# IN THE HIGH COURT OF JUDICATURE AT PATNA

**Company Appeal No.1 of 2013**
**IN**
**COM PET 3 of 1984**

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The State of Bihar Though the Principal Secretary cum Commissioner, Department of Commercial Taxes, Government of Bihar, Patna.

.... .... Appellant/s

Versus

1. Official Liquidator, Patna High Court, Maurya Lok Complex "A" Block, 4th Floor Dakbunglow Road, Patna.

---- Respondent

2. IDBI Bank Ltd., a company incorporated under Indian Companies Act, 1956 having its Registered Office at IDBI Tower, WTC Complex, Cuffe Parade, Mumbai-400005 and amongst other places having one of its Branch Office at Uma Complex, Frazer Road, Patna-800001 through its Assistant General Manager.

.... .... Intervener-Secured Creditor

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**Appearance :**

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| For the Appellant/s | : | Mr. Anil Kr. Sinha, GA-9 |
| | | Mr. Pawan Kumar, AC to GA-9 |
| For the O.L. | : | Gautam Kejriwal, Adv. |
| For the IDBI | : | Mr. Shivendra Roy, Adv. |
| | | Mrs. Sheela Sharma, Adv. |

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**CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA**

CAV JUDGMENT

**Date: 6-11-2015**

This appeal is directed against the order dated 13.1.2012 passed by the Official Liquidator, High Court Patna in Company Petition No. 3 of 1984, whereby and whereunder, the claim of the Deputy Commissioner, Commercial Tax, Sasaram Circle, Sasaram, Rohtas against the Rohtas Industries, the company under liquidation, has been though allowed to the tune of Rs. 11,06,22,706/- but has been classified as "ordinary".

2. The case of the appellant State of Bihar, is that his

claim is though covered by the provision of Central Sales Tax Act and Bihar Sales Tax Act which. being the dues of tax against the company under liquidation. does not fall into the category of debt and, in fact, is the statutory commitment of a citizen towards the state. In this regard, learned counsel for the appellant has placed reliance on Section 17 of the Central Sales Tax Act which, according to him, enjoins upon the Official Liquidator of the Company to not part with any assets of the company or the properties in his hand until he has set aside such amount equal to the amount notified as payable by way of tax.

3. Learned counsel for the appellant, in this regard, has placed reliance on a judgment of the Apex Court in the case of ***Imperial Chit Fund Pvt. Ltd. Vs. Income Tax Officer, Ernakulam*** reported in ***1996(8) SCC 303*** which, according to him, would completely cover the case of the appellant, inasmuch as, in the aforesaid judgment, the Apex Court had considered the effect of Section 178 of the Income Tax Act which is pari meteria Section 17 of the Central Sales Tax Act.

4. Learned Counsel for the Appellant State of Bihar on the basis of the judgment of the Full Bench of Andhra Pradesh High Court in the case of ***Income Tax Officer, B-Ward, Company Circle, Hyderabad Vs. Official Liquidator*** reported in ***101 ITR 470*** has also emphasized that for realization of the dues of tax (in that case income

tax) the government has to be treated as a secured creditor.

5. An alternative argument has also been advanced by the learned counsel for the appellant that on the basis of the aforesaid judgment of the Apex Court, even if the dues of Bihar Sales Tax may not become recoverable, in absence of a provision alike Section 178 of the Income Tax Act or Section 17 of the Central Sales Tax Act, in Bihar Sales Tax Act, but, then, the amount of Rs. 11,06,22,706/- for which the claim had been allowed by the Official Liquidator has two components, namely, Rs. 3,60,93,781.75/- by way of Central Sales Tax and remaining 7,45,28,924.25/- by way of Bihar Sales Tax and, as such, for the amount of Central Sales Tax Act to the tune of Rs. 3,60,93,781.75, the appellant will be entitled to recover the same as a secured creditor. Learned counsel for the appellant thus submits that not only the impugned order of the Official Liquidator should be set aside so far it relates to payment of Central Sales Tax to the tune of Rs. 3,60,93,781.75/- but, a direction should also be issued to the Official Liquidator to make payment of the aforesaid amount of Central Sales Tax.

6. Per contra, the Official Liquidator, having filed his reply, has taken a stand that any dues against the Company, under liquidation, of any person has to be considered for its being paid only after complying the provision of Section 529 A of the Companies Act

wherein the workmen dues and the debt due to secured creditor has been given priority to all other debts. He has also referred to the provision of Section 530(1) of the Companies Act with regard to priority in the preferential payment to make issue clear as with regard to such payment being subject to the provision of Section 529 A of the Companies Act. A special emphasis has been given by Mr. Patole, the Official Liquidator on wordings of Section 529A of the Companies Act as with regard to its being operational even in respect of any dues emanating from Income Tax Act or Central Sales Tax Act.

