

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMPANY APPLICATION NO.81 OF 2013
WITH
OFFICIAL LIQUIDATOR'S REPORT NO.96 OF 2017/VIII
IN
COMPANY PETITION NO.480 OF 1988**

In the matter Companies Act, 1
of 1956;

And

In the matter of M/s.Trimbak
Ispat Private Limited
(in liquidation)

M/s. Sterling Trade

... Petitioner

And

Manju Naresh Gupta

... Applicant

Versus

The Official Liquidator through

M/s. Trimbak Ispat Private Limited

(in liquidation)

... Respondent

Mr.Monish K. Vig for applicant.

Mr.Vishal Kanade I/b Satish S. Raut for respondent No.2.

(Ms.Pradnya Sunil Tanksale, Assistant General Manager of SICOM)

Ms.Vaishali R. Bhilare for respondent no.3.

Mr.Naushad Engineer for official liquidator.

Mr.Mahendhar Aithe, company prosecutor for official liquidator.

CORAM : K.R.SHRIRAM, J.

DATE : 30TH AUGUST 2018

P.C.

1 In this official liquidator's report, the liquidator is seeking the following directions :-

(a) *In view of para (22 & 24) above, whether this Hon'ble Court*

would be pleased to permit the Official Liquidator to reimburse an amount of Rs.7,63,203/- (Rs.10,87,605/-) and Rs.1,76,915/- to SICOM (after adjusting the recovery) and Canara Bank respectively towards security Expenses under section 476 of the Companies Act, 1956;

(b) In view of para (23) above, whether this Hon'ble Court would be pleased to permit the Official Liquidator to declare and pay a dividend @ 20.539% amounting to Rs.16,08,143/- (Rs.17,85,058/-) to Canara Bank subject submission of an undertaking to bring back the amount along with interest as and when demanded by the Official Liquidator for settlement of any worker claim in future;

(c) In view of para (27) above, whether this Hon'ble Court would be pleased to permit the Official Liquidator to open a 'Separate Dividend Account' with Punjab National Bank, Punjab National Bank House, Fort, Mumbai with a sum of Rs.16,08,143/- (Rs.17,85,058/-) under Rule 290 of the Companies (Court) Rules, 1959 for making payment of dividend to Canara Bank and the dividend shall be payable for a period of six months from the date on which the directions/orders are given by this Hon'ble Court for Declaration of Dividend and thereafter to transfer the unpaid/unclaimed dividend, if any, to the "Companies Liquidation Account" maintained with the Registrar of Companies, Maharashtra, Mumbai under Section 555 of the Companies Act, 1956;

(d) In view of para (28) above, whether this Hon'ble Court would be pleased to permit the Official Liquidator to dispense with the requirements of Rule 276 of the Companies (Court) Rules, 1959 and to issue the dividend notice to Canara Bank by "Speed Post" to their last known addresses;

(e) In view of para (29) above, whether this Hon'ble Court would be pleased to direct SICOM to deposit with the Official Liquidator, interest on amount of sale proceeds of immovable Rs.31,11,101/- for the period of 5 year and one month at the rate as may be decided by this Hon'ble Court."

2 Two issues arise in this report, viz., (a) Whether the secured creditors such as SICOM and Canara Bank are entitled to seek recovery/reimbursement of amounts spent by them towards security charges for protecting their security? and (b) Whether the amounts paid by

the guarantor to the creditor is to be credited even against the amounts due and payable by the principal debtor to the creditor?

3 On 3rd October 1991, this Court passed an order in Company Petition No.480 of 1988, by which the Respondent-Company M/s. Trimbak Ispat Private Limited was ordered to be wound up and the Official Liquidator attached to this Court was appointed as Liquidator thereof with usual powers under the Companies Act, 1956. The Official Liquidator on 19th October 1991, went to take possession of the factory and the movables situated at 395/8 Bombay Agra Road, Nasik. It was noted that SICOM had already taken possession of the said premises and had deployed its security guards. The Liquidator also took possession, as can be seen from the panchanama, however, the security continued to be that of SICOM. During 1991-1992, SICOM, which claimed to be a secured creditor in respect of certain movable and immovable assets, had taken out Company Application No.279 of 1992 for permission to sell the assets. Similarly even Canara Bank had filed Company application no.351 of 1991 for sale of its secured assets. On 30th April 1994, order was passed directing the Official Liquidator to sell the Company's property mortgaged to SICOM. On 16th November 1995, this Court passed the order, fixing the price for selling immovable properties. On 6th December 1995, advertisement was published in the newspapers for sale of the movable properties. On 25th

