

CASE NO.:  
Appeal (civil) 4055 of 1998

PETITIONER:  
RAJASTHAN FINANCIAL CORPN. & ANR.

RESPONDENT:  
THE OFFICIAL LIQUIDATOR & ANR.

DATE OF JUDGMENT: 05/10/2005

BENCH:  
S.N. VARIAVA, TARUN CHATTERJEE & P.K. BALASUBRAMANYAN

JUDGMENT:  
J U D G M E N T

P.K. BALASUBRAMANYAN, J.

1. Appellant No. 1, The Rajasthan Financial Corporation, is a corporation constituted under Section 3 of The State Financial Corporations Act, 1951 (hereinafter referred to as "the SFC Act"). Appellant No. 2, the Rajasthan State Industrial Development and Investment Corporation Limited, is a deemed financial institution by virtue of exercise of power by the Central Government under Section 46 of the SFC Act. The appellants are the secured creditors of M/s Vikas Woolen Mills Ltd. (hereinafter referred to as, "the company-in-liquidation"). By an order dated 14.6.1994, the company judge of the High Court of Bombay ordered the company-in-liquidation to be wound up. The Official Liquidator was directed to take charge of the assets of the company-in-liquidation. On 18.4.1995, the Official Liquidator applied for directions to the company court. He sought permission to get the property valued by a valuer from the panel of valuers of the Official Liquidator, and to sell the properties by public auction. He sought the issue of a direction to the appellants, the secured creditors, to advance Rs. 25,000/- each to the Official Liquidator to meet the expenses for selling the assets of the company-in-liquidation on condition that the amounts would be reimbursed to the appellants on priority basis from the sale proceeds. The information about the filing of this application was conveyed by the Official Liquidator to the appellants by communication dated 21.4.1995. Apparently, the appellants had no notice of the proceedings in liquidation and they, as secured creditors, now say that they want to stand outside the winding up. In their reply to the Official Liquidator, the appellants indicated that they proposed to pursue the remedies available to them under Section 29 of the SFC Act. The appellants had obtained a valuation of the properties of the company-in-liquidation and according to the valuers, the value of the assets came to Rs. 92,56,000/-. In addition to opposing the report of the Official Liquidator, the appellants also filed an application praying that as secured creditors standing outside the winding up, they may be permitted to realize the securities and apportion the net sale proceeds between them and the Bank of Baroda, another secured creditor, who was also entitled to payment pari passu with them. They undertook to pay over the dues of the workmen on the same being adjudicated by the Official Liquidator to the extent of the availability of the funds out of the net sale proceeds of the properties of the company, in accordance with Section 529-A of the Companies Act. The company court rejected the application of the appellants. The company court took the view that the right available under Section 29 of the SFC Act had to be exercised

consistently with the right of the workmen represented by the Official Liquidator who was a charge-holder and ranked pari passu with the secured creditors, even if they stood outside the winding up. The company court held that in view of a valuation report already available, it was not necessary to have a fresh valuation. The Court permitted the Rajasthan State Financial Corporation, Appellant No.1, to invite offers for sale of the properties and directed it to finalize the same in consultation with the Official Liquidator. It was directed that the reserve price would be fixed by the Company Judge on the report of the Official Liquidator. The sale proceeds were to be retained by the Official Liquidator until further orders. The Official Liquidator, in the meantime, was to invite the claims of the workmen and was to assess the extent of the claim of the workmen under Section 529 of the Companies Act. Challenging this order, the appellants filed an appeal before the Division Bench of the High Court of Bombay. The High Court dismissed the appeal preferring to follow the earlier decision of that Court in Maharashtra State Financial Corporation Vs. Official Liquidator [AIR 1993 Bombay 392]. It is feeling aggrieved by the dismissal of their appeal by the Division Bench, that the appellants have filed this appeal by special leave before this Court.

2. It has to be noticed that even though the appellants could have proceeded under Section 29 or under Section 31 of the SFC Act, neither of the appellants has chosen to actually invoke those provisions or to approach the concerned District Court under Section 31 of the SFC Act. In other words, no proceeding under the SFC Act has been set in motion by the appellants even now. In this situation, it is seen straightaway that Section 32 (10) of the SFC Act has application. The said sub-Section reads:-

"32(10). Where proceedings for liquidation in respect of an industrial concern have commenced before an application is made under sub-section (1) of section 32, nothing in this section shall be construed as giving to the Financial Corporation any preference over the other creditors of the industrial concern not conferred on it by any other law."

