

(2012) 06 AP CK 0074

In the Andhra Pradesh High Court

Case No : Company Petition No: 524 of 2008, Company Petition No: 1007 of 2011, Company Petition No: 257 of 2012 in Company Petition No: 26 and 68 of 1987

The Managing Director, M/s. LVSR Famrs Pvt. Ltd., Plot No. 10, Flat No. 101, 1st Floor, G.K.Classics, Srinagar Colony, Hyderabad APPELLANT

Vs

The Official Liquidator, High Court of A.P., Hyderabad and the Liquidator of M/s Vidyut Steels Ltd., The Manager, APIDC, Parsrama Bhavan, Basheerbagh, Hyderabad, The Manager, Andhra Bank, Sultan Bazar, Koti, Hyderabad and The Registrar of Companies, Kendriyasad, Sultan Bazar, Hyderabad
 A.P. Industrial Developmental Corporation Vs M/s. Vidyut Steels Ltd., M/s. LVSR Farms Pvt. Ltd.
 The Manager, Andhra Bank, Sultan Bazar Vs A.P. Industrial Development Corporation, M/s. Vidyut Steels Ltd., (in Liqn.) and M/s. LVSR Farms Pvt. Ltd. RESPONDENT

Date of Decision : 20-06-2012

Acts Referred:

Companies Act, 1956 — Section 10(1)(a), 124, 125, 125(1), 130
Contract Act, 1872 — Section 31, 32, 69
General Clauses Act, 1897 — Section 21
Provincial Insolvency Act, 1920 — Section 47, 47(1), 47(2), 47(3), 47(4)
Transfer of Property Act, 1882 — Section 100, 54

Citation : (2012) 06 AP CK 0074

Hon'ble Judges : Ramesh Ranganathan, J

Bench : Single Bench

Advocate : B. Chandrasen Reddy, for the Appellant; C. Mariamma for Respondent No. 3, P. Balaji for Respondent No. 2, Sri M. Anil Kumar for Official Liquidator for Respondent No. 1, S. Sri Ram Reddy Advocate for No. 2 and of Sri V. Raghu For Respondent No. 3 and None appeared, for the Respondent

Judgement

Ramesh Ranganathan

1. Company Application No.524 of 2008 is filed by the Managing Director of LVSR

Farms Private Limited, (hereinafter called the "Assignee"), to direct the Official Liquidator to recognize them as the secured creditor of the company under liquidation in the place of ICICI, IFCI, IDBI and LIC (the Central financial Institutions - hereinafter called "CFIs"). Company Application No.1007 of 2011 is filed by A.P. Industrial Developmental Corporation, represented by its Managing Director (hereinafter called "APIDC"), to treat them as the sole secured creditor having charge over land admeasuring Ac. 10.13, (hereinafter called "the immovable property"), situated at Plot No.9B, IDA, Bandlaguda Village, Patancheru, Phase-I, Medak District of the company under liquidation; not to treat the assignee as the secured creditor by virtue of the deeds of assignment in the place of the CFIs, and to calculate and pay the principal amount due to them along with the contractual rate of interest from the due date till the date of realization. Company Application No. 257 of 2012 is filed by Andhra Bank to implead them as 3rd respondent in C.A.No. 1007 of 2011; and C.A.No.306 of 2012 is filed by Andhra Bank to treat them as the secured creditor having charge over the immovable property, not to treat the assignee as the secured creditor by virtue of the deeds of assignment in the place of the CFIs; and to pay the adjudicated amount of Rs. 84,69,628/- due to them, along with the contractual rate of interest from 22.04.1998 till the date of realization. C.A.No.257 of 2012 is allowed and Andhra Bank is impleaded as the 3rd respondent in C.A.No.1007 of 2011. Facts, in brief, are that the Assignee is a private limited company engaged in the business of development, plotting and sale of immovable property. Vidyut Steels Limited (the company under liquidation - hereinafter called the "company") was incorporated under the Companies Act with the object of carrying on business in the manufacture of carbons, iron and steel castings etc. APIDC was the co-promoter of the Company having participated in its equity for Rs. 29.14 lakhs. The CFIs provided financial assistance to the Company after it created an equitable mortgage in their favour on 03.05.1978 by deposit of title deeds in respect of the immovable property. Consequent upon an order of winding up being passed by this Court, in Company Petition Nos. 26 and 65 of 1987 dated 22.04.1988, the Official Liquidator, in exercise of his powers u/s 449 of the Companies Act, took possession of the entire assets of the Company. While matters stood thus IDBI, one of the CFIs - secured creditors of the Company, executed a deed of assignment of debt in favour of the Assignee by registered document No.20883 of 2006 dated 04.09.2006, assigning its rights, title, interest and actionable claims in the debts of the Company. Likewise IFCI executed a registered deed of assignment vide document No.24370/2006 dated 22.09.2006, ICICI executed an assignment deed vide document No.3766/2007 dated 20.01.2007 and LIC executed the assignment deed vide document No.26211/2007 dated 23.07.2007. These four deeds of assignment were registered with the District Registrar, Medak.

2. The Assignee filed Company Application No.524 of 2008 claiming to have stepped into the shoes of these four CFIs -secured creditors under the aforesaid four deeds of assignment; they should be deemed to be the legal and beneficial

owners of the underlying securities and facilities free from all encumbrances; and they are legally and beneficially entitled to demand, receive and recover the dues payable to the four secured creditors on realization of the security, and for the balance from the Company. They seek permission of this Court to come on record, in the place of the four CFIs - secured creditors, in the winding up and subsequent proceedings. The Assignee would state that, on search of the documents and records, including the Register of charges, on 24.04.2008, it came to light that the following charge were created in favour of APIDC and Andhra Bank: (i) Document No.72 dated 08.07.1980 whereby a charge was created in favour of APIDC on the moveable assets of the company, both present and future (except book debts, typewriters, vehicles and office furniture) including moveable plant and machinery, implements, fittings, accessories, and goods acquired from time to time; and (ii) a modified charge, vide document No. 110 dated 07.03.1986, in favour of Andhra Bank of all the book debts present and future. The assignee would assert that no charge was created on the immovable properties of the Company either in favour of APIDC or in favour of Andhra Bank.

3. It is APIDC's case that the four CFIs had delayed rendering financial assistance in the form of a term loan necessitating their having to advance a temporary demand loan of Rs.25.00 lakhs on 06.09.1977; the Company had created a charge in favour of APIDC over its moveable assets as security for the said loan; the said demand loan was to be repaid, by the Company to APIDC, within six months of receipt of the term loan from the CFIs; however the Company repaid only Rs.8.00 lakhs on 05.08.1978, leaving a balance due of Rs. 17.00 lakhs; this resulted in blockage of funds of APIDC on a permanent basis; since the CFIs were not inclined to permit APIDC to recover the said loan, a series of consortium meetings were held; in the meeting held on 12.03.1984 it was decided that, out of the total principal loan of Rs. 17.00 lakhs due to APIDC, Rs.8.50 lakhs would be converted as a secured term loan, and the balance due of Rs.8.50 lakhs would be paid by the person inducted as one of the promoters of the Company; the Board of Directors of APIDC, in their meeting held on 02.06.1984, approved the said conversion; thereafter APIDC addressed letter dated 16.06.1984 to the Company duly marking a copy thereof to the CFIs intimating them that the Board of directors of APIDC had accepted the proposal made in the consortium meeting; thereafter the CFIs had addressed letters dated 20.03.1985 and 17.04.1985 conceding pari-passu charge in favour of APIDC, thereby extending the joint equitable mortgage over the immovable properties of the Company for the term loan of Rs.8.50 lakhs in favour of APIDC, along with the CFIs; the Company addressed letter dated 02.04.1986 informing APIDC that it had created a charge, for the term loan of Rs.8.50 lakhs, in their favour with the Registrar of Companies; along with the said letter the Company enclosed a cash receipt issued by the Registrar of Companies as evidence of filing Form-8; the Company had also shown the said term loan, advanced by APIDC, as a secured loan in its Balance Sheet along with the loans advanced by the other

CFIs (31th Annual Report for the financial year ended 30.06.1986); it was evident from the deeds of assignment, executed by the CFIs in favour of the assignee, that APIDC held joint equitable mortgage along with the CFIs over the immovable property of the Company; consequently APIDC must be held to have had a charge over both the moveable and immovable properties of the Company; APIDC had, vide letter dated 10.06.2008, requested the Registrar of Companies to issue Form No. 8 evidencing creation of a charge in their favour; they also enclosed thereto the letter dated 02.04.1986 addressed by the Company as also the receipt issued by the Registrar of Companies; surprisingly the Registrar of Companies, vide letter dated 12.06.2008, informed APIDC that, as per the available records, Form-8 did not seem to have been filed; APIDC was called upon to furnish a copy of the said Form-8 to enable them to ascertain the factum of filing of the said document as it was difficult to confirm, after a lapse of 25 years, whether or not Form-8 was filed, that too in the absence of the original receipt thereof having been filed; and, in such circumstances, the question of issuing certified copies thereof did not arise. Reference is made to the subsequent correspondence between APIDC and the Registrar of Companies which, in view of the questions which arise for consideration in these applications, need not be referred to. Suffice to note that APIDC filed C.A. No. 1871 of 2009 seeking a direction to the Registrar of Companies, and the said application was ordered by this Court on 05.11.2009; the Registrar of Companies, instead of implementing the orders of this Court, informed APIDC, vide letter dated 11.05.2010, that their dues of Rs.8.50 lakhs were shown as a secured loan in the Balance Sheet of the Company as at 30.06.1986; it must, therefore, be held that APIDC held joint equitable mortgage along with the four CFIs; and it should be treated as a secured creditor having charge over the immoveable properties of the Company. Reference is made by APIDC to the meeting held on 03.08.2011 wherein the official liquidator is said to have stated that APIDC had no charge over the immovable assets of the Company, and the assignee was entitled to be treated as a secured creditor. Hence the present application.

4. In their application, in C.A. No.306 of 2012, Andhra Bank would submit that the Company, which had availed credit facilities from them, had failed to repay the amount due under the said facilities; the Company was indebted to Andhra Bank for Rs.84,69,628/- towards various facilities availed by them; the charge created by the Company was registered with the Registrar of Companies; in the meeting convened on 28.01.2008 by the Official Liquidator it was held that only APIDC and Andhra Bank were the secured creditors; thereafter Andhra Bank had submitted its claim which was admitted on 20.12.2011 for Rs.84,69,628/- as a "secured debt"; this conclusively established that the Bank was a secured creditor; the deeds of assignment, relied upon by the assignee, are only for recovery of the debt due from the debtor of the assignors; these deeds of assignment are not enforceable as, by that date, the property stood vested in the Official Liquidator; any document creating a charge over the property of the

Company executed without the prior consent of the Official Liquidator, was void to that extent, and could not be enforced so as to defeat the claims of the other secured creditors; since the assignors debts had been satisfied, they had no further right to claim before the Official Liquidator that they were the secured creditors; the assignee could not be permitted to raise any claim or to be considered as a secured creditor; Andhra Bank was the secured creditor whereas the assignee was an unsecured creditor, and ranked subsequent to the Bank in priority.

