

(1997) 03 CAL CK 0022

In the Calcutta High Court

Case No : C.A. No. 477 of 1996 with C.P. No. 416 of 1992

West Bengal Financial Corporation

APPELLANT

Vs

Official Liquidator

RESPONDENT

Date of Decision : 13-03-1997

Acts Referred:

Companies Act, 1913 — Section 171, 232(1)

Companies Act, 1956 — Section 441(2), 443, 446, 446(1), 456(1)

State Financial Corporations Act, 1951 — Section 29, 30, 31, 46

Citation : AIR 1997 Cal 262

Hon'ble Judges : Altamas Kabir, J

Bench : Single Bench

Advocate : A.C. Kar, for the Appellant; Ashim Banerjee and Mrs. Mithua Sen, for the Respondent

Judgement

1. This application has been filed by the West Bengal Financial Corporation, hereinafter referred to as "the Corporation", u/s 446 of the Companies Act, 1956, inter alia, for the following reliefs:--

"a) Leave be given to West Bengal Financial Corporation, the applicant above-named u/s 446 of the Companies Act, 1956 to proceed with the proceedings initiated u/s 29 of the State Financial Corporations Act 1951 and the Official Liquidator and/or the Corporation be given leave to execute the conveyance in favour of Studio Print Art upon receipt of the balance consideration of Rs. 21,07,500/- from the highest offerer.

b) Leave be given to the applicant to proceed with the suit filed u/s 31 of the State Financial Corporations Act, being Original Suit No. 19 of 1994, pending before the Learned District Judge's Court of Barasat against the guarantors, who are ex-Director of the Company.

c) The Official Liquidator be directed to invite claim of the workmen and other secured creditors, if any, and to settle such claims so that the consideration received out of the sale proceeds by the applicant be distributed on pro rata

basis in accordance with the provisions contained in Sec, 529-A of the Companies Act, 1956;"

2. Appearing in support of the Judges Summons taken out on behalf of the Corporation, Mr. A. C. Kar, learned Advocate, submitted that the Corporation being a secured creditor coming in under the insolvency it had the option of staying outside the winding up proceedings and to realise its security and then prove for the balance. It also had the option of surrendering its security and prove for the whole debt or it could state in its proof the value at which he assessed the security and to prove for the balance after deducting the assessed value.

3. Mr. Kar submitted that prior to the Companies (Amendment) Act, 1985, whereby Section 529 of the Companies Act was amended by introducing the proviso to subsection (1) and also Section 529-A of the said Act, the law relating to insolvency was applicable in respect of the right of secured and unsecured creditors. Subsequent to the introduction of the proviso to sub-section (1) of Section 529 of the said Act, the security of every secured creditor was to be subject to a part passu charge in favour of the workmen to the extent of the workmen's portion therein and where a secured creditor instead of relinquishing his security and proving his debt, opts to realise his security, the liquidator would be entitled to represent the workmen and to enforce such charge. For the purposes of Section 529-A, it was also indicated that so much of the debt due to such secured creditor, as could not be realised by him by virtue of the abovementioned proviso or the amount of the workmen's portion in his security, whichever was less, would rank *pari passu* with the workmen's dues.

4. Mr. Kar pointed out that u/s 529-A it was provided that notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force, in the winding up of a company workmen's dues and debts due to secured creditors to the extent such debts ranked under clause (c) of the proviso. Sub section (1) of Section 529-A *pari passu* with such debts, would be paid in priority to all other debts. In the amended provisions it has also been provided that the debts payable under clauses (a) and (b) of sub-section (1) would be paid in full, unless the assets are insufficient to meet them, in which case they would abate in equal proportions.

5. Mr. Kar urged that the amendments introduced by the Companies (Amendment) Act, 1985, referred to above, did not affect the rights of a secured creditor to remain outside the winding up proceedings and to sell the pledged securities in order to realise its dues.

6. Mr. Kar submitted that in the present case notices both under Sections 29 and 30 of the State Financial Corporations Act, 1951, had been served on the Company demanding its outstanding dues and stating that possession would be taken over on or after 25th January, 1990.

7. Mr. Kar urged that while the order of winding up had been made on 30th June,

1993, the Corporation took possession of the factory premises on 23rd February, 1990, as would appear from the minutes of the meeting held at the factory premises on that date, being Annexure "D" of the present application.

