

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 613 OF 2014
IN
SUIT NO. 3636 OF 1999**

Metropolitan Infrahousing Pvt. Ltd.
a Company duly incorporated under the
Companies Act, 1956 and having its
registered Office at Gammon House,
Veer Savarkar Marg, Prabhadevi,
Mumbai - 400 025.

... Applicant

In the matter of:

ICICI Bank Ltd.
Company incorporated under the
Companies Act, 1956, and a Scheduled Bank
within the meaning of the Reserve Bank of
India Act, 1934 and having its Registered
Office at Landmark, Race Course Circle,
Vadodara - 390 007.
and
A corporate Office at ICICI Bank Towers,
Bandra - Kurla Complex, Bandra (East),
Mumbai - 400 051.

...Plaintiff

versus

The Official Liquidator,
Bombay High Court, Bank of India Building,
5th Floor, Mahatma Gandhi Road, Fort,
Mumbai - 400 023 as Liquidator of Pal
Peugeot Ltd., having its Office at Kalyan
Shil Road, Manpada, Dimbivli, Thane - 421 204

...Defendant

And

The Court Receiver, High Court,

Bombay, Bank of India Building, 2nd Floor,
Mahatma Gandhi Road, Fort,
Mumbai - 400 023

...Respondent

ALONG WITH
NOTICE OF MOTION NO. 3710 OF 2011
IN
SUIT NO. 3636 OF 1999

ICICI Bank Ltd.
a Banking Company incorporated under the
Companies Act, 1956 and Scheduled Bank
within the meaning of the Reserve Bank of
India Act, 1934 and having its registered Office
at Landmark, Race Course Circle, Vadodara,
390 007 and a Corporate Office at ICICI
Towers, Bandra-Kurla Complex, Bandra
(East), Mumbai - 400 01 with whom
ICICI Limited as amalgamated pursuant
to the order dated 11th April, 2002 passed
by the Hon'ble Bombay High Court

...Plaintiff

vs.

The Official Liquidator, attached to the
Ho'ble Bombay High Court, having office
at 5th Floor, Bank of India Building,
Fort, Mumbai - 400 023 as Liquidator
of Pal Peugeot Ltd., which has its Office at
Kalyan Shil Road, Manpada, Dombivli,
Dist. Thane, Maharashtra - 421 204.

...Defendant

Mr. Virag V. Tulzapurkar, Sr. Advocate with Dr. B.B. Saraf, instructed by M/s.
M.K. Ambalal & Co., for the plaintiffs/Applicant in NMS 3710 of 2011.
Mr. F. D'Vetre, Sr. Advocate with Mr. Durgaprasad Pujari, instructed by M/s.
PDS Legal, for the Applicant in NMS 613 of 2014.
Mr. J.P.Sen, Senior Advocate, for Official Liquidator.
Mr. M.S. Deshpande, Court Receiver, present.
Ms. Yogini Chauhan, Dy. Official Liquidator present.

CORAM: S. J. KATHAWALLA, J.

Date: 23rd NOVEMBER, 2016

JUDGMENT :

1. By Notice of Motion No. 3710 of 2011, the Plaintiffs -- ICICI Bank Ltd. (ICICI Bank) being debenture trustees in respect of 15% non-convertible debentures issued by M/s. Pal Peugeot Ltd.. (PPL) and representing 4.31% of the debenture holders of PPL is seeking the following reliefs:

“(a) That this Hon’ble Court be pleased to direct the Court Receiver, High Court, Bombay to pay to the Plaintiffs (decree holders) from the suit amount a sum of Rs. 29,83,57,444/- and/or any further and other amount (in respect of 4.31% of public holding of the debentures out of 100% debentures, for which the Plaintiffs act as trustee).

(b) that this Hon’ble Court be pleased to direct the Court Receiver, High Court, Bombay, to pay an amount of Rs. 1,86,43,604/- towards the Trustees’ remuneration and other consequential charges as per the decree dated 4th December 2006 till the date of the decree”

2. By Notice of Motion No. 613 of 2014, the Applicant -- Metropolitan Infra Housing Pvt. Ltd. (Metropolitan Housing) which holds the bulk of the debentures (95.69 per cent) in PPL has prayed for the following reliefs:

“(a) That the Applicant being the secured creditor be permitted to intervene in the matter of distribution of sale proceeds in the

above mentioned Suit;

(b) That the Respondent [i.e Court Receiver] be directed to distribute the balance sale proceeds, after payment to the Plaintiff [i.e ICICI Bank] of his costs, charges and expenses, to the Plaintiff and Applicant in proportion to the debentures held by the public and the Applicant in pari passu in satisfaction of decree dated 4th December, 2006;Alternatively, the balance sale proceeds lying with the Court Receiver, High Court Bombay be handed over to the Plaintiff [Note: i.e. ICICI Bank] with a direction to the Plaintiff to distribute the balance sale proceeds to the debenture holders in pari passu."

