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Asset Reconstruction Company (India) Limited Rep. by Its Vice President Vs. the Official Liquidator, High Court as the Liquidator of Siv Industries Ltd. (In Liquidation)

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Court : Chennai

Decided On : Apr-18-2006

Reported in : [2006]134CompCas267(Mad); 2006(3)CTC529; (2006)2MLJ822; [2006]72SCL18(Mad)

Judge : A.P. Shah, C.J. and ;M. Jaichandren, J.

Acts : Securitisation and Re-construction of Financial Assets and Enforcement of Security Interest Act, 2002 - Sections 3, 5, 5(1), 9, 13, 13(2), 13(4), 13(9), 20(4), 34, 35, 37 and 39; Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 3(1), 15, 20(1) and 20(4); Companies Act, 1956 - Sections 424A, 442, 446, 456, 457, 457(1), 457(2), 529, 529A, 529(1), 530 and 537; Transfer of Property Act, 1882 - Sections 69 and 69A; Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Sections 17, 17(2), 17A and 19(19); State Financial Corporations Act, 1951 - Sections 29 and 31; Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004

Appeal No. : O.S.A. Nos. 214 and 215 of 2005 and C.M.P. Nos. 15340 to 15343 of 2005

Appellant : Asset Reconstruction Company (India) Limited Rep. by Its Vice President

Respondent : The Official Liquidator, High Court as the Liquidator of Siv Industries Ltd. (In Liquidation)

Advocate for Def. : Arvind P. Datar, Sr. Counsel

Advocate for Pet/Ap. : A.L. Somayaji, Sr. Counsel ;for Rangarajan and ;Prabhakaran, Advs.

Judgement :

A.P. Shah, C.J.

1. Whether an Asset Reconstruction company formed under the Securitisation and Re-construction of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter referred to for brevity's sake as 'Securitisation Act', is entitled to be associated in the process of the sale of assets of a company under liquidation along with the Official Liquidator is the question which falls for our consideration in these appeals.

2. The facts leading to this appeal are that SIV Industries Limited (formerly South India Viscose Limited) run into financial difficulties and was declared as a sick industrial company within the meaning of Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter called SICA) by order dated 09.07.2002. Attempts at re-habilitate proved unsuccessful. BIFR ultimately recommended that SIV Industries Limited should be wound up under Section 20(1) of SICA vide order dated 25.09.2003. Before BIFR, ICICI requested permission to take possession of the assets under Section 20(4) of the SICA. Accordingly, BIFR appointed ICICI as selling agent to dispose of the properties of SIV Industries Limited under Section 20(4) of the Act and to deposit the sale proceeds to the concerned High Court for distribution under Section 529-A and other provisions of the Companies Act, 1956. However, it appears that ICICI did not take any steps to sell the property. Meanwhile, by order dated 28.04.2004 SIV Industries Limited was ordered to be wound up by the Company Court and the Official Liquidator was appointed as Liquidator. The Official Liquidator has taken possession of the assets and has sold certain movables on 21.02.2005 and

11.05.2005. The Official Liquidator has also got the valuation done of certain properties and an application for sale has been filed for the sale of two residential flats belonging to the company under liquidation.

3. The appellant _ Asset Reconstruction Company (India) Limited is a company formed under the Securitisation Act and has been registered under the Companies Act as required under Section 3 of the Securitisation Act and in terms of Section 5 of the said Act, the appellantcompany steps into the shoes of the banks or financial institutions empowered to take possession of the assets of the borrower including the right of transfer by way of lease, assignment, sale and realize the sale proceeds of the secured assets and to take over the management of the business of the borrower. The majority of the creditors have given consent for the appellant-company to formulate the modalities of the sale and also to appoint the appellant as Chairman of the Assets Sale Committee along with the Official Liquidator to dispose of the assets of the company in liquidation. The appellant has moved Company Application Nos. 712 and 713 of 2005 before the Company Court seeking to appoint the appellant as agent of the Official Liquidator to complete the modalities of the sale along with the Official Liquidator. By the impugned order, both the applications were rejected by the Company Court holding that once the winding up of the company is ordered the assets and effects of the company shall be deemed to be in the custody of the High Court from the date of the order of winding up. The Official Liquidator on whom the assets rest could only act as per the directions of the Company Court and cannot act independently. In such event when the power to deal with the property is entrusted to the Official Liquidator by the Company Court in its discretion the power of the appellant company by its incorporation for the purpose of reconstruction under the Securitisation Act, cannot override the power of the Official Liquidator under the Companies Act.