8. Mr Kar then submitted that, although, possession of the factory premises had been taken by the Corporation on that date, since the factory was running, no padlock was placed on the door of the factory premises in order to allow the management to continue normal production. Mr. Kar urged that in good faith the security and maintenance of the plants/equipment was entrusted to the management. Furthermore, the Company also paid a sum of Rs, 15,000/- to the Corporation on 29th March, 1990, but as no further payments were made, the Corporation published an advertisement in August, 1990, seeking offers from intending purchasers. Mr. Kar submitted that pursuant to such an advertisement several offers were received, but in the meantime the company paid a further sum of Rs. 25,000/- in September, 1990 and requested the Corporation to withdraw the notice given u/s 29 of the State Financial Corporations Act, 1951.

9. Mr. Kar urged that since the Company continued to commit defaults, the Corporation had the assets of the company valued by an approved valuer of this Court, and, ultimately, a fresh sale notice was published in June, 1993. Challenging the said publication, the company moved a writ application which was disposed of on 22nd June, 1993, with a direction to the company to pay the dues of the Corporation in instalments, as indicated in the order. It was stipulated that if such payments were made, the proposed sale would remain stayed. However, in the event of default, the stay would stand vacated.

10. Mr. Kar urged that in view of default committed by the company in making payments as per the leave granted by this Court, the Corporation held an open auction among the intending purchasers on 16th March, 1994, and the offer of Studio Print Art being the highest, was accepted and the purchaser was asked to deposit a sum of Rs. 7,02,500/- within 17th March, 1994 and to pay the balance amount within 14th April, 1994. Mr. Kar submitted that the purchaser has duly paid the said sum of Rs. 7,02,500/- within the stipulated period.

11. Mr. Kar then urged that, in the meantime, since the land which formed part of the assets had been mortgaged by pledging the title deeds, legal opinion was sought and the Corporation was advised that it should not hand over possession of the factory to any third party without filing a suit for foreclosure of the mortgage. Accordingly, a suit was filed u/s 31 of the State Financial Corporations Act before the learned District Court at Barasat, which Mr. Kar submitted was till pending.

12. Mr. Kar contended that, although, the order of winding up intervened on 30th June, 1993, it had not take away the right of the Corporation to continue with the proceedings initiated u/s 29 of the aforesaid Act and necessary directions should, accordingly, be given in that regard.

13. In support of his aforesaid submissions, Mr. Kar firstly referred to a decision

of the Supreme Court in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, , wherein it was, inter alia, observed that the secured creditor is outside the winding up and he can realise his security without the intervention of the Court by effecting sale of the mortgaged properties by private treaty or by public auction. It is only when the intervention of the Court is sought, either by putting in force any attachment, distress or execution within the meaning of Section 232(1) of the Companies Act, 1913, or proceeding with or commencing a suit or other legal proceedings against the company within the meaning of Section 171, that leave of the Court is necessary and if no such leave is obtained the remedy cannot be availed of by the secured creditor.

14. Mr. Kar submitted that, although, the matter had been decided under the relevant provisions of the Companies Act, 1913, the position remained unaltered under the Companies Act, 1956, under its corresponding sections. Mr. Kar urged that, in any event, the principles of insolvency were applicable both under the provisions of the old Act and the corresponding provisions of the new Act and the only difference was with regard to the subsequently amended provisions of Section 529 and the introduction of Sec. 529-A in the latter Act of 1956, which did not contemplate sale, but the manner of distribution of the assets of the company in liquidation.

15. Mr. Kar then urged that notwithstanding the amendments effected in Section 529 and the introduction of Section 529-A in the Companies Act, the view expressed in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, was reiterated by the Supreme Court in the case of *Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others*, .

16. Mr. Kar submitted that since the possession of the Company had been taken over by the Corporation before the winding up order had been made and the sale process had also been commenced and the offer of the highest bidder had been accepted and earnest money had been paid, the Corporation which had chosen to stay out of the winding up process, had the right to continue with the sale subject to such terms as may be imposed in view of the proviso to sub-section (1) of Section 529 and Section 529-A of the Companies Act.