3. Since both the Applications pray for similar reliefs and involve common facts and question of law, they are heard together and are disposed of by this common judgment.

4. Briefly set out are the facts relevant for deciding the issues raised in the above Notices of Motion.

4.1 ICICI Bank Ltd. (the Plaintiff in Suit No. 3636 of 1996 and the Applicant in Notice of Motion No. 3710 of 2011) were the Debenture-Trustees in respect of 15% non-convertible debentures issued by PPL under a Trust Deed dated 21st February, 1997. As security for the payment of debentures and interest, PPL created a mortgage in favour of ICICI Bank in respect of its lands situated at

villages Gharivali, Usarghar, Sandap, Sagaon and Sonarpada, Taluka Kalyan in the Registration District and Sub-District of Thane, Maharashtra and a charge over its moveable and immoveable properties.

4.2 PPL failed to make payments upon maturity of its non-convertible debentures. The above Suit being No. 3636 of 1999 was therefore filed by ICICI Bank, being the debenture trustees, to recover the unpaid principal and interest amounts under the said Trust Deed and to enforce the said mortgage and charge. By an order dated 30 June, 1999, the Court Receiver, High Court Bombay was appointed as receiver inter alia of the secured assets of PPL. By a subsequent order dated 8 February, 2002, the Court Receiver was directed to sell the secured properties by public auction.

4.3 The Court Receiver held four unsuccessful public auctions from about June 2002 to January 2004.

4.4 By an order dated 26 September, 2005 in Company Petition No. 110 of 2000, the said Company, PPL was ordered to be wound up and the Official Liquidator was appointed as Liquidator of PPL (hereinafter referred to as the Company in liquidation).

4.5 ICICI Bank, the debenture-trustees, opted to remain outside the winding

up, as secured creditors. They applied for and obtained leave u/s 446 of the Companies Act 1956 from the Company Court to continue the said suit. The plaint was allowed to be amended and the Official Liquidator was joined as a Defendant in the said Suit No. 3636 of 1999.

4.6 The Official Liquidator filed an affidavit dated 1 December, 2006 giving his consent to the decree being passed in the said Suit against the Company in terms of the minutes of order. Para 4 of the said affidavit read as under:

“4. The Official Liquidator however submits that the interest of the workers shall be protected at the time of distribution of sale proceeds as required under the provisions of section 529 A of the Companies act, 1956 and there is no objection for the decree being passed in terms of minutes handed over by the Plaintiff”

4.7 Thereafter Metropolitan Infrahousing (Applicant in Notice of Motion No. 613 of 2014) from time to time purchased some of the debentures under Orders of this Court dated 12 October, 2006, 12 December, 2006 and 13 January, 2011. In the circumstances, Metropolitan Infrahousing at present holds 95.69% of the debentures.

4.8 The said Suit was decreed in favour of ICICI Bank by a decree and Order dated 4th December, 2006, with the consent of the Official Liquidator duly

recorded therein. Prayers (a) (i), (a) (ii), and (b) to (j) were granted, with the rate of interest being as per the Trust Deed dated 21st February, 1997. The period of redemption was fixed, and failing payment, the secured properties were ordered to be sold. The Receiver was continued in execution to conduct the sale of the mortgaged properties.

4.9 By an Order dated 19 December, 2006, it was clarified that the distribution of sale proceeds shall be in accordance with section 529A of the Companies Act, 1956 ('the Act'). Clause 2 of the said decree was modified by consent by a subsequent Order dated 6 May, 2008. The total decretal amount (with interest upto the date of the decree as on 4th December, 2006) is Rs. 685,82,98,695/-.

4.10 By an order dated 7 September, 2007 Metropolitan Infrahousing was permitted to bid for the properties at the auction and was entitled to set off in case it was declared the successful bidder.

4.11 The sale was conducted by the Court Receiver. Metropolitan Infrahousing was the successful bidder for the immovable properties (sold as Part 'A' and 'B' lands) for Rs. 601,00,00,000/- (Rupees Six Hundred and One crores only) and Rs. 125,01,00,000/- (Rupees One Hundred Twenty Five Crore one lakh

Only) respectively aggregating to Rs 726,01,00,000/- (Rupees Seven Hundred and twenty six crores and one lakh only). By Orders dated 21 January, 2011 and 24 February, 2011, the sales of the Part 'A' and 'B' properties respectively in favour of Metropolitan Infrahousing were confirmed by this Court.