7. Let it be noted here that one of the secured creditors being the IDBI Bank had also sought intervention in I.A. No. 5138 of 2014 and this Court in this order dated 31.7.2014 had allowed such prayer whereafter it has been impleaded as respondent no.2.

8. Mr. Shivendra Roy, learned counsel for the respondent no.2, while adopting the stand taken by the Official Liquidator, has taken a categorical stand that any portion of dues including the dues of tax as clearly enumerated under Section 530(1) of the Companies Act will have to await the payment to the workmen as also to the secured creditors in terms of Section 529A of the Companies Act and, therefore, the appellant cannot claim any payment prior to the complete payment of secured creditors in the pending liquidation proceeding of the Rohtas Industries.

9. He has in this regard also sought to distinguish the judgment of the Apex Court in the case of Imperial Chit Fund Pvt. Ltd. (supra) by placing reliance on a judgment of the Gujrat High Court in the case of ***Assistant Commissioner of Income Tax Vs. Official Liquidator of Minal Oil & Industries Ltd. & 4*** reported in **[2007]** ***136 Company Cases 399 (Guj).***

10. Having regard to the aforesaid submissions, this Court will firstly go into the question as to whether the dues of Central Sales Tax under the provision of Companies Act has to be recovered even prior to the dues of the workman and secured creditors. In this regard, Section 529A of the Companies Act reads as follows:-

> *"Section 529A: Overriding 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) workmen's dues; and*
>
> *(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues,*
>
> *shall be paid in priority to all other debts.*
>
> *(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which they shall abate in equal proportions."*

(underlining for emphasis)

11. The underlined portion of Section 529A in fact by itself does not leave anything for speculation that the provisions of the

Companies Act and specially Section 529A thereof has an overriding effect on any other law which would also include even the Central Sales Tax Act.

12. As a matter of fact, the same is also clear from reading of Section 17(3) of the Central Sales Tax Act, inasmuch as, the first proviso itself recognizes that the Official Liquidator will have full power and liberty to part with the assets or the property of the Company under liquidation for making any payment to secured creditors whose dues are entitled under law to priority of payment over the debt due to government on the date of liquidation. To that extent, Section 17 on which over emphasized reliance has been placed by the learned counsel for the appellant is also extracted herein below:-

*"17. Company in liquidation.—*
*(1) Every person—*
*(a) who is the liquidator of any company which is being wound up, whether under the orders of a court or otherwise; or*
*(b) who has been appointed the receiver of any assets of a company, (hereinafter referred to as the liquidator) shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the appropriate authority.*
*(2) The appropriate authority shall, after making such inquiry or calling for such information as it may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the appropriate authority would be sufficient to provide for any tax which is then, or is likely*

*thereafter to become, payable by the company.*

*(3) The liquidator shall not part with any of the assets of the company or the properties in his hands until he has been notified by the appropriate authority under sub-section (2) and on being so notified, shall set aside an amount equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands:*

*Provided that nothing contained in this sub-section shall debar the liquidator from parting with such assets or properties in compliance with any order of a court or for the purpose of the payment of the tax payable by the company under this Act or for making any payment to secured creditors whose debts are entitled under law to priority of payment over debts due to Government on the date of liquidation or for meeting such costs and expenses of the winding up of the company as are in the opinion of the appropriate authority reasonable.*

*(4) If the liquidator fails to give the notice in accordance with sub-section (1) or fails to set aside the amount as required by, or parts with any of the assets of the company or the properties in his hands in contravention of the provisions of sub-section (3), he shall be personally liable for the payment of the tax which the company would be liable to pay:*

*Provided that if the amount of any tax payable by the company is notified under sub-section (2), the personal liability of the liquidator under this sub-section shall be to the extent of such amount.*

*(5) Where there are more liquidators than one, the obligations and liabilities attached to the liquidator under this section shall attach to all the liquidators jointly and severally.*

*(6) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force."*

(underlining for emphasis)

13. In the considered opinion of this Court, the proviso to Section 17(3) by itself is a complete answer to the submission of the learned counsel for the appellant that if the tax payable by the Company save and except payable under Companies Act has to await the payment to the secured creditors whose dues are recognized even under the Central Tax Act is one under law of having priority of payment over debt dues to government as would be very clear from the underlined portion of Section 17(3) of the Act.

