

Micronix India Vs. Disco Electronics Ltd.

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Court : Delhi

Decided On : Sep-13-1996

Reported in : [1999]96CompCas950(Delhi); 1996RLR487

Judge : J.K. Mehra, J.

Acts : State Financial Corporation Act, 1951 - Sections 29; [Companies Act, 1956](#) - Sections 529

Appeal No. : Civil Appeal No. 845 of 1992 and Civil Petition No. 60 of 1992

Appellant : Micronix India

Respondent : Disco Electronics Ltd.

Advocate for Pet/Ap. : Manoranjan,; B.N. Nayar,; V.N. Kalra,;

Judgement :

J.K. Mehra, J.

(1) In this case the Official Liquidator has challenged the sale of certain properties of the company in respect whereof Official Liquidator had been appointed as the Provisionalliquidator, purported to have been affected by Delhi Financial Corporation limited (hereinafter referred to as 'the DFC') in exercise of its powers under Section 29 of the State Financial Corporations Act.

(2) After the arguments, I was informed that similar controversy is pending decision by the Hon'ble Supreme Court and I should await the outcome thereof. Now, counsels have pointed out that the Hon'ble Supreme Court has since decided the matter in the case of Industrial Credit and Investment Corporation of India Ltd. v. M/s.Srinivas Agencies & Ors.. reported as 1996 (3) Supreme 400).Mr. Nayar, counsel for the Official Liquidator, concedes that the controversy before the Hon'ble Supreme Court was not identical with the questions arising in the present case as would 'appear from the discussion appearing hereinafter.

(3) Briefly stating the facts of the case are as under :-The Company 'Disco Electronics Ltd.' (hereinafter referred to as 'DISCO') had created a mortgage in favor of the Delhi Financial Corporation to secure loan facilities obtained by it on 20-1-1986. On 4/7-12-1990, the DFC on account of unsatisfactory operation and the defaults committed by the company recalled the loan.This notice was followed by another notice of 2 9/10/1991 threatening to take possession of the Unit at premises No. A-83, Okhla Industrial Area,Phase-11, New Delhi and the machinery installed atA-84 Okhla Industrial Area, Phase-11, New Delhi. After the Dfc had resumed possession under Section 29 of the State Financial Corporation Act, the DISCO approached the Dfc with the proposal that it should carry out the sale of the said property and in fact produced an intending purchaser namely M/s. Shivalik Traders for settling dues of the Corporation, but despite the Corporation having agreed to accommodate DISCO the said purchaser failed to honour its commitments asa consequence whereof possession of the said property No.A-83 Okhla Industrial Area, Phase li together with the machinery lying at A-84 Okhla Industrial Phase-11 was taken over by the Corporation on 23-2-1992. DISCO had undertaken to retain the possession for and on behalf of the DFC. In other words, Disco continued to be in possession, but only as custodian on behalf of the Dfc which means that Disco continued to hold the property though as agent of the Dfc and for and on its behalf. The said properties were advertised for sale by the Dfc on 4-6-1992 was conducted in the office of the Dfc on 22-6-1992 when the highest bid of Rs. 18 lakhs was received. the DFC called upon Disco to produce a higher bid if they wanted to do so. Thereafter, one Mr. Vinod Gupta made an offer of Rs. 20 lakhs. However, this bidder after some time withdrew his offer in view' of the DFC having received an offer of Rs. 28.5 lakh's on 23-9-1992 which offer was

accepted by the DFC.

(4) Canara Bank claimed to have a charge on the moveable lying stored at A-83 Okhla Industrial Area, the Dfc called upon the Canara Bank to lift the stock as it wanted to hand over the vacant possession of the premises to the successful bidder.

(5) While all this was going on, a petition for winding up of DISCO was filed on 3/03/1992 which was returned for removal of office objection and was refiled on 26/03/1992 i.e., before the sale of the property and it came up for orders on 27/03/1992. Even before passing of the order for admission, the Court had passed an order on 4-8-1992 (before the offer of impugned sale was received on 23-9-1992) restraining Disco from disposing of in any manner any of its assets or making any payment to any creditor till further orders. The winding up petition was admitted vide orders dated 29-9-1992. On the same day, the Official Liquidator attached to this Court was appointed as a Provisional Liquidator of the company with the direction to forth with take over the assets and records of the company. Thereafter, on 19/10/1992, there was a specific order of status-quo with regard to possession of property No. A-84 Okhla Industrial Area, Phase-11, New Delhi. Further, vide order dated 5/11/1992 the specific injunction with regard to possession of the said property and for removing any finished and semi finished goods, material, raw material etc. from the said premises has been passed.

(6) According to the Dfc, they had already issued final notice on 24-7-1992 before the admission of the winding up petition and appointment of the Provisional Liquidator and even the offer of the successful bidder had been received on 23-9-1992 which was also prior to the appointment of the Provisional Liquidator. This was, however, subsequent to the injunction order dated 4-8-1992. Counsel for the Dfc states that in fact, after admission of the winding up petition and appointment of the Provisional Liquidator, the Dfc proceeded to deliver only the possession to the successful bidder on 16-10-1992. As such the order of 19th October, 1992 had absolutely no effect on the prior act of handing over the possession. However, no Explanation has been made available for ignoring the prior injunction order passed by Court on 4-8-1992. It was also contended by Shri

Swatanter Kumar (as he then was) counsel for the Dfc that the action of the Dfc was under Section 29 of the State Financial Corporation Act and according to him, the provisions thereof would over-ride the provisions of the Companies Act by virtue of the provisions contained in Section 46B of the State Financial Corporations Act, which reads as under :-

"46B. Effect of Act on other laws.-The provisions of this Act and of any rules or orders made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law or the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern.'

