
(2013) 06 KAR CK 0218

In the Karnataka High Court

Case No : C.A. No. 190 of 2008 in Co. P. No. 167 of 1999

Official Liquidator of Kritika Rubber Industries P. Ltd.

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 13-06-2013

Acts Referred:

Citation : (2013) 181 CompCas 238

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Aravind Kumar, J.—This application is filed by the official liquidator u/s 537 read with section 436 of the Companies Act 1956 and rule 9 of the Companies (Court) Rules, 1959, to declare the sale of assets of the company (in liquidation) by respondents Nos. 1 and 2 as void and to direct the respondents to handover the assets of the company (in liquidation) to the official liquidator. Notice of this application came to be ordered on the respondents. They were duly served and unrepresented and as such they were placed ex parte by order dated June 26, 2008. This court considered the claim of the official liquidator and by order dated November 25, 2008, allowed the application and directed the respondents to handover the assets of the company (in liquidation). Being aggrieved by this order respondents Nos. 1 and 2 filed appeal in O.S. A. Nos. 19 of 2009 and 10 of 2009. The said appeal came to be disposed of by order dated July 7, 2011 and both the appeals were allowed by accepting the plea put forward by the appellants therein namely, that they should be afforded an opportunity before the company court to put forth their defence. The matter came to be remanded to the company court for consideration afresh.

2. Pursuant to the said order of remand, respondents Nos. 1 and 2 have filed their objections to the application. The summary of the objections raised by the first and second respondents are as under:

Objections of the first respondent.

3. The company (in liquidation) had borrowed loan and a charge had been created over the immovable property by mortgaging the same in favour of the bank and on account of the said company (in liquidation) becoming a defaulter O.A. No. 194 of 1997 was filed for recovery of Rs. 71,03,955 with interest and other charges and the said application came to be allowed on June 26, 2000. Pursuant to the said order, a recovery certificate came to be issued and the Recovery Officer of the DRT attached to the said property on June 27, 2005 and thereafter a public notice dated October 2, 2005, was issued for auctioning the property to be held on October 5, 2005. The second respondent was the successful bidder and it was sold to him by the Recovery Officer, DRT and the auction sale was confirmed on November 16, 2005.

4. It was further contended that the Recovery Officer through the public notice had called on the creditors of any priority claims and nobody had claimed except KIADB which was allowed partly and proceeds from the sale of mortgaged property were adjusted towards debt due to the applicant after clearing the dues of KIADB as allowed by the Recovery Officer.

5. After three years the secured creditor received a copy of the judgment dated November 25, 2008 and only then it came to its knowledge about Company Petition No. 167 of 1999 had been filed against the company (in liquidation) for winding up and the same was ordered to be wound up by this court by order dated June 29, 2006, as also the official liquidator having taken charge.

6. The application is not maintainable and leave of the company court is not required since the jurisdiction of the Tribunal is exclusive and the Tribunal alone has to decide the applications for recovery of debts due to banks or financial institutions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "DRT Act"). u/s 18 of the DRT Act the jurisdiction of any other court or authority would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon liability is exclusively vested in the Tribunal. It is also contended that the execution of recovery certificates issued u/s 19(22) of the DRT Act is vested with the Recovery Officer exclusively. The procedure contemplated under Chapter V of the Act is to be followed. It is not the intendment of the Act that while basic liability of the defendant is to be decided by the Debts Recovery Tribunal (hereinafter referred to as "the Tribunal"). u/s 17 of the DRT Act, the banks or financial institutions will have to go to the civil court or company court or some other authority outside the Act for realisation of the amount so determined by the Tribunal. No dual jurisdiction at different stages are contemplated. Section 34 of the DRT Act clearly states that it overwrites other laws to the extent of inconsistency. The adjudication of liability, issuance of recovery certificate and recovery of the amount by executing recovery certificate are within the exclusive jurisdiction of the Tribunal and Recovery Officer. No other court or authority can go into the said questions relating to the liability and recovery as provided under

the DRT Act. The said DRT Act is a special law which overrides other special laws and as such, leave of the company court u/s 446(1) of the Companies Act, 1956, was not necessary nor could the application be transferred to the company court u/s 446(2) of the Companies Act, 1956.

7. The second respondent has also without the knowledge of liquidation proceedings participated in the auction conducted by the Recovery Officer and is a bona fide purchaser entitled to the ownership and possession of property sold to him particularly when valid consideration has been paid to the Recovery Officer and property having been registered in the name of the second respondent and also he being in actual physical possession. On these grounds amongst others, the first respondent sought for dismissal of the application.

Objections of the second respondent

8. Apart from reiterating the contentions raised by the first respondent, the second respondent contends that he has acted bona fide without having any notice of liquidation proceedings and no information was furnished by the first respondent who was having knowledge of liquidation proceedings.

9. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") is a special Act and section 35 is a non obstante clause and it will have an overriding effect over other laws and this Act was enacted after the Companies Act, 1956 and as such it will prevail over the Companies Act, 1956.

10. u/s 18 of the DRT Act, jurisdiction of other courts (except that of the Supreme Court and High Courts under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17 is ousted and power to adjudicate is exclusively vested with the DRT. Similarly, recovery of the amounts due under the Recovery Certificate is exclusively vested with the Recovery Officer and leave of the company court is not required for initiating or continuing the proceedings under the DRT Act or in respect of execution proceedings of the Recovery Officer. The provisions of the DRT Act are superior to the provisions of sections 442, 446 and 537 of the Companies Act, 1956.

11. The second respondent has acted in good faith since he participated in auction sale conducted by the Recovery Officer under the provisions of the DRT Act and liquidation proceedings was not within the knowledge of the second respondent till service of ex parte order dated November 25, 2008 and he is a bona fide purchaser. The winding up order was passed after the property was purchased by the second respondent and as such the sale made by the Recovery Officer of the DRT is in accordance with law. On these grounds, the second respondent has sought for dismissal of the company application.

12. I have heard the arguments of Sri K.S. Mahadevan, the learned advocate appearing for the official liquidator, Sri Nanjunda Reddy, the learned senior advocate appearing on behalf of Sri D. Aswathappa, for respondent No. 1 and Sri

Udaya Shankar, the learned advocate appearing for respondent No. 2.

13. It is the contention of Sri K.S. Mahadevan, the learned advocate appearing for the official liquidator that any sale made during pendency of the winding up proceedings, without the permission of the company court is bad in law. He contends that the official liquidator is joint owner of property and he has a pari passu charge over the property by virtue of section 529A of the Companies Act, 1956. He would also contend that in the case of Allahabad Bank Vs. Canara Bank and Another, , the examination and interpretation of section 529A(1)(a) was not under consideration and it was the subject matter of consideration by larger Bench of the apex court in Andhra Bank Vs. Official Liquidator and Another, , whereunder it has been held that the finding recorded in paragraph 76 of the judgment in Allahabad Bank Vs. Canara Bank and Another, does not lay down the correct law and as such, he contends that the dicta laid down in Allahabad Bank Vs. Canara Bank and Another, need not be considered in view of the subsequent larger Bench judgment of the Andhra Bank Vs. Official Liquidator and Another, referred to supra, whereunder it has been held that power u/s 446 of the Companies Act, 1956, can only be exercised upon consideration of respective contentions of the parties raised in a suit or proceeding or any claim made by or against company and determination of priorities amongst the creditors would also fall for consideration if parties claiming the same were before the court. He would also submit that the apex court in the case of Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, , while considering the priority clause found in the Employee's Provident Funds and Miscellaneous Provisions Act, 1952, has held that the use of expression "all other debts" would imply that priority clause would operate against statutory as well as non-statutory and secured as well as unsecured debts including mortgage or pledge and the said Act being a social welfare legislation intended to protect the interests of the weaker section of society, courts have to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in articles 38 and 43 of the Constitution of India and contends that same would hold good in so far as section 529A is concerned which section has to be interpreted in favour of the workmen inasmuch as, the sale of an immovable property or the assets belonging to the company (in liquidation) is sold without reference to the official liquidator, it may not fetch the price which it would have if the official liquidator had been associated with and it is for this precise reason, a pari passu charge is created over the property of the company (in liquidation) in favour of the official liquidator. The rights of secured creditor is pari passu with the interest of workmen represented by the official liquidator in respect of company (in liquidation) and both of them would be the joint owners and as such, one cannot unilaterally sell properties without the knowledge or consent of the other joint owner. The necessity to involve the joint owner is to secure the best price and that would be the paramount consideration. He would also submit that the secured creditor cannot plead about lack of knowledge about the pendency of the

company petition for winding up and passing up of the winding up order and as on date of the sale of property by the Recovery Officer to the second respondent, i.e., on October 5, 2005, Company Petition No. 167 of 1999 had already been filed and was pending before this court and as such, by operation of law the secured creditor had notice. Hence, he seeks for allowing the application.