17. In this connection, Mr. Kar also referred to a Bench decision of the Karnataka High Court in the case of *International Coach Builders Ltd. (in Liquidation) v. Karnataka State Financial Corporation*, reported in (1994) 81 Comp Cas 19, wherein it was held that the permission granted to the Karnataka State Financial Corporation, a secured creditor of the company (in liquidation), to sell the company's assets which constituted security for repayment of loans advanced by it to the company and which it had already taken possession of before winding up was ordered, and to realise its dues subject to payment of the workmen's dues, by standing outside the winding up, was well in accordance with the provisions of Sections 529 and 529-A of the Companies Act read with Sections 29 and 46-B of the State Financial Corporations Act, 1951.

18. Mr. Kar also contended that, although, the suit u/s 31 of the State Financial Corporations Act had been commenced by the Corporation after the winding up order had been passed, post facto sanction could be granted to the Corporation to continue with the suit against the guarantors for realisation of any balance amount that may be due after sale of the assets of the company and distribution of the sale proceeds in the manner indicated in Sections 529 and 529-A of the Companies Act.

19. In this regard, Mr. Kar referred to the decision of the Supreme Court in *Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another*, wherein while considering the provisions of Section 171 of the Companies Act, 1913, which was replaced by Section 446 of the Companies Act, 1956, the Supreme Court was pleased to accept the view of this Court in *Suresh Chandra v. Bank of Calcutta* (1951) 21 Comp Cas 110 and held that the High Court has jurisdiction to grant leave to proceed with a suit or other proceedings against a company in liquidation, even if such leave was not obtained for its commencement. The Supreme Court observed further that the proceedings may at best be regarded as instituted on the date on which the leave was obtained from the High Court.

20. Mr. Kar also referred to a Bench decision of the Bombay High Court in *Maharashtra State Financial Corporation, Bombay Vs. Ballarpur Industries Limited, v. The Official Liquidator, High Court Bombay and Liquidator of M/s. Atrois Chemicals Private Limited*, wherein it was observed that the rights conferred on a Financial Corporation as a mortgagee u/s 29 of the State Financial Corporations Act are not wiped out when the company is in winding up. But the statutory right u/s 29 to sell the property has to be exercised with the rights of a pari passu charge-holder in whose favour a statutory charge is created under the proviso to subsection (1) of Section 529 of the Companies Act when the company is in liquidation.

21. Mr. Kar lastly referred to another decision of the Supreme Court in *Orissa State Financial Corporation and Another Vs. Hotel Jogendra*, wherein while considering the provisions of Sections 29 and 30 of the State Financial Corporations Act the Supreme Court observed in passing, while allowing the appeal, that the Corporation would be at liberty to take action against the respondent as required u/s 29 of the Act, irrespective of the orders passed by any Court. Of course, Mr. Kar very fairly submitted that such an observation was not relevant to the facts at issue in the matter before the Supreme Court and was in the nature of obiter.

22. Mr. Kar concluded his submissions on the note that the introduction of the proviso to sub-section (1) of Section 529 and Section 529-A in the Companies Act did not take away the rights of the Corporation to sell the pledged securities in exercise of the powers conferred u/s 29 of the 1951 Act, but such sale would be subject to the pari passu charge created by the proviso to sub-section (1) of Section 529 of the Companies Act in the proportion indicated in the explanation thereto.

23. Mr. Kar urged that in view of the legal position as explained both by the Supreme Court and various other High Courts in relation to the provisions of Sections 529, 529-A and 537 of the Companies Act, 1956, and Sections 29 and 31 of the State Financial Corporations Act, 1951, appropriate orders, as prayed for in the Judges' Summons, should be made.

24. Opposing the prayers made on behalf of the Corporation, Mr. Ashim Banerjee at the very outset submitted that having regard to the provisions of sub-section (2) of Section 456 of the Companies Act, after passing of the order of winding up, 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 through the Official Liquidator who is the agent of the Court for such purpose.

25. Mr. Banerjee submitted that in keeping with the above, the Assistant Official Liquidator wrote to the Director of the Corporation on 22nd July, 1993, informing him that pursuant to the order of winding up a representative had visited the registered office-cum-factory of the company and had been informed that the factory was under the possession of the Corporation. He was, therefore, asked to fix a date for handing over possession of the factory of the company in liquidation.

26. According to Mr. Banerjee, despite the said communication the Corporation did not make over possession of the registered office-cum-factory premises of the company to the Official Liquidator, although, the claim of the Corporation could extend only over the pledged goods and not the books of account and other statutory records as were required to be maintained by the company.