July 1996, an order was passed confirming sale of the plant and machinery, which was the security of SICOM and Canara Bank. Security of SICOM was sold for a sum of Rs.20 Lakhs and the security of Canara Bank was sold for a sum of Rs.9,02,000/-. The Official Liquidator has invested the entire consolidated sale-proceeds in Fixed Deposits and the same have been renewed from time to time. As on the date of OLR No.96 of 2017, a sum of Rs.58,09,089/- is available with the Official Liquidator. In 1996-1997, the Official Liquidator had invited claims of workers and creditors as per Rule 148, by giving advertisement in the newspapers. The last date for inspection of the claims was 5th November 1997. No claims of any workers was received.

On 9th August 2006, SICOM lodged its claim with the Official Liquidator for a total sum of Rs.47,25,598/- of which principal was Rs.22,76,366/- and interest upto 3rd October 1991 (date of winding up) amounted to Rs.24,49,232/-. On 29th February 2008, The Official Liquidator passed an order adjudicating SICOM's claim and admitted SICOM's claim for the said sum of Rs.47,25,598/-. On 22nd June 2010, SICOM, without the knowledge and consent of the Official Liquidator, unlawfully assigned the leasehold rights of the Respondent-Company to Balasaheb Patil & Associates in violation of Section 536 of the Companies Act for a sum of Rs.31,11,101/-.

On 2nd February 2011, Canara Bank lodged its claim and filed its Affidavit of proof of debt, claiming a sum of Rs.69,90,782.68 along with interest thereon at 12% per annum. On 14th March 2011, the Official Liquidator passed an order and adjudicated and admitted the claim of Canara Bank for an amount of Rs.78,29,676/-. During 2nd April 2012 to 25th April 2012, the Official Liquidator addressed letters to SICOM, calling upon them to indicate as to how they transferred the property. On 26th May 2015, the Official Liquidator issued a Show Cause Notice to SICOM with regard to the unlawful alienation of the leasehold rights of the property of the Respondent-Company in liquidation. On 12th August 2015, SICOM tendered an unconditional apology.

Around the same time, SICOM filed Company Application No.549 of 2015 to challenge the adjudication of its claim of Rs.47,25,598/- and claimed that it was, in fact, entitled to Rs.21,27,82,666.50 along with reimbursement of security charges of Rs.23,88,857/-. On 30th June 2015, this Court passed an order, rejecting SICOM's Application and upholding the adjudication made by the Liquidator of Rs.47,25,598/- and directed SICOM to submit proof of the security charges allegedly paid by it. On 9th September 2015, the Official Liquidator rejected the claim of SICOM for Rs.23,88,857/- towards security charges and allowed only Rs.10,87,605/- as security charges payable to SICOM.

On 4th January 2017, SICOM undertook to this Court to deposit the said sum of Rs.31,11,101/- with the office of the Official Liquidator and has, in fact, deposited the said sum of Rs.31,11,101/- with the Official Liquidator on 17th January 2017.

On 20th April 2017, present Official Liquidator's Report has been filed for declaration of dividend.

4 The Report originally contemplated, allowing certain security charges / expenses to be recovered by the secured creditors. However, during to the hearings, that had been held before this Court, the Court was of the view that the question of whether a secured creditor could claim reimbursement of the expenses incurred for preserving the assets which form its security when it alone was going to benefit from sale of the security was something that needed to be considered. It was felt that certain guidelines need to be laid down as to the circumstances when a secured creditor could be entitled to claim reimbursement of the expenses incurred for preserving an asset of the Company in liquidation.