14. In support of his submissions, he has relied upon the following judgments:

(1) Unreported judgment in (Karnataka State Electronics Development Corporation Ltd. v. Official Liquidator of M/s. Anco Communication Ltd) O.S.A. No. 31 of 2004 disposed of on June 21, 2005.

(2) [2000] 102 Comp Cas 3 (sic).

(3) International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., .

(4) Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, .

(5) Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, .

(6) Andhra Bank Vs. Official Liquidator and Another, .

(7) Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, .

15. Per contra, Sri Nanjunda Reddy, the learned senior advocate appearing on behalf of the secured creditor would contend that the recovery proceedings and sale of property belonging to a creditor is in the domain of the DRT and the company court's jurisdiction is ousted. He would contend that the DRT Act is a special enactment and section 34 would clearly indicate that except to the extent of saving clause of sub-section (2) of section 34 the provisions of the DRT Act will have an overriding effect and in view of sub-section (2) not providing for the application of provisions of the Companies Act, 1956, it would be subservient to the special enactment or in other words, the provisions of the DRT Act will prevail over the Companies Act, 1956.

16. He would elaborate his submission by contending that the right to sell and the right to distribution of sale proceeds being different, the application of section 529A of the Companies Act, 1956, which only deals with distribution will have to be read along with sub-section (19) of section 19 of the DRT Act which enables the DRT to order sale proceeds of a company to be distributed amongst its secured creditors in accordance with section 529A of the Companies Act, 1956. He would also contend that section 46B of the State Financial Corporations Act, 1951 (hereinafter referred to as "the SFC Act") is not similar to section 34 of the DRT Act inasmuch as, there is no provision in the SFC Act similar to sub-section (19) of section 19 of the DRT Act. He would draw the attention of court to paragraph 14 of Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, , whereunder the effect of section 529A has been considered, examined and held that no leave of company court was necessary for

initiating proceedings under the DRT Act and the company courts" jurisdiction under sections 442, 446 of the Companies Act stood ousted in respect of adjudication of liability and execution of certificate in respect of debts payable to banks and financial institutions, which are respectively within the exclusive jurisdiction of the DRT and the Recovery Officer. As such, he contends that when there is no similar provision like sub-section (19) of section 19 of the DRT Act under the SFC Act the right of secured creditor would be circumscribed by the provisions of the DRT Act. Hence, he prays for dismissal of the application.

17. Sri Udaya Shankar, the learned advocate appearing on behalf of the second respondent would support the contentions raised by the learned senior advocate and would supplement his argument under the following heads:

(1) The second respondent is a bona fide purchaser for value and sections 25 to 30 of the DRT Act provides for mode of sale which has been adopted by the Recovery Officer;

(2) The DRT's jurisdiction is exclusive on three grounds namely, jurisdiction, right to sell and right to appropriate;

(3) The right exercisable by the DRT under sub-section (19) of section 19 will be available as long as no winding up order is there. The official liquidator will not step in till the winding up order is passed or till a provisional liquidator is appointed;

(4) Sub-section (2) of section 537 of the Companies Act, 1956, is attracted and when it is read along with section 29 of the DRT Act, on facts, it would indicate that property sold to the second respondent was u/s 29 of the DRT Act and as such, the embargo under sub-section (1) of section 537 is not attracted and hence, the sale in favour of the second respondent is not void.

18. In support of his submissions, he relies upon the following judgments:

(1) Subhash Kathuria Sole Proprietor, Anitha International Vs. Deve Sugars Limited and Others, .

(2) Andhra Bank Vs. Official Liquidator and Another, .

(3) Allahabad Bank Vs. Canara Bank and Another, .

19. Having heard the learned advocates appearing for the parties and on perusal of the pleadings as well as the case laws pressed into service by the respective learned advocates, I am of the considered view that the following points would arise for my consideration:

(1) Whether the Debts Recovery Tribunal through its Recovery Officer under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is empowered to sell the assets of a company under liquidation at the instance of the secured creditor, without leave of the company court or without associating the official liquidator, despite deemed pari passu charge of the said

assets in favour of the official liquidator u/s 529A of the Companies Act ?

(2) Whether sale of the assets of the company (in liquidation) made by the Recovery Officer and certificate of sale issued thereof in favour of the second respondent is liable to be set aside and respondents should be directed to hand over the assets of the company (in liquidation) to the official liquidator ?

Factual matrix

20. A petition to winding up of the company Kritika Rubber Industries P. Ltd., came to be filed on June 19, 1999 in Co. P. No. 167 of 1999. Notice came to be ordered on July 2, 1999, as to why the petition should not be admitted. The matter was heard and it came to be admitted on March 30, 2000. Advertisement was deferred and an opportunity was extended to the respondents to pay the debts. On February 2, 2001, advertisement was ordered. Accordingly notice has been carried out in Times of India dated February 23, 2001, by notifying the hearing date of the company petition as on March 30, 2001. By order dated June 29, 2006, said company petition came to be allowed and an order of winding up came to be passed. The official liquidator attached to the company court was appointed as liquidator of the company and was directed to take charge of all the properties and effects of the said company forthwith.

21. The secured creditor, namely, Canara Bank (the first respondent herein) had filed an application on February 19, 1997, before the Debts Recovery Tribunal, Bangalore in O.A. No. 194 of 1997 u/s 19 of the DRT Act against said company, i.e., Kritika Rubber Industries P. Ltd. Application filed by the secured creditor before the DRT came to be allowed on June 26, 2000. Thereafter the Recovery Officer of the DRT ordered for attachment of immovable property of the company (in liquidation), namely, Industrial Plot No. 67-G in Survey No. 205 measuring 4,026 sq.ft situated at Bommasandra Village, Attibele Hobli, Anekal Taluk, Bangalore Rural District. Same was ordered to be brought for sale. The public notice for auction of sale came to be issued and auction came to be conducted and it was purchased by the second respondent herein. Confirmation of the sale was made in favour of the second respondent and thereafter certificate of sale came to be issued in favour of the second respondent.

22. The official liquidator filed the present application on March 6, 2008, seeking for a declaration to declare the sale of assets of company (in liquidation) by respondents Nos. 1 and 2 as void and for a direction to hand over the assets of the company (in liquidation) to the official liquidator.

23. In order to examine the rival contentions, it would be necessary to note the list of dates chronologically with events for answering the points formulated above:

Provisions of law

24. The provisions of various law which have been pressed into service are extracted hereinbelow since they would be necessary to analyse and adjudicate

the points formulated hereinabove. Hence, they are extracted hereinbelow:

The Companies Act, 1956

446. Suits stayed on winding up order.--(1) When a winding up order has been or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding 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 Tribunal and subject to such terms as the Tribunal may impose.

(2) The Tribunal 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...

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

529. Application of insolvency rules in winding up of insolvent companies.--(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-

(a) debts provable;

(b) the valuation of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,--

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised 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 realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank *pari passu* with the workmen's dues for the purposes of section 529A.

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section:

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to (pay his portion of the expenses) incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realisation by the secured creditor.

(3) For the purposes of this section, section 529A and section 530,--

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:--

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of-

(i) the amount of workmen's dues; and

(ii) the amounts of the debts due to the secured creditors.

529A. Overriding preferential payments.--(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company-

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues, shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportion.