On the face of it, it is apparent that no right is acquired by the appellants or no right has accrued to them or can accrue to them under Section 32 of the Act, unless any such right is conferred on the appellants by any other law in force. There is no plea that other than the SFC Act, any other law confers any additional right on the appellants. A mere right to take advantage of an enactment without any act done towards availing of that right cannot be deemed a right accrued. [See Abbot Vs. Minister of Land (1895) AC 425]

3. On the facts of this case, the position is that proceedings in liquidation of the debtor company are going on and two secured creditors who could have had recourse to the SFC Act to proceed against its assets, but who did not, are standing outside the winding up and are claiming rights under the SFC Act by approaching the company court. The rights so claimed have to be considered in the light of Section 529-A of the Companies Act read with Section 529 of that Act.

4. When this appeal came up for hearing before two learned Judges, it was submitted that there was a conflict between the decisions in Allahabad Bank Versus Canara Bank and Anr. [(2000) 4 SCC 406] and in International Coach Builders Limited Vs. Karnataka State Financial Corporation [(2003) 10 SCC 482]. The two learned Judges taking note of this submission and taking note of the importance of the question of law involved, placed the matter before a larger bench. That is how the matter has come up before us.

5. Learned Senior Counsel appearing for the appellants submitted that the appellants had special rights under the SFC Act and since there was no notice to them of the proceedings in liquidation and they were not parties to the order of winding up, they were entitled to proceed with the enforcement of their rights under the SFC Act and the company court was not justified in not permitting the appellants to sell the securities on their own and in directing them to associate the Official Liquidator in the matter of sale and in the matter of disbursement of the proceeds among the creditors. Learned counsel submitted that Allahabad Bank Versus Canara Bank and Anr (supra) was an authority in support of the proposition that the SFC Act would prevail over the Companies Act, it being general law as against the special law protecting corporations, like the appellants, namely, the SFC Act. Learned counsel submitted that the decision in International Coach Builders Limited Vs. Karnataka State Financial Corporation (supra) has not adverted to the earlier decision and had not properly understood the effect of the provisions of the SFC Act. Section 46B of the SFC Act gave the provisions of that Act, overriding effect. The claim of the appellants that they are entitled to sell the properties independent of the Official Liquidator, therefore, deserves to be accepted. Learned counsel for the Official Liquidator, on the other hand, submitted that on the facts and in the circumstances of the case, the High Court was justified in directing the sale to be held under the supervision of the Official Liquidator and in directing the Official Liquidator to hold the sale proceeds until further orders from the company court and that the proceeds have to be distributed only in terms of Section 529-A of the Companies Act. Learned counsel further submitted that no interference was called for with the decision of the High Court.

6. There is no doubt that the appellants are financial corporations within the meaning of the SFC Act conferred with the right to proceed under that Act, to take over the management and possession of the assets of the debtor, here the company-in-liquidation, or to enforce their claims by resort to Section 31 of the SFC Act by approaching the concerned District Court. The appellants not having invoked the provisions of the SFC Act, stand only in the shoes of secured creditors entitled to enforce their security. A liquidation of the company, the debtor, has intervened and what are the consequences of the order for winding up is the question to be considered. Once winding up of a company is resorted to, Sections 529 and 529-A of the Companies Act get attracted. Section 528 provides for debts of all descriptions to be admitted to proof. Section 529 makes applicable the rules of insolvency in the winding up of insolvent companies. The rules with regard to debts provable, the valuation of annuities and future and contingent liabilities, and the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent apply. Section 529(1)(c) of the Act deals with the rights of creditors. The same reads :

"529(1)(c). the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

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

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

(b) any amount realized by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditor as could not be realized by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A"

7. The proviso above quoted and Section 529-A of the Act were inserted by Amendment Act 35 of 1985 with effect from 24.5.1985. Section 529-A also can be set out conveniently at this stage. It reads :

"529A. Overriding preferential payment. \026 Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company \026

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 pari passu with such dues,

shall be paid in priority to all other debts.

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

A combined reading of Section 529-A and 529 indicates that notwithstanding anything contained in any other law for the time being in force or in the Companies Act itself, there is a preferential payment provided for workmen's dues and debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to Section 529(1) pari passu with such dues. Therefore, when the assets of the company are sold and the proceeds realized, the debts by way of workmen's dues and that of the secured creditors have to be paid in full if the assets are sufficient to meet them and if they are not sufficient, in equal proportions.