27. Mr. Banerjee submitted that in such circumstances, the Official Liquidator filed a letter for directions on 19th December, 1995, praying, inter alia, for a direction upon the Corporation to hand over the assets of the Company (in liquidation), including books and records, to the Official Liquidator, and for further leave to file a complaint against the ex-Directors for their failure to file statement of affairs as required u/s 454 of the Companies Act, and the same was disposed of on 31st May, 1996, on such terms.

28. Mr. Banerjee urged that having failed to comply with the aforesaid directions of the Court, the prayers made on behalf of the Corporation were liable to be rejected.

29. Mr. Banerjee then contended that from the legal opinion taken by the Corporation, which has been made Annexure "H" to the application under consideration, it would be evident that even on 13th April, 1994, the mortgagor was still in possession of the mortgaged property. Mr. Banerjee submitted that Mr. Kar's contention that possession of the factory premises and registered office of the company had been taken over on 23rd February, 1990, was completely incorrect. In the minutes prepared on that date, no description of the assets and properties of the company had been given and only a list of the plant and

machineries had been appended to the minutes.

30. Mr. Banerjee then contended that having regard to the provisions of sub-section (2) of Section 441 of the Companies Act, the winding up order which was passed on 30th June, 1993, must relate back to the date of presentation of the winding up petition, which was long before actual possession of the assets of the Company (in liquidation) was alleged to have been taken by the Corporation. The purported acceptance of the offer of Studio Print Art on the basis of the auction allegedly held on 16th March, 1994, was, accordingly, void in view of the provisions of Section 537 of the aforesaid Act.

31. Mr. Banerjee urged that having regard to the provisions of Section 456 of the Companies, Act, it is the Official Liquidator who has to conduct the sale and the Corporation could at best assist him in the matter. It was pointed out that while the Corporation was concerned only with its own dues, the Official Liquidator had to look after the interests not only of the Corporation but those of the secured and unsecured creditors as well and he would, therefore, be better motivated to obtain the best price possible.

32. Mr. Banerjee urged that while pronouncing judgment in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, the Hon"ble Supreme Court had no occasion to consider the proviso to sub-section (1) of Section 529 or Section 529-A of the Companies Act which were introduced by amendment three decades later. Mr, Banerjee submitted that with the altered legal position and in the interest of the workmen, whom the Official Liquidator had a statutory mandate to represent, leave, as prayed for by the Corporation, should be refused.

33. In support of his submissions, Mr. Banerjee firstly referred to a single Bench decision of the Gujarat High Court in the case of *Ananta Mills Ltd. v. City Deputy Collector, Ahmedabad*, reported in (1972) 42 Com Cas 476 : (1973 Tax LR 1713), wherein it was observed that on a winding up order being made u/s 443, it becomes the duty of the Official Liquidator u/s 456 to take into his custody or control all the property, effects and actionable claims to which the company is or appears to be entitled. Furthermore, in view of sub-section (2) of Section 456, alt the property of the company would be deemed to have vested in the Official Liquidator. The learned Judge went on further to observe that reading subsections (1) and (2) of Section 456 together, it would mean that the liquidator would keep in his actual custody the property of the Company and the custody of the liquidator would be the custody of the Court.

34. Mr. Banerjee then referred to another single Bench decision of the Bombay High Court in *Indian Textiles v. Gujarat State Financial Corporation*, reported in (1994) 81 Com Cas 599, where similar sentiments were expressed and it was held that having regard to the provisions of Section 456(2) of the Companies Act, the company Court is deemed to be in custody of all the assets of the company from the date of passing of the winding up order. Thereafter, the State Financial Corporation could invoke its powers under the State Financial

Corporations Act, 1951, if any, only with prior leave of the Company Court which directed winding up of the debtor-Company. It was also held that the State Financial Corporation would not be entitled to dispose of such assets by itself without obtaining the prior leave of the company Court once the company is directed to be wound up and the Official Liquidator is appointed. It was categorically observed that the Corporation would not be entitled to take action u/s 29 of the State Financial Corporations Act, 1951, or adopt proceedings before the District Court for sale of the securities as contemplated u/s 31 thereof, without obtaining prior leave of the Company Court winding up the company.