537. Avoidance of certain attachments, executions, etc., in winding up by Tribunal.--(1) Where any company is being wound up by Tribunal-

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

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

(2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government.

The Recovery of Debts Due to Banks and Financial Institutions Act, 1993

19(19). Where a certificate of recovery is issued against a company registered under the Companies Act, 1956 (1 of 1956), the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of section 529A of the Companies Act, 1956 and to pay the surplus if any, to the company.

29. Application of certain provisions of income tax Act--The provisions of the Second and Third Schedules to the income tax Act, 1961 (43 of 1961) and the income tax (Certificate Proceedings) Rules, 1962 as in force from time to time shall, as far as possible, apply with necessary modification as if the said provisions and the rules referred to the amount of debts due under this Act instead of to the income tax:

Provided that any reference under the said provisions and the rules to the

"assessee" shall be construed as a reference to the defendant under this Act.

34. Act to have overriding effect.--(1) Save as provided under 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 thereunder shall be in addition to, and not in derogation of, the Industrial Financial Corporation 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, (62 of 1984), the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India, 1989 (39 of 1989).

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

35. The provisions of this Act to override other laws.--The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law." State Financial Corporations Act, 1951

32. Procedure of District Judge in respect of applications u/s 31.--(10) Where proceedings for liquidation in respect of an industrial concern have commenced before an application is made under sub-section (1) of section 31, nothing in this section shall be construed as giving to the financial corporation any preference over the other creditors of the industrial concern not conferred on it by any other law.

46B. Effect of Act on other laws.--The provisions of this Act and of any rules or orders made thereunder 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.

Analysis of statutory provisions

25. The underlying object of section 446 is to ensure that the assets of the company (under liquidation) are brought under the control of the winding up/ company court to avoid, wherever possible, litigation and to ensure that all matters in dispute which are capable of being expeditiously disposed of by the company court is taken up by that court. This would subserve an important purpose inasmuch as, it would be the responsibility of the company court to ensure that there would be a proper winding up and dissolution of such company. The object of the winding up of a company by the court is to ensure the protection of interest of the creditors, workmen and realisation of its assets with a view to equitably distribute such proceeds amongst those entitled to. This

section is intended to safeguard the assets of the company (in liquidation) against wasteful or unwarranted expensive litigation in regard to matters capable of being determined expeditiously and cost effectively by the winding up or company court itself. To avoid any conflicting decision being rendered by different courts, the company court would be empowered to stay such proceedings unless permitted by it and vests such company court itself to entertain and dispose of such suit or proceeding initiated against the company (in liquidation) and also adjudicate the priorities.

26. Section 529 seeks to introduce into winding up proceedings the insolvency Rules as regards debts and liabilities provable. It applies to the winding up of an insolvent company and the laws of insolvency for the time being in force with respect to the estates of persons adjudged insolvent. Though every company in liquidation may presumably be treated as coming under the section, unless its assets are shown to be sufficient to meet its liabilities in full including interest and the expenses of winding up or in other words it means a company which is being wound up on account of its inability to pay its debts. However, this section ceases to be applicable as soon as it is found that the company, in the course of winding up, is not insolvent.

27. The first proviso to section 529 came to be introduced by the Act 35 of 1985 making it clear that the security of secured creditor would be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's dues. Section 529A which also came to be inserted by the Act 35 of 1985 enabled the legitimate dues of the workers to rank on pari passu with the secured creditors and even above the dues to the Government in the event of winding up of a company. The first proviso to sections 529(1) and 529A, which were introduced by Act 35 of 1985 would ensure that a secured creditor who intends to realise his security by remaining outside the winding up will have to act in association with the official liquidator who represent the workman while selling the assets of the company (in liquidation). The status of the secured creditor is conferred on the workman by operation of law, i.e., by virtue of sections 529, 529A and 530 conferring substantial rights and benefits on the workmen of a closed undertaking and such workmen would get pari passu charge over the assets of the company (in liquidation) along with the secured creditors. Perusal of section 537 would indicate that if any attachment, distress or execution is put in force without leave of the company court against the estate or effects of the company (in liquidation) after the commencement of winding up or any sale held of any of the properties or effects of such company without leave of the company court the same would be void. However, the exception is relating to the proceedings initiated for recovery of any tax or dues payable to the Government.

28. To recover any debt due from any person, an application to jurisdictional Tribunal u/s 19 of the DRT Act in the prescribed form can be filed by a bank or a financial institution. After issuing notice to the other side and on examination of

the pleadings and scrutiny of material evidence the tribunal would adjudicate the claim. If the claim is admitted the Tribunal will issue a recovery certificate in favour of the applicant-bank or financial institution as the case may be. Under sub-section (12) it is empowered to pass an interim order of injunction or stay or attachment. Under sub-section (19) of section 19 of the DRT Act, the Tribunal can order the sale proceeds of a company in respect of which certificate of recovery is issued to be distributed amongst its secured creditors in accordance with the provisions of section 529A of the Companies Act and pay the surplus to the company if any. The provisions of section 34(1) of the DRT Act, overrides other laws to the extent of inconsistency. Section 35 of the SARFAESI Act is in pari materia with section 34 of the DRT Act.

29. Under sub-section (10) of section 32 of the SFC Act the secured creditor cannot be construed to have a preference over other creditors of an industrial concern unless the proceedings for liquidation in respect of such industrial concern having commenced before an application is made under sub-section (1) of section 31.

Case law analysis

30. Interpretation of sections 442, 466 and 537 of the Companies Act 1956, came up for consideration before the Hon'ble apex court in the case of Allahabad Bank Vs. Canara Bank and Another, and after considering the rival contentions, the following six points came to be formulated (page 74 of 101 Comp Cas):

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

(1) Whether in respect of proceedings under the RDB Act at the stage of adjudication for the money due to the banks or financial institutions and at the stage of execution for recovery of monies under the RDB Act, the Tribunal and the Recovery Officers are conferred exclusive jurisdiction in their respective spheres ?

(2) Whether for initiation of various proceedings by the banks and financial institutions under the RDB Act, leave of the company court is necessary u/s 537 before a winding up order is passed against the company or before a provisional liquidator is appointed u/s 446(1) and whether the company court can pass orders of stay of proceedings before the Tribunal, in exercise of powers u/s 442 ?

(3) Whether after a winding up order is passed u/s 446(1) of the Companies Act or a provisional liquidator is appointed, the company court can stay proceedings under the RDB Act, transfer them to itself and also decide questions of liability, execution, and priority u/s 446(2) and (3) read with sections 529, 529A and 530, etc., of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal ?

(4) Whether, in case it is decided that the distribution of monies is to be done only by the Tribunal, the provisions of section 73 of the CPC and sub-clauses (1) and (2) of section 529, section 530 of the Companies Act also apply--apart from

section 529A to the proceedings before the Tribunal under the RDB Act ?

(5) Whether in view of provisions in sections 19(2) and 19(19) as introduced by Ordinance No. 1 of 2000, the Tribunal can permit the appellant-bank alone to appropriate the entire sale proceeds realised by the appellant except to the limited extent restricted by section 529A? Can the secured creditors like the Canara Bank claim u/s 19(19) any part of the realisations made by the Recovery Officer and is there any difference between cases where the secured creditor opts to stand outside the winding up and where he goes before the company court ?

(6) What is the relief to be granted on the facts of the case since the Recovery Officer has now sold some properties of the company and the monies are lying partly in the Tribunal or partly in this court ?

31. On the issue of exercise of exclusive jurisdiction under recovery of debts due to banks by the Tribunal and the Recovery Officer in their respective spheres, the apex court considered the reports of the Committees constituted by the appropriate Government to examine the need for passing of an Act, on account of large sums of monies due to banks and financial institutions had been locked up, and it has been held by the apex court that jurisdiction of the Tribunal in regard to adjudication of claim under the DRT Act is exclusive and the DRT alone has to decide such applications filed for recovery of debts due to banks or financial institutions and no other court or authority much less, the civil court or the company court can go into the said question relating to liability and recovery except as provided under the Act. It has been held as under (pages 76, 83 and 78 of 101 Comp Cas):

In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to banks or financial institutions. Once the Tribunal passes an order that the debt is due, the Tribunal has to issue a certificate u/s 19(22) (formerly u/s 19(7)) to the Recovery Officer for recovery of the debt specified in the certificate. The question arises as to the meaning of the word "recovery" in section 17 of the Act. It appears to us that basically the Tribunal is to adjudicate the liability of the defendant and then it has to issue a certificate u/s 19(22). u/s 18, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under article 226 or 227 of the Constitution). This is the effect of sections 17 and 18 of the Act.

