

(1997) 05 DEL CK 0017

In the Delhi High Court

Case No : C.A. No. 853 of 1994 in C.P. No. 169 of 1992, C.A. No. 856 of 1996 in C.P. No. 23 of 1985, C.A. No's. 2161, 2162 of 1993, 407, 408 of 1997 in C.P. No. 18 of 1991, C.A. No. 414 of 1996 and I.A. No. 8535 of 1996 in Suit No. 2266 of 1996, C.A. No's. 293 of

Mayur Syntex Ltd. (in Liquidation) and Atlantic Engineering Services Pvt. Ltd. APPELLANT

Vs

Punjab and Sind Bank
 Union Bank of India Vs Indo Gitra Ceramics Ltd. RESPONDENT

Date of Decision : 28-05-1997

Acts Referred:

Citation : (1997) 4 AD 821 : (1999) 96 CompCas 974 : (1997) 67 DLT 836

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : B.N. Nayar, Adv R.S. Kanoi, C.P. Kanoi and S.K. Kanoi, J. Lal and Yasmeen Tarapore, for the Appellant;

Judgement

This Judgment has been overruled by : Allahabad Bank Vs. Canara Bank and Another, AIR 2000 SC 1535 : (2000) 101 CompCas 64 : (2000) 2 CTC 723 : (2000) 4 JT 411 : (2000) 3 SCALE 169 : (2000) 4 SCC 406 : (2000) 2 SCR 1102 : (2000) AIRSCW 1347 : (2000) 3 Supreme 205

Dr. M.K. Sharma J.

1. A very important and vital question has been raised in these petitions which requires the immediate attention of this court. The question raised is as to whether on the coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, in short the "Debt Recovery Act", setting up the Debt Recovery Tribunal, "the Tribunal" in short, for adjudicating upon the claims of the banks and financial institutions, the jurisdiction of the company court under sub-section (1) of section 446 of the Companies Act, 1956, to grant or refuse leave of any suit or legal proceedings and under sub-section (3) of section 446 of the Companies Act to transfer the suits or any proceedings to the

company court has been taken away and that the said banks and the financial institutions need not apply for such leave either for filing new claims or proceeding with a pending claim, although the company has gone into liquidation and has been wound up by the company court.

2. I have heard Mr. Sumant Batra, Mr. A. S. Chandiok, Mr. P. C. Khanna, Mr. Manmohan, Mr. B. M. Nayyar, Mr. Rajiv Datta and other counsel appearing for the various parties and record appreciation of their painstaking efforts in assisting the court. On behalf of the banks and financial institutions, different facets arising out of the aforesaid question were mooted before me. One of the submissions on their behalf was that in terms of the provisions of the Debt Recovery Act, the authority, power and jurisdiction to decide the claims of the banks and financial institutions for recovery of their debts and matters connected therewith or incidental thereto, is vested with the Tribunals constituted under the Debt Recovery Act, and, Therefore, the company court does not have the jurisdiction to decide the suit and/or to grant or refuse leave on any suit or legal proceedings filed by such financial institutions for recovery of debt. The further submission of learned counsel appearing for the financial institutions was that the provisions of the Debt Recovery Act specifically and categorically exclude the jurisdiction of any authority or court including the High Court to decide and adjudicate upon the applications of banks and financial institutions for recovery of their debts and matters connected therewith or incidental thereto, and, Therefore, the company court shall not have any jurisdiction to decide such suits and/or to grant or refuse leave on any suit or legal proceedings instituted by the said financial institutions for recovery of debts in the Tribunal. It was further submitted that the Debt Recovery Act is a special legislation vesting special powers and special jurisdiction with the Tribunals constituted there under and also is later in point of time than the Companies Act, and as such, the provisions of the said Debt Recovery Act would override the provisions of the Companies Act which is a general legislation. Another submission of learned counsel was that the Debt Recovery Act is a complete enactment in itself and provides for adjudication of claims against a company, and, Therefore, obtaining leave u/s 446 of this Companies Act cannot be made a condition precedent for initiating proceedings against a company in case the said company is in liquidation.