35. The learned Court also took note of the provisions of Section 529-A of the Companies Act and observed that in view of the insertion of the said section in the Companies Act, the workmen have a statutory *pari passu* charge in their favour for their dues along with secured creditors of the company and the Official Liquidator is enjoined by law to protect the interest of the workmen. The sale of the securities or the distributions of the sale proceeds or apportionment thereof cannot be left to the choice of the secured creditors. The Official Liquidator steps in to intervene when the secured creditors attempt to realise their securities without the intervention of the Company Court.

36. Reference was also made to a Bench decision of the Andhra Pradesh High Court in *A.P. State Financial Corpn. Vs. The Official Liquidator*, High Court of A.P., wherein it was held that the right of a secured creditor ceases to be an absolute right where there is a *pari passu* charge in respect of the workmen's dues on the assets and properties of the company in liquidation and while allowing the secured creditor to go ahead with realisation of his security, it would not be unlawful for the Court to impose conditions while granting permission to the secured creditor to realise its dues by staying outside the liquidation proceedings. It was observed that u/s 29 of the 1951 Act, the statutory right to sell the property has to be exercised with the right of the *pari passu* charge-holder in whose favour the statutory charge is created by the proviso to Section 529(1) of the Companies Act when the company is in liquidation, and, therefore, such a power could be exercised only with the concurrence of the Official Liquidator who was required to take the permission of the Court before giving such concurrence.

37. Mr. Banerjee next referred to the view of the Karnataka High Court in the case of *Mysore Surgical Cottons (P.) Ltd. v. Karnataka State Financial Corporation*, reported in (1988) 1 Com LJ 63, where the views of the Andhra Pradesh High Court are reflected.

38. Mr. Banerjee submitted that even in the *Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others*, the Supreme Court had observed that no strait-jacket formula could be applied in these matters and that the discretion to be exercised in granting leave u/s 446(1) of the Companies Act would depend on the facts and circumstances of each case.

39. In his usual fairness, Mr. Banerjee referred to the decision of the Rajasthan High Court in *Madhu Chemicals Centre v. Standard Woollens Ltd.*, reported in (1995) 3 Com LJ 358, and in *State Bank of India v. Spintex Tubes and Constructions Ltd.*, reported in (1995) 82 Com Cas 290, which supported the case of the Corporation, but he also pointed out that while recognising the right of a secured creditor to realise its security by sale of the properties of the company without requiring the permission of the Court, the claims of the workmen were also recognised to be *pari passu* with those of the secured creditor.

40. Mr. Banerjee also referred to another decision of the Rajasthan High Court in *Boolani Engineering Corporation v. Asup Synthetics and Chemicals Ltd.*, reported in (1995) 4 Com LJ 77, where a view was taken that the provisions of the State Financial Corporations Act, 1951, would have an overriding effect over the provisions of the Companies Act, 1956, as the former was a special statute.

41. Mr. Banerjee then referred to the view taken by the Orissa High Court in *Hrushikesh Panda v. Orissa State Financial Corporation*, reported in (1987) 61 Com Cas 448 : 1986 Tax LR 1727, which also seemed to support the case of the Corporation.

42. Referring to the Bench decisions of the Bombay High Court and the Andhra Pradesh High Court in the *Maharashtra State Financial Corporation, Bombay Vs. Ballarpur Industries Limited, v. The Official Liquidator, High Court Bombay and Liquidator of M/s. Atrois Chemicals Private Limited, and the A.P. State Financial Corpn. Vs. The Official Liquidator, High Court of A.P.*, cited on behalf of the Corporation, Mr. Banerjee submitted that the view of the Rajasthan High Court had been differed from therein and the *pari passu* charge created under the proviso to sub-section (1) of Section 529 of the Companies Act had been duly recognised as co-existing with the rights of a Financial Corporation u/s 29 of the State Financial Corporations Act, 1951.

43. Mr. Banerjee then submitted that having regard to the nature of the provisions of Sections 29 and 30 of the said Act, the Corporation could not simultaneously proceed for relief under both the Sections. While Section 29 empowered a Financial Corporation to act without the intervention of the Court, Section 31 was a power to be exercised with the intervention of the Court. He relied on a decision of the Andhra Pradesh High Court in *Srinivasa Kandasari Sugars, Narasimhunipet Vs. Government of Andhra Pradesh and Others*, where it was held that having proceeded u/s 31 of the State Financial Corporations Act, 1951, and having thereafter withdrawn such proceeding, the Corporation was entitled to proceed afresh u/s 29 of the said Act.

