

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
COMPANY APPLICATION NO.314 OF 2017
WITH
OFFICIAL LIQUIDATOR'S REPORT NO.116 OF 2018
IN
COMPANY PETITION NO.263 OF 2003**

City Co-op Credit & Capital Ltd. a Society)
Registered under the Maharashtra Co-)
operative Societies Act, 1960, having its)
registered office at 224, 1st floor, Opp)
Mahalaxmi Theatre, Dindori Road)
Panchavati, Nashik - 422003) ..Applicant

In the matter between :

Sunil Ratnaparkhi)
1, Gajanan, B/H Mungi Karyalay, Pumping)
Station Road, Gangapur Road,)
Nashik 422013) ..Petitioner

Vs.

Official Liquidator of M/a Satwik Electric)
Controls Pvt Ltd., a company incorporated)
under the Companies Act, 1956, High Court)
Bombay, Bank of India Building, 5th floor)
M. G. Road, Fort, Mumbai 400 023) ..Respondent

Shri Rohaan Cama a/w. Shri Shanay Shah i/b. Ms. Sapana Rachure for applicant.

Shri Naushad Engineer for Official Liquidator.

Shri Rahul Narichania, senior advocate i/b. Shri Alok Mishra for ex-director (Shri Shivaji Bhosale).

**CORAM : K.R.SHRIRAM, J.
RESERVED ON : 03.05.2019
PRONOUNCED ON : 03.06.2019**

JUDGMENT :

1 Applicant in company application no.314 of 2017 is City Co-operative Credit & Capital Limited (“**Applicant**”). Applicant had filed the

above company application as a secured creditor of Satwik Electric Controls Private Limited (“**the Company**”), which Company is in liquidation, having been ordered to be wound up by an order dated 19th July 2007 passed by this Court. Applicant seeks directions from this Court to the Official Liquidator to disburse/pay to applicant a sum of Rs.2,29,30,687/- which had been adjudicated by the Official Liquidator as being payable to applicant with an undertaking to be given by applicant to return the same on such terms as may be directed by this Court.

2 In the above company application, the Official Liquidator has filed the Official Liquidator’s Report (“**OLR**”) seeking directions *inter alia* to change the status of applicant from being adjudicated as a secured creditor, to an unsecured creditor and to permit the Official Liquidator to modify its certified list dated 21st January 2016 to remove the name of applicant from the list of secured creditors.

The question that arises for consideration in the present proceedings is - Whether Applicant is an unsecured creditor or a secured creditor?

3 It is the stand of applicant that it is a secured creditor *inter alia* by operation of law and under a decree/order of the Co-operative Court *inter alia* directing attachment, possession and sale of an immovable property of the Company which was earlier mortgaged to applicant.

It is the stand of the Official Liquidator that (i) decree/order did not create a charge on the assets of the Company and applicant is not a secured creditor, and (ii) as there is no charge created by the Company which has been registered as required under Section 125 of the Companies Act, 1956, applicant cannot claim to be a secured creditor.

4 The admitted position from the records is that applicant was the mortgagee of an immovable leasehold property of the Company, being Plot Nos.12 and 13 admeasuring approximately 7,576 square metres at Village Satpur, District Nashik, together with construction of 2,484.03 square metres thereon (**the said land and building or property**) under a Deed of Mortgage dated 23rd January 2004. The mortgage pertained to financial facilities extended by applicant to the Company, which remained unpaid.

5 Applicant filed a proceeding for recovery of dues under Section 101 of the Maharashtra Co-operative Societies Act, 1960, ("**the Act**") in which, after issuing notices to the parties and after making appropriate enquiries, an order came to be passed by the Assistant Registrar, Co-operative Societies, whereby the Company and the guarantors were jointly and severally held liable to pay an amount of Rs.1,33,95,892/- together with interest thereon @ 18% p.a. from 1st July 2004 till payment, together with a sum of Rs.22,500/- towards application fees and expenses.

6 Pursuant to the above order, a Recovery Certificate dated 16th November 2004 came to be issued by the Assistant Registrar of Co-operative Societies under Section 101 of the Act (“**Recovery Certificate**”). The Recovery Certificate stipulated the manner in which the amount was to be recovered, i.e., as arrears of land revenue and further ordered that applicant would be entitled to execute the Recovery Certificate as per the provisions of Section 156 of the Act and Rule 107 of the Maharashtra Co-operative Societies Rules, 1961 (“**the Rules**”) without being required to file a separate application.

7 It is Applicant’s case that the Recovery Certificate contains instructions that were peremptorily given to the officers designated under the Act and the Rules for steps to be taken under the above provisions. Thus, vide the Recovery Certificate there was in effect a decree for payment of money coupled with an order for sale of the property in the event that the decretal dues were not paid.

8 Subsequently, on 12th January 2005, pursuant to the above directions for execution and sale of the properties, the possession of the said land and building was taken by the authorized officer under the Act. The Panchnama dated 1st December 2005 (“**Panchnama**”) notes that the said property mentioned therein was being attached in pursuance of the Decree/Recovery Certificate. The Panchnama identifies the property which

was being seized, which seizure in turn was done for facilitating sale of the property as directed by the Decree/Recovery Certificate. This was a step, Shri Cama submitted, taken in furtherance of the specific provisions of Section 156 of the Act and Rule 107 of the Rules as had been ordered by the Decree/Recovery Certificate.

9 Thereafter, in accordance with Rule 107 (11) of the Rules, a pre-auction notice dated 17th March 2005 was sent to the Company which notice identified the property and notified the Company that upon failure to pay the decretal dues within 30 days from the receipt of the notice, the property would be sold by public auction. Shri Cama submitted, this is consistent with Rule 107 (11) (c) of the Rules which provides the Recovery Officer shall sell the property in execution of the Decree/Recovery Certificate.

10 Shri Cama said all of the aforesaid steps took place in the year 2004/2005, much prior to the winding up order dated 19th July 2007 and thus, by 2004/2005 a charge had already been created by the Decree/Recovery Certificate and by operation of law on account of the Decree/Recovery Certificate providing for the attachment and sale of the property and having regard to the fact that upon non-compliance with the pre-auction notice to make payment within 30 days, the Recovery Officer was bound by law to sell the property under Rule 107 (11)(c) of the Rules.

Thus, according to Shri Cama, by 2004/2005 (i) there existed an order of attachment; and (ii) this attachment was coupled with an order for sale of an identified immovable asset, by and under orders of the functionaries under the Act. This constituted a charge created by operation of law/by the decree/order of sale and thus, there was no question of such a charge being required to be registered as contemplated in Section 125 of the Companies Act, 1956, for it to be enforceable against the Official Liquidator.

11 Before we reproduce further submissions of Shri Cama, the following dates and events are also relevant :-

(a) On 19th July 2007, this Court passed an order directing the Company to be wound up. The Company's assets attached pursuant to the Recovery Certificate were not sold as of the date of the winding up order.

(b) On 21st March 2014, this Court passed an order in Company Application No.492 of 2013 sanctioning the sale of the said land and building to Bhavin Wheels Pvt. Ltd. for Rs. 5,85,00,000/-. In the said order, this Court expressly directed Applicant to deposit the entire amount of sale proceeds less cost of the sale with the Official Liquidator since Applicant was not a secured creditor.

(c) On 1st September 2014, much (more than 7 years) after the Company had been wound up, Applicant filed an application under Section 87 of the Companies Act, 2013 for condoning the delay and extension of

time for filing particulars for registration of charge. It is obvious that in view of the order dated 21st March 2014, Applicant Bank had instructed the Company to get the charge registered so that Applicant could claim to be a secured creditor.

(d) On 23rd September 2014, Applicant filed its affidavit of proof of debt claiming to be a secured creditor with debt amount of Rs.6,26,05,066/-, even though its alleged security had not been registered with the Registrar of Companies (**RoC**).

(e) On 21st October 2014, the Regional Director, Western Region, condoned the delay on the part of Applicant in registering the charge. On 7th November 2014, the Company paid a sum of Rs.10,000/- towards penalty for delay in filing the application for registration of charge.

(f) On 17th November 2014, even though the Company had been ordered to be wound up by this Court, the RoC registered the charge of Applicant to secure the loan amount of Rs. 1,25,00,000/-. On the same day, as the RoC issued the certificate for registration of charge, Applicant addressed a letter to the Official Liquidator intimating that the charge was registered and their claim should be considered as a secured creditor.

(g) On 29th May 2015, the Official Liquidator adjudicated the claim of Applicant at Rs.2,29,30,687/- and Official Liquidator mistakenly, categorized Applicant as a secured creditor.

(h) On 21st January 2016, the Official Liquidator filed a certified list with the office of the Prothonotary & Senior Master, High Court, Bombay. The said list included, and Official Liquidator says erroneously, Applicant's name in the list of secured creditors.

(i) On 13th December 2016, Applicant filed company application no.314 of 2017 seeking release of the sum of Rs.2,29,30,687/- from the Official Liquidator.

(j) On 16th March 2018, in company application no.314 of 2017, the Official Liquidator pointed out that Applicant had not offered any proof that it was a secured creditor. This Court passed an order in the said company application directing Applicant to file an affidavit and annex copies of the mortgage deed, registration of charge under Section 125 of the Companies Act, 1956 and orders passed by the Co-operative Court under the MCS Act based on the statement of the counsel then appearing for Applicant that the mortgage was registered and that they would produce the necessary documents.