5 Further, as can be seen from what is set out hereunder, the amounts that SICOM has received from guarantors, has also been adjusted against SICOM's claim against the principal debtor. SICOM has sought to contend that the Liquidator could not have adjusted the amounts received from

guarantors.

6 ISSUE NO.1 :- Shri Engineer submitted that the manner in which the expenses incurred in connection with the winding up of a Company are to be paid, shared, recouped or recovered is dealt with in Rule 292 of the Companies (Court) Rules, 1959 (Rules) and Section 529 of the Companies Act, 1956 (The Act). Shri Engineer submitted that from a bare perusal of Rule 292 of the Companies (Court) Rules, what is apparent is as follows:

(i) Where a company in liquidation has funds for meeting the expenses, the Liquidator shall use the funds of the company for preserving the assets of the company.

(ii) If the company does not have funds, then the Official Liquidator may, with the leave of the Court, incur expenses in the process of winding up out of the permanent advance or other fund provided by the Central Government. If the Liquidator incurs such expenses, then the expenses, so incurred, shall be recouped out of the sale-proceeds of the assets of the company in priority to any other debt.

(iii) The proviso to Rule 292 stipulates that where monies are advanced by a “creditor” or “contributory” to preserve the assets of the company, the same shall be repaid out of amounts realized from the sale of the assets of the company to the said creditor / contributory in priority to any debt of the company. Therefore, from reading of Rule 292, it would appear that where a creditor

or contributory advances money for preserving the assets of the company, it would be entitled to recover the same. The rule does not distinguish between a secured creditor and unsecured creditor.

7 It is pertinent to note is that Section 529 of the Companies Act also deals with the subject matter.

(i) Section 529(1) stipulates that Rules of Insolvency of an individual would also apply to the winding up of a company. What this implies is that when a company goes into winding up, every secured creditor has two options viz. (a) to surrender its security and come within winding up and claim as an ordinary creditor; or (b) to retain its security and stand outside winding up.

(ii) It is clear that if a secured creditor chooses to come within winding up, then it must surrender its security for the benefit of the General Body of creditor and make a claim as an unsecured creditor. If it chooses to stand outside winding up, then it can retain its security and then prove for only the balance claim.

8 Shri Kanade appearing for SICOM, in fairness, submitted that where a secured creditor has stood outside winding up without relinquishing his security and proving for his debt, proceeds to realise his security, he shall be liable to pay his portion of the expenses incurred by the liquidator for the preservation of the security before its realisation by the secured creditor. Shri Kanade submitted that if a liquidator has incurred expenses, Section 529 does not provide for the secured creditor to reimburse the

liquidator for the expenses incurred. Shri Kanade submitted that under Rule 292 any amount spent by any creditor has to be paid by the official liquidator to the creditor.

9 Let us see what Rule 292 and Section 529 say. Rule 292 and Section 529 (1) and (2) read as under :-

Rule 292 reads as follows :

“R.292. Whether the company has no available assets.- *Where a company against which a winding-up order has been made has no available assets, the Official Liquidator may, with the leave of the court, incur any necessary expenses in connection with the winding-up out of any permanent advance or other fund provided by the Central Government, and the expenses so incurred shall be recouped out of the assets of the company in priority to the debts of the company:*

Provided that where any money has been advanced to the Official Liquidator by the petitioning or other creditor or contributory for meeting any preliminary expenses in connection with the winding-up, Official Liquidator may incur any necessary expenses out of such amount, and the money so advanced shall be paid out of the assets of the company in priority to the debts of the company.”

Section 529 (1) and (2) reads as follows:

“529. APPLICATION OF INSOLVENCY RULES IN WINDING UP OF INSOLVENT COMPANIES

(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to -

- (a) debts provable ;*
- (b) the valuation of annuities and future and contingent liabilities ;*
- and*
- (c) the respective rights of secured and unsecured creditors ; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:*

Provided that the security of every secured creditor shall be deemed to

be subject to a pari pasu 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 pasu with the workmen's dues for the purposes of section 529A.

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section :

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay his portion of the expenses incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realisation by the secured creditor.

Explanation. - For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security."