We hold that the provisions of sections 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of the liability of the defendant to the appellant-bank is concerned.

(ii) Execution of certificate by Recovery Officer: Is his jurisdiction exclusive:

Even in regard to "execution", the jurisdiction of the Recovery Officer is exclusive. Now a procedure has been laid down in the Act for recovery of the debt as per the certificate issued by the Tribunal and this procedure is contained in Chapter V of the Act and is covered by sections 25 to 30. It is not the intendment of the Act that while the basic liability of the defendant is to be decided by the Tribunal u/s 17, the banks/financial institutions should go to the civil court or the company court or some other authority outside the Act for the actual realisation of the amount. The certificate granted u/s 19(22) has, in our opinion, to be executed only by the Recovery Officer. No dual jurisdictions at different stages are contemplated. Further, section 34 of the Act gives overriding effect to the provisions of the RDB Act. That section reads as follows:

"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 thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation 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 1986)."

The provisions of section 34(1) clearly state that the RDB Act overrides other laws to the extent of "inconsistency". In our opinion, the prescription of an exclusive Tribunal both for adjudication and execution is a procedure clearly inconsistent with realisation of these debts in any other manner.

There is one more reason as to why it must be held that the jurisdiction of the Recovery Officer is exclusive. The Tiwari Committee which recommended the constitution of a Special Tribunal in 1981 for recovery of debts due to banks and financial institutions stated in its report that the exclusive jurisdiction of the Tribunal must relate not only in regard to the adjudication of the liability but also in regard to the execution proceedings. It stated in annexure XI of its report that all "execution proceedings" must be taken up only by the Special Tribunal under the Act. In our opinion, in view of the special procedure for recovery prescribed in Chapter V of the Act, and section 34, execution of the certificate is also within the exclusive jurisdiction of the Recovery Officer.

At the same time, some High Courts have rightly held that the Companies Act is a general Act and does not prevail under the RDB Act. They have relied upon Union of India (UOI) and Another Vs. India Fisheries (P) Ltd., .

Thus, the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer and no other court or authority much less the civil court or the company court can go into the said questions relating to the liability and

the recovery except as provided in the Act. Point No. 1 is decided accordingly.

32. Certain provisions in the Companies Act, 1956, came to be inserted simultaneously, namely proviso to sub-section (1) of section 529, portion of proviso to sub-section (2) of section 529, Explanation thereto and sub-section (3) of section 529 together with section 529A as also the words "subject to provisions of section 529A" found in section 530, omission of proviso to sub-section (2) of section 530 and insertion of clause (bb) to sub-section (8) of section 530 were carried out simultaneously by the Companies (Amendment) Act, 1985, i.e., (Act 35 of 1985). Whereas, sub-section (19) of section 19 of the DRT Act came to be introduced by the Ordinance, i.e., subsequent to insertion of proviso to section 529 and introduction of section 529A. In this background, the apex court examined as to which law would prevail over the other namely when monies are realised by the secured creditor under the DRT Act, it has been held that question of priorities among the banks and financial institutions and other creditors can be decided only by a Tribunal under the DRT Act and in accordance with section 19(19) read with section 529A of the Companies Act. It has been further held that leave of the company court is not necessary for initiating or continuing the proceedings under the DRT Act. After analysing the provisions above referred to it has been held by the apex court as under (pages 86 and 88 of 101 Comp Cas):

The decision of the Delhi High Court in *Mayur Syntex Ltd. (in Liquidation) and Atlantic Engineering Services Pvt. Ltd. Vs. Punjab and Sind Bank*, no doubt supports the contention of the respondents that the company court's jurisdiction prevails over that of the Tribunal/Recovery Officer under the RDB Act, 1993. The learned company judge in that case does, in fact accept that a statute which is a general one vis-a-vis another statute can also be a special one, vis-a-vis yet another statute. But the court, in our view, was not correct in its conclusion that, in this context, the Companies Act 1956, was not a general statute. Further in the said judgment it was stated that the "non obstante clause in section 34 of the RDB Act cannot apply because the Acts did not overlap". According to the High Court, there was no provision like section 446 in the RDB Act laying down the procedure as to what should be done in case of the passing of a winding up order by the company court nor a provision for recovery of amounts due from a company against which a winding up petition was pending or was ordered or for distribution from a common pool. But, now section 19(19) introduced by Ordinance No. 1 of 2000 clarifies and removes any such doubts inasmuch as it refers to execution and distribution of sale proceeds by the Tribunal/Recovery Officer. The observation that the RDB Act does not operate in the same field and hence, leave of the company court is necessary u/s 446(1), cannot, therefore, be accepted. We hold that the Delhi High Court's decision is not correctly decided...

The decision of the Rajasthan High Court in *Rajasthan Finance Corporation v. Official Liquidator* [1963] 2 Comp LJ 309, relied upon for the respondent cannot be of any help. That was a case which concerned itself with the State Financial

Corporations Act, 1951. Section 537 of the Companies Act was applied and it was held that the Companies Act did not yield to the provisions of the State Financial Corporations Act, 1951. There was no provision in the State Financial Corporations Act, 1951, like section 34 which gave overriding effect to its provisions.

For the aforesaid reasons, we hold that at the stage of adjudication u/s 17 and execution of the certificate u/s 25, etc., the provisions of the RDB Act, 1993, confer exclusive jurisdiction in the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the company court u/s 442 read with section 537 or u/s 446 of the Companies Act, 1956. In respect of the monies realised under the RDB Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with section 19(19) read with section 529A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993, are to the above extent inconsistent with the provisions of the Companies Act, 1956, and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding up petition against the debtor company and also after a winding up order is passed. No leave of the company court is necessary for initiating or continuing the proceedings under the RDB Act, 1993. Points Nos. 2 and 3 are decided accordingly in favour of the appellant and against the respondents.

33. In the above said case, dispute was between two nationalised banks, namely, the Allahabad Bank which had obtained a money decree against the debtor-company M/s. M. S. Shoes (East) Co. Ltd., from the DRT, Delhi under the DRT Act and Canara Bank whose claim as a secured creditor was still pending before the same Tribunal at Delhi, against the same company. The company court had passed an order staying the sale proceedings taken out by the Allahabad Bank before the Recovery Officer under the DRT Act since publication for winding up of the said company was pending before the Delhi High Court. The order of staying the sale proceedings was assailed by the Allahabad Bank before the apex court. The secured creditor supported the order of stay as against the contention of the Allahabad Bank that the Tribunal under the DRT Act can itself deal with the question of appropriation of sale proceeds. In this background, points formulated at paragraph 13 already extracted hereinabove came to be formulated. While answering as to whether the provisions of the DRT Act overrides other laws to the extent of "inconsistency" it has been held that jurisdiction of the Recovery Officer is exclusive and no dual jurisdiction at different stages are contemplated, since section 34 of the DRT Act gives an overriding effect to the provisions of the DRT Act over the Companies Act, 1956. It has been further held that section 19(19) of the DRT Act is clearly inconsistent with section 446 and other provisions of the Companies Act, 1956 and section 529A of the Companies Act, 1956, is also attracted to the proceedings before the Debts Recovery Tribunal. It has been further held that from the stage of adjudication u/s 17 and to the stage of execution of certificate u/s 25, etc., the provisions of the DRT Act confer

exclusive jurisdiction on the Tribunal and the Recovery Officer and as such there can be no interference by the company court u/s 442 read with section 537 or u/s 446 of the Companies Act. It has also been further held that in respect of the monies realised under the DRT Act the question of priorities among the banks and financial institutions can be decided only by the Tribunal in accordance with section 19(19) of the DRT Act read with section 529A of the Companies Act and in no other manner. It has also been held that the Companies Act has to yield to the DRT Act.