(k) On 6th April 2018, pursuant to the directions of this Court in the order dated 16th March 2018, Applicant filed an additional affidavit in company application no.314 of 2017. In the said additional affidavit, Applicant claimed to be a secured creditor based on the Mortgage Deed dated 23rd January 2004, order of the Deputy Registrar of Co-operative Societies dated 16th November 2004 and the adjudication of the Official

Liquidator declaring Applicant to be a secured creditor.

(l) On 6th November 2018, RoC filed an affidavit setting out the manner in which the charge came to be registered on 17th November 2014.

12 It was further submitted by Shri Cama that Section 101 of the Act contemplates that a proceeding may be filed *inter alia* by an Urban Co-operative Bank for recovery of its dues. Sub-section 1 of Section 101 of the Act provides that the Registrar may, after making enquiry in the manner prescribed, grant a certificate for the recovery of the amounts stated therein to be due as arrears. Sub-section 3 then provides that a certificate granted by the Registrar shall be final and conclusive proof of the arrears stated to be due therein and the same shall be recoverable according to the law for the time being in force as arrears of land revenue.

To facilitate the recovery of dues, Section 156 of the Act provides *inter alia* that the Registrar may recover the amount due by attachment and sale or by sale without attachment of the property of the person against whom such decree, decision, award or order has been obtained or passed.

Rule 107 (1) of the Rules provides the mode of sale of the property pursuant to Section 156 of the Act, but clarifies that no separate application is required in the event of a certificate issued under Sub-section 1 of Section 101 of the Act. Sub-rule 11 of Rule 107 of the Rules thereafter

provides that a demand notice be issued by the Recovery Officer to the defaulting party stipulating the property to be sold and putting a defaulting party to notice of the sale in the event of non-payment of the decretal dues.

Sub-rule 11(c) of Rule 107 of the Rules is of considerable importance and provides a mandatory direction that the Recovery Officer “*shall proceed to attach and sell, or sell without attachment, as the case may be, the immovable property...*”. Thus, upon non-payment by the defaulting party, there is a peremptory order and a specific direction for sale of the immovable property pursuant to the Decree/Recovery certificate.

This being the case, it is clear from the Scheme of the Act and the Rules that upon a Decree/Recovery Certificate being issued, as in the present case, the mechanism under Section 156 of the Act read with Rule 107 of the Rules automatically comes into play and on account of the non-payment by the defaulting party, there is ipso facto by operation of law and by virtue of the Decree/Recovery Certificate, an order of attachment of the property and for mandatory sale thereof in furtherance of the Decree/Recovery Certificate.

13 Shri Cama further submitted that once there is a decree or order, which contemplates not only attachment, but specifically mandates sale of an identified property to be carried out for repayment of identified and crystalized dues, as in the present case, there is a charge created on the identified assets by operation of law/the decree. Such a charge need not be

registered under Section 125 of the Companies Act, 1956, as is not a charge created by the Company but a charge created by operation of law/decreed. According to Shri Cama, the Official Liquidator has accepted the legal position, in paragraph 21 of the OLR that if there is an order for sale of the property, then in that case Section 125 of the Companies Act, 1956, would not apply.

14 Shri Cama relied upon the following two judgments:

(i) *Indian Bank V/s. Official Liquidator, Chemmeens Exports Private Limited & Ors.*¹; and

(ii) *Praga Tools Limited V/s. Official Liquidator of Bengal Engineering Company Private Limited*².

Shri Cama submitted that these judgments categorically lay down the proposition that Section 125 of the Companies Act, 1956, only applies if the charge is created by the Company. This is evident from Section 125 of the Companies Act, 1956 itself. However, as held by the Hon'ble Supreme Court in *Indian Bank (Supra)*, where the charge is created by operation of law or is created by an order or a decree, Section 125 of the Companies Act, 1956, has no application. In the case of *Indian Bank (Supra)*, the Hon'ble Supreme Court cited with approval the judgment of the Hon'ble Calcutta High Court in *Praga Tools (Supra)* and clearly held that the

1. (1998) 5 SCC 401

2. 1984 Vol. 56, Comp. Cas 214

same was good law. The Hon'ble Supreme Court proceeded to note that if on the date of winding up what was operative was not merely a declaration that a charge existed but in fact an order for sale of the property for realization of the decretal amount, such an order would be deemed to be a charge created on the property by operation of law/decreed/order of the Court and would not be void on account of being unregistered.

15 Mr. Cama added, the judgment of the Hon'ble Calcutta High Court in *Praga Tools (Supra)*, which was approved by the Hon'ble Supreme Court as stated above, was a case where by a consent order a sum of Rs.1.45 lakhs was held to be payable. A sum of Rs.50,000/-, which had earlier been deposited in the Court pursuant to the winding up proceedings instituted by petitioner therein, was ordered to be retained as security for the purpose of satisfaction of the decree in the event that the judgment debtor defaulted in paying the decretal amount. It was urged by petitioning creditor that petitioner, upon winding up, was a secured creditor to the tune of Rs.50,000/- and there was no requirement for registration of a charge created by the order of the Court.

The Hon'ble Calcutta High Court, Shri Cama submitted, laid down certain principles that form a guide as to what would constitute a charge created by a decree or order, and the same may be summarised as under:

(i) *there must be a decree or order for a certain identified amount;*

- (ii) a mode for payment of the money must be indicated; and
- (iii) there must be a provision in the order that permits the creditor to proceed against an identified security for the purpose of executing the decree/order.

Once these three requisites are fulfilled, then a charge was created by the decree/order of the court, which would not require registration and which entitles the petitioning creditor to claim as a secured creditor. The fact that the order in *Praga Tools (Supra)* was a consent order, makes no difference whatsoever; had the order been an order of the Court or a consent order the same assessment would be required to be done to arrive at a conclusion as to whether the order created a charge or not.

16 Shri Cama further submitted that in the facts of the present case, the above three requisites as set out in *Praga Tools (Supra)*, to constitute a charge by a decree/order of the Court are clearly fulfilled in as much as:

- (i) identified amount – the Recovery Certificate clearly identifies the amount payable as being Rs.133,95,892/- together with interest thereon;
- (ii) mode of payment/recovery – the Recovery Certificate itself states that the amount shall be recovered from the Respondents therein as arrears of land revenue;
- (iii) The order directs sale of an identified security for satisfying the decretal dues - The Recovery Certificate further states that applicant shall be entitled to recover the dues by executing the Recovery Certificate as per the provisions of Section 156 of the Act and Rule 107 of the Rules without any further application to be filed for this purpose. Mandatory directions have been given to the designated officers to act in accordance with Section 156 of the Act and Rule 107 of the

Rules. Section 156 of the Act clearly contemplates that the dues will be recovered by attachment and sale or sale without attachment of the property of the persons against whom the decree, decision, award or order has been obtained or passed. Thus, expressly in the Recovery Certificate, by incorporation of Section 156 of the Act, there is a direction for attachment and sale of the property for recovery of the decretal dues. Rule 107(11) of the Rules which is also directed to be acted upon in the Recovery Certificate clearly provides that in the event the defaulting party does not make payment in accordance with the notice for demand, then under Rule 107 (11)(c) of the Rules, the Recovery Officer “shall” sell the property which has been identified for satisfying the decree. Rule 107 of the Rules, which forms part of the Recovery Certificate, is a mandatory direction / order for attachment and sale of the property to satisfy the decree. It is thus clear from the scheme of the Act and Rules, the Recovery Certificate itself, and in any event the Panchnama and pre-auction notice read with the Recovery Certificate, constitutes an order for sale of the property towards satisfying the decree. Thus such an order for sale of the identified property in execution of the decree constitutes a charge on the subject property of the company, i.e., the plots and building thereon, which charge does not require registration. In the present case, the Panchnama and the pre-auction notice, both clearly identify the property which is attached and which is notified and directed to be sold. Applicant is thus, a charge holder/secured creditor to the extent of the value of the land and building sold, and is entitled to claim as a secured creditor in the present winding up proceedings.

17 Shri Engineer, per contra submitted as under:

A). Applicant cannot rely on the charge created by the Mortgage Deed dated 23rd January 2004 to claim the status of a secured creditor since the charge was registered with the Registrar of Companies subsequent to the winding up of the Company.

(i) Section 125 of the Companies Act, 1956 requires every charge created by a company to be registered with the Registrar of

Companies. The consequence of non-registration of charge is also prescribed therein, i.e., an unregistered charge would be void as against the liquidator and creditors of the company.

(ii) Section 125 makes it abundantly clear that a charge which is not registered with the company would be void as against the liquidator and any creditor. The Hon'ble Supreme Court in ***Kerala State Financial Enterprises Limited V/s. Official Liquidator, High Court Kerala***³, held as follows :

“9. Ordinarily a charge should be registered in terms of Section 125 of the Act. If the charges are not registered, the same would be void against the liquidator or creditors...”

(iii) Furthermore, the charge has to be registered before the company is wound up. Any charge registered after the winding up of the company is void. In this regard, the Hon'ble Supreme Court's in ***J. K. (Bombay) Private Limited V/s. New Kaiser-I-Hind Spinning and Weaving Company Limited &Ors.***⁴, held, in paras 31 and 32, as follows:

“31. The effect of a winding-up order is that except for certain preferential payments provided in the Act the property of the company is to be applied in satisfaction of its liabilities pari passu. Pari passu distribution is to be made in satisfaction of the liabilities as they exist at the commencement of the winding-up (cf. Sections 528 and 529 of the Act; Ghosh on Indian Company Law, 11th Edn., Vol. 2, p. 1073). The effect of a winding-up order on rights already completed as against rights yet to be completed is succinctly stated by Lord Halsbury in Bank of Scotland v. Macleod, [1914] A. C. 311, as follows :

"Rights in security which have been effectually completed before the liquidation must still receive the effect which the law gives to them. But the company and its liquidators are just as completely disabled by the winding-up from granting new or completing imperfect rights in security

3. (2006) 10 SCC 709

4. AIR 1970 SC 1041

as the individual bankrupt is by his bankruptcy. This, indeed, is the necessary effect of the express provision of the Companies Act that the estate is to be distributed among the creditors pari passu. Every creditor is to have an equal share, unless any one has already a part of the estate in his hands, by virtue of an effectual legal right."