3. On the other hand, counsel appearing for the official liquidator as also on behalf of ex-directors of the company in liquidation as also on behalf of other creditors, it was submitted that the convenience of the official liquidator is paramount and that when a company is in liquidation, all laws other than the Companies Act become general law qua matters which may be the subject-matter of ordinary civil courts. It was also submitted that the companies which have been wound up by the order of the company court shall stand on a different footing since the winding up powers under the law is vested with a wider jurisdiction when compared to a quasi-judicial tribunal which has been incorporated only to deal with simplicities suit involving recovery of dues. It was also submitted that the intention of the Legislature while enacting the Debt

Recovery Act was never to supersede or override the provisions enacted under the Companies Act for winding up of a company. It was pointed out that the intention of the Legislature while incorporating Part VII of the Companies Act was to vest a High Court by way of its company court to exercise special jurisdiction with respect to the companies which had been directed to be wound up and, Therefore, the Companies Act operates as a special Act in the case of a company which is wound up and would prevail over the provisions of the Debt Recovery Act which in such matters would become a general law.

4. In the context of the aforesaid submissions of learned counsel for the parties, it would be relevant to notice and understand the import of the provisions of the two Acts connected with the issue raised before this court. The relevant provisions of section 446 are extracted below :

"446. (1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceedings shall be commenced, or if pending at the date of winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose.

(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of -

(a) any suit or proceeding by or against the company

(b) any claim made by or against the company (including claims by or against any of its branches in India)

(c) any application made u/s 391 by or in respect of the company;

(d) 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 of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court."

5. The following provisions of the Debt Recovery Act also need to be extracted :

"(2)(g) "debt" means any liability (inclusive of interest) which is alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institutions or the consortium under any law for the

time being in force, in cash or otherwise, whether secured or unsecured, or whether payable under a decree or order of any civil court or otherwise and subsisting on, and legally recoverable on, the date of the application."

"17. Jurisdiction, powers and authority of Tribunals. - (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act."

"18. Bar of jurisdiction. - On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17."

"31. Transfer of pending cases. - (1) Every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal :

Provided that nothing in this sub-section shall apply to any appeal pending as aforesaid before any court.

(2) Where any suit or other proceedings stands transferred from any court to a Tribunal under sub-section (1), -

(a) the court shall, as soon as may be after such transfer, forward the records of such suit or other proceedings to the Tribunal; and

(b) the Tribunal may, on receipt of such records, proceed to deal with such suit or other proceedings, so far as may be, in the same manner as in the case of an application made u/s 19 from the stage which was reached before such transfer or from any earlier stage or denovo as the Tribunal may deem fit."

"34. Act to have overriding effect. - (1) Save as otherwise provided in sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made there under shall be in addition to, and not in derogation of, the Industrial Finance Corporations Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), and the Sick Industrial Companies (Special Provisions) Act,

1985 (1 of 1985)."

6. At this stage, it would be appropriate to advert to the object and scope of section 446 of the Companies Act. The apparent object behind enacting the provisions of section 446 was to save the company which is ordered to be wound up from wasteful and expensive litigation and to accelerate the disposal of winding up proceedings through a summary and cheap procedure by conferring jurisdiction on the court winding up the company to entertain petitions in respect of claims for and against the company. Part VII of the Companies Act deals with the procedure for winding up a company. Section 443 sets out the circumstances in which a company may be wound up by the court. Section 444 provides that where the court makes an order for the winding up of the company, the court shall forthwith cause intimation to be sent to the official liquidator and the Registrar. Section 446(1) provides that when a winding up order has been made and the official liquidator has been appointed, no suit or other legal proceedings shall be commenced and if pending at the date of the winding up order, shall be proceeded with against the company except by leave of the court and subject to such terms as the court may impose. Section 446(2), on the other hand, specifies the ambit of the jurisdiction of the court which is winding up the company, which confer special power and jurisdiction on the court which is winding up the company to do such acts that are set out in the various sub-clauses, notwithstanding anything contained in any other law for the time being in force. Section 446(2) does confer special jurisdiction on the court winding up the company, which otherwise it may not have enjoyed. Then comes section 446(3) whereunder any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is pending, could be transferred and disposed of by the company court, notwithstanding anything contained in any other law for the time being in force. This provision empowers the winding up court to transfer before it all proceedings pending against the company at different places, because it is convenient for the winding up of the company's affairs expeditiously when all the suits are transferred to the winding up court.