HE had further submitted that the State Financial Corporations Act, is special law, vis-a-vis the Companies Act which is general law and, therefore, its provisions will prevail over Companies Act, 1956. He had also contended that once possession is taken over under Section 29 of the State Financial Corporation Act, the DFC is deemed to have acquired the same right to dispose of/sell the said property as the owner and that the owner is left with no right except the equity of redemption to redeem the property by satisfying the claim of the DFC. But no satisfactory answer was forthcoming to the question that if Disco by virtue of an injunction is unable to sell, could Dfc acquire rights superior to those of the owner to sell in disregard to the order of injunction.

(7) Mr. Nayar appearing for the Official Liquidator, has strongly challenged this position and has contended that once a company goes into liquidation or a Provisional Liquidator is appointed, the special provisions governing the rights of the parties subsequent to such liquidation or the provisional liquidation would prevail as special law and will not be deemed to be the general law and that such order would relate back to the date of presentation of the winding up petition in terms of the provisions of Sections 537 and 441(2) of the Companies Act,

(8) Mr. Mukul Rohtagi, appearing for the purchaser, had argued mainly that his client is a bonafide purchaser, for valuable consideration without notice of any

defect in title, and has acquired the property as absolute owner. He has further contended that the purchaser's bid was the highest and the maximum that could be obtained under the circumstances and that the purchaser had offered adequate price.

(9) Both sides and also the purchaser had addressed lengthy arguments and have cited various authorities in support of their respective contentions.

(10) Some of the questions that fall for consideration in this case are :-

(A) Is presentation of the winding up petition, without the consent of the Delhi Financial Corporation after taking over by it of the possession permissible and competent in law in view of the provisions contained in Section 32E of the State Financial Corporations Act ?

(B) What is the effect of amendment to the Companies Act, which is subsequent to the enactment of State Financial Corporation Act with particular reference to Sections 529A, 446(2), each of which contains a non-obstante clause read with proviso to Sections 529, 537 and 441(2) of the Companies Act in the light of the provisions of Sections 29 and 46B of State Financial Corporation Act ?

(C) If the provisions of Section 537 of the Companies Act are applicable, can in the circumstances of this case leave to sell be granted to the D.F.C. ex-post facto? If so, is the Company Court competent not to accept the offer on the plea that the price offered is not adequate ?

(11) On the question of non-maintainability or incompetence of the winding up petition if filed without the consent of the Delhi Financial Corporation as per Section 32E of the State Financial Corporation Act, I am unable to accept the contention of Delhi Financial Corporation, as in fact, no take over of Management of the Company was ever effected. Take over of Management is quite distinct from take over of possession for the purpose of sale of establishment. In the former case action is resorted to with a view to nurse and rehabilitate the establishment by providing better management which is not the position in the latter case. In the present case even the actual physical possession had continued to be with Disco,

in its capacity as custodian of the Dfc and there is no evidence on record of any take over of the Management. This position is well settled and there cannot be any dispute that take over of Management of an undertaking is quite distinct from taking over of its assets for the purpose of sale thereof for satisfaction of the dues of the State Financial Corporation.

(12) Mr. Swatanter Kumar contended that the Corporation had along with the possession of the establishment taken over the management of the industrial unit also. He has tried to contend that takeover of the management is synonymous with the possession. I am unable to accept this contention. The expression 'Management' used in Section 32B of the State Financial Corporation Act is in a special context and that is a special provision confined to the cases where only management is taken over and the intention of the legislature appears to be to make a separate provision for the take over of the management by the Financial Corporation with a view to help the unit to revive by providing better Management and for that reason it is desirable that the presentation of the winding up petition proceedings in respect thereof should not be allowed without the knowledge and consent of the financial corporation. Nothing has been brought on record which shows that the Management was ever taken over for such purpose. In fact the admitted position in the present case is that the physical possession of the properties in dispute was never taken over by the officers of the Dfc, but was allowed to be continued with Disco (in liquidation), although in its capacity as custodian on behalf of the DFC. Such a situation by no means can be construed as taking over of the Management and the factual position, as set out, could not be construed or read along with the provision of Section 29 of the State Financial Corporation Act as has been contended, by Mr. Swatanter Kumar. The object of the two sections is different. While the object of Section 29 of the State financial Corporation Act is to provide a speedy mode of enforcing security for realisation of the dues of the Financial Corporation, the object of Section 32-G of the said Act appears to be that the takeover of Management of an industrial undertaking/unit is to nurse and, rehabilitate the undertaking/unit by providing it with efficient Management. The expression 'management' has been the subject matter of repeated ordinances, Acts as well as judgments occurring both under the Industrial Development Regulations Act as well as State Financial Corporation Act

and various ordinances when only the management of some of the sick mills or sick textiles undertakings or some other industrial undertakings was taken over by the government. If the Legislative intent was that the take over of the possession would include like over of the Management also, the Section 29 of the said Act would have been worded differently and there would have been no need to enact Section 32G which provides for take over of the Management only. The scope of the two sections is quite different and distinct and they deal with two different situations. Such a construction is in line with the rule of harmonious construction of the said provisions of law.