Tulsidas Jasraj Parekh v. Industrial Bank of Western India, 32 BLR 953. Similarly, in Re Anglo-Oriental Carpet Manufacturing Company, [1903] 1 Ch. 914, it was held that even where a company had executed a trust deed and issued debentures creating a charge on its assets but the charge had not been registered as required by the Companies Act by the time the company had passed an extraordinary resolution for voluntary winding-up the debenture-holders were not, as against the joint body of creditors, secured creditors.

32. It is thus well established that once a winding-up order is passed the undertaking and the assets of the company pass under the control of the liquidator whose statutory duty is to realise them and to pay from out of the sale-proceeds its creditors. Such creditors acquire on such order being passed the right to have the assets realised and distributed among them pari passu. No new rights can thereafter be created and no uncompleted rights can be completed, for doing so would be contrary to the creditors' right to have the proceeds of the assets distributed among them pari passu..."

(iv) In the present case, the charge allegedly created by the Company pursuant to the mortgage deed dated 23rd January 2004 was admittedly registered on 17th November 2014, i.e., after the winding up order dated 19th July 2007. Therefore, the registration of charge is unlawful and void and it does not elevate applicant into a secured creditor for the purposes of Section 529 and Section 529A of the Companies Act.

(v) The RoC has filed its affidavit to place on record the relevant documents with regard to the registration of charge. It is clear that the ex-directors had applied for registration. However, Applicant cannot distance itself from this illegal and unlawful act. This registration was done at the behest of Applicant because it is the only entity which could have

attempted to benefit from the application. Further, as can be seen from the facts, the certificate was obtained on 17th November 2014, and on the same day Applicant wrote to the Official Liquidator that it is a secured creditor. The fact that Applicant wrote on the same day is a telling circumstance which shows that the same was done at the behest/request of Applicant since this Court had vide its order dated 21st March 2014 had held that Applicant was not a secured creditor and could not take away the sale proceeds. In order to overcome the hurdle, Applicant has got the erstwhile directors of the Company to apply for registration of the charge. This shows that Applicant violated the law. Applicant also sought to rely on the registration of the charge as recorded in the statement of their Advocate, who stated that he would produce the same, in the order dated 16th March 2018. The fact that the charge was registered much after the company had been ordered to be wound up and Applicant wrote to the Official Liquidator on the very same day as the registration of the charge demonstrates that the entire process of registration was a calculated move on the part of Applicant in a desperate bid to fraudulently claim the status of a secured creditor. The RoC in its Affidavit filed in the present proceedings has also stated that the registration of charge was obtained on the basis of suppression of the material fact that the Company was in liquidation.

(vi) Applicant now states that they are not relying on the Mortgage Deed dated 23rd January 2004. This is too little too late. After

committing an illegality and getting caught, Applicant cannot seek to avoid the legal consequence merely by stating that they are not going to rely on the Mortgage Deed. The very fact that the charge was registered with the RoC after the winding up at the behest/instruction of Applicant would warrant dismissal of their Application for withdrawal of the money lying with the Official Liquidator.

(vii) The aforesaid clearly shows that Applicant cannot claim to be a secured creditor on the basis of the Mortgage Deed.

B). Reliance on Sections 47 and 48 of the Act is completely misconceived and is wholly inapplicable in the facts of the present case, and therefore, Applicant is not a secured creditor.

(i) Section 47 of the Act reads as follows:

“47. Prior claim of society:-

(1) Notwithstanding anything in any other law for the time being in force, but subject to any prior claim of Government in respect of land revenue or any money recoverable as land revenue and to the provisions of sections 60 and 61 of the Code of Civil Procedure, 1908.

(a) any debt or outstanding demand, owing to a society by any member or past member or deceased member, shall be a first charge;

(i) upon the crops or other agricultural produce raised in whole or in part whether with or without a loan taken from the society by such member or past member or deceased member,-

(ii) upon any cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or workshop, godown or place of business supplied to or purchased by such member or past member or deceased member, in whole or in part, from any loan whether in money or goods made to him by the society, and

(iii) upon any movable property which may have been hypothecated, pledged or otherwise mortgaged by a member with the society and remaining in his custody;

(b) any outstanding demands or dues payable to a society by any member or past member or deceased member, in respect of rent, shares, loans or purchase money or any other rights or amounts payable to such society, shall be a first charge upon his interest in the immovable property of the society

Explanation -The prior claim of Government in respect of dues other than land revenue shall be restricted for the purpose of subsection (1) to the assets created by a member out of the funds in respect of which, the Government has a claim.

(2) No property or interest in property, which is subject to a charge under the foregoing subsection, shall be transferred in any manner without the previous permission of the society; and such transfer shall be subject to such conditions, if any, as the society may impose.

(3) Any transfer made in contravention of sub-section (2) shall be void.

(4) Notwithstanding anything contained in sub-sections (2) and (3), a society, which has one of its objects, the disposal of the produce of its members, may provide in its bye-laws, or may, otherwise contract with its members, —

(a) that every such members shall dispose of his produce through the society, and (b) that any member, who is found guilty of a breach of the bye-laws or of any such contract, shall reimburse the society for any loss, determined in such manner as may be specified in the bye-laws.” (emphasis added)

(ii) A plain reading of Section 47 would indicate that a charge is created in respect of outstanding dues of a member towards the society only under the provisions of Section 47(1) of the Act. Section 47(1)(a) is wholly inapplicable as none of the circumstances set out therein apply. A charge is created on crops or other agricultural produce, cattle, fodder for cattle, agricultural or industrial implements or machinery, raw materials for manufacture, workshop, etc. supplied to or purchased by such member from any loan made to the member by the society; or any moveable property which may have been hypothecated, pledged or mortgaged by a member to the society. It is evident that in the present case, none of these situations exist. The Company does not have any crops or agricultural produce, it has not purchased any fodder or any other specified item from the loan it raised

from Applicant, and it has not hypothecated or pledged any moveable property to Applicant. Therefore, no charge within the meaning of Section 47(1)(a) can be said to exist.

(iii) Furthermore, as regards a charge under Section 47(1)(b), a charge is created in the member's interest in the immoveable property belonging to the society, and not in the immoveable property of the Company. Therefore, under Section 47 a charge is created on the member's interest in the immoveable property of the society and not on the immoveable property of the member who is borrowing. Therefore, no charge exists on any property of the Company under Section 47(1)(b) of the MCS Act.

(iv) Therefore, Section 47 is wholly inapplicable, which has been conceded by Applicant.

(v) Section 48 of the Act reads as follows:

“48. Charge on immovable property of members, borrowing from certain societies:-

Notwithstanding anything contained in this Act or in any other law for the time being in force;

(a) any person who makes an application to a society of which he is a member, for a loan shall, if he owns any land or has interest in any land as a tenant, make a declaration in the form prescribed. Such declaration shall state that the applicant thereby, creates, charge on such land or interest specified in the declaration for the payment of the amount of the loan which the society may make to the member in pursuance of the application and for all future advances (if any), required by him which the society may make to him as such member, subject to such maximum as may be determined by the society, together with interest on such amount of the loan and advances;

(b) any person who has taken a loan from a society of which he is a member, before the date of the coming into force of this Act, and who owns any land or has interest in land as a tenant, and who has not already made such a

declaration before the aforesaid date shall, as soon as possible thereafter, make a declaration in the form and to the effect referred to in clause (a); and no such person shall, unless and until he has made such declaration, be entitled to exercise any right, as a member of the society;

(c) a declaration made under clause (a) or (b) may be varied at any time by a member, with the consent of the society in favor of which such charge is created;

(d) no member shall alienate the whole or any part of the land or interest therein, specified in the declaration made under clause (a) or (b) until the whole amount borrowed by the member together with interest thereon, is repaid in full:

Provided that, it shall be lawful to a member to execute a mortgage / bond in respect of such land or any part thereof in favor of an Agriculture and Rural Development Bank or of the State Government under the Bombay Canal Rules made under the Bombay Irrigation Act, 1879 or under any corresponding law for the time being in force for the supply of water from a canal to such land, or to any part thereof:

Provided further that, if a part of the amount borrowed by a member is paid the society with the approval of the Central Bank to which it may be indebted may, on an application from the member, release from the charge created under the declaration made under clause (a) or (b), such part of the movable or immovable property specified in the said declaration, as it may deem proper, with due regard to the security of the balance of the amount remaining outstanding from the member:

(e) any alienation made in contravention of the provisions of clause (d) shall be void

(f) Subject to all claims of the Government in respect of land revenue or any money recoverable as land revenue, and all claims of the Co-operative Agriculture and Rural Multipurpose Development Bank in respect of its dues, in either case whether prior in time or subsequent, and to the charge (if any) created under an award made under the Bombay Agricultural Debtors Relief Act, 1947 or any corresponding law for the time being in force in any part of the State, there shall be a first charge in favour of the society on the land or interest specified in the declaration made under clause (a) or (b), for and to the extent of the dues owing by the member on account of the loan;

(g) and in particular, notwithstanding anything contained in Chapter X of the Maharashtra Land Revenue Code, 1966, the Record of Rights maintained there under shall also include the particulars of every charge on land or interest created under a declaration under clause (a) or (b), and also the particulars of extinction of such charge

Explanation - For the purposes of this section the expression "society" means;

(i) any resource society, the majority of the members of which are agriculturists and the primary object of which is to obtain credit for its members, or

(ii) Any society, or any society of the class of societies, specified in this behalf by him State Government, by a general or special order.”