4.12 Metropolitan Infrahousing, being the successful bidder as well as the debenture-holder, was allowed a set-off by the Official Liquidator to the extent of Rs. 547,28,34,538/- (Rupees Five Hundred and Forty seven Crores twenty eight lakhs thirty four thousand and five hundred thirty eight only), which amount included interest only upto 26 September, 2005 (the date of the winding up order). Metropolitan Infrahousing contested the computation of this amount of set-off and by an Order and Judgment dated 22nd September, 2011 of the Company Court (Dharmadhikari J.), the challenge of Metropolitan Infrahousing was negated and the amount of set off as computed by the Official Liquidator was confirmed (up to the date of the winding up Order). The Appeal filed by Metropolitan Infrahousing against the said Order dated 22nd September, 2011 is admitted.

4.13 ICICI Bank which admittedly holds 4.31 per cent of the debentures, have received Rs. 24,65,25,000/- under orders of this Court against their redemption amount of Rs. 29,83, 57,744/- calculated as on the date of the decree.

Metropolitan Infrahousing is entitled to receive Rs. 656,04,40,951/- towards redemption of 95.69 per cent debentures, calculated as on the date of the decree i.e. 4th December, 2006. As stated hereinabove, pursuant to the orders of this Court, Metropolitan Infrahousing was granted a set off in the sum of Rs. 547,28,34,538/- . The balance amount payable as on the date of the decree is Rs. 113,94,39,157/-. The surplus amount lying with the Court Receiver is Rs. 37,67,27,072.06 as on 4th February, 2015.

4.14 ICICI Bank and Metropolitan Infrahousing have therefore by the present Notices of Motion sought reliefs which are set out hereinabove and have submitted that the surplus amount must be directed to be paid to the debenture holders in proportion to their debenture holding or to the debenture trustee (ICICI Bank) for distribution to the debenture holders. It is submitted that no part of this amount can be paid to the unsecured creditors under Section 530 of the Companies Act, 1956 ("the Act") so long as there is an unpaid balance amount due to the secured creditors under the decree of this Court in the suit.

5. The Learned Senior Advocate appearing for the Official Liquidator has opposed the reliefs sought in the above Notices of Motion. He has submitted as follows:

5.1 That the secured creditors are entitled to payment, in pari passu with workers, to such amount as is due to them on the date of the winding up of the

Company or in the event of a Provisional Liquidator having been appointed, the date of provisional liquidation. Thereafter, they would be entitled to payment of any further interest in accordance with the Companies (Court) Rules, 1959 ("Companies Rules") only after all claims admitted to proof are satisfied.

5.2 That once a Company goes into liquidation, the distribution of the funds of the Company as well as any proceeds from the sale of any of its assets are governed by the provisions of the Companies Rules.

5.3 That Section 529 A of the Act provides that workmen's due and debts due to secured creditors shall rank pari passu and be paid in priority to all other debts. The issue as to what would be the "debt" payable to all creditors including workers and secured creditors is explained in Rule 154 of the Companies (Court) Rules, 1959, to the effect that the debts payable to creditors would, as far as possible, be estimated as on the date of the winding up order.

5.4 That as per Rule 179 of the Companies Rules, only once the claim of all creditors including unsecured creditors is discharged by the Official Liquidator, then from the surplus amount if any the payment of interest can be considered.

5.6 That this view of Rules 154 and 179 and the proposition that a secured creditor would be entitled to interest after the date of the winding up order only on all claims being satisfied are supported by a long line of authorities including

the following:

- (i) *Bank of Maharashtra vs. Pandurang Keshav Gorwarkar and others*¹ ;
- (ii) *Kerala Financial Corporation vs. Official Liquidator, High Court of Kerala*²;
- (iii) *Decision of this Court in Asha Bhosale vs. Magna Sound India Ltd. (in Liquidation)*³.

5.7 That there is no ground available for this Court to depart from the consistent view taken by the various High Courts that the secured creditor would be entitled to interest after the date of the winding up order only after payment of all claims by the Official Liquidator.