8. In Karnataka State Financial Corporation Vs. Patil Dyes and Chemicals (P) Ltd. and ors. [(1991) 70 Comp. Cas. 38], the Karnataka High Court held that rights under Section 29(1) of the SFC Act were available to the corporation only when the company is in charge and control of its assets and not when the company has lost control over its assets by the intervention of the company court and the Official Liquidator. Section 29 of the SFC Act did not justify a contention that where the creditor is a financial corporation, the assets of the company-in-liquidation pursuant to the order of the company court are taken outside the purview of the jurisdiction of the company court. On a proper construction of Sections 529 and 529A of the Companies Act, the workmen's dues and the debts due to the secured creditors to the extent of clause (c) of sub-Section (1) of Section 529, should be worked out in the light of the illustration given under Section 529 and that could be ordered only by the company court in exercise of his powers under Section 446(2)(b) and (d) of the Companies Act.

9. In Kerala Financial Corporation Vs. Official Liquidator and anr. [(1991) 71 Comp. Cas. 324], the Kerala High Court held that Section 529A of the Act prevailed over Section 29 of the SFC Act in case of a conflict and since the workmen's dues which rank pari passu with the dues of the secured creditors will have to be paid from the proceeds of the assets of the company including the security given to the secured creditors, any dispute as to the apportionment of workmen's dues and the amount due to the financial corporation and other related questions could not be left to be decided by the financial corporation. Therefore, in the best interests of all concerned, the sale of the assets had to be conducted by the Official Liquidator under the supervision of the company court. It may be noted that in that case, the financial corporation had sought permission of the company court to initiate proceedings under Section 29 of the SFC Act.

10. In Maharashtra State Financial Corporation, Bombay Vs. The Official Liquidator [AIR 1993 BOMBAY 392], the Bombay High Court took the view that rights conferred on a financial corporation as a mortgagee under Section 29 of the SFC Act are not obliterated when the company is in winding up. The statutory right under Section 29 to sell the property, had to be exercised consistently with the rights of a pari passu chargeholder in whose favour a statutory charge is created by the proviso to Section 529 of the Companies Act when the company is in liquidation. Therefore, such a power can be exercised only with the concurrence of the Official Liquidator and the Official Liquidator is required to take the permission of the Court before giving such concurrence since he is an officer of the Court and is required to act under the directions of the Court while exercising his powers on behalf of the workers. The Court held that there was no inconsistency between the SFC Act and Section 529 read with Section 529A of the Companies Act and hence Section 46B of the SFC Act was not attracted.

11. In International Coach Builders Ltd. (In Liquidation) Vs. Karnataka State Financial Corporation [(1994) 81 Comp.Cas.19], a Division Bench of the Karnataka High Court held that the right of a secured creditor of a company-in-liquidation, there the Karnataka State Financial Corporation, to realize its security by taking possession of properties of the company subjected to security and selling them by standing outside the winding up, cannot be said even remotely to be affected by the amendment of Section 529 and the insertion of Section 529-A of the Companies Act, 1956 by Act 35 of 1985. It was held that the permission granted to the Karnataka State Financial Corporation, a secured creditor of the company-in-liquidation, to sell the assets of the company which constituted security for repayment of loans advanced by the Corporation to the Company and which the Corporation had already taken into possession before the winding up was ordered, and the permission to realize the dues of the Corporation subject to payment of the workmen's dues as undertaken by it, by standing outside the winding up, was well in accordance with the provisions of Section 529, as amended, and Section 529-A as inserted in the Companies Act, 1956, and Section 29 and Section 46B of the SFC Act.

12. In Gujarat State Financial Corporation Vs. Official Liquidator and ors. [(1996) 87 Comp. Cas. 658], the Gujarat High Court doubted the correctness of the decision of the Kerala High Court in Kerala Financial Corporation Vs. Official Liquidator and anr. (supra) and followed the decision of the Karnataka High Court in International Coach Builders Ltd. (In Liquidation) Vs. Karnataka State Financial Corporation (supra). The Court held that the right of the secured creditor to deal with his security and realize the same without intervention of the court, remains unaffected notwithstanding such vesting, or property coming in the custody of the company court. To the extent of the charge or mortgage, the property does not come to the court and is not available for distribution of dividends generally unless the mortgagee relinquishes it or the surplus, if any, comes to the

court. Enforcement of such right remains outside the insolvency proceedings or winding up proceedings. It was held that the power of recovery of loans by State Financial Corporations under Section 29 of the SFC Act was not in conflict with Section 529A of the Companies Act, 1956.