(vi) Section 48 also is wholly inapplicable for the following reasons :

(a) The Explanation to Section 48 limits the applicability of the provisions of Section 48 only to: (i) resource societies where the majority of members are agriculturists; and (ii) any society specified by the State Government. Admittedly, Applicant does not fall within the scope of either of these two societies. It is not a resource society of agriculturists. And Applicant has failed to produce any order of the State Government extending the application of Section 48 to societies such as Applicant. Therefore, Applicant falls outside the scope of Section 48. This has also been conceded by Applicant during the hearing.

(b) Without prejudice to the aforesaid, Section 48(a) of the Act provides that a member of a co-operative society who makes an application to the society for a loan shall make a declaration in the prescribed form with respect to any ownership or tenancy interest the member has in any property and in the said declaration, the member shall create a charge on the said property in respect of the loan provided by the society to the member. No such declaration has been pleaded, produced or proved to have been made by the Company.

(c) A register of such declarations is also required to be maintained under Rule 48(2) of the Rules, which is also not produced by

Applicant. This also shows that the mandatory requirements before claiming a first charge have not been fulfilled.

(d) Further, in order to claim the benefit of first charge under Section 48(f) of the Act, every charge must be registered in the Record of Rights, as mandated by Section 48(g) read with Rule 48(5) of the Rules, which reads as under:

“48. Form of declarations to be made by members borrowing loans from certain societies and conditions on which any charge in favour of a society shall be satisfied:

...

(1)...

...

(5) Where a charge is created by a member on his land or on his interest in any land as a tenant by declaration under section 48, the society shall record or cause to record such particulars of charge in the Record of Rights maintained by the village officers of the village where such property is situated. Such recording of the Charge in the Record of Rights of the village shall be treated as a reasonable notice of such charge created under section 48.” (emphasis added)

(e) The mandatory nature of registration of charge created under Section 48 of the Act pursuant to Section 48(g) of the Act and Rule 48(5) of the Rules has been upheld by this Court in ***Gajanan Eknath Sonankar V/s. Shegaon Shri Agrasen Co-op. Credit Society Ltd.***⁵, where the Court held as follows:

“8. A careful reading of Section 48 of the MCS Act and Rule 48 of the Rules framed thereunder, to my mind, manifests that for knowledge to the people at large about the charge over immovable property or for claiming protection of Section 48 of the Act, it would be mandatory for the society to get the charge on immovable property created or recorded in the record of rights maintained by the village officers of the village where the property situated. Sub-rule 5 clearly says that if such charge is shown in the record of rights the

5. (2015) 1 MhLJ 579

same shall be treated as a reasonable notice of such charge created under section 48. Therefore, unless and until there is compliance of these two provisions, namely Section 48 and Rule 48 (5), the people at large cannot be expected to know about the charge, if any, on immovable property. In other words, if a society wants to claim protection or benefit of Section 48 of the MCS Act, the same can be obtained only from the date the charge is actually recorded in the record of rights and not otherwise. To sum up, in answer to Question No. 1, I hold that provisions of Section 48 and Rule 48 (5) are mandatory in nature for a Cooperative Society if a cooperative society wants to claim benefit /protection of the said provisions. I, therefore, answer the question No. 1 in affirmative.”

(f) Thus, in the absence of any registration of the charge created by the Company in favour of Applicant in accordance with the provisions of Section 48 of the Act and Rule 48(5) of the Rules in the Record of Rights, Applicant cannot claim to be a secured creditor by placing reliance on Section 48 of the Act.

(g) That being so, it is clear that the reliance placed on sections 47 and/or 48 of the Act is wholly misplaced and inapplicable.

C). The Recovery Certificate dated 16th November 2004 does not create a charge. Moreover, even if the terms of the Recovery Certificate are read with the provisions of the Maharashtra Co-operative Societies Act and/or the Maharashtra Co-operative Societies Rules and/or the steps taken thereunder, no charge is created on the property.

(i) The Recovery Certificate dated 16th November 2004 only states that an amount is due and payable. It does not say that Applicant is a secured creditor or that it has a charge on the assets of the Company. Further, on a perusal of Section 101, it is clear that Section 101 is only a summary manner in which certain types of societies can recover amounts

that are loaned. The section does not state that the amounts that are found to be payable are recoverable as a secured creditor. On the contrary, Section 101(3) of the Act makes it clear that the effect of a recovery certificate under Section 101 is that the amount so stated to be due shall be recoverable “according to the law for the time being in force as arrears of land revenue”.

(ii) The fact that the amount under the Recovery Certificate was recoverable from the Company “as arrears of land revenue” as per the provisions of Maharashtra Land Revenue Code, 1966 also does not create a charge and does not make Applicant a secured creditor. In the decision of a Division Bench of this Hon’ble Court in *SICOM Limited V/s. State of Maharashtra*⁶, the company in liquidation owed sales tax dues to the State Government. One of the issues that arose for the Court’s consideration was whether the sales tax dues, which were recoverable as arrears of land revenue, made the State Government a secured creditor of the company in liquidation. This Court answered the question in the negative. It held that there is a distinction between a sum which is recoverable as *land revenue* and a sum which is recoverable as *arrears of land revenue*, and it is only in case of the former that the State Government has a first charge under Section 169 of the Maharashtra Land Revenue Code. The Court observed in paras 9 and 10 as follows:

6. (2010) 6 Bombay Case Reporter, 749

“9. It is further to be seen here that if Section 38C does not operate in relation to a property of the Company because of operation of Section 529A, then by operation of the provisions of the Maharashtra Land Revenue Code, there is no change brought about in the situation. In our opinion, the provisions of Section 169 of the Maharashtra Land Revenue Code makes the position absolutely clear. Section 169 of the Maharashtra Land Revenue Code reads as under:

169. Claims of State Government to have precedence over all others:

(1) The arrears of land revenue due on account of land shall be a paramount charge on the land and on every part thereof and shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage judgment-decree, execution or attachment, or otherwise howsoever, against any land or the holder thereof.

(2) the claim of the State Government to any monies other than arrears of land revenue, but recoverable as a revenue demand under the provisions of this Chapter, shall have priority over all unsecured claims against any land or holder thereof.

10. Perusal of the above quoted provisions shows that the Maharashtra Land Revenue Code makes a clear distinction between the sum which is recoverable as a land revenue and sum which is recoverable as arrears of land revenue. What creates paramount charge is the sum which is the amount of land revenue and not the sum which is recoverable as land revenue. The Constitution Bench of the Supreme Court in its judgment in the case of Builders Supply Corporation, referred to above, in our opinion, has made the position absolutely clear. Following observations in the case of Builders Supply Corporation, in our opinion, are relevant. They read as under:

We have referred to this decision, because it brings out emphatically the real character of the provisions prescribed by Section 46(2). Section 46(2) does not deal with the doctrine of the priority of Crown debts at all; it merely provides for the recovery of the arrears of tax due from an assessee as if it were an arrear of land revenue. This provisions cannot be said to convert arrears of tax into arrears of land revenue either, all that it purports to do is to indicate that after receiving the certificate from the Income Tax Officer, the Collector has to proceed to recover the arrears in question as if the said arrears were arrears of land revenue. We have already seen that other alternative remedies for the recovery of arrears of land revenue are prescribed by Sub-sections (3) and (5) of Section 46. In making a provision for the recovery of arrears of tax, it cannot be said that Section 46 deals with or provides for the principle of priority of tax dues at all; and so, it is impossible to accede to the argument that Section 46 in terms displaces the application of the said doctrine in the present proceedings.”

Therefore, it is clear that the Recovery Certificate under Section 101 is only in the nature of a money decree and only makes the amount

recoverable as arrears of land revenue and that does not make the amount a secured debt. Therefore, the Recovery Certificate does not change the nature of the claim from an unsecured one to a secured one.

(iii) The reference to Section 156 of the Act and Rule 107 of the Rules is not sufficient to create a charge, since neither of these two provisions contains any term that would create a charge on the Company's properties pursuant to the issuance of a recovery certificate. Section 156 and Rule 107 merely provide for the mode of execution of a recovery certificate issued under Section 101 of the Act. They are akin to the provisions for execution under Section 51 read with Order 21 of the Code of Civil Procedure, 1908 ("CPC"). They can in no manner be construed so as to create a charge on the assets of the Company for the purposes of execution of a Recovery Certificate.

(iv) The plain language of Section 156 and Rule 107 shows that what they contemplate is the 'attachment' of a property and thereafter the sale of the property as the means of executing/enforcing the Recovery Certificate. It is settled law as laid down in the case of *Kerala State Financial Enterprises (Supra)* and ***Board for Industrial and Financial Reconstruction (B.I.F.R.) V/s. Coromandel Garments Ltd. & Ors.***⁷, that an attachment does not create a charge on the asset. That being so, the fact that Section 156 and Rule 107 talk about the 'attachment' of properties shows that it

7. In company application no.341 of 2016 on 13th July 2018

does not amount to creation of a charge as held by the Hon'ble Supreme Court in *Kerala State Financial Enterprises (Supra)* and this Hon'ble Court in *Board for Industrial and Financial Reconstruction (B.I.F.R.)vs Coromandel Garments (supra)*.