5.8 That ICICI Bank has been paid a sum of Rs. 24,65,03,468 being the amount due to it inclusive of interest upto the date of the winding up order. The sum of Rs. 1,86,43,604/- claimed by ICICI in its application does not appear to be covered by the decree on the basis of which the claim is made. Again, Metropolitan Infrahousing has been permitted to set off against the purchase price of the assets of the Company in liquidation the entire amount due to it on the date of the winding up order, namely a sum of Rs. 547,28,34,538 crores. As such, in the absence of all other claims (including claims of unsecured creditors)

¹ (2013) 7 SCC 754 PAGES 781-782 (PARAS 60-62)

² (1996) 87 Comp Cas 183 (Kerala)

³ Order dated 21st October, 2015 passed in OL Reort No. 188 of 2014 in Company Petition No. 719 of 2002

being met, no further interest beyond the date of the winding up order is liable to be paid to the secured creditors at present and the Company Applications are liable to be rejected.

6. The Learned Advocates appearing for the ICICI Bank and Metropolitan Infrahousing have submitted as follows:

6.1 That Rules 154 and 179 of the Company Court Rules relied upon by the Official Liquidator cannot apply to the facts of the present case as the Plaintiff stands outside winding up. Rule 154 applies only to those creditors who choose to remain within the winding up proceedings and file their claim with the Official Liquidator as per Companies Rules for adjudication and payment thereof and excludes cases where secured creditor stands outside winding up and opts to realise its security for recovery of decretal amount as in the present case. Similarly Rule 179 also does not apply to a secured creditor who has chosen to remain outside the winding up proceedings and has not submitted his claim for adjudication before the Official Liquidator.

6.2 That interpretation of the Official Liquidator if accepted by this Court to read Rule 179 of the Companies Rules to include payment to unsecured creditors prior to secured creditors would amount to a serious infirmity and is contrary to the provisions of the Act, more particularly Section 529 (1) and 529 (A). Under Section 529 (A) of the Act, the rights of the workmen are placed *pari passu* with

the secured creditor. It does not in any manner dilute or take away the rights of a secured creditor to be paid on priority its entire dues with interest. In fact, the proviso to Section 529 (1) expressly contemplates a secured creditor to stand outside winding up and realise its security.

6.3 That there is no provision under the Act which disentitles the secured creditor to recover its debts with interest beyond the date of winding up order.

6.4 That the Official Liquidator who consented to the decree being passed in favour of the secured creditors subject only to the workmen's pari passu entitlement being protected is bound by the decree.

6.5 That the decisions of the Hon'ble Supreme Court of India in the case of *Bank of Maharashtra vs. Pandurang Keshav Gorwarkar and others* (supra), *Laxmi Fibres Ltd. vs. A.P. Industrial Development Corporation Ltd. and others*⁴, *Indian Bank vs. Official Liquidator, Chemmeens Exports (P) Ltd.*⁵, *M.K. Ranganathan vs. Govt. of Madras*⁶ support the aforestated contentions of ICICI Bank and Metropolitan Infrahousing.

6.6 That the decisions relied upon by the Official Liquidator renders no assistance to the submissions advanced on his behalf.

6.7 That in the circumstances, since the workmen have been paid in full, the

⁴ AIR 2015 SC 3289

⁵ (1998) 5 SCC 401

⁶ (1955) 3 SCR 374

entire balance amount lying with the Court Receiver with the interest earned and/or accrued thereon be directed by this Court to be paid to ICICI Bank and Metropolitan Infrahousing.

7. In rejoinder, the learned Senior Advocate appearing for the Official Liquidator has submitted that the submissions advanced on behalf of ICICI and Metropolitan Infrahousing are misconceived. It is submitted that the right of the secured creditor to stand outside winding up does not entitle them to disregard the principles of the Act and Rules. This is clear from the judgment of the Hon'ble Supreme Court in *International Coach Builders vs. Karnataka State Financial Corporation*⁷ which fell for consideration by this Court in the case of *Asha Bhosale (supra)*. It is submitted that the judgment in *Indian Bank (supra)* relied upon by Metropolitan Infrahousing is entirely inapplicable to the present case since the said judgment was rendered in a case where the Official Liquidator sought to challenge before the Company Court a mortgage decree to which he was a party. The Official Liquidator has made no such attempt in this case. It is submitted that the reliance on the judgment of the Hon'ble Supreme Court in *Laxmi Fibres (supra)* is also misconceived. The judgment merely lays down the proposition that the secured creditor (in that case the A.P. Industrial Development Corporation Ltd. governed by the State Financial Corporations

⁷ (2003) 10 SCC 482 pages 490-496 (paras 14-25)

Act, 1955) cannot be compelled to prove its claim before the Official Liquidator. It is in this context that the observations in the judgment have been made. The judgment is no authority for the proposition that secured creditors would be entitled to payment of interest after the date of winding up prior to payment of other claims. This issue did not fall for consideration at all by the Hon'ble Supreme Court of India in that case. It is therefore once again submitted that the above Notices of Motion be dismissed with costs.