44. Mr. Banerjee contended that the two reliefs contemplated under Sections 29 and 30 could not be proceeded with simultaneously and the leave prayed for u/s 446 was, therefore, misconceived and was liable to be rejected.

45. Mr. Banerjee lastly contended that by an order dated 31st May, 1996, passed

by the Company Court on a Letter for Directions filed by the Official Liquidator, the Corporation had been directed to hand over the assets of the Company (in liquidation), including books and records, to the Official Liquidator. Mr. Banerjee urged that the Corporation should be directed to comply with the said order, before any other directions could be given on the application under consideration.

46. The question that we are faced with in this case involving the apparent conflict between the provisions of Sections 29, 31 and 46-B of the State Financial Corporations Act, 1951, on the one hand, and Sections 456 and 537 of the Companies Act, 1956, read with Sections 529(1) and 529-A thereof on the other, is not exactly new and has come up for consideration before different High Courts and also the Supreme Court from time to time and there appears to be a divergence of views between the different High Courts over the matter. However, the views expressed by the Hon''ble Supreme Court in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, long before the proviso to sub-section (I) and Section 529-A were introduced into the Companies Act by the Amending Act of 1985, have been subsequently reiterated by the Supreme Court, after taking into consideration the amended provisions.

47. In *Ranganathan's* case, although, the Hon''ble Supreme Court was not called upon to consider the proviso to sub-section (1) of Section 529 and Section 529-A of the Companies Act, 1956, I do not see how that makes any difference to the fundamental question regarding the right of a secured creditor to stay outside the winding up proceeding and to realise his security and then prove for the balance. The introduction of the aforesaid provisions in the Companies Act in 1985, was with the intention of ensuring that the workmen were not denied some share of the fruits of their labour. A *pari passu* charge was, therefore, created in favour of the workmen who were placed in a preferential category along with secured creditors in the proportion indicated in the illustration to Section 529.

48. In order to give effect to and enforce such charge, the Official Liquidator was vested with the statutory duty of representing the workmen to realise their dues *pari passu* with the secured creditor who chose to realise his security instead of relinquishing the same and proving for his debt.

49. In such perspective, the principle explained in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, remains valid for our purpose, and the same has been duly reiterated and explained by the Hon''ble Supreme Court in the light of the amended provisions of Sections 529 and 529-A of the Companies Act, in the case of *Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others*, referred to and relied upon by both the parties.

50. The Division Bench of the Karnataka High Court has also explained the position with lucidity in the *International Coach Builders Ltd. case* (1994 (81) Com Cas 19) (supra) cited by Mr. Kar.

51. From the various other decisions cited, the broad principle which emerges is that a secured creditor coming in under the insolvency has the option of staying outside the winding up proceedings and to realise his security and then prove for the balance, but subject to the pari passu charge created in favour of the workmen.

52. In other words, in the facts of this case, the Corporation would have the right to proceed to realise its security u/s 29 and then to "prove for the balance u/s 31 of the State Financial Corporations Act, 1951, subject to the pari passu charge created in favour of the workmen under Sections 529 and 529-A of the Companies Act, 1956.

53. The aforesaid right appears at first glance to be circumscribed by the provisions of Section 537 of the Companies Act once a company is in the process of being wound up by or subject to the supervision of the Court, but the issue has already been settled by the Supreme Court in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, In the said case, the questions posed were almost identical to those raised in this case on facts which were also almost similar.

54. In *Ranganathan's* case the Court was considering the provisions of Sections 171 and 232 of the Companies Act, 1913, corresponding to Sections 446 and 537 of the Companies Act, 1956. In the said case, while a winding up order was passed on 20th January, 1954, an agreement for sale of the assets of the Company in liquidation was thereafter entered into by the Official Receiver with the respondent No. 3 on 16th July, 1954, for sale of the properties for a price of Rs. 4,01,658/-, of which half was paid at the time of signing of the agreement and the other half was to be paid out of the sale proceeds of the assets of the Company.

55. In such context, on a challenge being thrown to the sale on the ground that the same was void in view of the provisions of Section 232 of the 1913 Act, corresponding to Section 537 of the 1956 Act, the Hon"ble Supreme Court held that the sales referred to in Section 232 could have reference only to sales held through the intervention of Court and not to sales held by a secured creditor outside the winding up and without the intervention of the Court. The Hon"ble Supreme Court was also of the view that such a sale is valid and binding on all the parties concerned.