(emphasis supplied)

10 Rule 292 emphasizes two situations, viz., (a) when the company against which the winding up order has been made, has no available assets and the liquidator to incur any necessary expenses in connection with the winding up, with the leave of the Court, uses any permanent advance or other fund provided by the Central Government, then the expenses so

incurred shall be recouped out of the assets of the company in priority to the debts of the company; (b) Where any money has been advanced to the liquidator by the petitioning or other creditors or contributory for meeting any preliminary expenses in connection with the winding up, the official liquidator may incur any necessary expenses out of such amount and the money so advanced, shall be paid out of the assets of the company in priority to the debts of the company. Therefore, what provision Rule 292 says is if any party, viz., petitioning or other creditor or other creditors or contributory has advanced certain amounts to the official liquidator to incur necessary expenses, such amount will be paid out of the assets of the company in priority of the debts of the company. In other words, if a party has funded the liquidator to meet his expenses, the liquidator will pay him back first that amount out of the assets/sales proceeds of the assets of the company and only the balance will be available for paying the debts of the company. This proviso of Rule 292 does not make any distinction between the secured creditors or un-secured creditors. If a party's case is it advanced money to meet the liquidators' expenses, then it will get that advance repaid first before the liquidator uses the sale proceeds or other assets of the company to pay off the company's debts.

11 Section 529(1)(c) lays down that the rules that shall prevail and be observed in the winding up of an insolvent company, with regard to the

respective rights of secured and unsecured creditors will be the same rules as are in force for the time being under the law of Insolvency with respect to the estates of persons adjudged insolvent. It also provides for a situation where a secured creditor instead of relinquishing its security and proving its debt, may stand outside winding up and opt to realise its security outside winding up. In such a situation, the workmen, shall also be entitled to charge of those securities rate-ably to the extent of the workmen's dues payable by the company.

12 Sub-section 2 of Section 529 deals with what every creditor of the company is entitled to. It says all persons will be entitled to prove for and receive dividends out of the assets of the company and this will also include unsecured creditors who may come in under the winding up and make such claims against the company as they respectively are entitled to make by virtue of Section 529. A proviso was inserted in the year 1960 and it says that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay his portion of the expenses incurred by the liquidator for the preservation of the security before its realization by the secured creditor. A Division Bench of this Court, in *Asian Power Controls Ltd. Vs. Bubbles Goyal*¹, has held that the secured creditor can decide whether to enforce the security

1 2013 (3) Mh.L.J. 811

and prove in the winding up for the balance of the debt after deducting the amount realised; or surrender the security to the Liquidator and prove for the whole of the debt as an unsecured creditor; or estimate the value of the property subject to her security and prove for the balance of the debt after deducting the estimated value; or rely on the security and not prove in the winding up proceedings. The Court held that a secured creditor can exercise his option after the company is ordered to be wound up. Therefore, there would be a situation where the land and building of the company (in liquidation) is, let us say mortgaged to XYZ Ltd. XYZ Ltd. would have exercised the option of enforcing the security and prove in the winding up the balance of the debt, if any, after deducting the amount realised. The liquidator may have incurred expenditure to preserve the said land and building which is mortgaged to XYZ Limited. The proviso says XYZ shall be liable to pay such expenses that the liquidator has incurred for preserving that land and building secured to XYZ Limited. But expression used is “.....*his portion of the expenses incurred by the liquidator.....*”. This is because there could be a situation where there are workmen of the company (in liquidation) who will have a *pari pasu* charge on that security to the extent of dues of workmen from the sale proceeds. In such a situation, XYZ Limited need not pay for the preservation cost for the entire amount but only to the extent of the

amount that XYZ is able to retain for itself (after deducting what is payable to the workmen) from realizing the security.

13 Pursuant to the amendment to Section 529 and the introduction of section 529A of the Act, workmen are treated *pari pasu* with the secured creditors. Further it is made clear by the very amendment that the secured creditor shall contribute to the expenses incurred by the liquidator in the same proportion as the secured creditor would be entitled to the value of the security. Therefore, if the secured creditor would be entitled to 60% of the realized sale proceeds of the security, then he shall have to contribute 60% of the expenses incurred. The balance 40% if it is to go to the workmen, then the expenses incurred by the liquidator to the extent of 40% would first have to be deducted from the amount payable to the workmen. This is the fairest way to distribute the burden of the expenses. The fact that the burden of the expenses would have to be shared even by the workmen is implied.