5. In his report No.276 of 2008, filed in C.A. No. 524 of 2008, the Official Liquidator would state that, from the documents filed by the assignee, it was seen that the four CFIs had advanced loans to the Company against its moveable and immoveable properties; these four CFIs held pari-passu first charge over the moveable plant and machinery, and a joint mortgage by deposit of title deeds of the lands and buildings situated at Plot No.8 & 9B in Sy.Nos. 29, 39, 40, 41 and 436 of Plot No.9B, IDA, Bandlaguda Village. Patancheru, Phase I, Medak District; the said charges were registered with the Registrar of Companies; subsequently the CFIs had assigned their debt/dues from the Company to the assignee by way of separate deeds of assignment of debt; the Official Liquidator had no objection to substitute the assignee in the place of the four CFIs (secured creditors), and to treat the assignee as a secured creditor of the Company.

6. In his report, filed in Company Application No. 1007 of 2011, the Official Liquidator has dealt with several aspects which need no reference herein as they have no bearing on the questions which arise for consideration in these applications. Suffice to note that, according to the Official Liquidator. APIDC is not the secured creditor as they had not filed Form-8 as proof of the charge covering the immoveable properties of the Company; and the Form-8 produced by them only showed that they were secured to the extent of a charge on the movable assets of the Company. In their reply thereto, APIDC would re-assert that the documents aforementioned would, by itself, show that they held joint charge, along with the four CFIs, over the immoveable property of the Company.

7. Elaborate submissions were made by Sri S. Sriram Reddy. Learned Counsel appearing on behalf of APIDC and Sri S. Ravi, Learned Senior Counsel appearing on behalf of the assignee. Sri V. Raghu. Learned Counsel appearing on behalf of Andhra Bank adopted the submissions of Sri S. Sriram Reddy. Written submissions have also been filed both on behalf of APIDC and the assignee. Several judgments were cited by Counsel on either side which shall be referred to hereinafter under the appropriate heads.

8. Sri S. Sriram Reddy, Learned Counsel for APIDC, would submit that in the consortium meeting held on 12.03.1984, between the CFIs and APIDC, the CFIs had agreed that a charge would be created in the favour of APIDC over the fixed assets of the company by ceding pari-passu charge; accordingly pari-passu charge was ceded in their favour vide letters dated 20.03.1985 and 17.04.1985; Form-8 was filed with the Registrar of Companies (ROC) on 27.03.1986 and,

therefore, APIDC must be held to be a secured creditor having charge over the immovable and movable properties of the company under liquidation. Learned Counsel would submit that failure, on the part of the Registrar of Companies, to furnish a copy of Form-8 cannot, in the light of overwhelming evidence, result in the debt being treated as an unsecured debt as registration and issuance of Form-8 is an administrative act, and such registration relates back to the date on which the application for registration of the charge was filed. Learned Counsel would state that, while the Company was wound up on 22.04.1988, the assignors had assigned their total debt of approximately Rs.20 crores to the assignee, in the year 2006-2007, for a nominal sum of Rs.90 lakhs; the security, when auctioned by this Court in the year 2010-2011, fetched Rs. 17.70 crores; while APIDC was not questioning the entitlement of the assignee to claim Rs.90 lakhs paid by them to the assignors i.e., the CFIs, they were aggrieved by the conferment of benefits by the CFIs on a third party depriving the body of creditors to the amounts they were legally entitled to.

9. The contentions urged by Sri S. Sriram Reddy, Learned Counsel for APIDC, can broadly be classified under the following heads:

i. The deeds of assignment do not convey any right, title or interest in favour of the assignee as they are in the nature of contingent contracts i.e., the benefit under the Deeds of Assignment is conferred or flows in favour of the Assignee only on the happening of a particular event;

ii. Assuming, without admitting, that the rights under the Deeds of Assignment are conferred on them, the Assignee cannot even then be treated as a secured creditor, in the place of the assignors, as a charge u/s 125 of the Companies Act has to be modified in terms of Section 135 thereof;

iii. the intendment and scope of the provisions of the Companies Act relating to liquidation proceedings, when read as a whole, is to ensure that the existing body of creditors, as on the date of winding up, realise their dues to the maximum extent possible, and a duty is cast on the Company Court to achieve the said objective;

iv. The action of the assignors, in accepting Rs.90 lakhs in full and final settlement of their dues, is in the nature of a One Time Settlement (OTS). Looking at the transaction from this angle, when a creditor is granting a one time settlement, the benefit should go to the principal debtor i.e., the company under liquidation, so that the same percolates to the entire body of creditors;

v. Though the transactions in question are ostensibly an assignment, they are in reality a sale as the end result is the same;

vi. The assignment in favour of the assignee is fraudulent as the assignee and the Company belong to the same group of companies/entrepreneurs.

vii. This Court has the jurisdiction and discretion, within the four corners of the Companies Act, to refuse to grant the relief sought for by the assignee which is

treated as the secured creditor in the place of assignors and, thereby, invalidate the assignment made in favour of the assignee; direct payment of Rs. 90 lakhs to them; and to further direct distribution of the balance sale consideration in favour of the existing body of creditors.

10. It is convenient to examine the rival contentions under different heads which, in the present case, is on the basis of the aforementioned contentions urged on behalf of APIDC.

I. The deeds of assignment do not convey any right, title or interest in favour of the assignee as they are in the nature of contingent contracts i.e., the benefit under the Deeds of Assignment is conferred or flows in favour of the Assignee only on the happening of a particular event.

11. Sri S. Sriram Reddy, Learned Counsel for APIDC, would submit that Article 4(1)(f) of the deed of assignment was consciously incorporated by the assignors to honour the letters of undertaking given by them earlier to create a *pari-passu* charge in favour of APIDC; the said clause was incorporated since a mortgage was created in favour of the assignors which they were holding also on behalf of APIDC; the no objection contemplated thereunder was only because APIDC had a stake in the charge over the said security; it was the intention of the assignors, in stating that no objection had to be obtained from the "joint mortgagee", that consent of the Official Liquidator had also to be obtained; the Official Liquidator was required, in turn, to obtain permission from this Court before conveying his no objection to the assignment; in the absence of consent being obtained from the Official Liquidator, the assignment deed would neither come into operation nor would the rights, title and interest of the assignors flow in favour of the assignee; if APIDC was not a mortgagee having charge of the security, there was no need to incorporate such a clause in the assignment deed as it would then amount to conferring a right on a third party to the transaction; the Official Liquidator, by virtue of Section 529A of the Companies Act, enjoyed the status of a joint-mortgagee by operation of law; the secured creditors could not act unilaterally without the consent of the co-mortgagees including the Official Liquidator; the assignment deed was in the nature of a contingent contract which cannot be enforced in the absence of the contingency having arisen i.e., consent of the Official Liquidator being obtained; while the right of the secured creditor to assign its debt prior to winding up was untrammelled, it could not do so after an order of winding up was passed, without reference to both the Company Court and the Official Liquidator; Article 1 (2)(i) of the deed of assignment gives overriding effect to the representations and warranties contained in Articles 3 and 4 as also the other clauses in the deed of assignment; Article 4(1)(f) is incorporated to protect the interests of APIDC; and, as the company is under winding up, the consent of the Official Liquidator has to be taken.

12. On the other hand Sri S. Ravi, Learned Senior Counsel appearing on behalf of the assignee, would submit that the validity of the deeds of assignment of the debt is not under challenge in these proceedings; in assigning the debt, the bank

is only transferring its asset; as the bank transfers its asset for a particular agreed price, it is no longer entitled to recover anything from the borrower; this asset is different from the assets which belongs to the borrower which is the underlying security; rights under a contract are always assignable; and, unless the contract is personal in nature and the rights are incapable of assignment, either in law or under an agreement between the parties, a benefit under a contract can always be assigned; and assignment of a debt is not contrary to public policy solely on the ground that the assignee has purchased the debt for a considerable discounted price or because that price is only payable after a period of credit.

13. According to the Learned Senior Counsel, simply because the assignee may make a profit on the transaction it would not run contrary to public policy; if there was no prospect of profit, commercial entities would never purchase a "debt"; the claim to a simple debt is assignable even if the debtor has refused to pay; the practice of assigning or selling debts to debt collecting agencies and credit factors can hardly be carried on if the law was otherwise; in some cases persons, who receive either a total or partial assignment of a debt which only operates in equity, are entitled to a charge upon the debt; the assignment, in terms of clause 4(1)(f) of the deed, is not contingent upon the consent of APIDC as claimed by them; Clause 4(1)(f) deals with delivery of documents; the material on record discloses that one of the secured creditors had delivered the documents to the Official Liquidator; APIDC cannot claim any benefit u/s 529A of the Companies Act; unlike workmen, the Companies Act does not statutorily recognize the lender as a secured creditor; APIDC has no right in law to claim that they are entitled to obtain assignment on payment of Rs.90.00 lakhs to the CFIs (assignors); there is no contract to that effect; and pre-emptive rights cannot be acquired in equity.

14. Before examining the rival contentions, it is necessary to note that separate deeds of assignment were executed in favour of the assignee by each of the four CFIs separately, and they were registered with the District Registrar, Medak at Sangareddy. Since these four deeds of assignment are similar to each other, it would suffice if reference is made to the relevant clauses of the deed of assignment executed by Industrial Development Bank of India (IDBI). Clause 1(3) of the said assignment deed records that the assignee was aware that the borrower (the Company) was in liquidation pursuant to the orders of this Court in C.P. No.26 of 1987; and the Official Liquidator was conducting liquidation proceedings, and was in possession of the movable and immovable properties of the borrower. Clause 1(4) records that the assignor was desirous of transferring its right, title, interest and actionable claims in the debts as also their right, title, interest and actionable claims in the encumbrance, facility documents, the underlying securities and all other documents in relation to the debts to the assignee, and the assignee had agreed to acquire and purchase, from the assignor, all rights in respect of and in relation to the debts, and incidental thereto all other rights of the assignor, title and, interest under and in relation to

the facility subject to the terms and conditions mentioned in the deed of assignment.

15. Article 1(b) defines "debts" to mean any and all amounts, (including without limitation the outstanding principal amount of the rupee and foreign currency facilities, interest, additional interest, compound interest, costs, charges, liquidated damages and expenses), which were due and payable by the borrower to the assignor in respect of the facilities under the terms of the facility document, and to include all rights/obligations arising out of, and in relation to, the facility agreements of the borrower held by the assignor as detailed in Schedule I. Clause (c) defines "deed" to mean the deed of assignment for transfer of the loan of Rs.6,22,82,000/- recoverable from the Company by the assignor. Article 2(1) stipulates that, in consideration of the assignee having paid to the assignor Rs.30,00,000/-, the assignor admitted and acknowledged the same and assigned, transferred and released unto the assignee with immediate effect, and the assignee took over from the assignor, the debts, rights, title and interest in the encumbrances, facilities and underlying securities under the facility documents, from and any and all encumbrances or other impediments and that the assignee shall be deemed to be the full and absolute legal and beneficial owner thereof and legally and beneficially entitled to demand, receive and recover in its own name from the borrower subject to the provisions of the deed including Articles 5 and 6. Clause (6) of Article 2 provides that from that date, subject to the provisions of the deed of assignment, the assignee shall have the absolute right of collecting all amounts limited to the share of the assignor out of the entire loan under any facility agreement, enforce any or all rights relating to/representing the debts and enforcing the facility and facility agreement/documents, underlying securities in such manner as the assignee, in its absolute discretion, determines as per the provisions of the facility agreement.