7. In *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, , and also in *Central Bank of India Vs. M/s. Elmot Engineering Co. and others*, , the Supreme Court has discussed the scope and ambit of the powers to be exercised by a company court u/s 446 of the Companies Act. It will be proper at this stage also to notice the provisions of sections 529 and 529A of the Companies Act. Section 529 deals with application of insolvency rules in winding up of insolvent companies whereas section 529A deals with overriding preferential payments. The proviso added to the aforesaid sub-section (1) of section 529 by the Amendment Act of 1985 provides that the security of every secured creditor shall be deemed to be the subject-matter of a *pari passu* charge in favor of the workmen. In *UCO Bank v. Official Liquidator* High Court, Bombay [1994] 81 Comp Cas 780; [1994] 2 UJ (SC) 470, it has been held that the effect of the proviso is to create by statute a charge *pari passu* in favor of the workmen on

every security available to the secured creditors of the employer company for recovery of debts at the time when the amendment came into force. It was further held that the aforesaid expression is wide enough to apply to the security of every secured creditor which remained unrealised on the date of amendment and the clear object of the amendment is that the legitimate dues of the workers must rank *pari passu* with those of secured creditors and above even the dues of the Government.

8. The Objects and Reasons for enacting the Debt Recovery Act are to provide for the establishment of Tribunals for expeditious adjudication for recovery of dues due to banks and financial institutions and for matters connected therewith or incidental thereto. The Statement of Objects and Reasons of the Debt Recovery Act is extracted below (see [1993] 78 Comp Cas 97 :

"Banks and financial institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to the banks and financial institutions has blocked a significant portion of their funds in unproductive assets, the value of which deteriorates with the passage of time. The Committee on the Financial System headed by Shri M. Narasimham has considered the setting up of Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. An urgent need was, Therefore, felt to work out a suitable mechanism through which the dues to the banks and financial institutions could be realised without delay. In 1981, a Committee under the chairmanship of Shri T. Tiwari had examined the legal and other difficulties faced by banks and financial institutions and suggested remedial measures including changes in law. The Tiwari Committee had also suggested setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The setting up of Special Tribunals will not only fulfill a long-felt need, but also will be an important step in the implementation of the report of Narasimham Committee. Whereas on 30th September, 1990, more than fifteen lakhs of cases filed by the public sector banks and about 304 cases filed by the financial institutions were pending in various courts, recovery of debts involved more than Rs. 5,622 crores in dues of public sector banks and about Rs. 391 crores of dues of the financial institutions. The locking up of such huge amounts of public money in litigation prevents proper utilisation and re-cycling of the funds for the development of the country.

2. The Bill seeks to provide for the establishment of Tribunals and Appellate Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions. Notes on Clauses explain in detail the provisions of the Bill."

9. The Objects and Reasons imply the following :

(a) As the usual procedure for recovery of loans due to banks and financial institutions resulted in blocking of thousands of crores of rupees need was to

devise a suitable mechanism through which recovery could be made; and

(b) the Legislature desired to remedy the difficulty in recovering loans due to banks and financial institutions and enforcement of securities charged with them. This remedy is available for both secured and unsecured loans.

10. According to Mr. Sumant Batra and Mr. A. S. Chandiok, the very intention of enacting the provisions of section 18 read with sections 31 and 34 is to vest the jurisdiction to decide the applications for recovery of debts by the financial institutions exclusively with the Tribunal and that is the reason why the Legislature has categorically excluded the jurisdiction of any other authority or court in matters falling within the jurisdiction of the said Tribunal. Relying on the provisions of section 34, it was stated by counsel that the non-obstante clause providing for clear and overriding powers of the Tribunal makes it clear that the provisions of the said Act will have overriding powers over any other provisions of law which might be inconsistent with the provisions of the said Act. According to them, the Legislature while enacting the Debt Recovery Act was fully aware of the provisions contained in the Companies Act including the provisions for winding up, but deliberately and intentionally opted to exclude the Companies Act, 1956, from the list of statutes mentioned in the said clause of section 34 and, Therefore, by necessary implication, the provisions of the said Debt Recovery Act would override the provisions of the Companies Act.