(13) The counsel for Official Liquidator has also raised contention that the expression 'Management of Undertaking being taken over' and 'its control', are quite separate and distinct and pointed out that the Hon'ble Supreme Court had found these expressions to be quite distinguishable. The meaning of two expressions take their colour from the context in which those are used. In this context, a reference be made to the case of The Life Insurance Corporation of India Vs . D. J. Bahadur & Ors.. reported as : (1981)ILLJ1SC and the case of S. V. Khandoskar v. V. M. Deshpande, Ito, and another reported as : [1972]83ITR685(SC) . In the light of the above discussion, I do not find any merit in this contention and reject this plea of Dfc and hold that the provisions of Section 32E of the State Financial Corporations Act are not attracted.

(14) Since all other points and contentions relate to the provisions of the State Financial Corporations Act 1951 and the rights and obligations there under vis-a-vis the rights and obligations under file Companies Act 1956 and the effect of the provisions of the twoActs, these can be dealt with together.

(15) The relevant provisions of the State Financial Corporations Act (except Section 46B already quoted hereinabove) and the Companies Act are as under :-

'29.Rights of Financial Corporation in case of default.-(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement. makes any default in repayment of any loan or advance or any Installment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms its agreement with

the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Whether any action has been taken against an industrial concern under the provisions of sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of the concern'.

(16) The relevant provisions of the Companies Act with which we are concerned in the present case are quoted hereinbelow for ready reference :-

'SECTION 441(1) : Where, before the presentation of a petition for the winding up of a company by the Court, a resolution has been passed by the company for voluntary winding up the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Court, on

proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.
section 442 : Power of Court to stay or restrain proceedings against company.

At any time after the presentation of a winding up petition and before a winding up order has been made, the company, or any creditor or contributory, may—(a) where any suit or proceedings against the company is pending in the Supreme Court or in any High Court, apply to the Court in which the suit or proceeding is pending for a stay of proceedings therein; and (b) where any suit or proceeding is pending against the company in any other Court, apply to the Court having jurisdiction to wind up the company, to restrain further proceedings in the suit or proceeding: and the Court to which application is so made may stay or restrain the proceedings accordingly, on such terms as it thinks fit.
446. Suits stayed on winding up order

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of 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.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of

(A) any suit or proceeding by or against the company -

(B) any claim made by or against the company (including claims by or against any of its branches in India):

(C) any application made under section 391 by or in respect of the company;

(D) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

WHETHER such suit or proceeding has been instituted or as instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies(Amendment) Act, 1960.

(3)Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

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

529A.Over riding preferential payments.

(1)Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company (a) workman's dues; and(b) debts due to secured creditors to the extent such debt rank under clause (c) of the proviso to sub-section (1) of section 529 pari pasu 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.537. Avoidance of certain attachments, executions, etc., in winding up by or subject to supervision of Court.(1) Where any company is being wound up by or subject to the supervision of the Court-(a) any attachment, distress or execution put in force, without leave of the Court, against the estate or effects of the company, after the commencement of the winding up; or(b) any sale held without leave of the Court, of any of the properties or effects of the company after such commencement;shall be void'.

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

(17) Counsel for the Dfc has cited various authorities wherein the provisions of various Special Acts were considered vis-a-vis theCompanies Act and in the

context of those provisions, Companies Act was held to be general law. He in support has relied upon *Forwarding (0) Ltd. v. Port Trust of Vizakhapatnam and others* reported as 1987 (61) Comp Cas 513 In- this case, a single Judge of Bombay High Court has held that the steps taken by the Port Trust Authorities are special powers under the Port Trust Act which is a special Act viz-a-viz the Companies Act. *Tn Comrade Bank Ltd. v. Jyoti Bala Desai* reported as : AIR1962 Cal86 it has been held that the Banking Companies Act was a special Act viz-a-viz the Companies Ad. The judgment in the case of *Damji Valji Shah and another v. Life Insurance Corporation of India and others* :reported as : [1965]3SCR665 was also cited' in this connection. The Court in that case held that the Tribunal set up under Lic Act would not loose jurisdiction to proceed if 'a company was to be wound up subsequent to the Life Insurance Corporation Act coming into force. In *Rashtriya Mill Mazdoor Satish Nagpur v. Model Mills Nagarpur* reported as 1984 (3) CLJ 249, the Supreme Court had held that the provisions of. the Industrial Disputes Act 'Snd the Bombay Industrial Regulations Act were special provisions viz-a-viz the provisions of the Companies Act. All these decisions were rendered in the light of and keeping in view the purpose of the provisions of different acts and in the light of the facts prevailing in each case.