8. I have considered the submissions advanced by the Learned Advocates appearing for the parties and have also considered the case law relied upon by them. In the backdrop of the facts as well as the rival contentions set out hereinabove, the main issue that falls for consideration of this Court is whether Rules 154 and 179 of the Companies (Court) Rules, 1959 are applicable to debts due to a secured creditor by a Company in liquidation, which secured creditor stands outside the winding up and opts to realise his security for recovery of the decretal amounts. To put it differently, can a secured creditor who has obtained a decree in his favour against a Company in liquidation which decree includes/directs the Company in liquidation to pay interest on the principal amount upto payment/realisation can be told by the Official Liquidator that despite the workers of the Company in liquidation having received all their dues as provided in law, the secured creditor is not entitled to any interest after the

date of the winding up of the Company unless and until all the claims against the Company including that of the unsecured creditors are satisfied.

9. Though the Official Liquidator has relied only upon Rules 154 and 179 of the Companies Rules, for a clear understanding, Rules 147 to 154 as well as Rule 179 are reproduced hereunder:

" R. 147. Fixing a date for proving debts - *Subject to the provisions of the Act, and in a winding-up by the Court, subject to the directions of the Court, the Official Liquidator in a winding-up by the Court shall, and the Liquidator in any other winding-up may, fix a certain day, which shall be not less than 14 days from the date of the notice to be given under the next succeeding Rule, on or before which the creditors of the company are to prove their debts or claims and to establish any title they may have to priority under section 530, or to be excluded from the benefit of any distribution made before such debts or claims are proved, or, as the case may be, from objecting to such distribution.*

R. 148. Notice to creditors -

(1) The liquidator shall give not less than 14 days' notice of the date so fixed by advertisement in one issue of a daily newspaper in the English language and one issue of a daily newspaper in the regional language circulating in the State or Union Territory concerned, as he shall consider suitable. Such advertisements shall be in Form No. 63.

(2) The Liquidator shall also give not less than 14 days' notice of the

date fixed, in a winding-up by the Court, to every person mentioned in the statement of affairs, as a creditor, who has not proved his debt and to every person mentioned in the statement of affairs as a preferential creditor, whose claim to be a preferential creditor has not been established or is not admitted, or where there is no statement of affairs, to the creditors as ascertained from the books of the company and, in any other winding-up, to each person who, to the knowledge of the Liquidator, claims to be a creditor or preferential creditor of the company and whose claim has not been admitted, to the last known address or place of abode of such person. Such notice shall be in Form No. 64 or 65 as the case may be, and shall be sent to each creditor by pre-paid letter post under certificate of posting.

(3) All the rules hereinafter set out as to the admission or rejection of proofs shall apply with necessary variations to any claim to priority as a preferential creditor.

R.149. Proof of debt - *(1) In a winding-up by the Court, every creditor shall, subject as hereinafter provided, prove his debt, unless the Judge in any particular case directs that any creditors or class of creditors shall be admitted without proof.*

(2) Formal proof of the debts mentioned in paragraph (d) of subsection (1), of section 530 shall not be required, unless the Official Liquidator shall in any special case otherwise direct, in a winding-up by the Court.

R.150. Mode of proof and verification thereof - *A debt may be proved by delivering or sending by post to the Liquidator, an*

affidavit verifying the debt made by the creditor or by some person authorised by him. If the affidavit is made by a person authorised by the creditor, it shall state the authority and means of knowledge of the deponent. A creditor need not attend upon the investigation unless required to do so by the Liquidator.

R.151. Contents of proof - *An affidavit proving a debt shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The affidavit shall state whether the creditor is a secured creditor, or a preferential creditor, and if so, shall set out the particulars of the security or of the preferential claims. The affidavit shall be in Form No. 66.*

R.152. Workmen's wages - *In any case where there are numerous claims for wages or accrued holiday remuneration by workmen and other employed by the company, it shall be sufficient if one proof in Form No. 67 for all such claims is made either by a foreman or some other person on behalf of all such creditors. Such proof shall have annexed thereto as forming part thereof, a schedule setting forth the names of the workmen and others and the amounts severally due to them. Any proof made in compliance with this Rule shall have the same effect as if separate proofs had been made by each of the said workmen and others.*

R.153. Production of bills of exchange and promissory notes - *Where a creditor seeks to prove in respect of a bill of exchange, promissory note or other negotiable instrument or security of a like nature on which the company is liable, such bill of exchange,*

note, instrument or security shall be produced before the Liquidator and be marked by him before the proof is admitted.