16. Article 3 refers to the representations, warranties and undertakings of the assignor and, under clause (1)(b) thereof, the assignor represented and undertook that the execution, delivery and performance by the assignor of the deed of assignment, and the consummation of the transactions contemplated therein, had been duly authorized by all necessary corporate proceedings and the deed had been duly executed and delivered by the assignor and constituted a valid and binding obligation on the assignor, enforceable in accordance with the terms. Under sub-clause (c) the assignor represented that neither had any encumbrance been created nor was any encumbrance subsisting over the assignor's right, title and interest in the facility documents and the debts. Clause 1(h) of Article 3 records the assignor's declaration that they had filed the affidavit of proof of debt with the Official Liquidator for recovery of Rs.6,22,82,000/-, and adjudication was pending. Under clause (j), the assignor agreed that they would remain bound to do or cause to be done any act, deed or thing for or in connection with or incidental to the transactions contemplated under the deed including, but not limited to, filing of requisite forms, documents with the concerned governmental departments, including with the Sub-Registrar

of Assurances, Registrar of Companies etc., for more perfectly assuring the assignment made in favour of the assignee. Article 4 relates to representations, warranties and undertakings of the assignee and, under clause (1)(f) thereof, the assignee represented and undertook that, in respect of the facilities granted to the borrower, the assignor held joint equitable mortgage along with ICICI etc. Article 4(1)(f) reads as under:

In respect of the facilities granted to the borrower, the assignor holds joint equitable mortgage along with ICICI, LIC and APIDC on the 10 Acres 13 cents of land on which the factory was erected. Upon the execution of these presents, the Assignor has hereby released the charge in respect of the assets with respect to which the Assignor had the joint charge on the said properties to the assignee. Without any further act or deed, the Assignee shall be entitled to request for the handing over of the original documents of the said properties from the Assignor and the Assignor shall do and perform such acts as are necessary for the purpose of ensuring delivery of original documents in favour of the Assignee subject to No Objection Certificates to be obtained from the joint mortgagees by the Assignor."

17. All that the assignee represented, under Article 4(1)(f) of the deed of assignment, was that, in respect of the facilities granted to the Company, the assignors held joint equitable mortgage over an extent of Ac. 10-13 cents of land on which the factory was erected; the assignee was entitled to request that the original documents of the said properties be handed over to them by the assignor; and the assignor would ensure delivery of the original documents in favour of the assignee subject to the assignor obtaining no objection certificates (NOC) from the other joint mortgagees. The requirement under Article 4(1)(f), of obtaining NOC, is limited to ensuring delivery of the original documents to the assignee. Under the said clause an obligation is cast on the assignor (CFIs), and not on the assignee, to obtain the NOC from APIDC. Even if APIDC and the Official Liquidator are held to be joint-mortgagees, along with the CFIs-assignors, the NOCs were required to be obtained merely for delivery of the original documents to the assignee, and not for assignment of the debt. Article 4(1)(f) neither expressly, nor by necessary implication, required consent of either the APIDC or the Official Liquidator to be obtained by either the assignee or the assignors for assignment of the debt. It is not even the case of APIDC that the original documents were handed over to the assignee by the assignors without obtaining NOC from them. Sri M. Anil Kumar, Learned Counsel for the Official Liquidator, would state that the Official Liquidator had, on the winding up order being passed/taken custody of the immoveable property in question, including all the original documents. The contention of Sri S. Sriram Reddy that failure by the assignee to obtain consent from APIDC, for assignment of the debt in their favour by the assignors, would fall foul of Article 4(1)(f) of the deed of assignment, and would necessitate the very assignment being declared null and void, does not merit acceptance.

18. A clear distinction has been drawn in common law, between a security and

an assignment. (Ashby Warner and Co. v. Simmons 1 (1938) 8 CC 111, The principle that the burden of a contract cannot be transferred so as to discharge the original contractor without the consent of the other party means that, as a general rule, the assignee of the benefit of a contract involving mutual rights and obligations does not acquire the assignor's contractual obligations. (Chitty on Contracts 30th Edition - Para 19-078 Page 1362). Where contractual rights are assigned, the extent of those rights are defined by the original contract, (Chitty on Contracts: 30th Edition Para 19-079, Page 1363), i.e., the contract between the CFIs and the Company pursuant to which the loan facilities were granted. An assignment of a debt is not invalid even if the necessity for litigation to recover it is contemplated. Provided that there is a bona fide debt, it does not become unassignable merely because the debtor chooses to dispute it. Suing on an assigned debt is not contrary to public policy even if the assignor retains an interest. (Comdex International Ltd. v. Bank of Zambia 2 (1998) QB 22

19. As a result of insertion of Section 529A of the Companies Act, 1956, a pari-passu charge, to the extent of the workmen's portion, is created on the security of every secured creditor when he opts to realize a security by standing outside winding-up. "Pari-passu" means "with equal steps, equally, without preference" (Jowitt's Dictionary, Vol. II, 1959 Edn., p. 1294). Black's Law Dictionary, 6th Edn., p. 1115 defines it as "By an equal progress;.... Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other." It is also defined as "With equal steps, that is to say, proceeding side by side at the same place" (Prem's Judicial Dictionary, Vol. III, 1964 Edn., p. 1217). The rights of the pari-passu charge-holders would run equally, temporally and potently, with the rights of the secured creditors. The official liquidator, as the representative of the workmen to enforce such pari-passu charge, would be in the position of a co-mortgagee, and have the right of representing the workmen equally with the rights of the secured creditors. Where there are co-mortgagees, one co-mortgagee cannot sell without the consent of the other co-mortgagees or institute any proceedings for sale of the mortgaged property without joining the other co-mortgagees either as plaintiffs or as defendants. The existence of the pari-passu charge-holder, being represented by the official liquidator, would necessarily bring in supervision of the Company Court as the official liquidator cannot act without directions from, and the supervision of, the Company Court. The statutory right to sell the property has to be exercised in tandem with the rights of the pari-passu charge in favour of the workmen created by the proviso to Section 529 of the Companies Act. Realization of the security can only be done by both the charge-holders joining and realising the security simultaneously. If a sale takes place, it can only be simultaneously for recovery of the claim of all pari-passu charge-holders, and the sale proceeds are required to be divided proportionately in the same proportion as their dues. International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.,

20. In the case on hand, the immovable property of the Company has been

brought to sale by this Court, and the secured creditors (CFIs) did not opt to realize their security by standing outside winding up proceedings. While the Official Liquidator, as a representative of the workmen, is in the position of a co-mortgagee, and the other co-mortgagees cannot sell the immovable property, (which is the subject matter of the security), without the consent of the Official Liquidator, it does not follow therefrom that the secured creditors cannot assign their rights in favour of a third party without the consent of the other co-mortgagees including the Official Liquidator. There is nothing in the deeds of assignment which necessitates the conclusion that the consent of the Official Liquidator has also to be obtained for assignment of the debt. The effect of assignment of a debt by a secured creditor in favour of the assignee is only that, to the extent of the debt owed by the Company to the assignor, the assignee steps into the shoes of the assignor and is entitled, along with the Official Liquidator and the other co-mortgagees, to a pari-passu charge on the security. If the charged property is sold the sale proceeds would be divided proportionately, in the same proportion as their dues, among all the charge holders. Consequent to the deeds of assignment being executed and registered in their favour, the assignee is entitled to exercise the right of subrogation. The foundation of the right of subrogation is the known equitable principle of reimbursement, embodied in Section 69 of the Contract Act, that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. But the Contract Act confers a personal right only whereas a right of subrogation involves an equitable charge on the property. When subrogation exists the previous encumbrance that is paid off is not at all extinguished but is kept alive and its benefit transferred to the person who has paid it off. *Hira Singh and Others Vs. Jai Singh and Others Dr. L.P. Prabhu v. Official Liquidator* (2008) 146 CC 157 . An assignee cannot recover more from the debtor than the assignor could have done had there been no assignment. (Chitty on Contracts 30th Edition - Para 19-074 Page 1361). Such assignment does not, in any manner, adversely affect the interests of the other secured creditors if any, or of the unsecured creditors and workmen, as the debts stand crystallized on a winding up order being passed. While a co-mortgagee may not be justified in selling the property without the consent of the Official Liquidator, as he is a representative of the workmen and holds pari-passu charge over the assets of the Company to the extent of the workmen dues, neither the provisions of the Companies Act nor the deeds of assignment prohibit the assignors from assigning the debt, due to them from the Company, to another (assignee). While the CFIs -assignors could have assigned the debt due to them from the Company to APIDC, (a State Government Public Sector Financial Institution), no statutory or contractual provision compelling them to do so has been brought to the notice of this Court. No statutory provision, which confers on the APIDC any right to claim that the debt should not have been assigned to the assignee, has also been brought to the notice of this Court. In the absence of any statutory or contractual provision conferring on the APIDC the right to have the debt, (due to the CFIs from the Company), assigned

in their favour, the contention that the debt due to the CFIs should be (Kerala High Court DB) assigned in favour of APIDC, on payment of Rs.90.00 lakhs by them to the CFIs, does not merit acceptance.

21. Section 31 of the Indian Contract Act, defines "contingent contract" to be a contract to do or not to do something if some event, collateral to such contract, does or does not happen. u/s 32, contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contracts become void.

22. The deeds of assignment of debt, in the case on hand are not contingent contracts. A debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in praesenti solvendum in future (Web v. stenton 6 (1988) 11 QB 518 Banchharam Majumdar v. Adyanath Bhattacharjee 7 (1909) ILR 36 Cal 936 (FB)] A liability depending upon a contingency is not a debt in praesenti or in futuro till the contingency has happened. But if there is a debt, the fact that the amount is to be ascertained does not make it any the less a "debt" if the liability is certain and what remains is only the quantification of the amount. (Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, . The meaning of the expression "debt" may take colour from the provisions of the concerned Act. It may have different shades of meaning. But the following definition is unanimously accepted: "a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation". The statutory definition of "debt" in Section 434(1)(a) of the Companies Act is a definite sum viz., exceeding Rs. 500. (Newfinds (India) v. Vorion Chemicals and Distilleries Ltd. (1976) 46 CC 87 (Madras High Court)). The debt, assigned under the deeds of assignment by the assignors-CFIs to the assignee, is a definite sum specified in the said deeds. The liability of the Company (now under liquidation) to pay the said sum is not contingent upon the happening or not happening of a collateral event, much less on consent being obtained from APIDC and the Official Liquidator.