11. Counsel, in support of their submissions, relied upon the decisions of Shri Sarwan Singh and Another Vs. Shri Kasturi Lal, . In the said case, the Supreme Court was concerned with the provisions of the Slum Areas (Improvement and Clearance) Act and the Delhi Rent Control Act, both of which contained non-obstante clauses stating that its provisions would override the provisions of any other law. The Supreme Court held that the provisions of the Delhi Rent Control Act would prevail over the Slum Areas Act because the Delhi Rent Control Act was provided with a non obstinate clause being fully aware of the similar provisions existing in the Slum Areas Act, more so when the two Acts were operative in the same field. It was held in paragraph 20 of the said judgment that when two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions would override those of any other law, cases of such conflict have to be decided by reference to the object and purpose of the laws under consideration. It was further held in paragraph 21 of the said judgment that for resolving inter se conflicts, one other test is that the later enactment must prevail over the earlier one. Finally, in paragraph 23, it was held that in view of the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non obstinate clauses in the earlier one, the provisions of section 14A and Chapter IIIA of the Rent Control Act must prevail over those contained in sections 19 and 30 of the Slum Areas Act.

12. In Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, , the Supreme Court was concerned with two non

obstinate clauses appearing in the State Financial Corporations Act, 1951, and the Sick Industrial Companies (Special Provisions) Act, 1985. On consideration of the provisions of the said Act, the Supreme Court held that the Sick Industrial Companies (Special Provisions) Act, being a subsequent enactment, contained a non obstinate clause therein, if it is found that both these statutes are special statutes. It was held in paragraph 9 "thereof that the Sick Industrial Companies (Special Provisions) Act being a subsequent enactment, the non obstinate clause therein would ordinarily prevail over the non obstinate clause found in section 46B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one.

13. In *Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others*, , the Supreme Court was concerned with the provisions of the Public Premises Act of 1971 and the Rent Control Act. In paragraph 55 of the said judgment, it was held by the Supreme Court that the Public Premises Act is also a special statute relating to eviction of unauthorised occupants from public premises and that both the enactments, namely, the Rent Control Act and the Public Premises Act, are special statutes in relation to the matters dealt with therein. It was further held that since the Public Premises Act is a special statute and not a general enactment, the exception contained in the principle that a subsequent general law cannot derogate from an earlier special law cannot be invoked and in accordance with the principle that the later laws abrogate earlier contrary laws, the Public Premises Act must prevail over the Rent Control Act.

14. Relying on the aforesaid decisions, learned counsel submitted that the provisions of the Companies Act are general law whereas the Debt Recovery Act is a special statute and is later in point of time and accordingly in consonance with the law laid down by the Supreme Court, the Debt Recovery Act being a subsequent enactment and a special law, the non obstinate clause therein would prevail over the non obstinate clause found in section 446(3) of the Companies Act which is a general statute.

15. There could be no controversy with the law laid down by the Supreme Court that if two Acts operate in the same field and if both of them are special statutes than the one which is later in point of time with a non-obstante clause would definitely prevail over the one which was earlier in point of time. It is also well settled that if there be a conflict between the provisions of a general law and provisions of a special law, the provisions of special law would prevail. Therefore, efforts will have to be made in the present case to find out whether the Debt Recovery Act is a general statute or a special statute when pitted against the provisions of the Companies Act, particularly the provisions of the winding up with which the present case is mostly concerned.

16. Mr. P. C. Khanna and Mr. B. N. Nayar submitted that the provisions of the Debt Recovery Act are general law. According to him, the provisions of the Debt Recovery Act relate to the procedural aspect for recovery of the debt by a financial institution. They submitted that when a different forum is provided for

recovery of debt, the same cannot be held to be a special law. The aforesaid submission is, however, disputed by Mr. Sumant Batra and Mr. A. S. Chandiok. According to them, the provisions of the Companies Act have been held to be general law by the Supreme Court in *Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others*, , whereas the provisions enacted under the Debt Recovery Act is a special Act to be made applicable under special circumstances. The counsel relied upon the observation in *Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others*, , that the company court has no jurisdiction to entertain and adjudicate upon any matters which the Tribunal, formed under the special provision, is empowered to determine under that Act.