(v) The decision of the Hon'ble Supreme Court in the case of ***Oil and Natural Gas Corporation Limited V/s. Official Liquidator of Ambica Mills Company Limited***⁸ was a case where ONGC was claiming to be a secured creditor on the basis of an undertaking given by Ambica Mills that it would not deal with or alienate its properties. ONGC sought to contend that this amounted to a charge created by law or decree. The Hon'ble Supreme Court negated this contention. It held that an undertaking not to alienate properties would not create a charge. Further, the Hon'ble Court noted that no particular asset was identified in the undertaking. Even in the present case, there is no identified asset that was mentioned in any order that was to be treated as security. The judgment in *Oil and Natural Gas Corporation Limited (Supra)* further holds that if the charge is not registered under Section 125 of the Companies Act, it would be void against the Official Liquidator. It is only if the charge is created by operation of law /decree that Section 125 would not be attracted. As can be seen, there is no charge created by law/decree. The Recovery Certificate under Section 101 read with Section 156 of the Act read with Rule 107 of the Rules does

8. (2015) 5 SCC 300 (paras 20-22)

not create a charge. The Recovery Certificate is akin to a money decree and Section 156 read with Rule 107 is just a mode of execution. The property is merely attached, and attachment has been held not to constitute a charge.

(vi) That being so, clearly there is no charge created by the Recovery Certificate.

D). Merely because pursuant to the Recovery Certificate a property was attached, no charge is created.

(i) It is also well-settled that attachment of properties of a company does not create a charge on the company's properties. The Hon'ble Supreme Court reiterated this principle in *Kerala State Financial Enterprises (Supra)*. In the said case, properties of a company were attached on account of the company's failure to pay its loan pursuant to the Kerala Revenue Recovery Act, 1968. Subsequently, the company went into liquidation. The appellant sought leave under Section 446 of the Companies Act, 1956 to proceed with the sale of the attached properties. The Hon'ble Supreme Court upheld the decision of the Hon'ble High Court of Kerala refusing to grant leave on the ground that a mere order of attachment does not create a charge. The Hon'ble Court held (in paras 9 and 10) as follows:

"9. Ordinarily a charge should be registered in terms of Section 125 of the Act. If the charges are not registered, the same would be void against the liquidator or creditors. The question which arises for consideration is as to whether if the properties are attached by a Revenue Recovery Court, Section 125 of the Act would be applicable. An attachment itself does not create any charge in the property. By reason of attachment, no decree is passed.

10. The expression 'attachment' has no definite connotation. An order of attachment is passed for achieving a limited purpose. It is subject to further

orders as also provisions of other statute.” (emphasis added)

(ii) The aforesaid decision was relied upon by this Hon’ble Court in *Board for Industrial and Financial Reconstruction (B.I.F.R.) vs Coromandel Garments (Supra)*. In the said decision, the Hon’ble Court held in para 25 as under:

“25. (a) The application proceeds on the basis that the attachment of the Satara property constitutes a charge in favour of applicant. In the course of the hearing, however, applicant has sought to abandon its stand that the attachment would constitute a charge. If it did, it would in any event fall foul of both Sections 531 and 536 of the Companies Act 1956. However, applicant has continued to maintain that by virtue of the attachment, applicant was a secured lender and was entitled to priority of payment out of the sale proceeds from the Satara property.

(b) There is nothing in law to support this proposition. In fact, the authorities are quite clear that an attachment does no more than prevent a debtor from dealing with an asset, thus ensuring that it would be available to satisfy any legitimate debt. Official Liquidator has relied in this behalf on the judgment of the Hon’ble Supreme Court in Kerala State Financial Enterprises Ltd. V/s. Official Liquidator, High Court of Kerala, (2006) 10 SCC 709, where the Court, inter alia, observed that ‘an attachment itself does not create any charge in the property’. Official Liquidator also relied on the judgment of the Hon’ble Calcutta High Court in Mahadeo Saran Sahu (Supra) where the Court following the Full Bench ruling in Frederick Peacock V/s. Madan Gopal. I.L.R. 29 Cal 428. and the dictum of the Judicial Committee in Motilal V/s. Karrabuldani, I.L.R. 25 Cal 179 (1897), held that it was impossible to contend that plaintiff in that case ‘acquired any title or charge upon the property by reason of the attachment in question’.”

(iii) In light of the aforesaid position of law, Applicant’s contention that the attachment of the Company’s property creates a charge and makes it a secured creditor cannot be accepted.

18 On the judgements cited by Shri Engineer, Shri Cama submitted as under:

(i) *Kerala State Financial Enterprises Limited (Supra)* – the

Official Liquidator relied upon paragraph 14 of this judgment to urge that a mere attachment would not be sufficient to constitute a charge. This submission is inapplicable in the facts of the present case as applicant's case is not merely one of an attachment, but is a case where there is an order/decreed for attachment coupled with sale of an identified property to satisfy the decretal dues. Such an order of sale is not a mere attachment and in fact constitutes a charge as set out above. The Official Liquidator further relied upon paragraphs 16 to 20 of this judgment to urge that a similar argument to that which was being urged by applicant herein was upheld by the Hon'ble Kerala High Court, but in paragraph 20, the Hon'ble Supreme Court noted that the Hon'ble Supreme Court had taken a different view from the Hon'ble Kerala High Court's view. It was thus sought to be urged that the view of the Kerala High Court which was analogous to applicant's arguments herein, was rejected or differed from by the Hon'ble Supreme Court.

This is a complete misreading of the judgment. In paragraph 18 of the judgment of the Hon'ble Supreme Court, the Hon'ble Supreme Court sets out the issues before the Hon'ble Kerala High Court. Pertinently, there were two distinct issues/questions which were being considered by the Hon'ble Kerala High Court viz., (a) the effect of a decree creating a charge; and (b) the interplay between Section 46-B of the State Financial Corporations Act, and Section 125 of the Companies Act, 1956, i.e., as to

which would prevail. The quoted portion of the Hon'ble Kerala High Court judgment deals separately (albeit in the same paragraphs), with the above two questions. The first question as to the effect of a decree creating a charge was answered by the Hon'ble Kerala High Court to say that an order for realization of the amount by sale of the assets of the Company amounts to a charge/decreed and such a charge having not been created by the Company, but being under an order of the Court, Section 125 of the Companies Act, 1956, will not apply. This issue was not differed from by the Hon'ble Supreme Court.

The second question before the Court on the interplay between the State Financial Corporations Act and the Companies Act, was answered by the Hon'ble Kerala High Court to say that the State Financial Corporations Act would have priority over the Companies Act. It is only in respect of this second question as regards the interplay between the two statutes, that the Hon'ble Supreme Court had taken a somewhat different view [paragraph 20]. The correctness of this reading of the judgment of the Hon'ble Supreme Court is evident from the subsequent paragraphs of the judgment, i.e., paragraphs 21 to 23, where the "*somewhat different view*" of the Hon'ble Supreme Court has been set out and which view only pertains to the second question viz., the interplay between the State Financial Corporations Act and other similar statutes on the one hand, and the Companies Act, 1956 on the other hand. Thus, the finding of the Hon'ble

Kerala High Court on the order creating a charge has been in no manner been interfered with or differed from by the Hon'ble Supreme Court.

(ii) *J. K. (Bombay) Private Limited (Supra)* – This judgment has no application, as applicant is not seeking to complete any transaction after the order of winding up. The order/decreed creating a charge in the present case was of 2004, much prior to the winding up order of 19th July 2007. By the date of the winding up order, the charge already stood crystalized and only the ministerial act of actually selling the property took place under the order of this Hon'ble Court on 21st March 2014. It is pertinent to note that in paragraph 26 of this judgment, the Hon'ble Supreme Court has noted that no particular form of words is necessary to create a charge and all that is necessary is that there must be an intention to make a property security for payment of money *in praesenti*. This judgment assists applicant as it is clear from the above facts that the Recovery Certificate and the subsequent Panchnama and pre-auction notice make the subject property security for payment of money.

(iii) *Board for Industrial and Financial Reconstruction (B.I.F.R.) vs Coromandel Garments (Supra)* – This judgment pertained to an order of attachment in a Consent Terms. The Hon'ble Bombay High Court has correctly held that a mere attachment would not constitute a charge. However, in the present case it is not a mere attachment or a pre-judgment attachment, but in fact an order specifically directing attachment of an

identified property and sale thereof towards satisfaction of the decree. Such an order being an order for sale stands on a different footing than a simplicitor order for pre-judgment attachment as in the case of *Forbes & Co.* (supra) and in the case of *Kerala State Financial Enterprises* (supra), which is relied upon by the Hon'ble Bombay High Court in this judgment.

(iv) *ONGC (Supra)* – Similar to the above, this was a case where the order was simply a pre-judgment attachment in the nature of a restraint on the Company not to further encumber its assets. It was not an order of sale or even attachment prior to sale of the property, and has no application in the present fact situation. In paragraph 26 of the judgment it is clarified that the undertaking given by the Company in Liquidation showed that there was no identified immovable asset which was to be made available in discharging the liability of appellant therein, unlike in the present case.

(v) *SICOM Limited (Supra)* – This judgment was relied upon by the Official Liquidator to contend that recovery of arrears of land revenue was different from an order stating that the dues would be recovered “*as arrears of land revenue*”. Firstly, this judgment has no application to the facts of the present case, which pertains to a charge being created under a decree which provides for an order of sale. In any event, paragraph 12 of this judgment makes it clear that the Court was deciding only the issue as to whether the State would have priority over secured creditors and workers in exercising its charge. The judgment nowhere holds that the State did not

have a charge *per se*. The only question was whether that charge would prevail over the workers and secured creditors. In the present case, it is sufficient for applicant's purpose if this Hon'ble Court was to hold that applicant had a charge on par with secured creditors and workers and applicant is not seeking any priority over secured creditors/workers.