23. While the submission of Sri S. Sriram Reddy. Learned Counsel for APIDC, that the CFIs had assigned the debt, due to them from the Company of nearly Rs. 20 crores, to the assignee for a paltry sum of Rs.90.00 lakhs cannot be brushed aside as without merit, the said question cannot be examined in these proceedings in the absence of necessary pleadings, in this regard, in the affidavits filed in support of these applications; the CFIs being arrayed as respondents; and necessary relief being sought by APIDC to have the deeds of assignment set aside on this ground. This question is, therefore, left open to be examined, if need be, in appropriate proceedings, if any, instituted in this regard later either by APIDC or by Andhra Bank.

II. Assuming, without admitting, that the rights under the Deeds of Assignment are conferred on them, the Assignee cannot even then be treated as a secured

creditor, in the place of the assignors, as a charge u/s 125 of the Companies Act has to be modified in terms of Section 135 thereof.

24. Sri S. Sriram Reddy, Learned Counsel for APIDC, would submit that Section 125 would apply even to the post-winding up period; an assignment amounts to a modification of the charge u/s 135, and the assignee is not automatically subrogated to the position of the assignor; even after a winding up order is passed, registration can be effected; as there was a change in the name of the charge holder, pursuant to execution of the deed of assignment, a modification of the charge should have been effected in accordance with Section 135 of the Act; the letter issued by the Department of Company Affairs of the Government of India dated 12.08.1960 would show that an assignment amounts to a modification of a charge as contemplated u/s 135; Section 135 stipulates the same procedure for modification of a charge as is prescribed for registration of the charge u/s 125 of the Act; Section 125 requires a charge to be registered within thirty days from the date on which the document is executed; only if the delay is condoned, can the charge be registered either by the Registrar or the Company Law Board; accepting the contention that Section 125 applies only to pre-winding up proceedings would mean that, since the list of creditors stands crystallised as on the date of the winding up order, the assignee cannot be treated as a creditor much less a secured creditor thereafter; though the deeds of assignment were executed in the years 2006-2007 by the assignors, the assignee has not taken any steps, for more than a year thereafter, for registering the charge before the Registrar of Companies (ROC); they had merely addressed a letter dated 03.04.2008 to the Official Liquidator requesting him to file the necessary amendments for incorporation of their name in the place of the assignors; even if the charge is now to be registered the rights of the workmen and the unsecured creditors, which got crystallised on an order of winding up being passed, would remain unaffected by such registration; registration of the charge, if effected after winding up, would take effect only from the date of such registration; the crystallised rights of the unsecured creditors would entitle them to a particular portion of the assets of the company; until the entire body of creditors, as also the shareholders, recover their dues, the assignee would not be able to enforce its charge and effect recoveries; the assignee cannot be treated as a creditor much less a secured creditor; it is the duty of the company court to ensure that the dues of the creditors, as on the date of winding up, are recovered to the maximum extent; consent being sought and obtained would enable the company court to ensure that the benefit generated is not taken away by a third party, but is conferred on the other creditors; and this construction would be in furtherance of the intendment of the provisions of the Companies Act which is to ensure payment of the debt of the creditors, as existing on the date of winding up, to the maximum extent possible.

25. On the other hand Sri S. Ravi, Learned Senior Counsel, would submit that Sections 125 and 135 of the Companies Act 1956 stipulate that the company is responsible for creation of the charge; the document which created the charge

contains the signature of both the parties i.e., the company and the charge holder; Sections 125 and 135 are applicable only when the company subsists; subsequent to an order of winding up, it is the Official Liquidator who administers the affairs of the company; a company, which is being wound up, cannot execute a document; the object of Sections 125 and 135 is to alert a prospective creditor to know the commitment and the status of a company's assets; on liquidation the Registrar of Companies notifies the winding up order; thereafter no application under Sections 125 and 135 can be filed; in an assignment there is neither enlargement of the claims of the creditors nor is there any further dent on the company's assets; it is merely a case of subrogation, and neither the creditors nor the Official Liquidator are adversely affected thereby; the four words in Section 135 namely "terms" "conditions" "extent" "operation" deal with one or the other facets of the charge which qualitatively affects the assets of the company or the body of creditors, and their interest therein; in case of substitution none of these factors are altered or modified; this Court, by its order dated 23.11.2010 in C.A. No.1346 of 2010, had already permitted the assignee to prefer their claim duly condoning the delay, and the said order has not been subjected to challenge; assignment of debt by the CFIs would not result in APIDC losing its existing rights over the immovable properties of the Company; APIDC cannot claim to be a secured creditor; however, for the purpose of this application, the assignee has no objection if APIDC is recognized as a secured creditor subject to the orders of this Court; the rights of creditors are to be tested, inter se, as on the date of the winding up order as their rights stand frozen as on that date; a subsequent assignment does not destroy, diminish, reduce, alter or prejudice any creditor's rights as on the date of the winding up order; instead of the CFIs recovering the dues from the Company, the assignee would exercise those rights qua the assets of the company in a like manner, and for a like extent, just as the original secured creditors would have done; and having regard to the fact that the provisions of the Companies Act, 1956, except the winding up chapter, regulate the activity of the company during its existence, Sections 125 and 135 would not apply after a winding up order is passed.

26. Section 2(10) of the Companies Act, 1956 defines a "company" to be a company as defined in Section 3. u/s 3(1)(i), a company mean the Company formed and registered under the Companies Act or an existing company as defined in clause (ii) thereof. Part V of the Companies Act, 1956 relates to registration of charges. Section 124 thereunder stipulates that the expression "charge" would include a mortgage. u/s 100 of the Transfer of Property Act, where the immovable property of one person is, by the act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge. (International Coach Builders Ltd.3). A charge is a right in immovable property; a right to have the said property brought to sale to realize a sum of money to be paid to the charge. By a

charge, the title is not transferred. On the other hand, "if a charge, then it is an interest." The meaning of "charge", in the Shorter Oxford Dictionary, Wharton's Legal Lexicon, Osborn's Legal Dictionary and Jewel's Legal Dictionary, is that it is a liability to pay money laid upon any estate or upon an obligation imposed upon property or when applied to property it would be security for payment of a debt or the performance of an obligation. It is a formal security for payment of a debt or the performance of an obligation, and payment would be from out of realisation of the proceeds of the property. (*Calcutta National Bank Ltd. v. Rangoon Tea Co. Ltd.* 10 (1970) Vol. 40 CC 565)

27. The distinction between a charge and a mortgage is that while a mortgage, even a simple mortgage, involves the transfer of an interest in specific immovable property, a charge transfers no such interest. The entire interest remains in the owner. (*Royzuddi v. Kali Nath* (1906) ILR 33 Cal. 985; *Gobinda Chandrapal v. Dwarka Nathpal* (1906) ILR 35 Cal. 837; *Akhoy Kumar Banerjee v. Corpn of Calcutta* (1915) ILR 42 Cal. 625; *Ashworth v. Munn* (1880) 15 CD. 368 at p. 374; *Imperial Bank of India v. Bengal National Bank Limited* (1931) ILR 58 Cal. 136. If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage-money by sale of the mortgaged property, it should be held to be a mortgage. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge. (*Tancred v. Delagoa Bay and East Africa Railway Company*. 16 (1889) LR23 Q.B.D. 239; *Gobinda Chandra Pal v. Dwarka Nath Pal* (1908) ILR 35 Cal. 837. In the case of a charge as well as in the case of a mortgage two elements are common. First that there is a loan, and second that there is a security for the repayment of the loan. The only difference between a charge and a mortgage is that in the case of a mortgage there is transfer of interest, but in the case of a charge there is no transfer of interest. A mortgage is described as a *jus in rem* and a charge is described as a *jus ad rem*. (*Raja Sri Sri Shiva Prasad Singh Vs. Beni Madhab Chowdhury*,

28. u/s 125(1) of the Companies Act, subject to the provisions of Part V, every charge created by a company and being a charge to which Section 125 applies is, in so far as any security on the company's property or undertaking is conferred thereby, void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, is filed with the Registrar for registration in the manner required by the Act within 30 days after the date of its creation. Section 109 of the Indian Companies Act, 1913 corresponds to Section 125 of the Companies Act 1956. The opening words of Section 125 show that the Section contemplates registration of mortgages and charges created by the company. A charge which comes into existence otherwise, is not within its purview. Section 125 is applicable only to a charge created by a company by a contract, and not to a charge arising by operation of law. (*Praga Tools Ltd v. Official Liquidator, Bengal*

Engineering Co. (1984) 56 CC. 214; T.V. Sundaram Iyengar & Sons P. Ltd. v. Official Liquidator, High Court, Madras (1972) 42 CC 359; K. Saradambal v. Jagannathan and Brothers (Automobile Engineers & Motor Works (P) Ltd. (1972) 42 CC. 359 (Mad). Section 125 of the Companies Act, 1956 makes the security void "not as against everybody, not as against the company grantor, but as against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the Company." (Chandbali Steamer Service Co. Ltd., In re (1956) vol.26 109.

29. The effect of extension of time for registration, and of actual registration of a charge within the extended time under the proviso to Section 125(1), is that the mortgage is constituted a valid charge ab initio, from the date of its execution subject to conditions, if any, imposed by the order of extension. (Ram Narain v. Radha Kissen Motilal Chamaria (1930) L.R. 57 IndAp 76, 83-84; In re Ehrmann Bros. Limited. (1906) 2 Ch. 697, 707; Chandbali Steamer Service Co. Ltd., In re22). Courts accede to an application to register a mortgage, or a charge, out of time provided the application is made bonafide and in good faith. An application for registration of a charge, which is highly stale and which seriously prejudices the rights of others, must fail. (Reshma Estate Private Ltd., In re (1977) Vol. 47 447.

30. Once a winding-up order is passed, Sections 449 read with Section 451(1) of the Act require the liquidator to exercise control over the undertaking and the assets of the Company. The liquidator is statutorily obligated to realise the assets and to pay, from out of the sale-proceeds, its creditors. The secured creditors acquire, on an order of winding up being passed, the right to have the assets realised and distributed among them pari-passu. No new rights can thereafter be created, and no uncompleted rights can be completed, for doing so would be contrary to the creditors' right to have the proceeds of the assets distributed among them pari-passu. The Court cannot complete their rights which are still incomplete, and thus set up certain creditors as secured creditors against the rest of the unsecured creditors. Such an order cannot be passed as it would be contrary to, and in breach of, the right of distribution pari-passu of the joint body of secured creditors. The status of creditors which can be recognised is that which existed on the date of the winding-up order, and no priority can be claimed by a subsequent charge - holder over the rest of the unsecured creditors. J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, Upon a winding up, the rights of the whole body of the company's creditors intervene and the position of the Liquidator, and through him of all the general creditors of the company, would be prejudiced if the time for registration were unconditionally extended. (Dinshaw and Co. Ltd., In re27). Where a winding-up has intervened, extension cannot be allowed so as to prejudice the creditors of the Company. (In re Ehrmann Brothers, Limited (1906) 2 Ch. 697, 707; Dinshaw and Co. Ltd., In re (1936) vol. 6 CC 434.