R. 154. Value of debts- *The value of all debts and claims against the Company shall, as far as is possible, be estimated according to the value thereof at the date of the order of the winding up of the Company nor where before the presentation of the petition for winding up, a resolution has been passed by the Company for voluntary winding-up, at the date of the passing of such resolution."*

R. 179. Payment of subsequent interest - *In the event of there being a surplus after payment in full of all the claims admitted to proof, creditors whose proofs have been admitted shall be paid interest from the date of the winding up order or of the resolution as the case may be, up to the date of the declaration of the final dividend, at a rate not exceeding 4 per cent per annum, on the admitted amount of the claim, after adjusting against the said amount the dividends declared as on the date of the declaration of each dividend."*

10. A perusal of Rules 147 to 154 of the Companies Rules, clearly indicate that each of them deals with a claim to be lodged by a creditor pursuant to advertisement in the newspaper, adjudication thereof by the Official Liquidator, the subsequent procedure of proof and list of creditors to be filed in Court and failure to prove debt within time fixed. Each of the aforesaid Rules contemplate "adjudication" of "claim" of the "creditor" "lodged" with the Official

Liquidator. Rule 154 therefore cannot be read in isolation and must be read in the entire scheme of the Rules in which it is incorporated. Rule 154 primarily applies only to those creditors who choose to remain within the winding up proceedings and file their claim with Official Liquidator as per the Companies Rules for adjudication and payment thereof, it specifically excludes cases where secured creditor stands outside winding up and opts to realise his security for recovery of decretal amount as is in the present case. Thus Rule 154 has no applicability to any secured creditor including ICICI Bank and Metropolitan Infrahousing who admittedly are standing outside the winding up proceedings.

11. Similarly Rule 179 also is not applicable to a secured creditor who has chosen to remain outside the winding up proceedings and has not lodged his claim with the Official Liquidator. The language of Rule 179 clearly read "*...there being a surplus after payment in full of all the claims admitted to proof, creditors whose proofs have been admitted to proof, shall be paid....*". The language of the Rule makes it abundantly clear that the Rule restricts payment of interest only to such parties whose claims have been admitted and adjudicated by the Official Liquidator and not those creditors who have remained outside the winding up. In fact in the judgment of the Kerala High Court in the case of *Kerala Financial Corporation vs. Official Liquidator (supra)* relied upon by the learned Counsel appearing for the Official Liquidator, the Kerala High Court (at

page 189) distinguished judgments of the Andhra Pradesh High Court and Karnataka High Court on the ground that those were cases of secured creditors standing outside winding up. In paragraph 2 of the said judgment of the Kerala High Court, the Court has said that “*it is made clear that in the said case the Applicant has preferred a claim before the Official Liquidator.*” Thus the judgment of Kerala High Court in fact assists the Plaintiff inasmuch as it suggests that a secured creditor standing outside the winding up stands on a different footing and Rule 179 would not be applicable to such a creditor.

12. However, the rights of a secured creditor who stands outside the winding up and opts to realise his security are subject to the provisions of Section 529 A of the Act, which places the rights of the workers *pari passu* with the secured creditor/s. Section 529 (A) is reproduced hereunder:

" (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.

Again, proviso to Section 529 (1) expressly contemplates that a secured creditor can stand outside winding up and realise its security. The relevant extract of

proviso to Section 529 (1) is reproduced hereunder:

“[Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen’s portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to 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’s dues; and*
- (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.]”*

Thus, a limited impediment is introduced with regard to the claim of a secured creditor under the winding up provisions of the Act with a view to protect the rights of the workmen to receive their wages on a pari passu basis.

13. It may be noted that under S. 445 (3) of the Companies Act, 1956, the workmen stand discharged from the date of the winding up order. Workmen are not entitled to any amount after the date of their discharge. It is therefore this

date which is held relevant for determining the pari passu ratios u/s 529A.

14. The judgment of the Hon'ble Supreme Court in the case of *Bank of Maharashtra (supra)* deals with the jurisdiction of the Debt Recovery Tribunal to adjudicate claims of workmen. Lodha, J.(as the Learned Judge then was) sets out the law thus:

“Having regard to the scheme of law, it appears to us that the relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the Company is the date of the winding up order and not the date of sale”. (emphasis added).