(18) In fact, the Legislature, on Realizing the need to safeguard the wages of workers, .amended the Companies Act and enacted Section 529A, quoted hereinabove, as also amended Section 529 by providing provisos to that section, which read as under :-

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

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

(B) any amount realised by the liquidator by way of enforcement of such charge shall, be applied rateably for the discharge of workmen dues ; arid

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

(19) Counsel for Official Liquidator apart from drawing distinctions in the cases cited on behalf of the Dfc has pointed out that the provisions of the State Financial Corporations Act are only complimentary and not in derogation of the provisions of the Companies Act. In support of this argument, he has referred to the latter part of Section 46B of the State Financial Corporation Act. He has also relied upon the observations of the Hon'ble Supreme Court in *Khandoskar's case* (supra). He has also cited a full Bench judgment in the case of *Income Tax Officer v. Official Liquidator (Kerala)* reported as 1985 (8) TLR 2143 1985(58) CC 590 in which it was held that the assessment proceedings of Income-tax Act are special proceedings and would continue, but the recovery order would not be passed as the recovery from company in liquidation is governed by the Companies Act.

(20) According to counsel for Dfc, the provisions of Section 29 of the State Financial Corporation Act are self contained. According to him, the expression 'deemed ownership of the concern' in Section 29(5) of the State Financial Corporation Act as well as the expression 'vesting' used in the sub-section (2) clearly indicates that the property passed to the Corporation in fact and in law including the vesting of title and possession. To construe the term 'vesting', counsel has cited the case of *The Vattichenikuru Village Panchayat v. Nori Venkatarama Deekshithulu & Ors.*, reported as J.T. 1991 5 Sc 1409) where the Hon'ble Supreme Court had dealt with the word 'vesting' in paras 12 and 13 of the judgment. He has also cited Sections 18 and 19 of the Transfer of Property Act in support of his contention that the 'vesting' includes both 'possession' and 'title' and vests a definite right in favor of the Corporation and the corporation acquires all the rights of the owner in the property in question. This, in my view, is an extreme argument and cannot be accepted in toto as would appear from the discussion hereinafter. I find that the expression 'vest' used in sub-section (2) of Section 29 of the State Financial Corporations Act is with reference to the vesting of property in the Transferee as if it had been transferred by the owner himself. Thus this sub-

section by itself does not vest the property absolutely in Dfc, but confers on it same right as the owner has only for the limited purpose of transferring the property. Sub-section (5) of the said section deals with right to sue or defend any action and for that limited purpose only Dfc would be deemed to be the owner of the concern so that it can file or defend suits by or against the concern. It is also not disputed that under Section 29(4) of the State Financial Corporations Act, the Dfc cannot retain more than its dues out of the sale proceeds. Thus the object of Section 29 of State Financial Corporation Act is to make provision for State Financial Corporations to enforce without recourse to asuit, the securities only to recover their dues. In- other words, DFC is only a class of secured creditor who has acquired special rights under Section 29 to realise the security for recovery of its dues without approaching the Court. In all other respects, it continues to retain the character of a secured creditor. In the absence of winding up or commencement of winding-up proceedings, Dfc would be perfectly within its rights to sell the security provided there is no injunction by Court restraining sale thereof, and convey good marketable title as the owner itself could do. However, the position would be different if the owner is under any disability such as injunction. The Dfc would not be entitled to ignore the injunction, particularly, in view of the fact that the company at that time was holding the property as custodian appointed by the DFC. Further Dfc could not acquire any right superior to those of the actual owner who at the relevant time was under a disability to sell on account of injunction order of the Court.

(21) Mr. Kumar has laid lot of stress on the non-obstante provision in the State Financial Corporations Act. I am unable to accept the contention- that the provisions of State Financial Corporation Act override all the provisions of the Companies Act. A reference in this behalf be made to the Full Bench decision of this Court in the case of Lic v. Asia Udyog Pvt. Ltd. (10) reported as . I cannot accept the construction placed' by Mr. Swatanter Kumar on the provisions of Section 29 and 46B and 32E of the State Financial Corporation Act to mean- total ouster of jurisdiction of the Company Court and that its provisions will always and in all circumstances prevail over all provisions of Companies Act even after winding up or provisional winding up. The legislature in its own wisdom amended the Companies Act and enacted provisions such as Section 529A and provisos to

Section 529 in order to protect the wages of the workmen' notwithstanding any law to the contrary,workmen's wages have now been put on par with the claims of secured creditors and their claims now rank pari passu with the claims of. secured creditors. Thus a new category of secured creditors has been created whose interest are to be represented and taken care of by the Official Liquidator. On principles of interpretation of statutes,Mr. Kumar in support of his stand, had also cited the followingcases:

(22) State of Bihar v. Hira Lal Kejriwal & Anr.; S. Gumej Singh v. S. Partap Singh Kainon, reported as : [1960]1SCR909 : D. Macropollo & Co. (P) Ltd. v. D.Macropollo & Co. (P) Ltd. Employees Union & Ors. reported as : (1958)11LLJ492SC State of West Bengal v. Union of India,reported as : [1964]1SCR371 ; M/s. Philips India Ltd. Vs.Labour Court Madras & Ors. reported as : (1985)11LLJ33SC ;The Balasinor Nagrik Cooperative Bank Ltd.Vs. Bahubhai ShankerLal Panda).' & Ors., reported as : AIR 1987 SC849 ; Osmania University Teachers Association v. State of A.P. & Anr., reported as : [1987]3SCR949 ; Captain Subhas Kumar v. The Principal Officer Mercantile Marine Deptt., Madras reported as : 1991 CriLJ2000 and' Kalawati Rai v. Soinyabai & Ors., reported as : [1991]2SCR599

(23) A perusal of these decisions would support the view that each case has to be decided on its own- facts and no universal rule can be said down unmindful of the facts of the case nor do those decisions support the extreme proposition advocated by Mr. Swatantra Kumar.