56. As indicated hereinbefore, the aforesaid view expressed in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, was subsequently cited with approval by the Hon"ble Supreme Court in the case of *Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others*, wherein it was observed as follows :--

"4. A combined reading of the aforesaid provisions leads to the following results:

(i) to (ii).....

(iii) Any sale held, even without the leave of the winding up Court pursuant to order of a Civil Court on it being approached by a secured creditor to realise its debts will not ipso facto be void, in view of the holding in Ranganathan's case that Section 537, dealing with the voidness of sale, operates when the sale is pursuant to attachment of company Court. This, however, would be the position where a company has not been wound up, but is in the process of being wound up.

57. While it is true that the Supreme Court did not have occasion to consider the provisions of Sections 529 and 529-A in deciding Ranganathan's case, it did consider the same in the Industrial Credit and Investment Corporation of India (Ltd.) case in observing that while the secured creditor is interested in realisation of his debt only, the Company Court looks after the interest of all the creditors, including the dues of the work-men which rank *pari passu* with debts due to secured creditors.

58. The view expressed by the Hon'ble Supreme Court in the abovementioned cases makes it clear that the provisions of Section 537 of the Companies Act will not operate as a bar to a secured creditor coming in under the insolvency in realising his security by staying outside the winding up proceedings, subject to the *pari passu* charge created under Sections 529 and 529-A of the Companies Act, once the assets of the Company (in liquidation) have been taken over by the secured creditor and have subsequently been sold. Of course, as also pointed out by the Supreme Court, each case has to be considered on its own merits and no strait-jacket formula can be evolved, and it has to be left to the discretion of the Court as to what order it chooses to pass in a particular set of circumstances, since in a conflict between a secured creditor and the liquidator, the rights of the liquidator must prevail.

59. In this case we are faced with a situation where prior to the passing of the winding up order, in exercise of its powers u/s 29 of the 1951, Act, the Corporation conducted sale of the assets of the Company (in liquidation) by public auction after publication of advertisement for such sale and accepted the highest offer made by Studio Art Print for Rs. 28.10 lakhs. It cannot be said such sale was conducted *sub rosa*. In keeping with the conditions of sale, the offerer also deposited a sum of Rs. 7,02,500/-towards earnest money with the Corporation. At this stage, the Corporation filed the application u/s 446 of the Companies Act, 1956, *inter alia*, for leave to continue with the proceedings initiated u/s 29 of the 1951 Act and for further leave to the Official Liquidator or the Corporation to execute a conveyance in favour of Studio Art Print on receipt of the balance consideration of Rs. 21,07,500/-, leave has also been sought for to continue with the suit filed u/s 31 of the 1951 Act, being Original Suit No. 19 of 1994, pending before the District Judge, Barasat.

60. Since the sale of the assets of the Company has already been conducted by the Corporation, I dispose of this application by granting leave to the Corporation to complete the sale in favour of the highest offerer. Studio Art Print, and to

execute and register a conveyance in its favour after receiving the balance consideration of Rs. 21,07,500/-, within a month from date. The said amount, together with the earnest money of Rupees 7,02,500/-, and the interest accrued thereupon, is to be deposited by the Corporation with the Official Liquidator immediately upon execution of the conveyance.

61. The Official Liquidator shall invite claims from the workmen and other secured creditors, if any, and to settle such claims and, thereafter, to disburse the consideration money from the sale in accordance with the provisions of Section 529-A of the Companies Act, 1956.

62. Leave is also given to the Corporation to continue with Original Suit No. 19 of 1994 filed by it before the District Judge, Barasat. against the guarantors, who are the ex-Directors of the Company.

63. The Corporation is also directed to forthwith hand over the other assets of the Company, if any, including books and records, to the Official Liquidator in compliance with the order passed by Shyamal Kumar Sen, J., on 31st May, 1996.

64. The costs of the Official Liquidator in contesting this application, assessed at 300 Gs., will come out of the sale proceeds to be deposited with the Official Liquidator.

65. All parties, including the Official Liquidator, to act on a signed copy of the operative part of this judgment on the usual undertaking.

66. Order accordingly.