14. As a matter of fact, the provision of Section 530 of the Companies Act again very clearly lays down that payment of other debt has to abide by the provision of Section 529A of the Act dealing with the overriding preferential payment by way of payment of workmen's due and/or the debt due to secured creditors. Section 530(1) in this regard being relevant is quoted herein below:-

> ***"Section 530(1):***
> *(1) In a winding up, [5] subject to the provisions of section 529A, there shall be paid] in priority to all other debts-*
>
> *(a) all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub- section (8), and having become due and payable within the twelve months next before that date;*
>
> *(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date*

*subject to the limit specified in sub- section (2);*

*(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;*

*(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions payable during the twelve months next before the relevant date, by the company as the employer of any persons, under the Employees' State Insurance Act, 1948 (34 of 1948 .) or any other law for the time being in force;*

*(e) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen' s Compensation Act, 1923 , (8 of 1923 .) rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;*

*(f) all sums due to any employee from a provident fund, a pension fund a gratuity fund- or any other fund for the welfare of the employees, maintained by the company; and*

*(g) the expenses of any investigation held in pursuance of section 235 or 237, in so far as they are payable by the company."*

15. Thus, in view of a very clear provision under Section 530(1) of the Company Act, it can be very well summed up that in the case of liquidation of a company, the first and foremost overriding payment to all other payment including preferential payment as

enumerated under Section 530(1) is the payment of workmen's dues and payment of debt due to secured creditors. As a matter of fact, it is only after the dues under Section 529A of the Company Act is cleared that the issue of making preferential payment to the categories of the dues in Section 530 would arise. In that view of the matter, this Court will have no difficulty in coming to the conclusion that till the payment of secured creditor, the appellant cannot claim payment of its tax.

16. In the considered opinion of this Court, the overall picture which emerges is that the Company Act envisages that from the assets of the Company under liquidation, firstly the payment has to be made to the workmen's dues and/or secured creditor and, thereafter, payment has to be made to the categories of dues/debts in Section 530 before making payment of any other dues not covered by the provision of Section 529A and 530 of the Company Act.

17. The view taken by this court in fact gets support from the aforesaid decision of the Gujarat High Court in the case of O.L. of Minal Oil & Industries Ltd. (supra) wherein it has been held as follows:-

> *"10. ----- Therefore, even considering the proviso to Section 178(3) of the Act, the Official Liquidator is not debarred from making any payment to secured creditors, whose debts are entitled under the law to priority of payment over debts due to Government on the date of liquidation. Thus, the said provision*

*itself provides that payment can be made to secured creditors having priority in law over the Government. Therefore, the contention on behalf of the applicant that on notifying the claim by the Assessing Officer under Section 178(2) of the Act, the Official Liquidator is required to set apart the said amount and only thereafter the balance amount can be disbursed amongst other secured creditors, cannot be accepted. If such interpretation is given, the same would be contrary to proviso to subsection (3) of Section 178 of the Act. Under the circumstances, the contention on behalf of the applicant to that effect is required to be rejected. If Section 529(A) of the Companies Act, 1956 is considered, it is clear that it has an overriding effect. Section 529(A) of the Companies Act was brought in by an amendment and was inserted in the Companies Act by Act of 1985. The said section makes it clear that notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, dues of the workers and the debts due to secured creditors to the extent such debts rank under Clause (c) of the proviso to Sub-section (1) of Section 529 Pari Passu with such dues shall be paid in priority to all other debts. It is also required to be noted at this stage that so far as the dues of the company towards the tax liabilities is concerned, the same would come within Section 530(1)(a) of the Companies Act and as per Section 530(1) of the Companies Act, the said dues as envisaged under Section 530(1)(a), would be subject to the provisions of Section 529(A) and the said dues are to be paid in priority to all other debts subject to the provisions of Section 529(A) of the Companies Act. Therefore, first the amount realized, is to be disbursed to the creditors, as mentioned under Section 529(A) of the Companies Act and they would have a preferential payments. Therefore, also considering Section 529(A) and 530(1)(a) of the Companies Act read with proviso to Section 178(3) of the Act, the workmen's dues and the debts due to secured creditors to the extent such debts rank under Clause (c) of the proviso to Sub-*

> *section (1) of Section 529 will have a Pari Passu and shall be paid in priority to all other debts. Therefore, the contention on behalf of the applicant that the dues of the Income tax department would have a priority over the secured creditors cannot be accepted and has no substance and the same is required to be rejected.”*

(underlining for emphasis)

18. As a matter of fact, in the aforesaid decision, a reliance has also been placed on the judgment of in the case of ***Syndicate Bank & etc. V. The Official Liquidator, Mumbai and Ors.*** reported in ***AIR 1999 Bombay 243*** as well as a judgment of the Kerala High Court in the case of ***Venad Pharmaceutical and Chemical Limited (in liquidation), In re and Anr.*** reported in ***(2003) 114 Company Cases 185.***

19. This Court having thus examined the judgment of Gujarat High Court, Bombay High Court and Kerala High Court is of the view that the law with regard to scope of Section 529(A) & 530 of the Company Act read with Section 178 of the Income Tax Act which is para meteria Section 17 of the Sales Tax Act has been correctly interpreted as with regard to payment of tax from the assets of the Company under liquidation to be only subservient to the dues and debt of the workmen and secured creditors.