(24) He has also based his argument on the decision of this court in the case of Aryavarta Plywood Ltd. (In Liquidation) v. Rajasthan State Industrial and Investments Corporation Ltd. and another reported as 1990 (1) C L J 222 wherein it has been held that the provisions of Section 32(x) of the State Financial Corporation Act are applicable to only court proceedings and the provisions of Sections 29 and 31 of the State Financial Corporations Act are quite independent. There can be no quarrel with this proposition of law. But, in that case. the learned single Judge has further gone on to consider that for the purposes of Section 537 of Companies Act, the crucial date is the date of winding up order.This view is

contrary to the express provisions of Section 537 of the Companies Act which refers to 'the date of commencement of winding up' and not 'winding up'. The expression 'winding up' has been duly derived in Section 441. quoted herein above. Sub-section(2) of Section 441 provides that the winding up of a company by the Court, shall be deemed to commence at the time of the presentation of the petition for the winding up. For that reason, this part of that judgment appears to be per incuriam and cannot constitute a precedent.

(25) The counsel appearing on behalf of DFC; while replying to the arguments of counsel for Official Liquidator has laid great emphasis on the point that the take over of the possession by DFC was earlier to the presentation of the winding up petition. According to him, even the acceptance of the offer for impugned sale by DFC in its effort to sell the property had taken place prior to the passing of the provisional winding up order. It was only the question of believing the properly against payment which remained to be performed when the order for appointment of provisional liquidator was made. The possession was also delivered prior to the status-quo order dated 19-10-1992. He has, however, not referred to the injunction order dated 4-8-1992 which was very much in force at the time when the offer for sale was received on 23-9-1992 and accepted by DFC nor offered any Explanation for their going ahead with sale in breach of and contrary to the said injunction order. He stated that it was by way of abundant caution that they have come forward to assist the Court on the question that their right to realise the property remains unimpaired by provisional winding up and this Court will have no jurisdiction to interfere therein even if higher price could be fetched for that property. According to him, the sale stood concluded and that the execution and the registration of the sale deed was a mere formality.

(26) Mr. Swatanter Kumar further contended that assuming that the Company Court has jurisdiction to see that there is no fraudulent preference or fraud of any kind involved it could grant leave/permission to sell ex post facto. He submits that the petitioners in the winding up petition were colluding with the company and its directors and had intentionally not got issued any notice to DFC of the filing of the company petition and submits that the fraud in fact is attributable to the petitioners and the company and not DFC. He further submits that there cannot be any

occasion for presentation for leave to sell when the company is not gone into liquidation yet or provisional liquidation. As such the intention of legislation was to enable such creditors to approach the court for leave ex post facto. Mr. Swatanter Kumar has also placed great emphasis on Section 32 of the State Financial Corporation Act. For this reason also he states that if at all it is held that the company court could look into such sale transaction the court should look into the bona fide conduct of the State Financial Corporation and grant leave ex post facto and allow it to complete the sale. According to him, the provisions of Sections 446 and 537 of the Companies Act are analogous to one another. He has cited the case of Income Tax Officer Emakulam v. Ol, Palai Central Bank Ltd. reported as 1985 (21) Tlr 2143 wherein it was held that the assessment proceedings are not legal proceedings. To the same effect under the Industrial Disputes Act is the judgment in Vadervu Suryanarayana v. Kocheriakota Venkata Subbarao & Anr., reported as Air 1951 Mad 947. He has also relied up the cases of Pyare Lal Vs N.D.M.C. (23) reported as : [1965] 3 SCR 665 and L.I.C. of India v. D.J. Bahadur & Ors., reported as : (1981) 1 LLJ 1 SC and has proceeded on to reiterate that Section 29 of the State Financial Corporation Act is a self contained code/provision which provides for the securing of the property. He contends that the Dfc had given full opportunity to the company to secure a better offer but the company has failed to do so and that the offer at which the Dfc has agreed to sell being Rs. 28.50 lakhs was the highest available and that is why the said offer was accepted. He thus contends that the Dfc has acted fairly and in a bona fide manner.

(27) Mr. Swatanter Kumar further contends that the Dfc was having statutory right and contractual power to enforce the mortgage under Section 29 of the State Financial Corporation Act, the provisions of Section 537 of the Act would not be attracted in this case.