34. The above judgment of Allahabad Bank Vs. Canara Bank and Another, came up for consideration before a larger Bench of the apex court in the case of Andhra Bank Vs. Official Liquidator and Another, in view of the correctness of the statement of law laid down in paragraph 76 of the said judgment (Allahabad Bank Vs. Canara Bank and Another,) came to be doubted. Hence, in Andhra Bank Vs. Official Liquidator and Another, , the hon"ble apex court formulated the following points for its determination (page 463 of 174 Comp Cas):

(i) whether the statement of law contained in paragraph 76 of the judgment of this court in Allahabad Bank Vs. Canara Bank and Another, does not lay down a good law; (ii) whether the impugned judgment could have been passed by way of an ad hoc measure in view of the fact that the company was sold as a going concern and the workers' dues were to be paid from the sale proceeds of the assets of the company; and (iii) whether any payment could be made to the parties to the winding up proceedings only upon considering the claims of all the creditors and in terms of the certificate issued by the Debts Recovery Tribunal under the RDB Act.

35. After examining the purport and meaning of section 529A, the apex court has held that finding recorded in Allahabad Bank Vs. Canara Bank and Another, does not lay down the correct law, in view of the fact that a stray observation had been made in Allahabad Bank Vs. Canara Bank and Another, to the effect that the "workmens" dues" have priority over all other creditors secured and unsecured. It has also been held because of section 529A(1)(a) such a question did not arise in the case, as Allahabad Bank Vs. Canara Bank and Another, was undisputably an unsecured creditor. It has been held therein as under (page 466 of 124 Comp Cas):

The observations were presumably made having regard to the fact situation obtaining therein as the Allahabad Bank was an unsecured creditor and the Canara Bank although a secured creditor would not come within the purview of sections 529 and 529A of the Companies Act. The decision in Allahabad Bank Vs. Canara Bank and Another, could, thus, be explained but we think it necessary to clarify the legal position having regard to the fact that the matter has been referred to this Bench and particularly when reliance thereupon has been placed by the High Court as a proposition of law as regard interpretation of sections 529 and 529A of the Companies Act...

In terms of the aforementioned provisions, the secured creditors have two options (i) they may desire to go before the company judge; or (ii) they may stand outside the winding up proceedings. The secured creditors of the second category, however, would come within the purview of section 529A(1)(b) read with proviso (c) appended to section 529(1). The "workmen's portion" as contained in proviso (c) of sub-section (3) of section 529 in relation to the security of any secured creditor means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of (a) workmen's due, and (b) the amount of the debts due to all the creditors. The submission of Mr. Gupta is that in a situation of this nature, what was necessary to be considered by the learned single judge was to find out the amount in relation where to the appellant was raising its claim as a secured creditor, namely, Rs. 135 lakhs vis-a-vis the aggregate of the amount of the workmen's dues of Rs. 19 crores and the claim of any other secured creditor was not required to be taken into consideration. We cannot accept the said contention. The illustration appended to clause (c) of sub-section (3) of section 529 is a clear pointer to the effect that the amount of debts due to the secured creditors should be taken into consideration for the purpose of ascertaining the workmen's portion of security....

While determining point No. 6, however, a stray observation was made to the effect that the "workmen's dues" have priority over all other creditors, secured and unsecured because of section 529A(1)(a). Such a question did not arise in the case as the Allahabad Bank was indisputably an unsecured creditor.

Such an observation was, thus, neither required to be made keeping in view the fact situation obtaining therein nor does it find support from the clear and unambiguous language contained in section 529A(1)(a). We have, therefore, no hesitation in holding that finding of this court in Allahabad Bank Vs. Canara Bank and Another, to the aforementioned extent does not lay down the correct law.

36. In the case of Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, the hon''ble apex court took note of the submission that there was a conflict between the decisions in Allahabad Bank Vs. Canara Bank and Another, and International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., and in this background the legality of the order passed by the High Court of Bombay came to be examined by a larger Bench of three hon''ble judges after being referred to by two hon''ble learned judges. In this context it has been observed by the apex court at paragraph 4 as under (page 392 of 128 Comp Cas):

When this appeal came up for hearing before two learned judges, it was submitted that there was a conflict between the decisions in Allahabad Bank Vs. Canara Bank and Another, and in International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., . The two learned judges taking note of this submission and taking note of the importance of the question of law involved, placed the matter before a larger Bench. That is how the matter has come up before us.

37. The company court had taken a view that the right available u/s 29 of the SFC Act had to be exercised consistently with the right of the workmen represented by the official liquidator who was a charge holder and ranked pari passu with the secured creditors, even if they stood outside the winding up. The company court also permitted the Rajasthan Financial Corporation to invite offers for sale of the properties and directed to finalise the same in consultation with the official liquidator and simultaneously the official liquidator was directed to invite claims from the workmen and assess the extent of claim of workmen u/s 529 of the Companies Act.

38. The facts which led to the passing of the said order was: Rajasthan Financial Corporation as a secured creditor and intending to stand outside the winding up proceedings, filed an application before the company court praying for permission to realise the securities and apportion the net sale proceeds between itself, the Rajasthan State Industrial Development and Investment Corporation Ltd., and Bank of Baroda being another secured creditor, who was also entitled to payment pari passu with them in respect of the company (in liquidation) M/s. Vikas Woolen Mills Ltd., which was ordered to be wound up by the company court by order dated June 14, 1994 and undertaking thereunder to pay the over dues of the workman on same being adjudicated by the official liquidator to the extent of funds available out of the net sale proceeds of the properties of the company in accordance with section 529A of the Companies Act. The official liquidator was directed to take charge of the assets of the company in liquidation on April 18, 1995. On April 21, 1995, the official liquidator intimated Rajasthan Financial Corporation about filing of an application before the company court for a direction to the Rajasthan Financial Corporation and Investment Corporation (secured creditors) to deposit Rs. 25,000 to meet the expenses for selling the assets of the company (in liquidation). The said application filed by the Rajasthan Financial Corporation came to be rejected by holding even if the secured creditor stood outside the winding up, their right available u/s 29 of the SFC Act has to be exercised consistently with the right of the workmen, represented by the official liquidator who was a charge holder and ranked pari passu with the secured creditors. The hon"ble apex court having taken note of Allahabad Bank Vs. Canara Bank and Another, has held that there is no conflict on the question of the applicability of section 529A read with section 529 of the Companies Act to cases where the debtor is a company and is in liquidation. It has been further held that conflict, if any, is in the view whether the DRT could sell the properties of a company (in liquidation) in terms of the Recovery of Debts Act. It was also noticed with approval that the finding recorded in Allahabad Bank Vs. Canara Bank and Another, that the DRT Act being a subsequent legislation and being a special law would prevail over the general law, the Companies Act. However, this argument was not accepted in so far as the SFC Act is concerned since section 529A was introduced by Act 35 of 1985 and the overriding provision therein would prevail over the SFC Act of 1951 as amended in 1956 and notwithstanding section 46B of the SFC Act. It was noticed by the apex court in the said judgment

that the appellants therein, i.e., Rajasthan Financial Corporation and Rajasthan State Industrial Development and Investment Corporation Ltd., had not set in motion any proceeding under the SFC Act and there was only liquidation proceedings pending before the company court and as such the secured creditors had approached the company court for permission to stand outside the winding up and to sell the properties of the company in liquidation. In this background the company court therein directed the sale of assets of the company (in liquidation) be held in association with the official liquidator representing the workmen and sale proceeds is to be held by the official liquidator for being distributed in terms of section 529A of the Companies Act under the supervision of the company court. It has been further held that the right to sell under the SFC Act or under the DRT Act by a creditor coming within those acts and standing outside the winding up is different from the distribution of the proceeds of the sale of security and the distribution in a case where the debtor is a company and is in the process of being wound up, can only be in terms of section 529A read with section 529 of the Companies Act. In conclusion it has been held that the DRT would be entitled to order sale of the properties of debtor-company even if it is in liquidation through its recovery officer but only after notice to the official liquidator. It has been held by the hon'ble apex court to the following effect (page 397 of 128 Comp Cas):