19 Shri Engineer also submitted that the Recovery Certificate issued under Section 101 of the Act is in the nature of a statutory form being Form V and that this statutory form does not in any manner create a charge on the assets of the Company, which would equate the position of applicant to that of a secured creditor. He further urged that Section 156 of the Act sets out the powers qua attachment and sale and that the exercise of these powers would not confer any right on applicant higher than that of an unsecured creditor.

20 In response Shri Cama submitted that there was fallacy in the argument of Shri Engineer because the Decree read with the Recovery Certificate has all the ingredients of an order creating a charge. In any event, applicant has not only placed reliance on the Recovery Certificate to contend that a charge has been created on the assets of the Company by operation of law; it has been the consistent stand of applicant that the Recovery Certificate read with the Panchanama as well as the pre-auction notice (which were steps in aid of the Recovery Certificate) equates the

position of applicant to that of a secured creditor. These orders passed by the authorities under the Act create a charge on the assets of the Company by operation of law.

21 Shri Cama also submitted that if the arguments of Shri Engineer were to be accepted, then there would never be a charge created by orders/decrees passed by statutory authorities under a statute and they would be rendered otiose and that only where a charge as contemplated under Section 125 of the Companies Act is registered, would the same be valid. In this case, applicant's rights qua the identified asset of the Company crystallized before the winding up order was passed by this Court. The pre-auction notice would indicate that the identified property was ordered to be sold but only the formal order selling the property remained to be passed. This would not render the orders/decrees passed by the authorities under the Act meaningless. On a true and correct reading of the provisions of the Act and the Rules, Shri Cama submitted that applicant by operation of law and under the order/decrees of a Court, is a secured creditor of the Company.

22 Shri Cama also submitted that it is not in dispute that by merely obtaining a decree, a party does not become a secured creditor; however, when the order of sale flows from the decree and the same is given effect to under the relevant statute, it can hardly be contended that applicant in this

case would fall within the category of those creditors who have merely obtained money decrees from a Court.

23 Shri Narichania submitted that the ex-director, who he was appearing for, has studied only upto B.A., did not know that getting the charge registered after an order of winding up was passed, was incorrect and he had no malafide intentions. Shri Narichania added now that the company has been ordered to be wound up, he would submit to any orders that the Court would pass in the application made by applicant and the stand taken by the Official Liquidator.

24 Heard the counsel, considered the pleadings and written submissions.

25 For ease of reference quoted herein are the relevant provisions of Section 2 (16) of the Companies Act, 2013, which defines a 'charge', Section 101 and Section 156 of the Act and Rule 107 of the Rules :

Section 2 (16) of the Companies Act, 2013

"charge" means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage;

Section 101 of the Maharashtra Co-operative Societies Act, 1960 :-

"101. Recovery of arrears due to certain societies as arrears of recovery of land revenue.

(1) Notwithstanding anything contained in section 91, 93 and 98, on an application made by a resource society undertaking the financing of crop and seasonal finance as defined under the Bombay Agricultural Debtors Relief Act, 1947 or advancing loans for other agricultural purposes repayable during a period of not less than eighteen months and not more than five years for the recovery of arrears of any sum advanced by it to any of its

members on account of the financing of crop or seasonal finance or for other agricultural purposes as aforesaid or by a crop-protection society for the recovery of the arrears of the initial cost or of any contribution for obtaining services required for crop-protection which may be due from its members or other owners of lands included in the proposal (who may have refused to become members) or by a lift irrigation society for the recovery of arrears of any subscription due from its members for obtaining services required for providing water supply to them, or by a Taluka or Block level village artisans multi-purpose society advancing loans and arranging for cash credit facilities for artisans for the recovery of arrears of its dues, or by a co-operative housing society for the recovery of arrears of its dues, or by a co-operative dairy society advancing loans for the recovery of arrears of any sum advanced by it to any of its members or by an urban co-operative bank for the recovery of arrears of its dues, or any sum advanced by the District Central Co-operative Bank to its individual members or by non-agricultural co-operative credit society for the recovery of the arrears of its dues or by salary-earners co-operative society for the recovery of arrears of its dues, or by a fisheries co-operative society for the recovery of arrears of its dues), or by any such society or class of societies, as the State Government may, from time to time, notify in the Official Gazette, for the recovery of any sum advanced to, or any subscription or any other amount due from, the members of the society or class of societies so not notified; and on the society concerned furnishing a statement of accounts and any other documents as may be prescribed in respect of the arrears, the Registrar may, after making the inquiry in such manner as may be prescribed, grant a certificate for the recovery of the amount stated therein, to be due as arrears: The application for grant of such certificate shall be made in such form and by following such procedure accompanied by such fees and documents as may be prescribed.

Explanation-I.-For the purposes of this sub-section, the expression "other agricultural purposes" includes dairy, pisciculture and poultry.

Explanation-II.-For the purposes of this sub-section, the expression "maintenance and service charges" means such charges as are specified in the by-laws of the concerned co-operative housing society.

(2) Where the Registrar is satisfied that the concerned society has failed to take action under the foregoing sub-section in respect of any amount due as arrears, the Registrar may, of his motion, after making such inquiries as may be prescribed, grant a certificate for the recovery of the amount stated therein, to be due as arrears and such a certificate shall be deemed to have been issued as if on an application made by the society Concerned.

(3) A certificate granted by the Registrar under sub-section (1) or (2) shall be final and a conclusive proof of the arrears stated to be due therein, and the same shall be recoverable according to the law for the time being in force, as arrears of land revenue. A revision shall lie against such order or grant of certificate, in the manner laid down under Section 154 and such certificate shall not be liable to be questioned in any court.

(4) It shall be lawful for the Collector and the Registrar to take precautionary measures authorised by Sections 140 to 144 of the Bombay Land Revenue Code, 1879 or any law or provisions corresponding thereto for

the time being in force, until the arrears due to the concerned society, together with interest and any incidental charges incurred in the recovery of such arrears, are paid, or security for payment of such arrears is furnished to the satisfaction of the Registrar.”

Section 156 of the Maharashtra Co-operative Societies Act, 1960 :-

“156. Registrars powers to recover certain sums by attachment and sale of property—

(1) The Registrar or any officer subordinate to him and empowered by him in this behalf or an officer of such society as may be notified by the State Government, who is empowered by the Registrar in this behalf may, subject to such rules as may be made by the State Government, but without prejudice, to any other mode of recovery provided by or under this Act, recover—

(a) any amount due under a decree or order of a Civil Court obtained by a society;

(b) any amount due under a decision, award or order of the Registrar, Co-operative Court or Liquidator or Co-operative Appellate Court;

(c) any sum awarded by way of costs under this Act;

(d) any sum ordered to be paid under this Act as a contribution to the assets of the Society;

(e) any amount due under a certificate granted by the Registrar under sub-section (1) or (2) of section 101 or under subsection (1) of section 137; together with interest, if any, due on such amount or sum and the costs of process according to the scales of fees laid down by the Registrar from time to time, by the attachment and sale or by sale without attachment of the property of the person against whom such decree, decision, award or order has been obtained or passed.

(2) The Registrar or the officer empowered by him shall be deemed, when exercising the powers under the foregoing sub-section, or when passing any orders on any application made to him for such recovery, to be Civil Court for the purposes of Article 136 in the Schedule to the Indian Limitation Act, 1963.”

Rule 107 (1), (8)(i) to (iii), (11)(a) to (c) and (12) of the Maharashtra Co-operative Societies Rules, 1961 :-

“Rule 107. (1)[Procedure for attachment and sale of property under Section 156]:-

(1) A creditor holding a decree requiring the provisions of Section 156 to be applied, or society to which—

(a) any amount is due under a decree or order of a Civil Court obtained by the society;

(b) any amount is due under a decision, award or order of the Registrar, Arbitrator, Liquidator or Tribunals;

(c) any sum is awarded by way of costs under the Acts;

(d) any amount is due under a certificate granted by the Registrar to the assets of the society;

(e) any amount is due under a certificate granted by the Registrar under Section 98 under sub-sections (1) or (2) of Section 101 or under sub-section (1) of Section 137 together with interest, if any, due on such amount or sum and the costs of process by the attachment and sale or by sale without attachment of the property of the person against whom such decree, decision, award or order has been obtained or passed, shall apply to the Recovery Officer within whose jurisdiction the debtor resides or the property of the debtor is situated. In the case of a society, a copy of the resolution of the committee of the society authorising any of the members to make and sign the application on its behalf, shall accompany the application]:

[Provided that no such application shall be necessary in respect of a certificate given under sub-section (1) or (2) of Section 101 of the awards or orders referred to in Rule 84.]”

“Rule 107. (8) (i) to (iii)

(i) Where the property to be attached is a decree either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made, if the decree sought to be attached was passed by the Registrar or by any person to whom a dispute was transferred by the Registrar under Section 93 by a nominee or a board of nominees, then by the order of the Registrar.

(ii) Where the Registrar makes an order under clause (i), he shall, on the application of the applicant who has attached the decree, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(iii) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in clause (i) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner for the holder thereof.”