(28) In my view, in the taking over of the possession under Section 29 of the State Financial Corporation Act, the owner always retains the right of ownership of the property does not pass on to the financial corporation, but it is only for certain purposes of affecting recovery of its dues by the sale and to remove any impediments in their way that the statute by a deeming provision has granted to the financial corporation powers of the owner for the limited purpose of Realizing

the security, to convey good marketable title to the purchaser, and to defend any legal action, but the property does not absolutely vest in it. In *Thota China Subba Rao and others Vs. Mattapalli Raju and others* reported as AIR (25) 1950 Federal Court¹. *Ganga Dhar Vs. Shankar Lal and others* reported as : [1959]1SCR509 . *Narandas Karsendas v. S. A. Kanitam and another* reported as : [1977]2SCR341 , it has been held that the right of redemption subsists till the mortgaged property is actually transferred by execution of sale deed and its registration. Similarly when the book debts are hypothecated with the Bank, the hypothecation could not make the Bank the owner of the debt, and that the bank has to recover the debts. Mr. Nayar has contended that Section 537 has to be read with Section 442 and has also contended that Section 537 is totally independent of and not a section setting out the consequences of disregard of Section 446. Section 537 is really complimentary to section 442 and not to Section 446 of the Companies Act. He has cited in support the decision in *Naresh Fabs Vs. Glidiya Exports P. Ltd.* reported as (1986) 60 Comp Cas 229.

(29) In *Income Tax Officer New Delhi v. OL., National Conduits (P) Ltd.* reported as (1981) 51 C C 174. decision supports Iris argument that right from the date of presentation of a petition for winding up the court's protective arm is thrown on all transactions so that private individuals may not take undue advantage of the situation and thus leave the husk of the company at the time when the order for winding up comes to be passed. In this connection, Mr. Nayar has relied upon the cases of *Maharaj Singh v. State of Uttar Pradesh and others* reported as : [1977]1SCR1072 , *Supdt. & Remembrancer of Legal Affairs West Bengal v. Anil Kumar Bhunja and others* reported as (31) : 1979 CriLJ1390 . The *Fruit & Vegetable Merchants Union v. The Delhi Improvement Trust* reported as : [1957]1SCR1 and *Rashtriya Mill Mazdoor Sangh (supra)* reported as (1984) 3 CL J 249.

(30) Property is actually transferred by execution of the sale deed and registration thereof (if its value exceeds Rs. 100) under Section 69 of the Transfer of Properties Act. as has been held by the Hon'ble Supreme Court in *Narandas Karsondas (supra)* : [1977]2SCR341 . Mr. Nayar referred to Section 125, 391, 446, 453(1)(a) of the Companies Act to buttress his arguments that the secured

creditors are not outside the winding up altogether. H& has further submitted that assuming a scheme of arrangement was to be sanctioned by the Court with a view to revive the company, all classes of creditors including the secured creditors would be bound by the said scheme of arrangement. The test as to whether a particular legislation is a general law or a special law. will depend on. the intention of the legislature which in the absence of any specific provision can be inferred from the facts and surrounding circumstances of a case such as the present case. It is contended that a law which is special law for protecting the rights of D.F.C. qua the company giving it special powers will become general law once the company goes into liquidation. Mr. Nayar has placed reliance in. this behalf on L.I.C. v. Asia Udyog P. Ltd. and other (supra). In the case of Jayasingh Dnyanu Mhoprekar & Anr. v. Krishna Babaji Patil & Anr. reported as : AIR 1985 SC1646 , the Hon'ble Supreme Court had observed that "Mortgage is at par with the attachment of the property.' In. the matter of Ovation International (India) P. Ltd Grey Steel Casting &Finishing; Co. Pri. Ltd. Vs, Adverts (Private) Ltd. and another reported as 39 Comp Cas 595 (35) wherein it was observed that even if the properties are attached before the winding up of the company, the decree could not be executed without the permission of the Company Court under Section 446 of the Companies Act.Mr. Nayar pointed out that the ratio of S. V. KondaskarVs.V. M. Deshpandey, Ito 42 Comp Cas 168(36) has been followed in the cases of Income Tax Officer, Emakulam Vs.OL reported as 52 Comp. Cas. 157 (37) Ito, Emakulam v. Ol, Bank of India Ltd. (In Liqn) 52 Comp. Cas. 164 (38), Income-tax Officer, New Delhi v. Narula Finance P. Ltd. 48 Comp. Cas 740 (39) Golcha Properties Pvt. Ltd. v. Income-taxOfficer, Jaipur and others 44 Comp. Cas 144, Baroda Board and Paper Mills Ltd. (In. Liwn) v. ITO. Ahmedabad and others . Sales Tax Officer Petlad v. Rajrathna Naranbhai Mills Co. Ltd.. and another 44 Comp. Cas 65, and Ito, Ernakulam v. Ol, Swaraj Motors(P) Ltd.. 48 Comp. Cas 11, in support of his contention that all special legislations authorising exercise of Civil Court's power become general law once the company goes into liquidation. Incometax dues do not enjoy preferential rights inspire of specific provisions contained therein and they are to be paid as per Section 530(1)(a) of the Companies Act.