In Allahabad Bank Vs. Canara Bank and Another, , the question of jurisdiction of the Debts Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, vis-a-vis the company court arose for decision. This court held that even where a winding up petitions pending, or a winding up order has been passed against the debtor company, the adjudication of liability and execution of the certificate in respect of debts payable to banks and financial institutions, are respectively within the exclusive jurisdiction of the Debts Recovery Tribunal and the Recovery Officer under that Act and in such a case, the company court's jurisdiction under sections 442, 537 and 446 of the Companies Act stood ousted. Hence, no leave of the company court was necessary for initiating proceedings under the Recovery of Debts Act. Even the priorities among various creditors, could be decided only by the Debts Recovery Tribunal in accordance with section 19(19) of the Recovery of Debts Act read with section 529A of the Companies Act and in no other manner. The court took into account the fact that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, was a legislation subsequent in point of time to the introduction of section 529A of the Companies Act by Act 35 of 1985 and it had overriding effect. But it noticed that by virtue of section 19(19) of the Recovery of Debts Act, the priorities among various creditors had to be decided by the Recovery Tribunal only in terms of section 529A of the Companies Act and section 19(19) did not give priority to all secured creditors. Hence, it was necessary to identify the limited class of secured creditors who have priority over all others in accordance with section 529A of the Companies Act. The court also held that the occasion for a claim by a secured creditor against the realisation by

other creditors of the debtor u/s 529A read with proviso (c) to section 529(1) of the Companies Act could arise before the Debts Recovery Tribunal only if the concerned creditor had stood outside the winding up and realised amounts and if it is shown that out of the amounts privately realised by it, some portion had been rateably taken away by the liquidator under clauses (a) and (b) of the proviso to section 529(1). The court has not held that section 529A of the Companies Act will have no application in a case where a proceeding under the Recovery of Debts Act has been set in motion by a financial institution. The court here was essentially dealing with the jurisdiction of the Debts Recovery Tribunal in the face of sections 442, 537 and 466 of the Companies Act..

In *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, this court considered the correctness of the views expressed by the Karnataka High Court and the Gujarat High Court. This court held that a right is available to a financial corporation u/s 29 of the SFC Act against a debtor, if a company, only so long as there is no order of winding up. When the debtor is a company in winding up, the rights of financial corporations are affected by the provisions in sections 529 and 529A of the Companies Act. It was also held that the proviso to section 529 of the Companies Act creates a "pari passu" charge in favour of the workmen to the extent of their dues and makes the liquidator the representative of the workmen to enforce such a charge. The decision of the Bombay High Court in *Maharashtra State Financial Corporation, Bombay Vs. Ballarpur Industries Limited, v. The Official Liquidator, High Court Bombay and Liquidator of M/s. Atrois Chemicals Private Limited*, was approved. The reference to a larger Bench was occasioned by the fact that the decision in *Allahabad Bank Vs. Canara Bank and Another*, was not adverted to in this decision. This decision recognizes that, whether a creditor is standing outside the winding up or not, the distribution of the proceeds has to be in terms of section 529 of the Companies Act read with section 529A of that Act in a case where the debtor is a company in liquidation. As far as we can see, there is no conflict on the question of the applicability of section 529A read with section 529 of the Companies Act to cases where the debtor is a company and is in liquidation. The conflict, if any, is in the view that the Debts Recovery Tribunal could sell the properties of the company in terms of the Recovery of Debts Act. This view was taken in *Allahabad Bank Vs. Canara Bank and Another*, in view of Recovery of Debts Act being a subsequent legislation and being a special law would prevail over the general law, the Companies Act. This argument is not available as far as the SFC Act is concerned, since section 529A was introduced by Act 35 of 1985 and the overriding provision therein would prevail over the SFC Act of 1951 as amended in 1956 and notwithstanding section 46B of the SFC Act. As regards distribution of assets, there is no conflict. It seems to us that whether the assets are realised by a secured creditor even if it be by proceeding under the SFC Act or under the Recovery of Debts Act, the distribution of the assets could only be in terms of section 529A of the Act and by recognising the right of the liquidator to calculate the workmen's dues and collect it for distribution among them pari passu with

the secured creditors. The official liquidator representing a ranked secured creditor working under the control of the company court cannot, therefore, be kept out of the process.

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

liquidation. It was in that context that the rights of the official liquidator were discussed in *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.,* . The Debts Recovery Tribunal and the District court entertaining an application u/s 31 of the SFC Act should issue notice to the liquidator and hear him before ordering a sale, as the representative of the creditors in general.

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

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, would be entitled to order the sale and to sell the properties of the debtor, even if a company in liquidation, through its Recovery Officer but only after notice to the official liquidator or the liquidator appointed by the company court and after hearing him.

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

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

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

Now reverting back to the case on hand, we find that the directions issued by the company court are in the interest of all the creditors and are well within its jurisdiction. But we find merit in the submission that the company court was not justified in not ordering a fresh valuation of the properties. Having regard to the lapse of time, we are satisfied that a fresh valuation is necessary. We direct the company court to get a fresh valuation done by a valuer from the panel of valuers of the High Court. The other directions issued by the company court are affirmed.

39. In the above referred to judgment the hon"ble apex court has clarified that there is no inconsistency between the decisions in *Allahabad Bank Vs. Canara Bank and Another,* and *International Coach Builders Ltd. Vs. Karnataka State*

Financial Corpn., respectively in respect of applicability of sections 529 and 529A of the Companies Act in the matter of distribution among the creditors. It has been noticed by the hon''ble apex court in the said case that once winding up proceedings has commenced and the liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of financial institutions coming under the DRT Act or SFC Act, can only be with the association of the official liquidator and under the supervision of the company court. It has been further held that right of a financial institution or of the DRT or that of a financial corporation or the court which has been approached u/s 31 of the SFC Act to sell the assets may not be taken away, but the same stands restricted with the requirement of the official liquidator being associated with it, giving the company court the right to ensure distribution of assets and ensuring that distribution takes place in terms of section 529A of the Companies Act. It has been noticed by the apex court in the said judgment that the appellants therein had not set in motion any proceedings under the SFC Act and only liquidation proceedings was pending and as such, the financial corporations had approached the company court seeking permission to stand outside the winding up to sell the properties of the company (in liquidation). In this background, the company court had directed the sale to be held in association with the official liquidator. As such, the apex court affirmed the said finding of the company court on the ground that the directions are clearly consistent with the provisions of the relevant Acts. It has also been held therein that the right to sell under the SFC Act or under the DRT Act by a creditor coming within those acts and standing outside the winding up is different from the distribution of proceeds of the sale of the security and 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 529A read with section 529 of the Companies Act. In conclusion the apex court held as under (page 400 of 128 Comp Cas):

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

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, would be entitled to order the sale and to sell the properties of the debtor, even if a company in liquidation, through its Recovery Officer but only after notice to the official liquidator or the liquidator appointed by the company court and after hearing him.

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

(iii) If a financial corporation acting u/s 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company in liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the company court and acting in terms of the directions issued by that court as

regards associating the official liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of section 529A and section 529 of the Companies Act.

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

40. Thus, it can be seen the legal position with regard to the right to sell under the State Financial Corporations Act or under the DRT Act by a creditor coming within those Acts and standing outside the winding up proceedings is different from the distribution of the proceeds of the sale of the security and the distribution in a case where the debtor is a company in the process of being wound up and it can be only after notice to the official liquidator or the liquidator appointed by the company court is heard.

41. In *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, , issue was with regard to the right of the SFC exercisable u/s 29 of the SFC Act against the debtor. It has been held therein that under the SFC Act the corporation can unilaterally exercise its right available u/s 29 in respect of a company so long as there is no winding up order. However, in case of the official liquidator representing the workmen who would have *pari passu* charge in their favour u/s 529 of the Companies Act, then necessarily SFC will have no right to unilaterally sell the property and it has to be sold only in association with the official liquidator.