31. The Court has the discretion and may refuse to grant relief u/s 125 of the Companies Act on the ground that the rights of unsecured creditors have crystallized by the winding up order. The position is somewhat different where no winding up order has been made, and a winding up petition is pending. Before the winding up order is made, the rights of the unsecured creditors are not crystallized, but on the making of such an order their rights will attach and commence as from the date of presentation of the petition. During the pendency of the winding up petition their rights are inchoate, and are in suspense. (Palmer's Company Precedents, 16th Edition, Vo. II 418-19; In re The AIR Transport Ltd. (1955) 25 CC 473.

32. Upon the commencement of the winding up, an immediate duty is cast upon the liquidator to collect the assets and distribute them among the creditors then existing. The right acquired by the general body of creditors, under an order for winding up of the company, is clearly an accrued right acquired in respect of all the assets of the company. After an order for winding has been passed, and a liquidator has been appointed, the applicant can neither enforce the unregistered charge against the liquidator nor does he acquire any priority over any creditor of the company. (Chandbali Steamer Service Co. Ltd., In re²²; Buckley's Companies Act (12th edition) at page 238). As a charge registered with the Registrar of Companies, after a winding up order has been passed, cannot be enforced against the liquidator, it is incongruous that Section 125/135 would require a charge to be registered/modified at the behest of the official liquidator.

33. Section 135 of the Act provides that whenever the terms or conditions or the extent or operation of any charge, registered under Part V, are modified it shall be the duty of the company to send to the Registrar the particulars of such modification, and the provisions of Part V as to registration of a charge shall apply to such modification of the charge. Black's Law Dictionary - 6th Edition defines the word "terms" as conditions, obligations, rights, price etc., as specified in contract or instrument". The word "conditions" is defined therein as "qualification or restriction or limitation modifying or destroying the original act with which it is connected; an event, fact or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite; a stipulation". The word "extent" is defined thereunder as "amount; scope; range; magnitude". The word "operation" is defined therein as "exertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity".

34. On the question whether a person interested in the registration of a charge (the creditor) may take steps for modification of the charge u/s 134, the Department of Company Affairs, Government of India clarified, in their circular letter No.12/90, dated 06.06.1990, that the particulars of the charge, u/s 125 read with Section 134 of the Act, could be filed either by the company or by the charge-holder; a harmonious construction of both the provisions, and more particularly the language of Section 135, suggested that it included modification

of a charge by an interested person as well; such modification should also be deemed to have been made by the company; further Section 21 of the General Clauses Act may also be applied in case of modification of a charge; and, in view of the aforesaid, the particulars for modification of the charge could be filed by the subject company, as also by the charge-holder.

35. As noted hereinabove, Section 135 of the Companies Act expressly stipulates that the provisions of Part V, as to registration of a charge, shall also apply to such modification of charge. As Section 125 applies only to a charge created by the company, Section 135 would also apply only to a charge modified by the company. In the case on hand, even by the date on which the deeds of assignment were executed by the CFIs in favour of the assignee, an order of winding up had already been passed and the assets of the company were under the custody and control of the Official Liquidator subject to the supervision of the Company Court. As the charge, created earlier in favour of the CFIs, has not been modified by the Company, Section 135 of the Companies Act has no application.

36. The document, creating a charge over the subject lands and the factory building constructed thereupon, is signed by both the parties thereto i.e., the company and the charge holder (CFIs -assignors). By the deeds of assignment, the assignors have assigned their debt to the assignee. The charge created hitherto by the Company, in favour of the CFIs -assignors, has neither been modified nor has a fresh charge been created by the Company in favour of the assignee. The deeds of assignment were executed much after the order of winding up was passed. u/s 445(3) of the Companies Act, an order of winding up is deemed to be a notice of discharge of the officers and employees of the company. Section 2(30) defines the word "officer" to include any Director, Manager or Secretary or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the Directors is or are accustomed to act. u/s 447, an order of winding up shall operate in favour of all the creditors, and of all the contributories of the company, as if it had been made on the joint petition of a creditor and of a contributory. u/s 456 (1), where a winding up order has been made, the liquidator shall take into his custody or under his control all the property, effects and actionable claims to which the company is or appears to be entitled. Under sub-section (2) thereof, all the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company. As all the Directors, officers and employees of the company stand discharged, and the Official Liquidator takes into his custody all the assets and properties of the Company, consequent on an order of winding up being passed, the Company cannot thereafter create a charge of its assets in favour of a creditor. A company, an artificial person, acts only through its Board of Directors, officers and employees and, since all of them stand discharged on a winding up order being passed, the company cannot create a charge, or modify an existing charge, after an order of winding up is passed.

37. Further, on an order of winding up being passed, the rights of the creditors of the Company stand crystallized. If Section 125 and 135 are construed as enabling a charge created or modified after a winding up order is passed to be registered, it may well result in a charge being registered in favour of an existing unsecured creditor thereby adversely affecting the rights of the body of creditors. While a charge created by a company as a going concern for registration of which an application is filed before the Registrar either by the Company or by its creditor, (after a petition for winding up of the company has been presented in Court but before a winding up order is passed), may, for just and valid reasons, be registered after a winding up order is passed on the delay in seeking registration being condoned, a charge created earlier cannot be modified by the company after a winding up order is passed as it is the Official liquidator who is in control and custody of the assets of the Company thereafter. Section 125 and 135 of the Companies Act would, therefore, apply only to a charge created/modified by a Company, and not by a Company under liquidation or by the liquidator of the Company. As Section 135 of the Companies Act applies only where the terms or conditions or extent or operation of any charge is modified, and as execution of a registered deed of assignment does not result in such a modification, Section 135 of the Act has no application thereto.

38. Section 130(1) of the Act requires the Registrar of Companies to keep a register containing particulars of all charges requiring registration. u/s 130(3) the Register, kept in pursuance of Section 130(1), shall be open to inspection of any person on payment of such fee as may be prescribed for each inspection. Section 132 obligates the Registrar to give a certificate under his hand of the registration of any charge. The object of Section 125, and the aforesaid provisions of Part V of the Companies Act, is to protect public interest, including that of a prospective creditor, as it can easily be ascertained whether or not a charge has been created on the assets of the company. u/s 449, on a winding up order being made in respect of a company, the Official Liquidator shall, by virtue of his office, become the liquidator of the Company. u/s 444, where the Court makes an order of winding up, the Court shall forthwith cause intimation thereof to be sent to the Official Liquidator and the Registrar. u/s 445(1), on the making of a winding up order, it shall be the duty of the petitioner in winding up proceedings, and of the Company, to file with the Registrar a certified copy of the order within thirty days from the date of making of the order. Section 445(2) obligates the Registrar of Companies, on the filing of a certified copy of the winding up order, to make a minute thereof in his books relating to the Company, and to notify in the Official Gazette that such an order has been made. Notification in the Official Gazette is public intimation of an order of winding up being passed. Since publication in the gazette is a notice to the public that a company is being wound up, and as custody of all the properties of the company are under the control of the Official Liquidator and are subject to the supervision of the Company Court, the possibility of a person lending money to a Company, which has been directed to be wound up, would not arise unlike in the case of a company which is a going

concern.

39. Even otherwise the deeds of assignment cannot be said to be a charge, as all that the CFIs have done thereby is to assign the debt due to them, (from the company), to the assignee. It is not as if the debt, for which the charge was created by the company, has been paid or satisfied in whole requiring the Registrar of Companies, u/s 140 of the Companies Act, to enter a memorandum of satisfaction in the Register of charges. As no proceedings were initiated u/s 138, or action taken u/s 139 and 140, the charge hitherto registered in favour of the CFIs continues to remain in force even after an order of winding up is passed. The debt payable by the Company to the CFIs remains due, and the only effect of assignment of the said debt, by the CFIs to the assignee, is that the assignee would step into the shoes of the assignor, and be entitled to claim the said debt.

40. On the question whether transfer or assignment of his rights by the charge-holder would amount to modification of a charge within the meaning of Section 135 of the Companies Act requiring filing of a return by the Company before the Registrar of Companies, the Department of Company Affairs, Government of India, in their circular letter No.8/50(135))/60-PR dated 12.08.1960, clarified that, whenever a charge is assigned in favour of another person, the assignee becomes the de-jure charge-holder; such a charge would, therefore, amount to a modification of the charge requiring registration u/s 135; this conclusion was supported by the accepted practice of making the names of the parties in a contract as a relevant term of the contract; moreover, u/s 130, one of the particulars to be entered by the Registrar in the Register of charges (Form No. 13) is about the persons entitled to the charge; hence, if the particulars regarding the assignee of the charge are not duly entered by the Registrar in the Register of charges on the transfer of rights by the original charge-holder, the creditors or shareholders, inspecting such register, would not be able to know who the present charge-holders were; and registration of this modification of charge should, therefore, be effected by the company concerned in Form No. 14 on payment of the prescribed filing fee.

41. That a charge can only be registered if it is created by the company was not noticed in the aforesaid circular. While holding that Section 135 stipulates the same procedure for modification of a charge as is prescribed for registration of the charge u/s 125 of the Act, the Department of Company Affairs failed to notice that assignment of a debt by a secured creditor in favour of a third party does not involve the company at all and, consequently, assignment of such a debt cannot be said to be a modification of a charge requiring registration u/s 135 of the Act. The construction placed on Section 135 of the Companies Act by the Department of Company Affairs, Government of India is not binding on this Court more so, as the Department of Company Affairs has itself, in its subsequent circular letter dated 7.5.1980, clarified that Section 125 of the Companies Act applies only to a charge created by a company, the expression

"created" shows that only charges founded on contracts are intended to be covered and, therefore, a charge created by a liquidator of a company is not registrable under Sections 125 and 134 of the Companies Act.

42. In any event, even if persons who dealt with the statute have understood its provisions in another sense, such mistaken construction of the statute does not bind the court so as to prevent it from giving it its true construction *National and Grindlays Bank Ltd. Vs. The Municipal Corporation of Greater, Bombay*, ; *M/s. Punjab Traders and others Vs. State of Punjab Traders and others*, . Reliance placed by Sri S. Sriram Reddy, Learned Counsel for APIDC, on the letter of the Department of Company Affairs dated 12.8.1960 is, therefore, of no avail.

43. The scope of Section 135, and that the said provision is applicable only in case a charge created earlier is modified by the company that too, if registration of such a modification is sought by the company prior to an order of winding up being passed, was not noticed in *Dr. L.P. Prabhu*⁵. Reliance placed by Sri S. Sriram Reddy, Learned Counsel for APIDC on *Dr. L.P. Prabhu*⁵ is, therefore, misplaced. Since modification of a charge has no application to an assignment of debt by a secured creditor in favour of a third party, after an order of winding up is passed, more so as the company is not a party to such an assignment, failure to register it u/s 135 of the Act is of no consequence. The submission of Sri S. Ravi, Learned Senior Counsel appearing on behalf of the assignee, that in an assignment there is no enlargement of the claims of the creditors nor is there any further dent on the company's assets; it is merely a case of subrogation and neither the creditors nor the official liquidator are adversely affected thereby; is well founded and merits acceptance.

