

**(2012) 11 GUJ CK 0004**

**In the Gujarat High Court**

**Case No :** O.J. Appeal No's. 110 and 152 of 2008 and Co. Application No's. 237 of 2005, 411 and 657 of 2006

Textile Labour Association

APPELLANT

Vs

Official Liquidator of Arbuda Mills Ltd. and 6

RESPONDENT

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**Date of Decision :** 07-11-2012

**Acts Referred:**

Companies Act, 1956 — Section 529, 529A

**Citation :** (2013) 118 SCL 89

**Hon'ble Judges :** R.R. Tripathi, J;N.V. Anjaria, J

**Bench :** Division Bench

**Advocate :** D.S. Vasavada, for the Appellant; J.S. Yadav, B.H. Bhagat, Ms. Manisha Lavkumar and Pranav G. Desai, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Ravi R. Tripathi, J.—Incidentally, the appellant in both the appeals is the same-Textile Labour Association. Both these appeals are filed being aggrieved by the order passed by the learned Company Judge, which is in O.J. Appeal No. 110 of 2008 his order passed in Company Application No. 411 of 2006 and in OJ Appeal No. 152 of 2008 the order is in Company Application No. 657 of 2006. The learned advocate for the appellant requested that OJ Appeal No. 110 of 2008 be taken first for consideration so as to enable him bring home his contention. The learned advocate for the appellant submitted that in the matters wherein the company is in liquidation pursuant to an order passed by this Court, the debts of all the secured creditors-he explained that all the secured creditors means, secured creditors some of whom have first charge over the property whereas some of them having second charge on the property and so on-are clubbed together and their debt is put against the dues of the workmen and then the pari passu principle is applied and "ratio" is worked out in which the amount realised from the assets of the company is disbursed. The learned advocate for the appellant submitted that while determining the ratio, the debt of all the secured

creditors (first charge holders, second charge holders and so on) is taken into consideration whereby the "ratio" worked out brings down the portion in favour of the workmen of a lower value whereas, at the time of disbursement of the amount, the amount is disbursed to the first charge-holders. He further submitted that the amount is not disbursed to the second charge holders and so on. This Court requested the learned counsel to make it clear as to whether, under the law, while determining the *pari passu* charge, any distinction is made by law inter se the first charge holder and the second charge holder and so on. The learned advocate submitted that Sections 529 and 529A of the Companies Act, 1956 do not make any such distinction.

On perusal of the aforesaid two provisions, we find that clause (c) of sub-section (1) of Section 529 provides for "the respective rights of secured and unsecured creditors....." It does not classify the secured creditors on the basis of the first charge holder or the second charge holder or so on. Similarly, in proviso to clause (c) of subsection (1) of Section 529 of the Act, the words used are, "security of every secured creditor....." meaning thereby the law does not make any distinction between these secured creditors on the basis of their holding charge being the first charge or the second charge or so on. Same is the position so far as Section 529A is concerned. In clause (b) of subsection (1) of Section 529A, the words used are, "debts due to secured creditors....." meaning thereby the law does not draw any distinction between the secured creditors. So far as Sections 529 and 529A are concerned, the word secured creditor, irrespective of the fact whether it is first charge holder on a particular property of the company in liquidation or the second charge holder, makes no difference while calculating the ratio for distribution of the amount available by applying the principle of *pari passu* charge.

(Emphasis supplied)

2. The learned advocate for the appellant initially read few paragraphs of the order impugned (order in Company Application No. 411 of 2006 dated 28.11.2007, Coram: Hon'ble Mr. Justice K.A. Puj). He specifically drew the attention of the Court to paragraph 4 of the said order, which reads as under:-