42. In the case of *Subhash Kathuria Sole Proprietor, Anitha International Vs. Deve Sugars Limited and Others*, relied upon by learned counsel appearing for the secured creditor to contend that sale conducted by it without association of the official liquidator is to be affirmed by this court since it is a secured creditor standing outside winding up proceedings, cannot be accepted for reasons more than one. At the outset itself it is to be noticed that in *Subhash Kathuria Sole Proprietor, Anitha International Vs. Deve Sugars Limited and Others*, , the official liquidator was a party before the Debts Recovery Tribunal and he had raised objections for sale and only thereafter auction was directed to be held by the DRT. In the said case, the secured creditor namely the State Bank of Mysore had also obtained prior permission from the company court for selling properties of the company. After the sale was conducted, confirmation of sale came to be issued in favour of the auction purchaser and the said purchaser had approached the official liquidator to handover possession of the property of the company (in liquidation) which was not handed over to it and as such an application came to be filed to remove the security guards and handover possession of subject property. While adjudicating this application, it has been held by the Madras High

Court that the Tribunal can sell the property after notice to the official liquidator and after hearing him. Finding recorded by Madras High Court is as under (page 118):

From the above judgments, the following legal principles are settled by the Supreme Court and the High Courts:

(1) A Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is entitled to order the sale and to sell the properties of the debtor even of a company in liquidation through its recovery officer, but, only after notice to the official liquidator or the liquidator appointed by the company court and after hearing him...

(3) No leave of the company court is necessary for initiating proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act), nor can the company court transfer to it (or) otherwise interfere with such proceedings...

(9) When should a company court grant leave to the secured creditor to proceed with the suit against the company after winding up order was made and when should a company court transfer the dues of such suit during the pendency of winding up proceedings, would depend upon the facts and circumstances of each case having regard to the position of the plaintiff secured credit vis-a-vis the other secured creditors.

(emphasis1 supplied by me)

43. It has been further held in the facts of the said case that the secured creditor need not get any leave from the company court to proceed with the sale proceedings but it should be held after notice to the official liquidator. It has been held therein as under (page 122 of 158 Comp Cas):

I am unable to accept this submission for the reason that now the law has been settled by the hon''ble Supreme Court that the secured creditor need not get any leave from the company court to proceed with the sale proceedings of the assets of the company in liquidation. What is mandatory is that the official liquidator should be a party and notice should be issued to him. This was undoubtedly complied with by the secured creditor and the Debts Recovery Tribunal in this case and in such circumstances it cannot be said that the sale is not binding on the company in liquidation because of the order passed by this court on March 10, 2000.

(emphasis1 supplied by me)

44. In this background, the sale conducted by the DRT on August 11, 2005, after hearing the objections of the official liquidator the highest bid came to be accepted and possession of the assets sold in auction having not been delivered the official liquidator was directed to remove the security guards and handover possession of the property.

45. In *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, , direction given by the company court that the sale be held in association with the official liquidator came to be affirmed in the interest of all the creditors and the said directions issued by the company court as such, came to be affirmed with a modification and further direction for getting fresh valuation of the properties as indicated therein. In the said case, the apex court was essentially dealing with the jurisdiction of the DRT in the light of sections 442, 466 and 537 of the Companies Act. It has not been held that section 529A of the Companies Act will have no application.

46. There cannot be any dispute with regard to the fact that the DRT Act being a special enactment prevails over the Companies Act and in case of conflict between special laws, namely, the DRT Act and the Companies Act, the latter Act prevails over the former. A secured creditor who stands outside the winding up proceedings can proceed to realise his security without leave of the company court to realise his dues. It has been noticed by the apex court that proviso to section 529 of the Companies Act creates a "pari pasu" charge in favour of the workmen to the extent of their dues and makes the liquidator representative of the workmen and he is entitled to enforce such a charge. In conclusion, it has been held that once a winding up proceedings has commenced and the liquidator is put in charge of the assets of the company being wound up, the distribution of proceeds of sale of the assets held at the instance of the financial institutions coming under the Recovery of Debts Act or Financial Corporations coming under the SFC Act, can only be with the association of the official liquidator and under the supervision of the company court. It has been further held that the DRT and the District Court entertaining an application u/s 31 of the SFC Act should issue notice to the liquidator before ordering sale of the assets of the company as the official liquidator would be the representative of the creditors in general.

47. As already noticed hereinabove, the secured creditors in *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, intended to stand outside the winding up and pursue their remedies available u/s 29 of the SFC Act and had sought permission of the company court to realise the securities and apportion the net sale proceeds between them and the Bank of Baroda (another secured creditor), who was entitled to payment pari pasu with them. They had also undertaken to pay over the dues of the workmen on the same being adjudicated by the official liquidator to the extent of availability of funds out of the net sale proceeds of the properties of the company, in accordance with section 529A of the Companies Act. However, the company court had issued direction to associate the official liquidator for sale of the property belonging to the company in liquidation since he represents the workmen and the said direction came to be affirmed by the apex court with modification regarding valuation only.

48. In the light of discussion made hereinabove the following conclusions can be drawn.

Conclusions

(i) The DRT Act provides for establishment of the Tribunals and Appellate Tribunals for expeditious adjudication of disputes raised by the banks and financial institutions for recovering its dues and matters incidental and connected thereto.

(ii) Section 17 of the DRT Act deals with jurisdiction, powers and authority of the Tribunals and it confers exclusive jurisdiction on the Tribunal to entertain, adjudicate and decide applications filed by the banks and financial institutions.

(iii) Section 18 of the DRT Act creates a bar namely, no court or other authority would be entitled to exercise jurisdiction, power or authority in relation to the matters specified in section 17 (except the Supreme Court and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution).

(iv) section 19 provides for filing of an application to the Tribunal and the procedure to be followed thereunder.

(v) Sub-section (19) of section 19 provides for distribution of the sale proceeds among secured creditors in accordance with the provisions of section 529A of the Companies Act, 1956.

(vi) Section 34 of the DRT Act would indicate that said Act overrides other laws to the extent of inconsistency.

(vii) The tribunal is vested with exclusive jurisdiction for adjudication and execution in relation to disputes relating to recovery of debts due to banks and financial institutions and no other court or authority will have jurisdiction including the civil court and company court.

(viii) Under sub-section (19) of section 19 of the DRT Act, priorities among the various creditors has to be adjudicated by the Tribunal only in terms of section 529A of the Companies Act and it does not provide for the secured creditors to have priority over others.

(ix) The secured creditor standing outside the proceedings would not be required to seek the leave of company court when the asset of the company (in liquidation) is brought to sale through the aegis of the tribunal or recovery officer as the case may be.

(x) The security held by every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen and to the extent of the workmen's dues.

(xi) The official liquidator representing the class of workmen is an interested person for ensuring proper price being fetched when the assets of the company is being sold since the official liquidator represents the entire body of the creditors and also hold the right on behalf of the workers.

(xii) At the time of conducting the sale of the assets of the company in

liquidation by the Tribunal or its recovery officer, the official liquidator has to be necessarily associated in such process of sale.

(xiii) In the event of the official liquidator being notified, heard and associated in the sale of the asset of the company (in liquidation) by the Tribunal or the recovery officer and in the event of official liquidator being aggrieved by such sale, he would be entitled to challenge the same by filing an appeal as provided under the DRT Act.