44. The submission that the construction placed on behalf of APIDC, on Section 135 of the Companies Act, is in furtherance of the intendment of the provisions of the Companies Act, is only noted to be rejected. The duty of the Court is to give effect to the intention of the legislature, as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. (*Banarasi Devi Vs. Income Tax Officer, Calcutta*, *Attorney-General v. Carlton Bank* 32 (1899) 2 QB 158 . The primary rule of construction is that the intention of the Legislation must be found in the words used by the Legislature itself. AIR 2003 SC 2103 . The legislature is deemed to intend and mean what it says. The need for interpretation arises only when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the legislature. *I.T.C. Ltd. Vs. Commissioner of Central Excise, New Delhi* and *Another*, A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. *Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others*, ; *Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others*, A provision must be construed according to the natural meaning of the language used. The Court, in interpreting a statute, must therefore proceed without seeking to add words which are not to be found in the statute. *Southern Petrochemical Industries Co.*

Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, Union of India (UOI) Vs. Mohindra Supply Company, ; Bank of England v. Vagliano Bros 39 LR (1891) AC 107 ; Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, Smt. Seema Bansal Vs. Dr. Mayank Bansal, . Statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances, (Chertsey Urban District Council v Mixnam's Properties Ltd. (1964) 2 All ER 627 , and must be construed according to the rules of grammar. When the language is plain and unambiguous, and admits of only one meaning, no question of construction of a statute arises for the Act speaks for itself. The meaning must be collected from the expressed intention of the legislature. State of Uttar Pradesh Vs. Dr. Vijay Anand Maharaj, . In construing a statutory provision, the first and foremost rule of construction is the literal construction. All that the court has to see at the very outset is what does that provision say. If the provision is unambiguous and if, from that provision, the legislative intent is clear, the court need not call into aid other rules of construction of statutes. The other rules of construction are to be called into aid only when the legislative intention is not clear. Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others, Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.,

45. If the words used are capable of one construction only, it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the Statute must be interpreted in their plain grammatical meaning, Kanai Lal Sur Vs. Paramnidhi Sadhukhan, , and must be construed in its ordinary sense as it is well recognised that the language used speaks the mind and reveals the intention of the framers. The Commissioner of Income Tax, Madras Vs. T.V. Sundram Iyengar (P) Ltd., The language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect in the words used by the legislature, the court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result. (Raghunath Rai Bareja³⁵ Prakash Nath Khanna and Another Vs. Commissioner of Income Tax and Another, Delhi Fin. Corpn. and Another Vs. Rajiv Anand and Others, It would be impermissible to call in aid any external aid of construction to find out the hidden meaning. A statute should be construed according to the intention expressed in the Statute itself. Col. D.D. Joshi and Others Vs. Union of India (UOI) and Others, . The other rules of interpretation i.e., the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or, if read literally, would nullify the very object of the statute. Where the words of a statute are clear and unambiguous, recourse cannot be had to principles of interpretation other than the literal rule Swedish Match AB and Another Vs. Securities and Exchange Board, India and Another, Raghunath Rai Bareja).

46. Resort can be had to the legislative intent for the purpose of interpreting a provision of law, when the language employed by the legislature is doubtful or susceptible of meanings more than one. *Ombalika Das and Another Vs. Hulisa Shaw*, . Unless there is any ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances. *The Commissioner of Income Tax, Madhya Pradesh and Bhopal Vs. Sodra Devi*, . A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is ambiguous only if it contains a word or phrase which, in that particular context, is capable of having more than one meaning. (*Kirkness (Inspector of Taxes) v. John Hudson & Co., Ltd.* (1955) AC 696 (HL)). It is only when the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, would Courts prefer to adopt the latter construction. As Section 135 does not suffer from any ambiguity, there is no reason to resort to any secondary canon.

47. I find no merit in the submission that, as the assignors have walked away from the liquidation proceedings, the benefits generated thereby should enure to the benefit of the other creditors. The assignors have assigned the debt, due to them from the Company, to the assignee. They have not waived their right, to be paid the debt, in favour of the Company but have merely transferred the said debt to the assignee enabling the latter to recover the amount, due from the Company to the assignors, by proving for the debt before the Official Liquidator. The mere fact that Section 125 of the Companies Act applies only in case a charge is created by the Company, and that too prior to the commencement of winding up, does not mean that a secured creditor cannot assign their debt to another after a winding up order is passed. On assignment of a debt, the assignee steps into the shoes of the secured creditor - assignors, and is a secured creditor of the Company for a sum not exceeding the debt due from the Company to the assignors. Consequent on the deeds of assignment being registered under the Registration Act, the amounts due to the secured creditors (CFIs - assignors) now stands transferred to the assignee. Neither can the assignee be deprived of the benefits due to them under the registered deeds of assignment nor can the amounts hitherto due to the CFIs assignors be paid to the other creditors, including APIDC and Andhra Bank.

III. The intendment and scope of the provisions of the Companies Act relating to liquidation proceedings, when read as a whole, is to ensure that the existing body of creditors, as on the date of winding up, realise their dues to the maximum extent possible, and a duty is cast on the Company Court to achieve the said objective.

48. Sri S. Sriram Reddy, Learned Counsel, for APIDC, would submit that, on a winding up order being passed, it is incumbent on the Company Court, under whose supervision the liquidation proceedings are conducted, to realise the assets and sell them for the maximum value possible in order to clear the dues of the existing body of creditors; therefore any secured creditor, who wants to leave the winding up proceedings by accepting a nominal amount in full and final settlement, cannot do so without seeking the consent of the Official Liquidator/ the Company Court; if such consent is sought, it would enable the Official Liquidator to take appropriate action in the matter so that the benefit generated from such an action, on the part of the secured creditor, would percolate to the creditors down the line; and these provisions are incorporated to protect the interests of the existing body of creditors as on the date of the order of winding up. He would submit that, in the present case, the assignors had assigned the debt to the assignee without prior consent of the Official Liquidator; the transaction should be treated as a transaction u/s 47(3) and be redeemed; in case of default in payment, the secured creditor can only take recourse to any one of the options contemplated in Section 47; as assignment is not one of the options prescribed u/s 47, the assignors could not have assigned the debt; they had, by this process, circumvented the scheme of winding up; no right accrued in favour of the assignee under the deeds of assignment; as against their investment of Rs.90 lakhs, the assignee was seeking payment of Rs.2,38,27,590/- from the official liquidator which meant that they would make a huge profit of Rs. 1,48,27,590/-; if the assignment was invalidated, this sum of Rs.1.48 crores would enure to the benefit of the entire body of creditors; as the liquidation proceedings have generated Rs. 17.70 crores, the assignee would get much more; this Court should not permit a third party, unconnected with the winding up proceedings much less with the Company, to walk away with a large chunk of the sale proceeds leaving the genuine existing creditors high and dry as such an act would not be in consonance with the intendment of the provisions of the Companies Act; this Court should direct the Official Liquidator to pay the assignee Rs.90 lakhs, and distribute the balance sale consideration among the existing body of creditors; and the other creditors, including the unsecured creditors, whose names are found in the list of creditors, as on the date of the winding up, would get the benefit that is generated as a result of the assignors walking out of the liquidation proceedings.

49. On the other hand Sri S. Ravi, Learned Senior Counsel appearing on behalf of the assignee, would submit that the collective rights of the secured and unsecured creditors are frozen as on the date of winding up; there cannot be any variation thereafter; in the present case the position remains the same; the body of secured creditors have the same claim with respect to the quantum, interest, and the charge over the extent of their security; operation of their rights over the assets is not altered; in the place of the four secured creditors i.e., the CFIs, the assignee has been substituted, and the subrogation does not result in violation of the rights and liabilities of the remaining creditors who remain as

they are whether they are secured or unsecured creditors or workmen.

50. u/s 441(2) of the Companies Act, 1956, the winding up of a company by the Court shall be deemed to commence at the time of presentation of the petition for winding up. u/s 446(1), where a winding up order has been made or the Official Liquidator has been appointed, no suit or other legal proceeding shall be commenced or, if pending on the date of the winding up order, shall be proceeded with against the company except by leave of the Court, and subject to such terms as the Court may impose.

51. The order for winding up operates in favour of all the creditors of the company, and the creditors of an insolvent company are entitled to payment of a ratable dividend out of the assets of the company, for "the theory in bankruptcy is to stop all things at the date of bankruptcy, and to divide the wreck of the man's property as it stood at that time" (In re Savin (1872) L.R. 7 Ch. App. 760-764; Chandbali Steamer (1956) vol. 26 109). The unsecured creditors of the company acquire a right, under the winding up order, in respect of the properties of the company, such rights stand attached from the date of the presentation of the winding up petition. When the company goes into liquidation the creditors acquire rights against the property. An order for the winding up of a company operates in favour of all the creditors of the company. As a result of the order, the creditors are entitled to have all the assets of the company administered and applied for their benefit, and such right attaches and commences as from the date of the presentation of the petition for winding up. (In Re Ehrmann Bros²⁴; In re M.I.G. Trust Ltd. (1933) 1 Chy. 542; In re The AIR Transport Ltd ; Buckley on the Company Acts, 12th Edition, Page 238). On a winding-up order being made, any disposition of the company's property is void unless sanctioned by the court and the statutory scheme, for distribution of the company's assets among its creditors, comes into operation, and the scheme relates back to the commencement of the winding up with the result that the unsecured creditors are in the nature of cestuis que trust with beneficial interest extending to all the company's property under that scheme. At all times, after the presentation of the winding-up petition, an unsecured creditor has sufficient interest. (R v. Registrar of Companies (1986) 1 All.E.R. 105. A winding-up petition, when presented, creates a legitimate expectation in all unsecured creditors. As presentation of such a petition is for the benefit of all unsecured creditors, it creates a contingent right in favour of the unsecured creditors. Such rights or legitimate expectations cannot be defeated at the hands of a negligent secured creditor. (In re L. H. Charles & Company Ltd. 57 (1935) WN 15 (Ch. D); Reshma Estate Private Ltd., In).