17. Across the Bar, various decisions were referred to relating to the issue as to whether the provisions of the Companies Act would override the provisions of other Acts. Special mention can be made to a decision of this court in *Life Insurance Corporation of India v. Asia Udyog (P.) Ltd.* [1982] 1 Delhi 582; [1984] 55 Comp Cas 187. In the said case, the Full Bench was concerned with the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, and the provisions of the Indian Companies Act relating to winding up proceedings. In the said case, the Full Bench of this court held that the Act of 1971 dealing generally with public premises means that if there is dispute regarding eviction or recovery of rent proceeding with regard to public premises, the same would be a special Act so far as the companies other than those under winding up are concerned, but would be general if the company is under winding up, where the special Act would be the Companies Act on the analogy of *Union of India (UOI) and Another Vs. India Fisheries (P) Ltd.*, . The Full Bench borrowed the expression of the Supreme Court in *Life Insurance Corporation of India Vs. D.J. Bahadur and Others*, , to hold that "for certain cases, an Act may be general and for certain other purposes, it may be special and that the court cannot blur a distinction when dealing with finer points of law". The Full Bench held that if the Life Insurance Corporation is permitted to recover its dues without obtaining leave of the winding up court, it would thus derive undue benefits and advantage against other unsecured creditors which would defeat the very object of the winding up provisions in the Companies Act which is to make the court the custodian of the companies which are being wound up. It was also held that the only way to reconcile the two provisions would be to read down the powers of the authorities under the Act of 1971 to deal with the matter of public premises when they are occupied by companies in winding up except by leave of the court. The Full Bench also noticed the decision of *Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others*, , and held that there is no anomaly in the situation in view of the reason that the Legislature intended that the assets of the company in liquidation should be dealt with at one place by the company judge who would on an over all view of the matter be in the best position to distribute the funds of the companies equitably so that there is no unseemly scramble of various creditors to realise their dues from the company.

18. Reference may also be made to a decision of this court in *Micronix India v. Disco Electronics Ltd. (in Liquidation)*, AIR 1996 4 AD (Delhi) 650; [1999] 96 Comp Case 950. In paragraph 18 of the said decision, it was held that the provisions of sections 29, 46B and 32E of the State Financial Corporations Act do not create a total ouster of jurisdiction of the company court. The court did not accept the contention that the said provisions mean total ouster of the jurisdiction of the company court, that its provisions will always and in all circumstances prevail over the Companies Act, even after the winding up or provisional winding up. It was held that the Legislature in its own wisdom amended the Companies Act and enacted the provisions such as section 529A and provisos to section 529 in order to protect the wages of the workmen notwithstanding any law to the contrary. Workmen's wages have now been put on par with the claims of secured creditors and their claims now rank *pari passu* with the claims of secured creditors and thus a new category of secured creditors has been created whose interests are to be represented and taken care of by the official liquidator.

19. The substratum of the aforesaid decisions clearly indicate that a water tight compartment cannot be evolved and a strait jacket formula cannot be laid down for holding that the provisions of a particular Act are general law or special law. Each law has to be examined with reference to the object and purpose and circumstances when pitted against the provisions of any other Act governing the same field. A particular Act may be a general law under certain circumstances and as against a particular law, but when pitted as against another law, the same may become a special law. Therefore, the contention of Mr. A. S. Chandiok and Mr. Sumant Batra cannot be accepted that since in the case of *Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others*, , it was held by the Supreme Court that the provisions of the Companies Act are general law, Therefore, under all circumstances the said law would remain to be general law. We are concerned, in the present case, as to whether the provisions of winding up as contained in the Companies Act when pitted against the provision of the Debt Recovery Act would be general law or special law. That investigation would also require an enquiry as to whether the provisions of the Debt Recovery Act when pitted against the Companies Act are special law or not. But before embarking upon the said enquiry, it would also be relevant to find out if the said two Acts overlap each other and/or cover the same field.

20. Giving effect to the non obstinate clause in the light of the decisions of the Supreme Court as laid down in the case of *Shri Sarwan Singh and Another Vs. Shri Kasturi Lal, and Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another*, would come in only when the two Acts containing such non obstinate clauses overlap or clash with each other. It is laid down by the Supreme Court in the case of *Basti Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Another*, that if two provisions relate to the same subject-matter, to the same situation and both the provisions overlap and are coextensive and at the same time so contrary and repugnant in their terms and

make that one must perish at all, then and only then they are inconsistent.