“107. (11) In the attachment and sale or sale without attachment of immovable property, the following rules shall be observed :-

(a) The application presented under sub-rule (2) shall contain a description of the immovable property to be proceeded against, sufficient for its identification and in case such property can be identified by boundaries or numbers in a record of settlement of survey, the specification of such boundaries or numbers and the specification of the defaulters share or interest in such property to the best of the belief of the applicant and so far as he has been able to ascertain it.

(b) The demand notice issued by the Recovery Officer under sub-rule (3) shall contain the name of the defaulter, the amount due, including the expenses, if any, and the batta to be paid to the person who shall serve the demand notice, the time allowed for payment and in case of non-payment,

the particulars of the properties to be attached and sold or to be sold without attachment, as the case may be. After receiving the demand notice, the Recovery Officer shall serve or cause to be served a copy of the demand notice upon the defaulter or upon some adult male member of his family at his usual place of residence, or upon his authorised agent or, if such personal service is not possible, shall affix a copy thereof on some conspicuous part of the immovable property about to be attached and sold or sold without attachment, as the case may be:

Provided that where the Recovery Officer is satisfied that a defaulter with intent to defeat or delay the execution, proceeding against him is about to dispose of the whole or any part of his property, the demand notice issued by the Recovery Officer under sub-rule (3) shall not allow any time to the defaulter for payment of the amount due by him and the property of the defaulter shall be attached forthwith.

(c) If the defaulter fails to pay the amount specified in the demand notice within the time allowed, the Recovery Officer shall proceed to attach and sell, or sell without attachment, as the case may be, the immovable property noted in the application for execution in the following manner.”*

Rule 107 (12)

Where prior to the date fixed for a sale, the defaulter or any person acting on his behalf or any person claiming an interest in the property sought to be sold tenders payment of the full amount due together with interest, batta and other expenses incurred in bringing the property to sale, including the expenses of attachment, if any, the Recovery Officer shall forthwith release the property after cancelling, where the property has been attached, the order of attachment.”

26 ‘Charge’ is defined in Section 124 of the Companies Act, 1956 to include a mortgage. Section 124 and the relevant provisions of Section 125 read as follows:

“124. ‘Charge’ To Include Mortgage In This Part: In this Part, the expression ‘charge’ includes a mortgage.

125. Certain Charges to be Void Against Liquidator or Creditors Unless Registered:-

(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty

days after the date of its creation:

Provided that the Registrar may allow the particulars and instrument of copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty days on payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.

(2) Nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.

(3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.

(4) This section applies to the following charges:

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company;

(c) a charge on any immovable property, wherever situate, or any interest therein;

(d) a charge on any book debts of the company;

(e) a charge, not being a pledge, on any moveable property of the company;

(f) a floating charge on the undertaking or any property of the company including stock-in-trade;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.”

27 During the oral hearings, Shri Cama for applicant after conceded that :

(i) It was aware of the fact that the Mortgage Deed was not registered; and that the registration of the charge on 17th November 2014 was not correctly carried out, should not have been done and is of no legal effect. Shri Cama in fact submitted that Applicant is not relying on the Mortgage Deed at all to claim the status of a secured creditor;

(ii) Applicant is not relying on Section 47 of MCS Act to claim the status of a secured creditor as Section 47 is inapplicable;

(iii) Applicant is not relying on Section 48 of MCS Act to claim the status of a secured creditor as it is inapplicable;

28 Therefore, the only submission urged by Applicant, that remains for this Court's consideration, is that the Recovery Certificate under Section 101 read with the attachment of the Company's properties and the pre-auction sale notice, read with Section 156 of the MCS Act and Rule 107 of the MCS Rules has the effect of creating a charge by operation of law/decreed.

29 Applicant's submissions were, to re-cap:

(i) They have a Recovery Certificate under Section 101 of the Act.

(ii) The Recovery Certificate specifies that the amounts shall be recoverable under Section 156 read with Rule 107 without any further order.

(iii) Section 156 read with Rule 107 contemplate the attachment and sale of assets/properties.

(iv) The Company's property was attached and a pre-auction notice was given.

(v) That viewed as a composite whole, Section 101, read with Section 156 and Rule 107 created a charge by operation of law/decreed.

30 In my view, none of these individually or cumulatively, create a charge on the Company's properties and therefore, do not convert applicant into a secured creditor. The submissions of applicant is misconceived, *inter alia*, for the following reasons :

(i) The Recovery Certificate dated 16th November 2004 only states that an amount is due and payable. It does not say that Applicant is a secured creditor or that it has a charge on the assets of the Company. Further, on a perusal of Section 101, it is clear that Section 101 is only a summary manner in which certain types of societies can recover amounts that are loaned. The section does not state that the amounts that are found to be payable are recoverable as a secured creditor. On the contrary, Section 101(3) of the Act makes it clear that the effect of a recovery certificate under Section 101 is that the amount so stated to be due shall be recoverable "according to the law for the time being in force as arrears of land revenue".

(ii) The fact that the amount under the Recovery Certificate was recoverable from the Company "as arrears of land revenue" as per the provisions of Maharashtra Land Revenue Code, 1966 also does not create a charge and does not make Applicant a secured creditor. In this regard, the decision of a Division Bench of this Court in *SICOM Limited (Supra)* is relevant. In the said case, the company in liquidation owed sales tax dues to the State Government. One of the issues that arose for the Court's

consideration was whether the sales tax dues, which were recoverable as arrears of land revenue, made the State Government a secured creditor of the company in liquidation. This Court answered the question in the negative. It held that there is a distinction between a sum which is recoverable as *land revenue* and a sum which is recoverable as *arrears of land revenue*, and it is only in case of the former that the State Government has a first charge under Section 169 of the Maharashtra Land Revenue Code. Therefore, it is clear that the Recovery Certificate under Section 101 is only in the nature of a money decree and only makes the amount recoverable as arrears of land revenue and that does not make the amount a secured debt. Therefore, the Recovery Certificate does not change the nature of the claim from an unsecured one to a secured one.

(iii) The reference to Section 156 of the Act and Rule 107 of the Rules is not sufficient to create a charge, since neither of these two provisions contain any term that would create a charge on the Company's properties pursuant to the issuance of a recovery certificate. Section 156 and Rule 107 merely provide for the mode of execution of a recovery certificate issued under Section 101 of the Act. They are akin to the provisions for execution under Section 51 read with Order 21 of the CPC. They can in no manner be construed so as to create a charge on the assets of the Company for the purposes of execution of a Recovery Certificate.

(iv) The plain language of Section 156 and Rule 107 shows that what they contemplate is the ‘attachment’ of a property and thereafter the sale of the property as the means of executing/enforcing the Recovery Certificate. It is settled law as laid down in the case of *Kerala State Financial Enterprises (Supra)* and *Board for Industrial and Financial Reconstruction (B.I.F.R.) vs Coromandel Garments (Supra)* that an attachment does not create a charge on the asset. That being so, the fact that Section 156 and Rule 107 talk about the ‘attachment’ of properties shows that it does not amount to creation of a charge as held by the Hon’ble Supreme Court in *Kerala State Financial Enterprises (Supra)* and this Court in *Board for Industrial and Financial Reconstruction (B.I.F.R.) vs Coromandel Garments (Supra)*.

(v) Applicant contends that since the Recovery Certificate expressly stipulates that the amount so decreed is recoverable pursuant to Section 156 and Rule 107 without any further order, it creates a charge. This is patently incorrect for the reasons set out hereunder :

(a) The Recovery Certificate is issued in the standard format prescribed for the same under the MCS Rules. Rule 86F, which falls in Chapter VIII-A, dealing with grant of recovery certificate under Section 101 of the Act, prescribes that the recovery certificate shall be issued in Form V. The relevant portion of Form V reads as follows:

“I hereby order that amount mentioned above be recovered from the

respondents as per the provisions of the Maharashtra Land Revenue Code 1966 as arrears of Land Revenue or;

Applicant should get the above amount recovered through the officers who have been delegated the powers under section 156 of the Maharashtra Cooperative Societies Act, 1960 and Rule 107 of the Maharashtra Cooperative Societies Rules, 1961. There is no need to file a separate application for implementation of this recovery certificate.”

(b) It is thus evident that the Recovery Certificate issued in favour of applicant is in the prescribed format and the reference to the provisions of Section 156 of the Act and Rule 107 of the Rules is not a distinctive feature of applicant's Recovery Certificate. Every recovery certificate issued under Section 101 will mention that the amount is to be recovered under Section 156 read with Rule 107 without requiring any further orders to be passed. Therefore, the sequitur to Applicant's contention is that every holder of a recovery certificate under Section 101 of the Act would be a secured creditor. This interpretation is against the plain language of Section 101(3) which only sets out that the amounts are recoverable as arrears of land revenue which does not make the holder of the recovery certificate a secured creditor. It is a well-settled proposition of law that a decree-holder is not a secured creditor for the purposes of Section 529A of the Companies Act. The Hon'ble Supreme Court has upheld this principle in ***Textile Labour Association & Anr. V/s. Official Liquidator & Anr.***⁹, where the Hon'ble Court held (in paragraphs 8 and 9) as follows:

“8. The effect of Sections 529 and 529-A is that the workmen of the company become secured creditors by operation of law to the extent of the workmen's dues provided there exists secured creditor by contract. If there is no secured

9. (2004) 9 SCC 741

creditor then the workmen of the company become unsecured preferential creditors under Section 529-A to the extent of the workmen dues. The purpose of Section 529-A is to ensure that the workmen should not be deprived of their legitimate claims in the event of the liquidation of the company and the assets of the company would remain charged for the payment of the workers' dues and such charge will be pari passu with the charge of the secured creditors. There is no other statutory provision overriding the claim of the secured creditors except Section 529-A. This Section overrides preferential claims under Section 530 also. Under Section 529-A the dues of the workers and debts due to the secured creditors are to be treated pari passu and have to be treated as prior to all other dues.