(31) Thus, according to the submissions of Official Liquidator, once the company as under provisional liquidation or liquidation, then in the event of any conflict occurring between those provisions of the Companies Act and the said special law, the provisions of the Companies Act relating to winding up and all consequential provisions become special law and would override the provisions of the said Special Laws to the extent those are inconsistent with the provisions of the Companies Act. Taking this view in the cases of *Income Tax Officer Ernakulam v. Ol*, reported as 52 Comp Cas 156 (45) it was held that even Income Tax Act would be deemed to have become general law on the company going into liquidation and the provisions of Companies Act will prevail and would be deemed to be the special law.

(32) In case, there are two acts, each having a non-obstante clause, then the safer course will be to presume that the legislature intended the latter act. to prevail in case there arose any conflict in the provisions of the two Acts and such conflict could not be resolved by construing the provisions of two Acts harmoniously. The legislature in the present case was aware of the earlier Act, i.e., State Financial Corporation Act, while enacting the non-obstinate clause such as sub-section 529A of the Companies Act, it should be assumed that the legislature did not intend the provisions of Section 529A of the Companies Act to be ignored by the Financial Corporation as a new category of creditor ranking *pari passu* with secured creditors had been created.

(33) Mr. Nayar's next contention was that D.F.C. being an instrumentality of state, reasonableness in its conduct is necessary and guidelines were also laid down by the Hon'ble Supreme Court for exercising powers under Section 29 of the State Financial Corporation Act, 1951 in the case of *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors.*, reported as : [1992]1SCR616 . It was submitted that the conduct of D.F.C. had not been reasonable inasmuch as it ignored the injunction of this Court and the sale was also not for maximum price that could be fetched.

(34) In the case of *M. K. Ranganathan & Anr. v. Government of Madras & Ors.*, reported as : [1955]2SCR374 , the Hon'ble Supreme Court came to its conclusion

as under :-

'IT is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with time. It is also a well recognized rule of construction that the legislature does not intend to make substantial alteration, in the law beyond what it explicitly declares either in express words or by clear implication and that the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched. Held therefore, that having regard to the context in which the words 'any sale held without leave of the Court of any of the properties' added in s. 232(1) by the amending Act Xxii of 1936 have been used in juxtaposition with 'any attachment, distress or execution put into force without leave of the Court against the estate or effects' it would be a legitimate construction to be put upon them that they refer only to sales held through the intervention of the Court and not to sales effected by the secured creditor outside the winding up and without the intervention of the Court, and that the amendment was not intended to bring within the sweep of the general words sales effected by the secured creditor outside the winding up. Held accordingly that in the present case the sale effected by respondent No. 2 as the receiver of the trustees of the debenture holders in July, 1954 was valid and binding on all parties concerned and could not be challenged as it was sought to be done by the Official Receiver.'

The ruling in the case of Ranganathan (supra) was rendered in the light of the provisions as they existed in Section 232 of the Indian Companies Act, 1913, which read as under :-'232. (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects or any sale held without leave of the Court of any of the properties of the company after the commencement of the winding up shall be void.'

(35) Even though the same words appear in Section 537(1) of the [Companies Act, 1956](#), a very material change appears to have been introduced by splitting the section into two clauses, thus doing away with the just position of the expression in

sub-clause (a) from those in sub-clause (b). Section 537(1) of the Companies Act, 1956 is reproduced as under :__

'537.(1) Where any company is being wound up by or subject to the supervision of the Court--

(A) any attachment, distress or execution put in force without leave of the Court, against the estate or effects of the company, after the commencement of the winding up : or

(B) any sale held, without leave of the Court, of any of the properties or effects of the company after such commencement: shall be void.'

(36) I had an occasion to examine the position of law under Section 232(1) of the Indian Companies Act, 1913 and that prevailing under Section 537(1) of the [Companies Act, 1956](#) in the case of the Peerless General Finance & Investment Co. Limited Vs. Majestic Apparels Pvt. Ltd., reported as : 59(1995)DLT238 wherein I had after examining the reasons given by the Hon'ble Supreme Court in M. K. Ranganathan's case for excluding the secured creditors from the purview of Section 232(1) found that it was so on account of the juxtaposition of the words appearing therein. In 1956 Act, the legislature split those very words into different clauses whereby the sales etc. were put into clause (b) while attachment was put under clause (a). therefore, the words in clause (a) cannot be said to be juxtaposed with clause (b). therefore, in my opinion, there was a definite purpose behind the change introduced in Section 537 of the present Act from Section 232 of the earlier Act.

(37) In the case of Icici (supra), the facts were different. The proposition quoted hereunder and a perusal of judgment would show that proposition at No. (iii) as also others were conceded by the parties which included that what was laid down in M. K. Ranganathan's case under Section 232 of the Indian Companies Act, 1913 continued to apply to the interpretation of Section 537 of the Companies Act notwithstanding the aforementioned change in the section. The relevant extract is reproduced hereunder :-

'(I) A winding-up court has jurisdiction, inter alia, to entertain or dispose of any suit or proceeding by or against the company, even if such suit or proceeding had been instituted before an order for winding-up had been made. This apart, the winding-up court has jurisdiction to transfer such a suit or proceeding to itself and dispose of the same. These follow from sub-sections (2) and (3) of Section 446.

(II) When a winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding, even if pending at the date of the winding-up order, can proceed against the Company except by leave of the Company Court vide sub-section (1) of Section 446.