21. When the provisions of the winding up as enacted under the Companies Act are considered, no such similar provision could be found in any other Act laying down such a procedure as to what should be done in the case of winding up of the company. The only procedure that is laid down could be found under the aforesaid provisions of Chapter VII of the Companies Act and more particularly in section 446 thereof. The Debt Recovery Act nowhere lays down as to what should be the procedure to be followed for recovery of the amount due from a company which has gone into liquidation or has been wound up and distribution thereof amongst the various creditors. The said Debt Recovery Act deals only with the procedure for recovery of debts due to a financial institution and the procedure therein as sets out under the said Act. On the other hand, Chapter VII deals with and sets out the entire procedure as to how a company should be wound up by the court and in the case of such winding up of a company, how the assets of the said company should be dealt with and distributed and how the creditors, both secured and unsecured, should be repaid. In a suit for recovery of loan by the banks and the financial institutions, the object is to find out if the plaintiff/claimant is entitled to any amount and if so, the quantum of the amount and after such fixation of liability, the process of recovery of the said amount is resorted to by the court for the benefit of the plaintiff. The object of the provisions of the Debt Recovery Tribunal is also the same but the procedure prescribed therein is cheaper and expeditious compared to the remedy provided under the common law. On the other hand, the object of the winding up process is somewhat different. In a winding up matter, the court makes the recovery for forming a common pool. The object is to recover the assets and distribute the same to the creditors in accordance with their priorities, putting the secured creditors and dues of the workmen at the top. Part VII of the Companies Act providing for the process of winding up deals with special circumstances and requirements of an insolvent and sick company whereas the Debt Recovery Act is concerned with the general law of recovery of loan through the process of specialised Tribunals.

22. In my considered and careful opinion, the provisions laid down u/s 446 of the Companies Act do not operate in the same field as that of the Debt Recovery Act and in case there is some conflict in between the provisions of the two Acts, the endeavor of the court should be to harmoniously construct the said provisions so as to give effect to the objects of both the Acts and in doing so, if necessary, to read down the provisions of one of the said Acts. Even in respect of conflicting statutory provisions, it has been held by the Supreme Court in *State of Rajasthan Vs. Gopi Kishan Sen*, , that the role of harmonious construction of apparently conflicting statutory provisions is well-established for upholding and giving effect to all the provisions as it may be possible, and for avoiding the interpretation which may render any of them ineffective or otiose. The said law, in my opinion, is squarely applicable to the present case. On consideration of the provisions of the two Acts, I am of the firm opinion that not only the provisions

of the winding up operate in different fields altogether from that of the Debt Recovery Act but also the provisions relating to the winding up of the company, particularly the provisions of section 446(1) are a special law as it specifically deals with the nature, procedure and the manner of winding up of a company and for distribution of the assets of a company which has been wound up. The said provisions when pitted against the provisions of the Debt Recovery Act could be harmoniously construed in order to give effect to the purpose, intent and object of both the Acts. Under such circumstances, the ratio of the decisions relied upon by Mr. Sumant Batra and Mr. A. S. Chandiok would not be applicable in the facts of the present case.

23. Reference, in this connection, may also be made to a decision of the Supreme Court in *Industrial Credit and Investment Corporation v. Srinivas Agencies* [1996] 86 Com Case 255; [1996] ISJ 479. In the said decision, the Supreme Court considered the provisions of section 446 of the Companies Act and also the provisions of the Debt Recovery Act. While deciding the aforesaid case, the Supreme Court noticed the provisions of sections 446, 529, 529A and 537 of the Companies Act as also the provisions of the Debt Recovery Act. After noticing the aforesaid provisions, the Supreme Court has stated thus (page 263) :

"We have duly applied our mind to the rival contentions. It is no doubt correct that the interest of the secured creditor, who has taken recourse to an independent proceeding to realise his debt has to be protected; but it is apparent that this cannot be done at the cost of other secured creditors. To preserve the integrity of one secured creditor, another secured creditor cannot be discredited his integrity has to be of equal concern. It may, however, be that in a particular case the secured creditor who has approached the civil court happens to be one who has lent huge amount, or be one who is the main secured creditor. In such a situation, on approach being made by such creditor, we have no doubt that the company court would duly take note of this fact and should like to grant leave required by sub-section (1) of section 446; and by the same token refuse to transfer the proceedings to his court. This is not to say that in all the cases where the proceedings have been initiated by the main secured creditor, the company court would grant leave. Much would depend on the circumstances of each case. But, if the position be that the secured creditor who had approached the civil court is one amongst many similar creditors, it may be that the company court feels that to take care of the interest of other secured creditors, either the relief of leave does not deserve to be granted or that the proceeding is required to be transferred to it for disposal. It may be pointed out that sections 529 and 529A of the Act do contain provisions in so far as the priority of the secured creditor's claim is concerned. Of course, the company court would not transfer the proceeding to it merely because of its convenience ignoring the difficulties which may have to be faced by the secured creditor, who may be at a place far away from the seat of the company court. The need to protect the company from unnecessary litigation and cost have, however, to be borne in mind by the company court.