52. The debt due to the creditors, both secured and unsecured, of the Company stands crystallized on an order of winding up being passed and relates back to the date on which a petition for winding up is presented. The amounts due to them cannot be varied thereafter. But for the assignment, (the deeds for which were executed and registered long after the order of winding up was passed),

the "CFIs, in whose favour a charge on the immovable properties was created by the Company, would have been entitled to recover the debt due to them from the Company as its secured creditors. Consequent upon assignment of the debt, the assignee has merely stepped into the shoes of the CFIs, and its claim would be limited to, and not extend beyond, the amount due from the Company to the secured creditors - CFIs. It is not in dispute that the amount claimed by the assignee is less than the amount due from the Company to the CFIs. What is, however, contended by Sri S. Sriram Reddy, Learned Counsel for APIDC, is that the assignee is merely entitled to be repaid Rs.90.00 lakhs which they had paid as consideration for assignment of the debt, and the CFIs must be deemed to have waived the amount due to them from the Company, which would result in the amounts due to these CFIs being made available for distribution among the other creditors including APIDC and Andhra Bank, and this would be in consonance with the intendment of the provisions of the Act. This contention has merely to be noted to be rejected. Even if APIDC is presumed to be a secured creditor, and to hold a pari-passu charge over the immovable properties of the Company along with the CFIs, they are merely entitled for distribution of the sale proceeds pari-passu with the CFIs, and the workmen represented by the Official Liquidator, and cannot claim that the amounts due from the Company to the secured creditors CFIs should, instead, be made available for payment of their dues in excess of what they are entitled to on a pari-passu distribution of the sale proceeds of the immovable properties (the underlying security of the charge).

53. u/s 47 (1) of the Provincial Insolvency Act, 1920, where a secured creditor realises his security he may prove for the balance due to him after deducting the net amount realised. Under sub-section (2), where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt. Under sub-section (3) where a secured creditor does not either realise or relinquish his security he shall, before being entitled to have his debt entered in the Schedule, state in his proof the particulars of his security and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed. Under sub-section (4) where a security is so valued the Court may, at any time before realisation, redeem it on payment to the creditor of the assessed value. Under sub-section (5) where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor. Under sub-section (6) where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

54. While the provisions of Section 47 of the Provincial Insolvency Act are made applicable even to companies in view of Section 529(1) of the Companies Act, and the said provision is intended to protect the interests of the entire body of creditors, Section 47 does not prohibit assignment of a debt by the assignor to

the assignee after an order of winding up has been passed. Section 47 has no application as the assignors (CFIs) who, prior to assignment of their debt, were the secured creditors of the Company have not sought to realise their security. As the property in question has already been brought to sale by this Court, it must be presumed that the CFIs (the secured creditors) have relinquished their security for the general benefit of the creditors and they would, therefore, have been entitled to prove for their entire debt in terms of Section 47(2). As the CFIs have merely assigned their debt to the assignee, the question of the interests of the general body of creditors, (whose respective debts stood crystallized on an order of winding up being passed), being adversely affected thereby does not arise.

55. Section 47(3) applies only when the property, which is the subject matter of the charge, has either been realized or has been relinquished by the secured creditor. In the present case the immovable property of the Company has been sold pursuant to an auction conducted by this Court; and Rs. 17.70 crores, realized on sale thereof, is lying with the Official Liquidator, and not with the secured creditors - CFIs. Section 47(3) has, therefore, no application. Section 47(4) applies only where a creditor has, in terms of Section 47(3), valued the security and seeks to receive dividend in respect of the balance due to him after deducting the value so assessed. In the case on hand the security, i.e., the immovable properties, have been sold by the Official Liquidator and not by the secured creditors i.e., the CFIs. Section 47(4) is a protective measure conferring power on a Court to redeem a security if it is satisfied that the value placed thereupon by the creditor is far less than its actual value, and thereby ensure that the creditor does not value the security at a price less than what its actual value is or claim more dividend than the balance due after deducting the actual value of the security. In the case on hand, neither have the CFIs valued the security nor have they made any claim for payment of dividend for the balance amount. They have merely assigned the debt, due to them from the Company, to the assignee on payment of a total consideration of Rs. 90.00 lakhs.

56. Section 47 merely deals with the manner in which a secured creditor can prove for his debt in insolvency proceedings, and the value to be placed on the security in case it has not been realized or relinquished by the secured creditor. What the secured creditor - CFIs herein have done is to assign the debt, due to them from the Company, to the assignee. Consequent thereto the assignee, having stepped into the shoes of the secured creditors, is entitled to put forth its claim as such before the Official Liquidator. In the absence of any statutory or contractual provision prohibiting such assignment this Court would not be justified in directing the Official Liquidator to pay Rs.90,00,000/- to the assignee, or to make available the sale proceeds of Rs. 17.70 crores to the other creditors including APIDC and Andhra Bank, after deducting Rs. 90,00,000/-. The claim of APIDC to be entitled, along with the other creditors of the company, to the entire sale proceeds minus Rs. 90,00,000/- is not based on any statutory or contractual provision. The quantum or extent of the amount, which the assignee is entitled

to, is not for this Court to examine in these proceedings, as the claim of the assignee is required to be adjudicated in the first instance by the Official Liquidator. The existing creditors can neither be said to have been left high and dry nor is there any basis in the contention that the assignee, a third party to these proceedings, would walk away with a large chunk of the sale proceeds. As noted hereinabove this Court would not be justified in placing a hypothetical construction on the provisions of the Act on the premise that such a hypothetical construction is more consistent with the alleged object and intendment of the provisions of the Act.

57. The secured creditors - CFIs would find place in the list of creditors, as on the date of the winding up order, as the secured creditors of the Company. As a result of the assignment, an assignee is merely entitled to make a claim for the amounts which stand crystallised in favour of the secured creditors - CFIs as on the date of the winding up order. The contention that creditors, other than the secured creditors - CFIs, should alone get the benefit of the proceeds realised on the sale of the immovable properties does not merit acceptance as the CFIs - assignors were the secured creditors of the Company on the date of the winding up order. Assignment of the debt by the CFIs - assignors does not mean that they have walked out of the liquidation proceedings waiving the debt due to them from the Company. All that has happened, consequent upon assignment of the debt, is that the assignee stands substituted in the place of the four CFIs - secured creditors. Subrogation would not result in violation of the rights and liabilities of the other creditors (secured, unsecured and the workmen) as the entitlement of the assignee is limited only to a pari-passu distribution of the assets to the extent of the debt due to the CFIs - secured creditors from the Company. There is no material on record to show, let alone establish, that the CFIs have waived the debt due to them from the Company. Assignment of the debt is merely a transfer by the secured creditors-CFIs of the said debt, (due to them from the Company), to the assignee. Assignment of debt does not amount to waiver. Crystallization of the debts, as on the date of the order of winding up, would not entitle APIDC to claim any amount more than what they are entitled to on a pari-passu distribution of the sale proceeds of the underlying security of the charge, (of which they may be the joint-charge holders), along with the CFIs and the workmen. As the CFIs are the secured creditors of the Company, (as the charge created in their favour by the Company has not been deleted from the Register maintained by the Registrar of Companies till date), the assignee is justified in contending that they are entitled to be treated as a secured creditor consequent upon the deeds of assignment being registered with the District Registrar, Medak.

IV. The action of the assignors, in accepting Rs.90 lakhs in full and final settlement of their dues, is in the nature of a One Time Settlement (OTS). Looking at the transaction from this angle when a creditor is granting a one time settlement, the benefit should go to the principal debtor i.e., the company under liquidation, so that the same percolates to the entire body of creditors.

58. Sri S. Sriram Reddy, Learned Counsel for APIDC, would submit that the action of the assignors, in accepting Rs.90 lakhs in full and final settlement of their dues, is in the nature of a one time settlement (OTS); the assignors ought to have made an offer, for settlement of the debt due to them, either to the Official Liquidator or to the APIDC as it is akin to a creditor proving for a lesser amount than what is actually due to him; in such an event, the balance amount would be available for distribution to the other creditors; as the Official Liquidator, by proceedings dated 03.08.2011, had observed that the assignee was entitled for substitution without taking into consideration the documents filed by APIDC, and had held that APIDC is not a secured creditor, they were constrained to file C.A. No.1007 of 2011; and APIDC should be treated as a secured creditor.

59. On the other hand Sri S. Ravi, Learned Senior Counsel, would submit that a one time settlement of dues is between a financial institution and its borrower; in the present case there is no compromise by the CFIs in favour of the borrower; on the other hand the assignment is a transaction between two creditors, one choosing to receive a specified sum and the other leaving it to the other to recover the debt from the borrower; the assignment of debt by the CFIs, in respect of a debt due to them from the Company, is not barred in law; there is no provision under any statute requiring the CFIs to obtain the consent of the Official Liquidator for assignment of the debt by them; the contentions urged to the contrary are not supported by any legal provision; the rights of CFIs, under the respective loan agreements, had accrued to the assignee which had stepped into the shoes of the CFIs; the Official Liquidator, by his report dated 1.7.2008 and after scrutinizing the deeds of assignments entered into between the CFIs and the assignee, had conveyed his no objection to treat them as a secured creditor in the place of the four CFIs; and the contention of APIDC, with respect to the value of the property, relates to the current valuation, and not its value at the time of assignment of the debt by the CFIs.

60. A one-time settlement is entered into between a financial institution (creditor) and its borrower (debtor) to enable the latter to repay the debt, due from them to the financial institution, in terms of the said settlement. In the present case, the assignee has been assigned the debt due from the Company to the CFIs. It is not even the case of APIDC that the assignee had borrowed money from the CFIs or that the CFIs had received Rs.90.00 lakhs as a one time settlement for the debt due to them from the assignee. Assignment of debt is merely a transfer, by a creditor to a third party, of the debt due to them from their debtor. It does not make the third party-assignee a debtor of the assignor. As power is conferred on the Official Liquidator to adjudicate the claims of creditors (secured, unsecured and workmen), it would not be appropriate for this Court, even before the claim of the assignee is finally adjudicated by the Official Liquidator, to examine the extent and the quantum of the debt which is required to be accepted, by the Official Liquidator, as due to the assignee.

61. It is evident from the documents placed before this Court that, in the meeting held between the CFIs - secured creditors and APIDC on 12.3.1984, it was decided to convert Rs.8.5 lakhs due from the Company to APIDC as a secured term loan. The letters of the CFIs dated 20.3.1985 and 17.4.1985 show that they had conceded a pari-passu charge in favour of APIDC thereby extending the joint equitable mortgage, over the immovable properties of the Company, in their favour along with the CFIs. The Company had, vide letter dated 2.4.1986, informed APIDC that it had created a charge for the term loan of Rs.8.50 lakhs in their favour with the Registrar of Companies, and had enclosed a cash receipt issued by the Registrar of Companies as evidence of Form No.8 being filed. It is no doubt true that the Registrar of Companies had, vide letter dated 12.6.2008, informed that, from the available records, it appeared as if Form No.8 had not been filed, and it was difficult after a lapse of 25 years to confirm whether Form No.8 was filed or not, that too in the absence of the original receipt being made available. All that the Registrar of Companies has expressed is his inability to confirm filing of Form No.8 in view of the long lapse of time of more than two and half decades. This, by itself, does not necessitate the conclusion that Form No.8 was not filed. It is true that the photostat copy of the cash receipt, said to have been issued by the office of the ROC, shows the date as 27.03.1983 which, according to the assignee and the Official Liquidator, casts a cloud on the genuineness of the receipt. In this context it is necessary to note that C.A. No. 1871 of 2009 was filed by APIDC seeking a direction to the Registrar of Companies to furnish a certified copy of Form-8 pertaining to the cash receipt in question; the purpose for which the said cash receipt had been issued; and the head of account to which the amount collected by them under the cash receipt had been credited. This Court, by order dated 05.11.2009, ordered the application and directed the Registrar of Companies to furnish the information sought for by APIDC within a period of four weeks. Subsequently the Registrar of Companies, vide letter 11.5.2010, informed APIDC that their dues of Rs.8.5 lakhs was shown as a secured loan in the Balance Sheet of the Company as at 30.6.1986. The evidence aforementioned, coupled with the fact that the Registrar of Companies merely performs an administrative act in registering the charge filed before him and as the assignee has no objection to APIDC also being treated as a secured creditor, would substantiate the contention of Sri S. Sriram Reddy, Learned Counsel for APIDC, that it is a secured creditor to the extent of the term loan for Rs.8.5 lakhs. Since their claim has to be examined by the Official Liquidator, I consider it appropriate to direct him to reexamine the claim of APIDC to be treated as a secured creditor in the light of the evidence referred to hereinabove, and the observations made in this order. Needless to state that, even if the request of APIDC is acceded to by the Official Liquidator, they shall only be entitled to a pari-passu charge, over the immoveable property of the Company, along with the assignee and the workmen. Their contention that the assignee ought to be treated as an unsecured creditor is devoid of merit and necessitates rejection.