4. Mr. A.L.Somayaji, learned Senior Counsel appearing for the appellant submitted that the appellant has special rights under the Securitisation Act and since there was no notice to them of the proceedings in liquidation and they were no parties to the order of winding up, they were entitled to proceed with the sale of the assets along with the Official Liquidator and the Company Court was not justified in

rejecting the applications of the appellant. The learned Senior Counsel submitted that the decision in Allahabad Bank v. Canara Bank : [2000]2SCR1102 was an authority in support of the proposition that the provisions of Securitisation Act would prevail over the provisions of Companies Act, since Securitisation Act being a special enactment made for protecting the interests of banks and financial institutions. Learned Senior Counsel submitted that the decision of the Supreme Court in Rajasthan State Financial Corporation and Another v. Official Liquidator and Anr. : AIR 2006 SC755 also support the stand of the appellant that the appellant-company which is a securitisation company and having purchased the security interest from ICICI Bank Limited and also having obtained consent from other secured creditors of the company under liquidation is entitled to be associated in the sale of assets along with the Official Liquidator. The learned Senior Counsel submitted that in the vent of inconsistency between Section 457 of the Companies Act and second proviso to Section 13(9) of the Securitisation Act, the Securitisation Act shall prevail and the secured creditor/securitisation company is entitled to take over the assets and sell the same. He submitted that the Securitisation Act being the later enactment overrides the provisions of Companies Act in respect of sale of assets and the provisions of the Securitisation Act are meant to safeguard the interests of the secured creditors and the securitisation companies formed under the Securitisation Act.

5. In reply, Mr. Arvind P.Datar, learned Senior Counsel for the respondent submitted that the power under Section 9 of the Securitisation Act is without prejudice to the provisions contained in any other law. In other words, such power does not override the provisions of the Companies Act. Section 37 of the Securitisation Act states that the provisions of the said Act are in addition to and not in derogation, inter alia, of the companies Act. Therefore, according to Mr. Datar the power of the liquidator to take charge of the assets and sell the same is not in any way affected or diluted by the formation of an Assets Reconstruction Company. According to Mr. Datar once the company is wound up, all the assets are to be taken into custody of the Official Liquidator under Section 456 of the Companies Act. Under Section 457(1)(c) of the Companies Act only Official Liquidator has the power to sell movable and immovable properties of the company. He submitted that under Section 457(2)(v) of the Companies Act Official

Liquidator can appoint an agent to do any business which he is 'unable to do himself'. Therefore, where the Official Liquidator is capable of completing a particular task, there is no question of appointing an agent. He further submitted that in the instant case the Official Liquidator has taken custody of the assets and completed valuation, and there is no reason or justification for appointing a Sale Committee with the appellant herein. He submitted that the appellant has failed to sell the assets despite an order by the BIFR on 24.09.2003, and it has now approached the Company Court only to claim commission from the sale proceeds. According to Mr. Datar there is no conflict between the Securitisation Act and the Companies Act. If the financial institution has not taken steps before the DRT its only remedy is to approach the Company Court for proper directions for realizing its securities. In such a case, the Assets Reconstruction Company has no locus standi even to apply for being appointed as an agent to sell the property.

6. In order to appreciate the contentions raised at the bar, it would be necessary to note the relevant provisions of the Securitisation Act. It is seen from the preamble of the said Act that it has been enacted with a view to regulate the securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected there to. The Act enables the banks and financial institutions to realize long term assets, manage problems of liquidity to the assets liability, and to improve recovery by exercising powers to take possession of security, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The Act further enables for setting up of Assets Reconstruction Companies which are empowered to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realize the secured assets and take over the management of the business of the borrower. The validity of the provisions of the said Act was upheld by the Supreme Court in Mardia Chemicals Limited v. Union of India : AIR 2004 SC2371 except that of Sub-section 2 of Section 17 which provides deposit of 75% before entertaining an appeal by the DRT under Section 17 of the Act. In Mardia Chemicals (supra) the Supreme Court observed as follows:

Para-35: As referred to above, the Narasimham Committee was constituted in 1991 relating to the Financial System prevailing in the country. It considered wide

ranging issues relevant to the economy, banking and financing etc. Under Chapter V of the Report under the heading 'Capital Adequacy, Accounting Policies and other Related Matters' it was opined that a proper system of income recognition and provisioning is fundamental to the preservation of the strength and stability of banking system. It was also observed that the assets are required to be classified, it also takes note of the fact that the Reserve Bank of India had classified the advances of a bank, one category of which was bad debts/doubtful debts. It then mentions that according to the international practice, an asset is treated as non-performing when the interest is overdue for at least two quarters. Income of interest is considered as such, only when it is received and not on the accrual basis. The Committee suggested that the same should be followed by the banks and financial institutions in India and an advance is to be shown as non-performing assets where the interest remains due for more than 180 days. It was further suggested that the Reserve Bank of India should prescribe clear and objective definitions in respect of advances which may have to be treated as doubtful, standard or substandard, depending upon different situations. Apart from recommending to set up of Special Tribunals to deal with the recovery of dues of the advances made by the Banks, the Committee observed that impact of such steps would be felt by the banks only over a period of time, in the meanwhile, the Committee also suggested for re-construction of assets saying 'Committee has looked at the mechanism employed under similar circumstances in certain other countries and recommends the setting up of, if necessary by special legislation, a separate institution by the Government of India to be known as Assets Reconstruction Fund (ARF) with the express purpose of taking over such assets from banks and financial institutions and subsequently following up on the recovery of dues owed to them from the primary borrowers'. While recommending for setting up of Special Tribunals, the Committee observed:

Banks and financial institutions at present face considerable difficulties in recovery of dues from the clients and enforcement of security charged to them due to the delay in the legal processes. A significant portion of the funds of banks and financial institutions is thus blocked in unproductive assets, the values of which keep deteriorating with the passage of time. Banks also incur substantial amounts of expenditure by way of legal charges which add to their overheads. The question

of speeding up the process of recovery was examined in great detail by a Committee set up by the Government under the Chairmanship of the late Shri Tiwari. The Tiwari Committee recommended, inter alia, the setting up of Special Tribunals which could expedite the recovery process.

The Committee also suggested some legislative measures to meet the situation.

Para 36: In its Second Report, the Narasimham Committee observed that the NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report of Narasimham Committee deals about legal and legislative framework and observed:

8.1: A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries.

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the asset without intervention of the Court and for reconstruction of the assets. It is thus to be seen that the question of nonrecoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting the attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amount of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the report of the Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps without the legal framework. We are, therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it

was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy-decision cannot be faulted with nor it is a matter to be gone into by the Courts to test the legitimacy of such a measure relating to financial policy.

7. Sections 34 and 35 of the Securitisation Act read as under:-

Section 34: Civil Court not to have jurisdiction:-

No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to the taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Section 35: The provisions of this Act to override other laws:-The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

8. The relevant provision of the Securitisation Act about the rights of secured creditor in Section 13 is as under:-

Section 13: Enforcement of Security Interest:- (1) Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor my be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act. (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment therefore, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his

liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. (3-A) If, on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A. (4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in Clause (d) of subsection (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under Sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee al rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of Sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to Sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount, realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956:

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realize his security instead of relinquishing his security and proving his debt under proviso to Sub-section (1) of Section 529 of the Companies Act, 1956, may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529-A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of Section 529-A of the Companies Act, 1956 and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation:- For the purposes of this sub-section, -

(a) 'record date' means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) 'amount outstanding' shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent Court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of Sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorized in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in subsection (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

9. It may be mentioned here that after Securitisation Act, amendment has been made to Section 15 of the SICA as under:

'Section 15: Reference to Board:-

(1) Where an industrial company has become a sick industrial company, the Board of Directors of the company, shall, within sixty days from the date of finalisation of

the duty audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company.

Provided that if the Board of Directors has sufficient reasons even before such finalisation to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days after tit has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company.

Provided further that no reference shall be made to the Board of Industrial and the Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Where a financial assets have been acquired by any securitisation company or reconstruction company under Sub-section (1) of Section 5 of that Act.