14 When the expenses have been incurred in the past by the liquidator, the same were deducted from the total sale proceeds before the amounts are released to the workmen. So the amount of expenses are in effect being deducted.

15 In my view, it also means that if a secured creditor who has decided to stand outside winding up, decides to realise the security has incurred certain costs to preserve that security, cannot claim reimbursement from the official liquidator such amount incurred for preserving that security. If the secured creditor is paid that reimbursement what it would mean is that a secured creditor will realize the assets, pocket the entire money but the unsecured creditor who does not get any benefit from that particular asset, will be contributing to the sole benefit of the secured creditor. That would be unfair. There could be a situation where no money will be available with the liquidator to make such a payment. Would that mean the unsecured creditors who won't get anything will have to contribute from their pocket in addition to what they have lost. This will be absurd. When one reads both the provisions together, what emanates is that every party who derives benefit has to contribute in proportion to the benefit derived. Therefore, the liquidator need not reimburse either SICOM or Canara Bank for the security expenses incurred for preserving the security which was realized by SICOM and Canara Bank and the entire sale proceeds is being paid over to them.

16 There could be a situation where the land and building might have been mortgaged to a financial institution but the plant and machinery inside the land and building are not, and the financial institution has

engaged services of a security agency to protect the entire property. Let us assume that the entire property has been sold on as is where is basis to a third party by the official liquidator and 80% of the sale proceeds relates to the mortgaged land and building and 20% relates to the plant and machinery. Let us also assume that the secured creditor has incurred Rs.1,000/- towards security costs for the entire property. The secured creditor, as provided under Section 529(2), shall be liable to pay his portion of the security charges for the preservation of the land and building which will be 80% of Rs.1,000/-, i.e., Rs.800/-. The balance 20% equivalent to Rs.200/-, the secured creditor can claim to be reimbursed by the official liquidator who shall distribute that costs amongst all the unsecured creditors who will be paid out of the amount equivalent to 20% of the sale proceeds.

Therefore, as stated earlier, each party contributes to expenses in proportion to the benefit each party derives.

17 In the circumstances, if the secured creditor stands outside winding up by enforcing the security and prove in the winding up for the balance of the debt after deducting the amount realised, then he shall pay for the expenses of protecting that security. If the liquidator has incurred expenses then the secured creditor shall reimburse the liquidator and if the secured creditor himself has incurred, he shall not be entitled to get any

reimbursement from the liquidator.

If the secured creditor surrendered the security to the Liquidator and decides to prove whole of the debt as an unsecured creditor, then he shall be entitled to be reimbursed the entire security expenses incurred by him and if the liquidator has incurred, the liquidator cannot call upon the said secured creditor to reimburse the expenses incurred but the expenses will be distributed among all unsecured creditors including the secured creditor who has surrendered the security to the liquidator.

18 Therefore, though the Liquidator had, in his Report, sought to grant certain security expenses, the same cannot be paid over to SICOM as SICOM is liable to pay the same since it is exclusively entitled to the realization proceeds of its security. Hence no amount under this head-security is now payable by the liquidator to SICOM.

19 So far as the second issue is concerned, Shri Engineer submitted that the amounts received on sale of movables hypothecated to SICOM and Canara Bank are Rs.20,00,000/- and Rs.9,02,000/- respectively, totaling to Rs.29,02,000/-. The amounts were invested in Fixed Deposits. The total amount including interest available is Rs.58,89,089.00/- (excluding the amount of Rs.31,11,101/- deposited by SICOM) The bifurcation of amount of Rs.58,89,089.00 is as under:-

Table: - A

Sr. No	Name of Claimant	Sale proceeds realized (in Rs.)	%	Interest (in Rs.)	Total amount including interest (in Rs.)
1.	SICOM Ltd	20,00,000	69	20,63,471	40,63,471
2.	Canara Bank	9,02,000	31	9,23,618	18,25,618
	Total	29,02,000	100	27,87,089	58,89,089