V. Though the transactions in question are ostensibly an assignment, they are in reality a sale as the end result is the same.

62. Sri S. Sriram Reddy, learned counsel for APIDC, would submit that the transaction was akin to a sale; while, in the case of a sale, the purchaser would walk away with the property, in the case of an assignment the assignee would walk away with a large chunk of the sale consideration; if it is treated as a sale, it would have been hit by the provisions of Section 537(1)(b) of the Companies Act; in order to escape the rigour of Section 537(1)(b), the assignors had ingeniously labelled the transaction as an assignment; thereby what they could not have done directly was sought to be done indirectly; and it was causing damage to the existing body of creditors.

63. Sale of the property after commencement of winding up proceedings, save with the leave of the Court, is prohibited and is held to be void u/s 537(1)(b) of the Companies Act. Section 54 of the Transfer of Property Act defines "sale" as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Such transfer, in the case of tangible immovable property of a value of Rs.100/- and upwards, can be made only by way a registered instrument. On a registered sale deed being executed, ownership of the immovable property stands transferred from the vendor to the vendee. A charge, on the other hand, does not result in transfer of ownership of immovable property. It is only a formal security for payment of debt from out of the proceeds realized on the sale of the property. Unlike in the case of a "Sale", the title and ownership of the property is not transferred in the case of a "Charge".

64. Unlike a "sale" where the property stands transferred, an assignment of debt is merely a transfer of the debt due from the debtor to a creditor, and does not involve transfer of immovable property. By subrogation, the assignee steps into the shoes of the assignor and, if the assignor is a secured creditor, the assignee may, subject to compliance with statutory stipulations if any, be entitled to be treated as a secured creditor. It, however, would not make him the owner of the immovable property of the Company, and his right as a secured creditor is only to have the security realized and the sale proceeds utilized for repayment to him of the debt due to the assignor from the Company. As noted hereinabove, in the absence of any statutory or contractual prohibition, a creditor is entitled to assign his debt to another and, since no sale of immovable property is involved in an assignment of debt, Section 537(1)(b) of the Companies Act has no application.

VI. The assignment in favour of the assignee is fraudulent as the assignee and the Company belong to the same group of companies/entrepreneurs.

65. Sri S, Sriram Reddy, Learned Counsel for APIDC, would contend that the people behind the formation of the company i.e., its ex-promoters and directors had managed the assignors, and had got the assignment executed in favour of the assignee; the promoters/directors of the company could not have dealt with

the properties of the company as it is under winding up; they could not have got the assignment executed in their favour in the said capacity; by executing an assignment deed in favour of the assignee - a separate legal entity - the erstwhile promoters were walking away with a large chunk of the sale proceeds; and, if the corporate veil is lifted, the truth would come out.

66. On the other hand Sri S. Ravi, Learned Senior Counsel, would submit that no iota of evidence has been placed before this Court to justify the illusory contention of APIDC that the assignee and the Company had common Directors or shareholders; and such contentions were false and without factual foundation.

67. Except for a bare and bald allegation, (which in any event has been denied by the assignee), no material has been placed before this Court in support of the grave and serious allegation that persons behind the formation of the company i.e., the ex-promoters and directors had managed the assignors-CFIs, and had got the assignment executed in favour of the assignee or that the erstwhile promoters, through the assignee, were walking away with a large chunk of the sale proceeds. In the absence of any documentary evidence being placed before this Court in support of such a plea, let alone adequate proof being produced, I see no reason to conduct a roving enquiry in this regard or examine this contention any further. This contention also necessitates rejection.

VII. This Court has the jurisdiction and discretion, within the four corners of the Companies Act, to refuse to grant the relief sought for by the assignee which is to be treated as the secured creditor in the place of assignors and, thereby, invalidate the assignment made in favour of the assignee; direct payment of Rs.90 lakhs to them; and to further direct distribution of the balance sale consideration in favour of the existing body of creditors.

68. Sri S. Sriram Reddy, Learned Counsel for APIDC, would submit that this Court had the jurisdiction to refuse the relief sought for by the assignee who was seeking to be treated as a secured creditor in the place of the assignors; to invalidate the assignment made in favour of the assignee; direct payment of Rs.90 lakhs to the assignee; and further direct distribution of the balance sale consideration in favour of the existing body of creditors; and a duty was cast on the Company Court to ensure that the dues of all the existing creditors were cleared to the maximum extent possible. Learned Counsel would contend that, even if the Company Court is said to have limited jurisdiction, it is nonetheless a Court of record; as a Court of record it has the jurisdiction to refuse to validate the assignment made in favour of the assignee; the assignee was seeking to make a profit of 150% on their investment; while the transaction in question was a business proposition for the assignee, it affected the lives of workmen, the dues of unsecured creditors, and the dues of APIDC - a public corporation; balance of convenience and equity lay in favour of the entire body of creditors; and, as such, the assignment made in favour of the assignee should not be validated. Learned Counsel would submit that this Court has the inherent power to render substantial justice in cases where its judicial conscience is pricked, and

the present case was a fit one for exercise of power which inheres in every Court.

69. Courts in India are courts both of law and equity. Courts of equity exercise jurisdiction in personam. (Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., . The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction M.M. Thomas Vs. State of Kerala and Another, Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another, M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , and the jurisdiction to determine their own powers. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court. (M.V. Elisabeth AIR 1993 SC 1014; Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another, Halsbury's Laws of England, 4th edn., Vol. 10, para 713; M.M. Thomas (2003) 4 SCC 341; Md. Ataur Rahman Khan v. Md. Kamaluddin Ahmed (1987) 1 ALT 216.

70. The mere fact that there is no provision, parallel to Article 142 of the Constitution of India relating to the High Courts, can be no ground to think that they have not to do complete justice and, if moulding of relief would do complete justice between the parties, the same can be ordered. The power to do complete justice also inheres in every Court, not to speak of a Court of plenary jurisdiction like the High Court. Of course this power is not as wide as the Supreme Court has under Article 142. B.C. Chaturvedi Vs. Union of India and others,

. Rule 9 of the Companies (Court) Rules, 1959 saves the inherent powers of the Court to pass appropriate orders which may be necessary for the ends of justice or to prevent the abuse of the process of the court. (In Re: Khosla Fans (India) P. Ltd. 1983) 53 CC 858 (P&H). The public interest element is a predominant factor in the Companies Act itself. National Textile Workers" Union and Others Vs. P.R. Ramakrishnan and Others, .

71. It is, however, necessary to note that, u/s 10(1)(a) of the Companies Act, the High Court has jurisdiction in relation to the place at which the registered office of the company is situated except to the extent to which jurisdiction has been conferred on any District Court subordinate to the High Court in pursuance of sub-section (2). The jurisdiction which is conferred on the High Court is confined, in view of Section 10(1)(a), to the provisions of the Companies Act, 1956 and the Rules made thereunder, and not beyond. A Judge, in winding up, is no doubt the custodian of the interests of every class affected by the liquidation, and it is his duty to see to it that all assets of the company are brought into the winding up. (AIR 1936 322 (Privy Council) . It must not, however, be lost sight of that, in the absence of any statutory or contractual prohibition, the CFIs were

not precluded from assigning their debt to the assignee and as, by subrogation, the assignee steps into the shoes of the assignors - CFIs this Court cannot but treat the assignee as a secured creditor in the place of the assignors. This Court would not be justified in exercising its jurisdiction beyond what is specifically conferred on it under the Act and the Rules or to ignore the registered deeds of assignment. The contention that public interest would only be served in refusing to treat an assignee as a secured creditor, thereby enabling the existing creditors to receive amounts beyond what they are otherwise entitled to, is vague and is not based on any statutory or contractual provision. As to how public interest would be served by denying the assignee the amounts they are entitled to under the registered deeds of assignment, or in conferring on the other creditors a benefit which is far beyond their entitlement, is difficult to fathom. I see no reason, therefore, to invalidate the assignment made in favour of the assignee or to direct distribution, (after payment of Rs. 90.00 lakhs to the assignee), of the balance consideration in favour of the other creditors on grounds of equity which do not have support in law.

72. Neither APIDC nor Andhra Bank can be said to have suffered substantial injustice as what they are entitled to is only for payment of the debt due to them from the Company. While a charge was created in favour of both APIDC and Andhra Bank over the moveable assets of the Company, no charge was created by the Company in favour of Andhra Bank over its immoveable properties. Even if APIDC is held to be a secured creditor, holding charge over the immovable properties of the Company, it would only hold a pari-passu charge along with the CFIs and the workmen. APIDC can, therefore, only claim to be entitled for a pari-passu distribution of the sale proceeds, of the immovable property, along with assignee (who has stepped into the shoes of the secured creditors - CFIs) and the workmen represented by the Official Liquidator. Viewed from any angle, I see no reason to hold that the assignee is not entitled to be treated as a secured creditor, on their having stepped into the shoes of the assignors-Central Financial Institutions. C.A. No.524 of 2008 is allowed and the Official Liquidator shall treat the applicant therein as a secured creditor of the Company under liquidation in the place of ICICI, IFCI, IDBI and LIC. C.A. No.1007 of 2011 is disposed of directing the Official Liquidator, in the light of the observations made hereinabove, to re-examine the claim of APIDC to be treated as a secured creditor-holding pari-passu charge over the immovable properties of the company under liquidation along with the assignee and the workmen. Unlike APIDC, no material has been placed before this Court by Andhra Bank to show that either the Central Financial Institutions had agreed to treat them as a secured creditor holding joint charge of the immovable property of the company under liquidation, or that an application was hitherto made either by the company or by them for registration of the charge, over the immoveable property of the Company, in their favour. The assignee has also not conveyed its consent to treat Andhra Bank as a secured creditor. C.A. No. 306 of 2012 filed by Andhra Bank is, therefore, dismissed.