Provided also that on or after the commencement of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 were a reference is pending before the Board for Industrial & Financial Reconstruction, such a reference shall abate if the secured creditors representing not less than three fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under the Sub-section (4) of Section 13 of that Act.

10. Amendment on similar lines has been made to Section 424-A of the Companies Act, 1956. Amended Section is as under:-

'424-A. Reference to Tribunal:-

(1) Where an industrial company has become sick industrial company, the Board of Directors of such company shall make a reference to the Tribunal and prepare a scheme of its revival and rehabilitation and submit the same to the Tribunal along with an application containing such particulars a may be prescribed, for

determination of the measures which may be adopted with respect to such company;

Provided that nothing contained in this sub-section shall apply to a Government Company;

Provided further that a Government Company, may with the prior approval of the Central Government or a State Government, as the case may be, make a reference to the Tribunal in accordance with the provisions of this sub-section and thereafter, all the provisions of this Act apply to such Government Company;

Provided also that in case any reference had been made before the Tribunal and a scheme for revival and rehabilitation submitted before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004, such a reference shall abate if the secured creditors representing three fourth in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures to recover their secured debt under subsection (4) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

Provided also that no reference shall be made under the Section if the secured creditors representing three fourth in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures to recover their secured debt under Sub-section (4) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

11. At this stage we may also refer to the judgment of the Supreme Court in Allahabad Bank v. Canara Bank : [2000]2SCR1102 . In that case, the question of jurisdiction of the Debts Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, vis-`-vis the Company Court arose for decision. The Supreme 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 the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was a legislation subsequent in point of time to the introduction of Section 529-A 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 529-A 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 529-A read with proviso (c) to Section 529(1) of the Companies Act could arise before the Debts Recovery Tribunal only if the creditor concerned 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 there was essentially dealing with the jurisdiction of the Debts Recovery Tribunal in the face of Sections 442, 537 and 466 of the Companies Act.

12. In Rajasthan State Financial Corporation v. Official Liquidator, (supra) the question that fell for consideration before the Supreme Court was as to the right of State Financial Corporation under Section 29 of the State Financial Corporations Act, 1951 against debtor company to sell assets of company and realize security, when the company is under winding up. The Supreme Court held that in such a

case the said power can be exercised by the State Financial Corporation only after obtaining appropriate permission from Company Court and acting in terms of directions issued by Company Court as regards conduct of the sale and distribution of proceeds thereof in terms of Sections 529 and 529-A of the Companies Act. Paragraphs 17 and 18 of the said decision are important for the purpose deciding the case of hand and read as follows:

Para- 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 529-A 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 529-A 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 decisio ns in Allahabad Bank v. Canara Bank : [2000]2SCR1102 and in International Coach Builders Ltd. v. Karnataka State Financial Corporation : [2003]2SCR631 in respect of the applicability of Sections 529 and 529-A 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. 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 Ltd. (supra). The Debts 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.

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

(i)A Debts 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 529-A 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 creditor concerned 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.

13. In the light of the law laid down by the Rajasthan State Financial Corporation Case (supra) it is clear that where the bank or the financial institution has initiated proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Debts Recovery Tribunal would be entitled to order sale even if a company is under 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. Where, however, no proceedings have been initiated under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 the case would fall under paragraph 18 (iii) of the judgment of the Supreme Court in Rajasthan State Financial Corporation Case, (supra). In that event if the securitisation company acting under Section 13 of the Securitisation 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 distribution thereof among the creditors in terms of Section 529-A and 529 of the Companies Act.

14. In the instant case, the Official Liquidator has taken possession of the assets and certain movables have already been sold. The Official Liquidator has also got valuation of some of the assets by ITCOT Consultancy Services, Chennai. A sum of Rs. 2 lakhs has been paid as valuation fee for valuation of the assets. In our opinion, the ends of justice would be served if the Official Liquidator is directed to associate the appellant-company in sale of the assets in terms of paragraph 18(iii) of the Rajasthan State Financial Corporation Case, (supra). The appellant through its counsel makes a statement that in view of the facts and circumstances of the case the appellant shall not claim any commission on the sale of the assets. The appeals are accordingly disposed of. No costs. Consequently, connected C.M.Ps. are closed.

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