As set out in the said judgment, the cut off date, i.e. the date of the winding up order, is relevant only for arriving at the ratio at which the sale proceeds are to be distributed among workmen and secured creditors. In fact, in para 54 page 2051 of the said Judgment, it is held inter alia that “.. *The claims of the secured creditors are thus required to be considered giving priority over unsecured creditors but their claims would be pari passu with the workmen.*”

15. However, the limited impediment created under the statute, i.e. to allow the secured creditors to realise their claim subject to the right of the workmen to receive their wages on a pari passu basis with the date of winding up to be

treated as the relevant date for the determination and payment of the pari passu amounts does not affect the rights of the secured creditors to realize their security and receive their full dues, once the provisions of Section 529A have a full play. The control of the Company Judge and the Official Liquidator, under given circumstances, extends only to ensure that the aforesaid purpose of Section 529A is effectively achieved.

16. The Hon'ble Apex Court in the matter of *Laxmi Fibres Ltd. Vs. A.P. Industrial Dev. Corpn. Ltd. & Ors.* (supra) noticed its previous judgments including the judgment in *International Coach Builders Ltd*, and laid down the law as under:

“7. In International Coach Builders Ltd. this Court not only followed the view taken in A.P. State Financial Corporation case but went on to explain in paragraph 31 as to how the view adopted would not obliterate the difference between a creditor opting to stay outside winding up and one who opts to prove his debt in winding up. Para 31 of the judgment provides thus:

“31. Finally, counsel for SFCs urge that the view we are to take would obliterate the difference between a creditor opting to stay outside winding-up and one who opts to prove his debts in winding-up. We are unable to accept it. As a result of the amendments made by the Act of 1985 in the Companies Act, 1956, SFCs as

secured creditors, must seek leave of the Company Court for the limited purpose of ensuring that the pari passu charge in favour of the workmen is safeguarded by imposition of suitable conditions under the supervision of the Company Court. If this amounts to impeding their hitherto unimpeded rights, so be it. Such is the parliamentary intendment, according to us. This impediment is of a limited nature for the specific purpose of protecting the pari passu charge of the workmen's dues and subject thereto, SFCs can continue to exercise their statutory rights as secured creditors without being reduced to the status of unsecured creditors required to prove their debts in insolvency and stand in line with other unsecured creditors. Neither is the apprehension expressed justified, nor the contention sound."

8. *It is clear from the aforesaid judgment that no doubt the changes brought about in the Companies Act through amendments of 1985 impede even the statutory powers available to a secured creditor like SFCs under Section 29 and the other relevant sections of the SFC Act but the impediment is indeed of a limited nature; its specific purpose being to protect the pari passu charge of the workmen's dues.*

*After ensuring that this purpose is achieved or ensured, the State Financial Corporations can continue to enjoy their statutory rights as secured creditors. **They will not be reduced to the status of unsecured creditors and equally will not be required to prove their debts nor will be required to stand in line with other unsecured creditors.***

*10. In our considered view, the rights of a financial corporation available under the provisions of the SFC Act have been compromised or impeded by the amendment of 1985 in the Companies Act, **particularly the proviso added to Section 529(1) and Section 529A, only to a limited extent and for the limited purpose of securing the right of the workers for distribution of their wages as pari passu charge.** But such limited impediment to their rights under the SFC Act will not alter the status of State financial corporations as secured creditors and they will not be required to prove their debt which they are entitled to realize under the provisions of the SFC Act subject to right of the workers to receive their wages also as secured creditors on pari passu basis. The control of the Company Judge and the Official Liquidator if authorized, can extend only to ensure that the aforesaid purpose of Section 529A is effectively achieved. Like any other affected person, if the Company represented by the Official Liquidator has reasons to be*

aggrieved by claims made by a financial corporation under the SFC Act, its remedy would be to initiate appropriate civil proceedings to challenge such claim or debt of a State financial corporation before an appropriate forum and not to assume jurisdiction to sit in adjudication and decide entitlement of the financial corporation when it has opted to stand outside the liquidation proceeding as a secured creditor. As noted earlier, the statutory powers of SFCs have suffered only a limited impediment only to serve the purpose of protecting workers' dues." (emphasis supplied)

17. Punjab and Haryana High Court in the matter of *State Bank Of Patiala Vs. Northland Sugar Complex Ltd.*⁸ considered the applicability of the Company Court Rules and held (in paragraph 29) that the said Rules do not apply to secured creditors who stand outside the winding up proceedings. Para 29 reads thus:

"29. Now, the question which remains to be decided is whether interest can be claimed by the secured creditors after the date of winding up order or not. Rule 154 of the Companies (Court) Rules on which counsel for the official liquidator has put reliance is not applicable in respect of the secured creditors who stand outside the winding up. Since the secured creditors stand outside the winding up on the strength of their security, the consortium of banks are entitled

⁸ 2004 55 SCL 92 (Punj &Har),

to realise the interest in terms of the order passed by the court of competent jurisdiction. The date of winding up is relevant only for those creditors whose claim is required to be settled by the official liquidator. Since the claim of the consortium of banks is not required to be adjudicated upon by the official liquidator, they are entitled to execute the order inclusive of interest against the sale proceeds of their securities. However, such realisation would be subject to the dues of the workmen as and when finalised in respect of which the banks shall furnish undertaking aforesaid.”

18. The observations in paragraph 37 of Magnasound regarding interest relied upon by the Official Liquidator was in the context of the offer made by the assignee to pay additional amounts to cover the dues of the workers (which dues had not been determined or adjudicated upon by the Official Liquidator at that time). Thus, it is clear that the observation is in the context of determining the amounts respectively due to the workmen and the subrogee pari-passu under Section 529A.

19. The Judgment dated 22 September, 2011 of Dharmadhikari, J. (relied upon by the Official Liquidator) in the present matter is therefore required to be seen in the light of the above Judgments of the Supreme Court and the law laid down therein. That Judgement is passed on a Liquidator's Report, which, in turn considers the question of set off to be granted to the purchaser of the

property, who is himself the secured creditor in respect of the property and who wants to realize his security outside winding up. The Official Liquidator is concerned with this security only to the extent of the workmens dues which rank pari passu with the secured creditor's claim. It is an admitted position in law, as I have noted above, that for working out this pari passu charge and determining the sharing ratio between them both the workmen's dues and the claim of the secured creditor must be reckoned as of the date of the winding up order. The Official Liquidator, accordingly, had to merely consider the claim of ICICI Bank Ltd. and Metropolitan Infrahousing upto the date of the winding up order and accordingly grant set off for the claims payable to the latter after considering the pari passu charge towards the workmens dues. The Official Liquidator thus calculated the claim and granted the set off in his report. It was this report which came up for orders before Dharmadhikari, J. and which was accepted by the Learned Judge. In that context, the Judgment of Dharmadhikari, J. only deals with the question of determining the pari passu ratios between the workmen and the secured creditor and does not and cannot have the effect of extinguishing or wiping out the balance amount of the debt due and owing to ICICI Bank Ltd. under the decree in the suit. In fact, at one place in his order the Learned Judge (Dharmadhikari, J.) has clearly noted that "Once the set off was permitted to be claimed that by itself does not mean that the computations

and calculations of the said set off as made by the Metropolitan is final and conclusive." Once this set off is granted and the purchaser brings in the balance amount of sale price, the balance so brought in will have to abide by the respective rights of the parties to it. The question of the purchaser's entitlement (as a secured creditor choosing to remain outside winding up) to the balance which Dharmadhikari, J. had no occasion to consider will then have to be decided in the light of the law on the point.

20. For the aforesaid reasons, I am not in agreement with the submissions advanced on behalf of the Official Liquidator.

21. Admittedly the Court Receiver/Official Liquidator has an approximate amount of Rupees Thirty Eight Crores Thirty Six Lakhs as on 15th November, 2016 lying with him after making all the payments as required under Section 529A of the Act. No part of this amount can be paid to the unsecured creditors of the Company so long as the full decretal amount remains outstanding and payable to the secured creditors.

22. However, I am informed that since some of the claims filed before the Official Liquidator by some of claimants claiming to be 'workmen' of the Company in liquidation, were rejected by the Official Liquidator and the adjudication upheld by this Court and by the Appeal Court, the claimants have filed SLPs being Nos.29398 and 29399 of 2016 impugning the said orders.

Though notice has been issued in the said SLPs by the Hon'ble Supreme Court, till date no ad-interim/interim order are passed in the said SLPs.

23. In view thereof, the following order is passed:

The entire balance surplus amount lying with the Court Receiver/Official Liquidator with the interest earned or accrued thereon, is ordered to be paid to ICICI Bank Ltd. and Metropolitan Infrahousing as prayed by them in their respective Notices of Motion, subject to them giving an undertaking to the Official Liquidator that they shall bring back the said amounts or part thereof if any amounts are directed to be paid to the Petitioners in SLP Nos.29398 and 29399 of 2016 by the Hon'ble Supreme Court.

24. The above Notices of Motion are accordingly disposed of.

(S.J. KATHAWALLA, J.)