4. Since the Textile Labour Association, representing the workers was impleaded as party respondent No. 7 in this application, notice was issued and an affidavit-in-reply was filed on 15.2.2007 by one Mr. Raghavendra Sharma, who is (sic. has) identified himself as an active representative/member of the Textile Labour Association. He has raised an objection in the said affidavit that the secured creditors are not having their charge over the property as the charge created on the property is required to be incorporated in Form No. 7/12. The said charge is not incorporated in Form No. 7/12. He has further stated that as far as the ratio contemplated under Sections 529 and 529A of the Companies Act, 1956 is concerned, only the secured creditors having the first charge should be taken into consideration and the secured creditors having the second charge should be excluded while working out the ratio. If this proposition is accepted, the ratio

fixed up by the Chartered Accountant will be changed and the disbursement to the workers will be more than what was determined by the Chartered Accountant. It is further stated in the said affidavit that as per the information available with him, the applicant and other Banks have already filed affidavits of proof of debt and if it is so, then they have submitted to the jurisdiction of the Official Liquidator. It is, therefore, submitted that the applicant and other Banks who are already party respondents are unsecured creditors and therefore, whatever amounts that were paid to them are required to be recovered. It is further stated in the said affidavit that the original documents/documents creating mortgage or deed of mortgage or deed of hypothecation are not available with the Banks and if the original documents are not available, then it is not admissible piece of evidence and therefore, it cannot be said that the mortgage is created or charge is created or they are secured creditors at all.

(Emphasis supplied)

3. It appears that in the affidavit filed by said Raghavendra Sharma more than one contention is raised, but, then, the learned advocate for the Textile Labour Association has pressed into service the contention which is referred hereinabove.

4. The learned advocate for the appellant could not convince this Court on the said contention. The learned advocate for the appellant was requested to point out any particular provision or part thereof like Section 529 and/or 529A which makes distinction between the secured creditors on the basis of their holding the first charge or the second charge or so on. The learned advocate is not able to point out any such distinction being made by the legislature so far as Section 529 and 529A of the Companies Act are concerned. The learned advocate then relied upon a decision of the Honourable Apex Court in the matter of Jitendra Nath Singh Vs. The Official Liquidator and Others, . The learned advocate for the appellant read Head Note A and then the relevant paragraphs being paragraphs Nos. 7, 8, 9, 10, 15, 31, 32 and 46 of the judgment and tried to convince this Court that the provisions of Sections 529 and 529A of the Companies Act, 1956 should be so interpreted by this Court that at the time of deciding *pari passu* charge and working out the ratio between the debts of the secured creditors and the dues of the workmen, the debt amount of the secured creditors who hold the first charge only should be taken into consideration, which will necessarily result into a higher ratio in favour of workmen and the debt amount of the secured creditors holding the second charge or so on should not be taken into consideration. The learned counsel for the appellant could not convince this Court by pointing out any reason for accepting the submissions made by the learned counsel for the appellant and for interpreting Section 529 in the manner suggested by the learned advocate.

5. The learned advocate for the appellant also relied upon a decision of this Court in the matter of O.J. Appeal No. 156 of 2007 in Company Application No. 489 of 2006 and other cognate matters (Coram: Hon"ble Mr. Justice D.A. Mehta, as he then was, and Hon"ble Ms Justice H.N. Devani) dated 12th January 2009. The

learned advocate for the appellant pressed into service sub-paragraph (t) of paragraph 48 wherein the Court has summarised its conclusions. Sub-paragraph (t) reads as under:-

the pari passu charge envisaged by a conjoint reading of Sections 529 and 529A of the Companies Act is available only in relation to first charge holder and the second charge holder cannot be equated with the first charge holder. Therefore, clubbing of debts where the charges might place of the first charge holder assignor bank

The learned advocate for the appellant could not explain, "the reference to context" of the aforesaid conclusion drawn by the Bank and therefore the same cannot be made applicable to the facts of the case on hand more particularly, when this Court, on examination of the provisions of Sections 529 and 529A of the Companies Act, found that the submission made by the learned advocate for the appellant has no force.

6. Learned advocate, Mr. Bhagat submitted that he has about half a dozen orders on the same line and the said orders are not challenged by the very appellant by filing appeal. In light of the aforesaid discussion, we do not deem it proper to quote all those orders of the learned Company Judge. So far as OJ Appeal No. 152 of 2008 is concerned, the same is filed against the judgment and order dated 26th July, 2007 passed in Company Application No. 657 of 2006. Learned counsel for the appellant submitted that the learned Company Judge has taken the same view as is taken by the learned Company Judge in the aforesaid order. If that being so, the discussion made hereinabove is applicable to the facts of the case in O.J. Appeal No. 152 of 2008.

Having no substance in the submissions made by the learned counsel for the appellant, both the appeals fail and the same are dismissed accordingly.