49. In the light of analysis of case law as discussed hereinabove, when the facts on hand are examined, it would emerge that on the date of the order allowing the application for recovery of debt came to be passed by the DRT in O.A. No. 194 of 1997, i.e., on June 26, 2000, the winding up petition had already been filed against the company (in liquidation) and it was ordered to be advertised on February 2, 2001 and accordingly the advertisement had been carried out which came to be accepted by the company court. The order of the DRT allowing the application came to be passed on June 26, 2000, as already noticed hereinabove and pursuant to the said order, attachment order came to be issued by the Recovery Officer on June 27, 2005, by which time the company petition had already been advertised. The secured creditor cannot contend that the filing of the company petition was not within its knowledge. By operation of law namely by virtue of subsection (2) of section 441 presentation of petition for winding up has to be construed as the date on which proceedings are deemed to have commenced. The Division Bench of this court in O.S.A. No. 31 of 2004, dated June 21, 2005, in the case of Karnataka State Electronics Corporation Ltd. v. Official Liquidator, has observed as under:

10. At the outset, we intend to place on record that facts are not in dispute. We say so because, the allotment of the industrial plot was in the year 1994. One of the conditions in the lease-cum-sale agreement was, that the allotment could be cancelled, if for any reason, the allottee does not make use of the industrial plot for the purpose for which it is allotted. This was not done by the allottee till this court thought it fit to wind up the respondent-company, i.e., nearly for about 10 years from the date of the allotment. Company Petition No. 135 of 2000 was filed on June 28, 2003, i.e., much earlier to cancellation of the lease-cum-sale agreement by the applicant-Corporation and in fact, before the applicant-Corporation has cancelled the allotment of industrial plot to the company in liquidation, an order of winding up of the respondent-company in Company Petition No. 135 of 2000 was already passed by this court. The applicant-Corporation pleads its ignorance about the pendency of the proceedings before this court. This plea can never be accepted since the procedure normally adopted by this court is to notify the presentation of the company petition before any order of winding up proceedings is passed in at least one newspaper, which has the largest circulation in the State. The applicant-Corporation which has battery of Law Officers working for them, cannot plead ignorance of the pendency of winding up proceedings before this court. Since this issue is not taken note of by

the learned company judge, we also do not intend to deliberate on this issue. But, we only observe, that even when you want to offer lame excuse, the same should look at least reasonable of acceptance. Excuses should not be offered, that too by affidavits, only to sustain their inaction...

12. Section 537 of the Act, provides for avoidance of certain attachments, executions, etc., in winding up by or subject to supervision of court. The winding up proceedings would commence from the date of presentation of the petition before this court for winding up of the company as envisaged u/s 433 of the Act and other similar provisions under the Act. Once such proceedings are initiated, any assets of the company cannot be meddled without the leave of the court. This settled legal proceedings, time and again is stated by various High Courts and also the Highest Court. An elaboration of this settled legal principle, in our view, is only wholly unnecessary.

50. In the case on hand, the secured creditor had filed O.A. No. 194 of 1997 on February 19, 1997. The said application came to be allowed by the DRT on June 26, 2000. During this interregnum period, the winding up petition came to be filed by a creditor u/s 433(e) of the Companies Act on June 19, 1999 and the said petition was admitted on March 30, 2000 and advertisement was published on February 23, 2001. After five years after allowing of the application by the DRT, its Recovery Officer ordered for attachment of the assets of the company under liquidation on June 27, 2005, by which time the company petition had already been admitted and notice of such admission was published in Times of India newspaper dated February 23, 2001, by notifying the hearing date as March 30, 2001. Thereafter, public notice for auction of the sale came to be issued by the Recovery Officer on October 2, 2005 and auction was conducted on October 5, 2005, which came to be confirmed on November 16, 2005. Sale certificate came to be issued in favour of the second respondent herein by the Recovery Officer, DRT on February 2, 2006.

51. When a company is being wound up by the court and any attachment, distress or execution has been put in force without the leave of the company court after the commencement of the winding up or any sale has been held without leave of the company court in respect of the properties or effects of the company after commencement of the winding up proceedings such attachment, distress, execution or sale as the case may be would be void under sub-section (1) of section 537 of the Companies Act.

52. However, sub-section (1) of section 537 is not attracted to any proceedings for recovery of tax or impost or any dues payable to the Government as per sub-section (2). The words "commencement of the winding up" occurring in section 537(1) refers to the time of presentation of the petition for winding up and not the date of order of winding up in view of section 441(2) of the Companies Act. It reads as under:

441. Commencement of winding up by Tribunal--(1) Where, before the

presentation of a petition for the winding up of a company by the Tribunal, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Tribunal, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the winding up.

53. The intention of relating back the winding up of a company to the date of presentation of the petition for winding up is to avoid dispositions of the property, made after presentation of the petition for winding up. Therefore, when an order of winding up is made, even though the actual process of winding up starts from the date of the order, the winding up of the company is deemed to have commenced from the date of filing of the petition for winding up, where the order of winding up is made u/s 433(b) to (f) of the Companies Act. Thus, relating back the order of winding up to the date of presentation of the petition for winding up, will occur only where the order of winding up is made u/s 433(b) to (f) in a winding up petition. The secured creditor in the instant case had initiated proceedings under the DRT Act to realise the dues recoverable from the company (in liquidation). In view of proviso to sections 529(1) and 529A, the workmen's dues would rank *pari passu* with the debt due to the secured creditor in the winding up of a company. In other words, the official liquidator would step into the shoes of the secured creditor to the extent of workmen's dues since by deeming provision he represents the workmen and amounts due to them would be on par with the secured creditor to be distributed in accordance with section 529 of the Companies Act. His presence for sale of assets of the company would be very much required or in other words he has to be associated with the sale process. He represents a ranked secured creditor (workmen) working under the control of the company court and as such he cannot be kept in dark or out of the sale proceedings. He has to ensure distribution of sale proceeds under the direction of the company court and it is his primary responsibility. Hence, it would not only be wise but also safe in the interest of all to ensure association of the official liquidator with the process of sale, who would also ensure in securing the correct and proper price for the assets of the company (in liquidation).

54. In that view of the matter, it cannot be held in the instant case that secured creditor either had lack of knowledge of pendency of winding up proceedings on the ground that the secured creditor had stood outside the winding up proceedings to claim immunity of its act namely, selling the asset of the company (in liquidation) without association official liquidator.

55. It is noticed in the instant case that company petition came to be admitted on March 30, 2000 and advertisement was carried out on February 23, 2001. Subsequently, during the pendency of company petition, recovery officer has

attached the property on June 27, 2005 and has auctioned the same on October 5, 2005, confirmation of the sale has taken place on November 16, 2005, pursuant to which certificate of sale came to be issued by the DRT in favour of the second respondent on February 2, 2006. The property in question having been delivered by the Recovery Officer to the second respondent pursuant to such sale cannot be allowed to be continued in view of the findings given hereinabove and as such further consequential directions are to be issued and accordingly it is issued.

56. In the light of aforesaid discussion, I am of the considered view that point No. (1) deserves to be answered by holding that the Debts Recovery Tribunal by itself or through its recovery officer under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is empowered to sell the asset of a company under liquidation at the instance of the secured creditor without leave of the company court but associating the official liquidator since he is deemed to have *pari passu* charge of the assets u/s 529A of the Companies Act, 1956. Point No. (2) has to be answered in favour of the official liquidator by declaring that sale of assets of the company in liquidation) made by the Recovery Officer of the Debts Recovery Tribunal at the instance of the secured creditor and consequential certificate of sale issued thereunder in favour of the second respondent is liable to be set aside, with consequential directions. In the result, following order is passed:

ORDER

(1) Application is hereby allowed.

(2) The auction of the property No. 67/G in Survey No. 205 measuring about 4,026 sq.ft situated at Bommasandra village, Athibele Hobli, Anekal Taluk, Bangalore Rural District conducted on October 5, 2005 and sale confirmation made on November 16, 2005, together with the certificate of sale dated February 2, 2006, issued by the Debts Recovery Tribunal, Bangalore in favour of the second respondent is hereby set aside.

(3) The respondents are hereby directed to handover possession of the property bearing No. 67/G in Survey No. 205 above referred to the official liquidator attached to the company court within outer limit of four weeks from today.

(4) The Debts Recovery Tribunal shall intimate the Sub-Registrar, Anekal Taluk, Bangalore District of the order passed by this court setting aside the sale to enable him to make necessary entries in the register regarding cancellation of sale.

(5) The Debts Recovery Tribunal through its recovery officer is at liberty to sell or auction the property in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Rules and regulations made thereunder governing the sale of immovable property only after associating the official liquidator attached to the company court.

(6) The amount paid by the second respondent to the first respondent for purchasing the property above referred to shall be refunded by the first respondent.

(7) The second respondent would be at liberty to participate in the said auction or sale as the case may be.

(8) No order as to costs.

¹Here printed in italics