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 strait 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 the Recovery of Debts Due to 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, the 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*.

The appeals and transfer cases stand disposed of with these observations, leaving the company court to pass appropriate orders in the concerned matters in the light of what has been stated by us. No order as to costs."

24. From the aforesaid decision, the following principles emerge :

(a) It was settled position by now that a secured creditor stands out-side the winding up proceedings and under the law he can proceed to realise the security without the leave of the winding up court, if at the time of its institution the company was not wound up. (For this settled law, reference may also be made to the decision in *Central Bank of India v. Elmot Engineering Co.* [1994] 81 Comp Case 13 (SC) and *M.K. Ranganathan and Another Vs. Government of Madras and Others*, .

(b) However, the provision would be different in a case where the company is wound up in view of the provisions of sections 446, 529(1), (2), 529A and 537 of the Companies Act.

(c) A winding up court shall have jurisdiction to entertain or dispose of any suit or proceeding by or against the company even if such suit or proceeding had been instituted before an order for winding up had been made even by transferring such suit or proceeding to itself.

(d) No suit or legal proceedings, even if pending on the date of winding up order, can proceed against the company, except by leave of the court, under sub-section (1) of section 446.

(e) When an application is made seeking transfer of a suit or other legal proceeding instituted against the company to the company court, the court shall decide about leave to be granted or refused for the purpose of institution,

continuation or transfer, depending on the facts and circumstances of each case exercising its discretion judiciously.

(f) A workman is also to be satisfied *pari passu* with the secured creditor.

25. The aforesaid legal principles laid down by the Supreme Court are binding and law of the land. Under such circumstances, Mr. Nayyar's sub-missions that the convenience of the official liquidator should be held as paramount and that secured creditor should be held to stand inside the winding up proceeding, are without merit.

26. Mr. Sumant Batra, during the course of his arguments, submitted that in the said decision, the Supreme Court has not considered the effect of the provisions of sections 31 and 34 of the Debt Recovery Act. On a careful perusal of the decision of the Supreme Court, I find the said submission of learned counsel is without any merit. The Supreme Court, in paragraph 10, has referred to the submission of learned counsel appearing therein stating that the counsel has referred to the court the provisions of the Debt Recovery Act which was recently enacted because of the considerable difficulty being experienced by financial institutions in recovering loans and enforcement of security charged with them. Therefore, the provisions of the said Act were noticed by the Supreme Court while deciding the said case. Mr. Nayyar's submission that this decision of the Supreme Court should be considered *per incuriam* is held to be without force, as the decision was given not on concession but on appreciation and notice of the relevant provisions.

27. On a careful perusal of the decision of the said case, I find that the Supreme Court has put a harmonious construction on the provisions of the two Acts with which I am directly concerned in the present case, when it observed that the approach to be adopted by the company court could not be put in a strait jacket formula and that each case is to be judged on its own facts and merits. The court has further observed that the company court has to bear in mind the rationale behind the enactment of the Debt Recovery Act.

28. In the light of the aforesaid discussions and also in terms of the decisions of the Supreme Court in *Industrial Credit and Investment Corporation v. Srinivas Agencies* [1996] 86 Comp Cas 255; [1996] ISJ (Banking) 479 and taking note of the observations made by the Full Bench of this court in *Life Insurance Corporation of India v. Asia Udyog (P.) Ltd.* [1982] 1 Delhi 582; [1984] 55 Comp Cas 187, I am of the conclusive view that each case has to be adjudged on its own facts. The approach of the company court under such circumstances in each case should be in the light of the observations made by the Supreme Court in paragraph 12 of the said judgment. In my considered opinion, Therefore, there is no conflict in between the provisions of the Debt Recovery Act and the provisions of section 446 of the Companies Act and that each case has to be adjudged on its facts and merits and the company court shall have the full power and jurisdiction to consider the best interest of the creditors, both secured and

unsecured, as also the workman who has been equated at par with the secured creditors and other attending circumstances, and then pass necessary orders under the provisions of section 446.

29. In view of the decision taken by me herein, it would thus be necessary to examine each one of the cases on its own merits and pass necessary orders therein.

30. List the matters on July 26, 1997, for directions.