13. In Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and ors. [(1996) 4 SCC 165], while considering the question as to when should a company court grant leave to a secured creditor to proceed with his suit against the company after an order of winding up was made, and on what conditions the permission should be granted, this Court held that in the case of conflict in power between the Official Liquidator appointed by the company court and the Receiver appointed by the Civil Court in a suit filed by the secured creditor, the interest of the Official Liquidator should have precedence. The Court observed that the liquidator looks after the interests of a large segment of creditors along with that of workmen, whereas the Receiver appointed in a creditor's suit confines his concern to the interest of the particular secured creditor at whose instance, the Receiver had been appointed.

14. In Allahabad Bank Vs. Canara Bank & anr. (supra), the question of jurisdiction of the Debts Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, vis-à-vis the company court arose for decision. This Court held that even where a winding up petition is pending, or a winding up order has been passed against the debtor Company, the adjudication of liability and execution of the certificate in respect of debts payable to banks and financial institutions, are respectively within the exclusive jurisdiction of the Debts Recovery Tribunal and the Recovery Officer under that Act and in such a case, the company court's jurisdiction under Sections 442, 537 and 446 of the Companies Act stood ousted. Hence, no leave of the company court was necessary for initiating proceedings under the Recovery of Debts Act. Even the priorities among various creditors, could be decided only by the Debts Recovery Tribunal in accordance with Section 19(19) of the Recovery of Debts Act read with Section 529-A of the Companies Act and in no other manner. The Court took into account the fact that Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was a legislation subsequent in point of time to the introduction of Section 529A of the Companies Act by Act 35 of 1985 and it had overriding effect. But it noticed that by virtue of Section 19(19) of the Recovery of Debts Act, the priorities among various creditors had to be decided by the Recovery Tribunal only in terms of Section 529A of the Companies Act and Section 19(19) did not give priority to all secured creditors. Hence, it was necessary to identify the limited class of secured creditors who have priority over all others in accordance with Section 529-A of the Companies Act. The Court also held that the occasion for a claim by a secured creditor against the realization by other creditors of the debtor under Section 529A read with proviso (c) to Section 529(1) of the Companies Act could arise before the Debts Recovery Tribunal only if the concerned creditor had stood outside the winding up and realized amounts and if it is shown that out of the amounts privately realized by it, some portion had been rateably taken away by the liquidator under clauses (a) and (b) of the proviso to Section 529(1). The Court has not held that Section 529-A of the Companies Act will have no application in a case where a proceeding under the Recovery of Debts Act has been set in motion by a financial institution. The Court here was essentially dealing with the jurisdiction of the Debts Recovery Tribunal in the face of Sections 442, 537 and 466 of the Companies Act.

15. In A.P. State Financial Corporation Vs. Official Liquidator [(2000) 7 SCC 291], this Court held that the Company Judge, while permitting the financial Corporation to stay outside the liquidation proceedings, rightly imposed conditions to ensure that the

Corporation would : (i) discharge its liability due to workers under Section 529-A of the Companies Act, (ii) inform the Official Liquidator in advance about the proposed sale of properties of the indebted companies, and (iii) would obtain the Court's permission before finalizing the tenders. This Court specifically overruled the view taken by the High Court that it was not necessary for the Financial Corporations to seek permission of the company court to stay outside the winding-up proceedings. It was held that Sections 529(1) and 529-A of the Companies Act had overriding effect and the 1985 amendment being later in point of time, the non-obstante clause therein would prevail over the non-obstante clause contained in Section 46B of the SFC Act.

