel for Shri Harkishandas Keshavdas Kothari, ex-director of the company, relied upon the latest judgment of the High court of

Gujarat in the case of Official Liquidator, Himalaya Tools (India) Pvt. Ltd. v. Gujarat State Financial Corporation [1991] 2 GLH 208. In this case, the official liquidator of the company (under liquidation) had made an application for a direction of the court to the effect that the Gujarat State Financial Corporation be directed to hand over possession of the assets taken charge of to the official liquidator. After surveying a large number of cases cited before the court/s, the High Court of Gujarat formulated its conclusion in para 33 of the judgment. M. B. Shah J. of the High Court of Gujarat held that section 29 of the State Financial Corporations Act did not empower the Financial Corporation to take possession of the property of the company (under liquidation) from the custody of the court or the official liquidator. The learned judge held that the question of priorities or the distribution of sale proceeds was required to be determined by the court which was winding up the company. The learned judge held that section 529A of the Act provided by its non obstante clause that the workmen's dues and the debts owing to secured creditors must abate in equal proportion and all of them have pari passu charge over the securities. The learned judge made several other observations during the course of his judgment. I am in respectful agreement with the view taken by the High Court of Gujarat in so far as it analyses the implication of section 529A of the Act and construes section 456 of the Companies Act, 1 of 1956, and sections 29 and 46B of the State Financial corporations Act, 1951. The learned Judge held that even if the secured creditors wanted to remain outside the winding up proceedings and realise their securities without the intervention of the court, they could do so only after obtaining prior leave of the company court. I have no doubt in my mind that after the insertion of section 529A of the Companies Act, 1 of 1956, the legal position has undergone a change and the official liquidator is entitled to be in custody, control and charge of all the mortgaged and hypothecated assets unless leave is granted by the company court to the secured creditor to take charge of such assets on such terms and conditions as the company court may deem fit to impose.

16. It is not necessary for the purpose of this proceeding to decide as to whether section 446 of the Companies Act, 1 of 1956, is applicable to the action of taking of possession u/s 29(1) of the State Financial Corporations Act, 1951. In all probability section 446(1) of the Companies Act, 1 of 1956, is not applicable to the proceeding concerning taking of possession u/s 29(1) of the State Financial Corporations Act. It is not necessary to decide this question in these proceedings. Sections 446 and 537 of the Act are undoubtedly applicable.

17. I shall now refer to the two judgments of our own High Court on which reliance is placed by learned counsel for the Gujarat State Financial Corporation. Mr. Merchant, learned counsel for the Gujarat State Financial Corporation, relied on the Division Bench judgment of our High Court in the case of State Industrial and Investment Corporation of Maharashtra Limited v. Maharashtra State Financial Corporation and in the case of State Industrial and Investment Corporation of Maharashtra Limited Vs. Maharashtra State Financial Corporation and another, . In this case, Bharucha J., as his Lordship then was (now High

Lordship of the Supreme Court of India), speaking on behalf of the Division Bench, held that the sale of the assets held by the SICOM in exercise of its power of sale as a secured creditor outside the winding up and without the intervention of the court was not void. The Division Bench held that section 537 of the Companies Act, 1 of 1956, was not applicable to a case where the secured creditor chose to realise his security outside the winding up and without the intervention of the court. In my opinion, after insertion of section 529A of the Companies Act, 1 of 1956, in the statute, the legal position on the subject has undergone a vital change. In my humble opinion, the ratio of the said judgment has no applicability to the proceedings under consideration before the court. Now, by operation of law, a statutory security has been created in favour of the workmen of the company (under liquidation) and all the secured creditors including the workmen rank *pari passu* in respect of their dues and the securities. Thus, the official liquidator representing the workmen is entitled to realise the said securities by operation of law and protect the interest of the workmen. It is the need of the hour to give a harmonious interpretation to the various provisions of the two legislations referred to hereinabove.

18. Learned counsel for the Gujarat State Financial Corporation also relied on the judgment of G. D. Kamat J. in the case of Maharashtra State Financial Corporation v. Official Liquidator, Sidhu Tyres (P.) Ltd. [1988] 64 Comp Cas 641. In my opinion, this judgment is clearly distinguishable as it does not refer to section 529A of the Companies Act, 1 of 1956, or its impact on the interpretation of the other connected provisions.

In the result, I pass the following order :

(a) The Gujarat State Financial corporation is directed to hand over possession of the company's assets situate at Bharuch, i.e., consisting of land and building, etc., of which it took possession on September 7, 1987, to the official liquidator within six weeks from today. The order of *status quo* shall continue to be operative on force till the official liquidator takes possession of the assets from the Gujarat State Financial Corporation.

(b) The official liquidator is specifically authorised to take steps to sell the said assets by public auction or by private treaty subject to confirmation of sale by the company court after following the usual procedure and after giving reasonable opportunity to all the parties concerned including the Gujarat State Financial Corporation to bring offer from the intending buyers so as to enable the official liquidator to fetch the best possible price.

(c) The Gujarat State Financial Corporation is directed to handover the entire amount of net sale proceeds received by it from sale of plant and machinery belonging to the company under liquidation which assets are supposed to have been sold by the Gujarat State Financial Corporation on or about December 23, 1991, without the leave of the company court. The net sale proceeds shall be handed over by the Gujarat State Financial Corporation to the official liquidator

within six weeks from today. The claim of the official liquidator to claim interest on the said amount by adopting separate appropriate proceedings is reserved.

(d) The official liquidator shall investigate the claims of the workmen expeditiously.

19. The application made by learned counsel for Mr. Harkishandas Keshavdas Kothari, ex-director of the company (under liquidation), for taking action against the Gujarat State Financial Corporation under the Contempt of Courts Act, 1971, is rejected. The action of the Gujarat State Financial Corporation, though illegal, does not appear to be in the nature of wilful and deliberate defiance of the orders passed by this court. The impugned action of the Gujarat State Financial Corporation in taking possession of the asset on September 7, 1987, and sale of plant and machinery on or about December 23, 1991, is illegal but not mala fide. If the Gujarat State Financial Corporation does not comply with the orders of this court passed today within the time stipulated, the official liquidator shall be at liberty to make a report to this court for taking action against the Gujarat State Financial Corporation and its officers under the Contempt of Courts Act, 1971.

20. Having regard to the facts and circumstances of the case there shall be no order as to costs.

21. The parties are directed to act on the basis of an ordinary copy of this order duly authenticated by the Registrar of Companies.

22. Issue of certified copy is expedited.