20. As a matter of fact, a reliance placed on the judgment of the Apex Court in the case of Imperial Chit Funds (P) Ltd. (supra) is wholly misplaced, inasmuch as, in that case, the issue was not with

regard to the rights of the secured creditors vis-à-vis payment of tax payable to the Government as envisaged under Section 529A of the Company Act rather the issue before the Apex Court was qua section 530(1)(a) with other unsecured creditors and it was in that context that the Apex Court, considering the provisions of Section 178 of the Income Tax Act, had gone to hold that if an order was passed under Section 178 of the Income Tax Act and considering the equality amongst the creditors as set out in Section 530(5) of the Company Act, an order under Section 178 for Income Tax dues would have preference over other unsecured creditors set out in Section 530(1) of the Act.

21. The Gujarat High Court has also in the case of O.L. of Minal Oil & Industries Ltd. (supra) had sought to distinguish the judgment of the Apex Court as also the Full Bench of the Andhra Pradesh High Court in the following words:-

> *"11. So far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Imperial Chit Funds (P) Limited (supra) by the learned Counsel appearing on behalf of the applicant is concerned, as stated above, before the Hon'ble Supreme Court, the issue was with regard to inter se claim of the creditors under Section 530(1) of the Companies Act and the issue with regard to priority and/or preference over the secured creditors as envisaged under Section 529(A) of the Companies Act, was not there at all. Thus, the question before the Hon'ble Supreme Court was whether the claim of the tax would have precedence over the claim of other creditors under Section 530 of*

*the Companies Act in view of the provisions of subsection (5) of Section 530 of the Companies Act and it is to that extent that the Hon'ble Supreme Court held that an order passed under Section 178 of the Act will prevail over the rights of other unsecured creditors under Section 530 of the Companies Act and therefore, the decision of the Hon'ble Supreme Court in the case of Imperial Chit Funds (P) Limited (supra) is not of any Page 1469 assistance to the applicant. Identical questions came to be considered by the Bombay High Court and Kerala High Court in the cases of Syndicate Bank and etc. (supra) Venad Pharmaceuticals and Chemicals Limited (in liquidation) In re (supra) respectively and considering the decision of the Hon'ble Supreme Court in the case of Imperial Chit Funds (P) Limited as well as the decision of the Andhra Pradesh High Court in the case of Income tax Officer, B-Ward, Company Circle, Hyderabad (supra), the Bombay High Court and Kerala High Court have held that rights of the secured creditors and the workers as set out under Section 529(A) of the Companies Act would override the claim of the tax authorities in respect of order made under Section 178 of the Act. This court is in full agreement with the decisions of the Bombay High Court and Kerala High Court by which the contention of the Income tax department that considering the provisions of Section 178 of the Act, the dues of the Income tax department would have a preference over the secured creditors and the workers, has been negatived."*

22. Thus, it has to be essentially held that the whole purpose of Section 529A of the Company Act is to ensure that workmen and secured creditors should not be deprived of their legitimate claim in course of the liquidation of the company. As a matter of fact, the legislature has secured the workmen's dues and dues of secured creditors which rank pari passu should be paid in

priority to all other debts. There is no statutory provision overriding the claim of secured creditor except Section 529A of the Company Act and, thus, the submission of the learned counsel for the appellant that the dues of Central Sales Tax Act must be paid with cost of winding in priority to the claim of secured creditor cannot be accepted much less allowed.

23. As noted above, the Official Liquidator has already allowed the claim of the appellant but, the grievance that such claim should have been allowed in preference to the dues of the workmen and secured creditors is not acceptable. This Court, however, must clarify that when the Official Liquidator in the impugned order has used the claim of the appellant being "ordinary" he had actually meant that such claim of the appellant is payable in terms of Section 530(1) of the Act which again makes it very clear that the same is subject to the payment of provision of preferential payments to be made under Section 529A of the Act.

24. That being so, this appeal is devoid of any merit and is, accordingly, dismissed.

**(Mihir Kumar Jha, J)**

Patna High Court
Dated the 6th November 2015
A.F.R./Rishi/-

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