Amount available for payment to SICOM

1	Total amount available including interest	40,63,471.00
2	Plus: amount deposited by SICOM in view of unlawful assignment by SICOM	31,11,101.00
	Total	71,74,572.00
3	Less: Provision for income tax, Central Government Commission etc	1,59,440.00
4	Balance available for declaration of dividend to SICOM:	70,15,132.00

The following amount is due and payable to SICOM:

1	Adjudicated claim of SICOM	47,25,598.00
2	Less: Paid by guarantor on 19.04.2007	40,50,000.00
3	Less: Paid by Naresh Gupta on 25.05.2010	10,00,000.00
	AMOUNT PAYABLE TO SICOM	NIL (already received Rs.3,24,402/- more than adjudicated amount)

As can be seen from what is set out hereinabove, SICOM is not entitled to any further sum as dividend from the Official Liquidator. The adjudicated claim of SICOM was Rs.47,25,598/-. SICOM had already received a sum of

Rs.40,50,000/- on 19th April 2007 and a further sum of Rs.10 Lakhs on 25th May 2010 aggregating to Rs.50,50,000/-, which is Rs.3,24,402/- more than the amount adjudicated by the Official Liquidator.

20 Shri Engineer also submitted that the liability of the guarantor and the principal debtor is co-extensive. Payment by one discharges the other. For example if a company owed Rs.10,000/- to a bank, and its director had also guaranteed the repayment of Rs. 10,000, if the guarantor had paid the full amount, the creditor could not have demanded the amount from the principal debtor. Similarly if the principal debtor had paid the amount, the creditor could not have demanded the amount from the Guarantor. This is because of Section 128 of the Indian Contract Act, 1872 provides that the liability is co-extensive. The payment by one will discharge the other. The Hon'ble Supreme Court in *Industrial Investment Bank of India vs Biswanath Jhunjunwala* ² has held that the guarantor's rights and liabilities are co-extensive as the principal debtor's. What this means is that the creditor can move at the same time against both or can choose who he wishes to proceed against. It does not, however, mean that the creditor can recover the same amounts twice over from each. That being so, it is clear that when a guarantor makes payment to a creditor, the benefit of which has to be given to the principal debtor because the liability of the principal

2 (2009) 9 SCC 478

debtor and the guarantor is co-extensive. It is not as if the creditor is entitled to recover the amount twice over (once from the principal debtor and once from the guarantor). That in view of the aforesaid, there are no amounts now due and payable by the Liquidator to SICOM. SICOM is free to recover whatever amounts are due and payable under the decree against the guarantor and the fact that the principal debtor has been discharged by law will not affect the creditors right to proceed against the guarantor.

Shri Engineer states that if SICOM has a decree in excess of Rs.21 crores against the guarantor then SICOM can claim the entire balance amount from the guarantor.

21 Shri Kanade submitted that he has received only Rs.50,50,000/- from the guarantor and he will give credit to the guarantor. Shri Kanade submitted that once the decree is satisfied, the guarantor will step into the shoes of SICOM and claim from the liquidator the amount of Rs.47,25,598/-. Shri Engineer submitted that though legally the guarantor will be entitled to step into the shoes of SICOM, the liquidator will be able to lodge a claim only as an unsecured creditor against the official liquidator and the guarantor's claim will rank *pari pasu* with other unsecured creditors. Shri Engineer submitted that therefore, the amount that will be payable, ultimately to the guarantor will be much lesser amount and not

Rs. 47,25,598/-.

22 I agree with Shri Engineer. The liability of a guarantor and principal debtor is co-extensive. Section 128 of the Indian Contract Act, 1872 is very clear on this and it reads as under :-

“128. Surety’s liability.—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. —

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract." Illustration A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it. A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it."

23 Payment by one discharges the other. If the guarantor has paid the full amount, the creditor could not have demanded the amount from the principal debtor also. Similarly if the principal debtor has paid the amount, the creditor cannot demand the amount from the Guarantor. The payment by one will discharge the other. The Hon’ble Supreme Court of India, in *Industrial Investment Bank of India Limited* (supra) has held that guarantor’s liability is co-extensive with that of the Principal debtor. What this means is that the creditor can move at the same time against both or can choose who he wishes to proceed against. It does not mean that the creditor can recover the same amounts twice over from each. When a

guarantor makes payment to a creditor, the benefit of that has also to be given to the principal debtor.