16. In International Coach Builders Limited Vs. Karnataka State Financial Corporation [(2003) 10 SCC 482], this Court considered the correctness of the views expressed by the Karnataka High Court and the Gujarat High Court. This Court held that a right is available to a financial corporation under Section 29 of the SFC Act against a debtor, if a company, only so long as there is no order of winding up. When the debtor is a company in winding up, the rights of financial corporations are affected by the provisions in Sections 529 and 529-A of the Companies Act. It was also held that the proviso to Section 529 of the Companies Act creates a "pari passu" charge in favour of the workmen to the extent of their dues and makes the liquidator the representative of the workmen to enforce such a charge. The decision of the Bombay High Court in Maharashtra State Financial Corpn. Vs. Ballarpur Industries Ltd. [AIR 1993 Bom 392] was approved. The reference to a larger bench was occasioned by the fact that the decision in Allahabad Bank Versus Canara Bank and Anr (supra) was not adverted to in this decision. This decision recognizes that, whether a creditor is standing outside the winding up or not, the distribution of the proceeds has to be in terms of Section 529 of the Companies Act read with Section 529A of that Act in a case where the debtor is a company-in-liquidation. As far as we can see, there is no conflict on the question of the applicability of Section 529A read with Section 529 of the Companies Act to cases where the debtor is a company and is in liquidation. The conflict, if any, is in the view that the Debts Recovery Tribunal could sell the properties of the Company in terms of the Recovery of Debts Act. This view was taken in Allahabad Bank Versus Canara Bank and Anr (supra) in view of Recovery of Debts Act being a subsequent legislation and being a special law would prevail over the general law, the Companies Act. This argument is not available as far as the SFC Act is concerned, since Section 529A was introduced by Act 35 of 1985 and the overriding provision therein would prevail over the SFC Act of 1951 as amended in 1956 and notwithstanding Section 46B of the SFC Act. As regards distribution of assets, there is no conflict. It seems to us that whether the assets are realized by a secured creditor even if it be by proceeding under the SFC Act or under the Recovery of Debts Act, the distribution of the assets could only be in terms of Section 529A of the Act and by recognizing the right of the liquidator to calculate the workmen's dues and collect it for distribution among them pari passu with the secured creditors. The Official Liquidator representing a ranked secured creditor working under the control of the company court cannot, therefore, be kept out of the process.

17. Thus, on the authorities what emerges is that once a winding up proceeding has commenced and the liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the financial institutions coming under the Recovery of Debts Act or of financial corporations coming under the SFC Act, can only be with the association of the Official Liquidator and under the supervision of the company court. The right of a financial institution or of the Recovery Tribunal or that of a financial corporation or the Court which has been approached under Section 31 of the SFC Act to sell the assets may not be taken

away, but the same stands restricted by the requirement of the Official Liquidator being associated with it, giving the company court the right to ensure that the distribution of the assets in terms of Section 529A of the Companies Act takes place. In the case on hand, admittedly, the appellants have not set in motion, any proceeding under the SFC Act. What we have is only a liquidation proceeding pending and the secured creditors, the financial corporations approaching the company court for permission to stand outside the winding up and to sell the properties of the company-in-liquidation. The company court has rightly directed that the sale be held in association with the Official Liquidator representing the workmen and that the proceeds will be held by the Official Liquidator until they are distributed in terms of Section 529A of the Companies Act under its supervision. The directions thus, made, clearly are consistent with the provisions of the relevant Acts and the views expressed by this Court in the decisions referred to above. In this situation, we find no reason to interfere with the decision of the High Court. We clarify that there is no inconsistency between the decisions in Allahabad Bank Versus Canara Bank and Anr (supra) and in International Coach Builders Limited Vs. Karnataka State Financial Corporation (supra) in respect of the applicability of Sections 529 and 529A of the Companies Act in the matter of distribution among the creditors. The right to sell under the SFC Act or under the Recovery of Debts Act by a creditor coming within those Acts and standing outside the winding up, is different from the distribution of the proceeds of the sale of the security and the distribution in a case where the debtor is a company in the process of being wound up, can only be in terms of Section 529-A read with Section 529 of the Companies Act. After all, the liquidator represents the entire body of creditors and also holds a right on behalf of the workers to have a distribution pari passu with the secured creditors and the duty for further distribution of the proceeds on the basis of the preferences contained in Section 530 of the Companies Act under the directions of the company court. In other words, the distribution of the sale proceeds under the direction of the company court is his responsibility. To ensure the proper working out of the scheme of distribution, it is necessary to associate the Official Liquidator with the process of sale so that he can ensure, in the light of the directions of the company court, that a proper price is fetched for the assets of the company in liquidation. It was in that context that the rights of the Official Liquidator were discussed in International Coach Builders Limited (supra). The Debt Recovery Tribunal and the District court entertaining an application under Section 31 of the SFC Act should issue notice to the liquidator and hear him before ordering a sale, as the representative of the creditors in general.

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

- i) A Debt Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.
- ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.
- iii) If a financial corporation acting under Section 29 of

the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the company court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529A and Section 529 of the Companies Act.

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

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

21. The appeal is thus disposed of affirming the directions issued by the company court, but with a modified direction for getting a fresh valuation of the properties as indicated in the earlier paragraph.

22. We make no order as to costs.