(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 debt will not ipso facto be void, in view of the holding in Ranganathan's case that Section 537, dealing with 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.'

(38) In the case of *Icici* (supra) also, the real bone of contention before the Court was as to whether (1) leave of the winding up Court should be granted to a secured creditor to proceed in a suit after an order of winding up has been made, and (2) when should a winding up Court transfer to itself any suit or proceeding by or against the company during the pendency of the winding up proceedings. This is not the controversy in the present case. The Hon'ble Supreme Court, after noticing the desirability of protecting the interests of secured creditors and to preserve the integrity of secured creditor, as also the other secured creditors and the need to protect the Company from unnecessary litigation and costs, had laid down as under :-

'We are, therefore, of the view that the approach to be adopted in this regard by the Company Court does not deserve to be put in a straight jacket formula. The discretion to be exercised in this regard has to depend on the facts and circumstances of each case. While exercising this power we have no doubt that the company court would also bear in mind the rationale behind the enactment of Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, to which

reference has been made above. We make the same observation regarding the terms which a company court should like to impose while granting leave. It need not be stated that the terms to be imposed have to be reasonable, which would, of course, vary from case to case. According to us, such an approach, would maintain the integrity of that secured creditor who had approached the civil court or desires to do so, and would take care of the interest of other secured creditors as well which the company court is duty bound to do. The company court shall also apprise itself about the fact whether dues of workmen are outstanding ; if so, extent of the same. If it would be seen whether after the assets of the company are allowed to be used to satisfy the debt of the secured creditor, it would be possible to satisfy the workmen's dues *pan passu*.'

(39) Mr. Nayar pointed out that since the matter was based on both the parties conceding broad propositions of law including at (iii) above, in terms of the ratio of the Hon'ble Supreme Court's Judgment in the case of *Municipal Corporation of Delhi v. Gurnam Kaur*, reported as : AIR 1989 SC 38 , it could not constitute a precedent for the reason that the propositions were conceded by both the parties. Apart from not being in full agreement with Mr. Nayar, I do not consider it necessary to go into this question in this case.

(40) In my opinion, any sale which in violation of the injunction order of the Court, which in the present case was still subsisting when the offer was received and accepted by Dfc, can not be clothed with legitimacy or validity. This aspect of the case cannot be lost sight of. Prior to the receipt of the offer, the Dfc admittedly acquired the same right to dispose of the property as the owner of the property had and if the owner had been enjoined from, selling the property, DFC could not acquire a better right to sell which would be contrary to the injunction of the Court. As already noticed above, in the present case, even prior to the status-quo order dated 19-10-1992, there existed an injunction order which was passed on 4-8-1992 long before the receipt of the offer of the successful bidder and its acceptance. therefore, the acceptance of offer was in violation of the injunction order dated 4-8-1992. Another reason for not upholding the sale is that the price obtained was also not adequate as noticed hereinabove. It is for these reasons also, apart from others, that this sale cannot be upheld notwithstanding the plea of the purchaser

that he is a bonafide purchaser for valuable consideration and without notice.

(41) In the course of the arguments Mr. Swatanter Kumar made a submission that in case the court considers that the provisions of Sections 537, 441, 442 of the Companies Act are the special law and that the provisions of the Financial Corporation Act would be deemed to be the general law in cases of companies under winding up then he prays that the present case is a fit case where leave should be granted by the Court. I would be inclined to accept this position because there is no bar on the powers of the court to grant such leave even ex-post facto and that no provision has been brought to my notice whereby the court cannot grant leave even if it is satisfied that the sale is bonafide and that the optimum price has been obtained by the Financial Corporation. Obtaining of optimum/maximum price is in the interest of all including DFC. I, therefore, hold that this Court has power to grant leave to sell ex-post facto provided the sale is bonafide, legally valid and maximum price has been obtained. In this case, I am not satisfied with the price offered and cannot accept that it was the maximum price for the simple reason that while these arguments were in progress, I decided another application where I had sanctioned the sale of the second unit of this very company without any plant or machinery or moveables that is the plot and the superstructure only for Rs. 43 lakhs whereas in the present case the price of Rs. 28 lakhs offered was not only for an identical plot together with the superstructure but also with the plant and machinery installed therein. This clearly shows that the optimum price has not been obtained by the Dfc and for that reason I am not inclined to grant leave to sell the property ex-post facto.

(42) The net result is that the sale affected by Dfc for inadequate consideration and contrary to the subsisting injunction order of the Court and whereby the possession of the property was delivered after the order of appointment of the provisional liquidator is not approved and is set aside. The Dfc is granted leave to auction the property afresh by associating the Official Liquidator with settlement of proclamation of auction and the auction. Both the parties, would be at liberty to, scout for suitable bidders. The proclamation containing terms of sale shall be subject to the approval of the Company Judge. The Dfc should take steps to recover possession of the property delivered. Rs. 28.5 lakhs shall be fixed as the

reserveprice. However, the highest bidder at the sale by Dfc is granted liberty to join in the future auction and bid for the same property.The sale shall be subject to confirmation by the Company Judge.In the circumstances of the case, the parties are left to bear their own costs.

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