24 In this case, by operation of law, the liability of the company is capped at Rs.47,25,598/-. Admittedly, the guarantor has paid Rs.50,50,000/- which is Rs.3,24,402/-more than the liability of the company (in liquidation). Therefore, SICOM cannot claim from the company the amount that it has already received from the guarantor. The official liquidator need not pay this amount to SICOM. SICOM has a decree against the guarantor. There is no decree against the company (in liquidation). It is entirely left upon SICOM to execute the decree against the guarantor and recover its entire decretal amount from the guarantor. There could be a situation that SICOM recovers the entire amount and the guarantor would step into the shoes of SICOM and the guarantor may or may not claim the amount of Rs.47,25,598/- from the liquidator. Even assuming that guarantor makes such a claim, still the claim of the guarantor will rank *pari pasu* with other unsecured creditors. The guarantor having paid off the entire liability of the company (in liquidation), it will be open to the guarantor to lodge its claim with the official liquidator to that extent and the official liquidator will consider the claim and adjudicate it in accordance with law. It is clarified that I have not

made any observation on the merits of such claim and that will be decided independently by the official liquidator.

GENERAL

25 Shri Engineer submitted that SICOM sold immovable property of the Company (in liquidation). SICOM had lease hold rights and it had, without the knowledge and consent of the Official Liquidator, unlawfully assigned the leasehold rights of the Respondent-Company (in liquidation) to a third party and retained a sum of Rs.31,11,101/- sometime in May/June-2010.

26 On the directions of this Court, SICOM deposited this amount of Rs.31,11,101/- with the official liquidator sometime in January 2017. It is the case of the official liquidator that SICOM, having retained and enjoyed this money for more than 5 years, may be directed to pay some interest also. Shri Engineer submitted that SICOM has utilized this money towards earning revenue and normally the lending rates have been around 14% per annum with monthly or quarterly or half-yearly rests. Shri Engineer submitted that SICOM could not have earned money out of this amount of Rs.31,11,101/- as it was not entitled and hence SICOM should be directed to pay interest to the official liquidator of at least 14% per annum on this amount of Rs.31,11,101/-. Shri Kanade, in fairness, and on instructions from Ms.Pradnya Sunil Tanksale, Assistant General Manager of SICOM

who is present in Court, stated that SICOM would deposit interest @ 8% per annum. The money if it would have been invested in fixed deposit at the rate then prevailing (Shri Engineer and Shri Kanade state it would be around 9½ at that point of time for five year's period for fixed deposit) would have earned interest at 9.5% p.a. In my view, and as this interest will enure to the benefit of all unsecured creditors who may or may not get their entire claim, SICOM should be directed to pay interest @ 9% per annum on Rs.31,11,101/- from the date SICOM received that amount upto date it deposited the amount with the Official Liquidator. This amount to be paid over to official liquidator within four weeks. In view of the above, the official liquidator is directed to rework the amounts mentioned in Paragraphs 22 to 24 of the official liquidator's report and take further steps to make payments.

27 At this stage, Shri Kanade states that SICOM should be permitted to sit with the official liquidator to rework the actual amount spent on security expenses.

If the expenses incurred was to preserve the security of SICOM and SICOM has stood outside winding up and realized this security for its sole benefit, as stated earlier, the question of recovering any amount from the official liquidator does not arise. Therefore, I see no reason why SICOM should sit with the official liquidator to rework the security charges. This

will extend to Canara Bank also.

28 The Official Liquidator's Report accordingly disposed.

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29 Prayer clause (c) and (b), counsel states, applicant is not pressing.

Prayer clauses (a) and (b) has been dealt with in the official liquidator's report above. Therefore, application disposed.

(K.R. SHRIRAM, J.)

Shraddha
Kamlesh
Talekar
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signed by
Shraddha
Kamlesh
Talekar
Date:
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