9. Therefore, the law is clear on the matter as held in UCO Bank case that Section 529-A will override all other claims of other creditors even where a decree has been passed by a court.”

(c) Therefore, it is evident that a decree-holder is not a secured creditor for the purposes of Section 529-A of the Companies Act, 1956. The Act too does not anywhere expressly provide that a charge is created in favour of every holder of a recovery certificate under Section 101 or that such holder of recovery certificate is a secured creditor. In such circumstances, I cannot accept applicant's contention that by implication, a holder of a recovery certificate becomes a secured creditor merely because of the reference to Section 156 of the Act and/or Rule 107 of the Rules. Such a construction would significantly alter the priority of claims as stipulated in Sections 529, 529A and 530 of the Companies Act, 1956 and such alteration is not permissible without the express mandate of the legislature.

(vi) The legislature, in fact, has impliedly excluded the interpretation proposed by applicant. The latin maxim *expressio unius est exclusio alterius*, i.e., the express mention of one is the exclusion of another

is relevant. The Hon'ble Supreme Court of India relied on the *expressio unius* principle in *Ethiopian Airlines V/s. Ganesh Narain Saboo*¹⁰. In this case, one of the issues before the Hon'ble Court was whether Section 86 of the Code of Civil Procedure, 1908 applies to proceedings under the Consumer Protection Act, 1986. The Hon'ble Court held that the Consumer Protection Act clearly enumerates those provisions of the CPC which are applicable to proceedings under Consumer Protection Act. Since the said provisions do not include Section 86, the legislature is deemed to have excluded its applicability to proceedings under the Consumer Protection Act. The Hon'ble Supreme Court held (in paragraph 65) as follows:

“65. However, notwithstanding the fact that proceedings of the National Commission are ‘suits’ under the Carriers Act, vide the expressio unius principle, the Consumer Protection Act, 1986 clearly enumerates those provisions of the CPC that are applicable to proceedings before the Consumer Fora. Such provisions include 13(4), in which the Consumer Protection Act, 1986 vests those powers vested in a civil court under the CPC to the District Forum. However, according to the principle of expressio unius, because the legislature expressly made the aforementioned provisions of the CPC applicable to the consumer proceedings, the legislature is, therefore, deemed to have intentionally excluded all other provisions of the CPC from applying to the said proceedings. This is particularly true since, as explained above, the Consumer Protection Act, 1986 sets forth an exhaustive list of procedures, distinguishable from those required under the CPC, that the consumer redressal fora must follow. Therefore, since the Consumer Protection Act does not state that Section 86 applies to the Consumer Fora's proceedings, that section of CPC should be held to be not applicable.”

(vii) In the present case, therefore, in the absence of the Act providing for an automatic creation of a charge pursuant to a recovery certificate granted under Section 101 of the Act, no such charge can be

10. (2011) 8 SCC 539

deemed to have been created. The only deeming fiction stipulated for the amount due under a recovery certificate is that it shall be recoverable as arrears of land revenue (Section 101(3) of the Act), which, as can be seen from what is set out earlier clearly does not create a charge.

(viii) Similarly, the Act expressly stipulates the situations in which a charge is created in respect of a debt owed by a member to the society. These include :

(a) Under Section 46 of the Act, a society shall have a charge upon the share or interest in the capital and on the deposits of a member and upon any dividend, bonus or profits payable to such member in respect of any debt due from such member to the society.

(b) Section 47(1) of the Act provides that any debt or outstanding demand of a society against a member is a first charge upon certain properties of the member enumerated therein.

(c) A charge under Section 48 of the Act is created on a member's land where a member takes a loan from the society, provided the pre-conditions of Section 48 are met.

(ix) Since the Act expressly envisages situations in which a charge is created on members' interests in respect of debt owed to the society, by not providing for creation of a charge in respect of amount due

under a recovery certificate granted under Section 101 of the Act, in light of the *expressio unius* principle, the Act is deemed to have excluded the creation of a charge for an amount due under such recovery certificate.

(x) Even applicant's reliance on the decision in *Praga Tools Ltd. (Supra)* is misplaced for the following reasons :

(a) The judgment was cited for the proposition that an order of a court could create a charge and section 125 of the Companies Act would not apply to it. However, what is important to note is that the order that was held to have created the security was a consent order. Parties by consent agreed that Rs. 50,000 would be the security. In law the effect of consent terms is that it is a contract of the parties with the imprimatur of the Court. It was in such a case that the Hon'ble Calcutta High Court held that a charge had been created. This is completely distinguishable as compared to the facts of the present case.

(b) The security furnished by the company in liquidation in *Praga Tools (Supra)* was specific, i.e., it was a sum of Rs.50,000/- and the order which was held to have created a charge specifically stipulated that in case of default, it was that specific sum of Rs.50,000/- that would be considered as security. In the present case, the Recovery Certificate does not anywhere specify the asset of the Company which ought to be considered as security in the event of default in payment of the amount due under the

Recovery Certificate. Indeed, in similar circumstances, in the absence of any identification of property which is rendered as security, the Hon'ble Supreme Court in *Oil and Natural Gas Corporation Limited (Supra)* held that there was no intention to create a charge and no charge had been created on the company's property. The Court held (in paragraph 26) as follows:

"26. The undertaking given by the company in liquidation in this case was as under:

3. I state that Respondent No. 10 Company undertakes that none of immovable assets of the company will be further charged and encumbered hereafter with effect from 15-04-1987, i.e. from the date of order of this Hon'ble Court except with the leave of this Hon'ble Court.

4. I state that Respondent No. 10 Company further undertakes not to alienate any of its immovable assets hereinafter with effect from 15-04-1987 except with the leave of this Hon'ble Court. The Respondent No. 10 Company further undertakes to make available all its immovable assets in the event of discharging the liabilities which may arise on account of the difference between the price at which all the gas being supplied to the company during the pendency of the proceedings in this connection and the price which may be determined by this Hon'ble court while disposing of the present appeals finally.

A perusal of the aforesaid undertaking shows that Ambica Mills has not identified any particular immovable assets which would be made available in discharging the liabilities in favour of the Appellant. Therefore, we have no hesitation in rejecting the submission of Mr. Kuhad that the interim order read with the undertaking expressed an intention to create an enforceable charge of any particular asset of the company in liquidation." (emphasis added)

(c) As stated above, the Recovery Certificate merely contains a reference to Section 156 of the Act and Rule 107 of the Rules for the purpose of execution of the Recovery Certificate. Neither the Recovery Certificate nor Section 156 nor Rule 107 identifies any property which

would be treated as security for the amount due under the Recovery Certificate. Therefore, no charge can be said to have been created.

(d) The Hon'ble Supreme Court in *Oil and Natural Gas Corporation Limited (Supra)* also distinguished *Praga Tools (Supra)* and held that no charge had been created in favour of the appellant therein.

(xi) Applicant has also relied on the decision in *Indian Bank (Supra)* to contend that a charge that has been created by operation of law and/or by the Recovery Certificate and therefore it does not have to be registered under Section 125 of the Companies Act, 1956. This judgment is completely distinguishable for the following reasons :

(a) The decree in the *Indian Bank (Supra)* case was in a mortgage suit in which preliminary decree was passed. The fact that it was in a mortgage suit is a crucial difference when compared to the facts in the present case, which was just a summary procedure for recovery of money. It was in this regard that the Hon'ble Supreme Court held in *Indian Bank (Supra)* that a charge was created on the basis of a preliminary decree in a mortgage suit because the decree had specifically directed that if the amount due was not paid, the plaintiff would be entitled to apply to the court for passing a final decree for sale of the property which was given as security in an equitable mortgage. In the present case, the Recovery Certificate neither refers to the creation of a charge in respect of the amount

due therein nor does the Recovery Certificate state that any property of the Company shall be treated as a security for the purposes of execution of the Recovery Certificate or that it may be attached/sold in the event of default in payment of amount due. The Recovery Certificate is akin to a money decree which simply orders the Company to pay the sum adjudicated therein to applicant.

(b) The argument that the Panchnama attaching the property and the pre-auction notice stipulates that if the amount is not paid the attached properties would be sold and that the same would demonstrate that a charge had been created is also misconceived. The Panchnama and the pre-auction notice are not judgments/orders/decrees. They are mere steps in execution of the Recovery Certificate. If applicant's contention is to be accepted, it would tantamount to a situation where any unsecured decree-holder could contend that merely because any property has been attached in execution and put up for sale it is now a secured creditor, which would run counter to the settled position in law that an unsecured creditor who has a decree does not become a secured creditor and also that an attachment does not create a charge.

(c) It was in the context of a mortgage suit that the Hon'ble Supreme Court has held that if an order of sale of the mortgaged property had been passed, then the provisions of Section 125 would not apply. It is

important to note that a charge could be created either by the act of parties or by operation of law. Act of parties necessarily means a situation where parties are ad-idem/agree that a particular asset may be offered as security. A charge created by operation of law would be a situation where a charge is created by virtue of a legal provision such as Section 55(4)(b) and 55(6)(b) of the Transfer of Property Act, Sections 529 and 529A of the Companies Act, Section 48 of the Act, and recovery of land revenue under Section 169 of the Maharashtra Land Revenue Code. Where a charge is created by the decree, it would necessarily contemplate a situation where a party has either a contractual right or a statutory right for claiming a charge. If neither of them is available, then the court would not pass a decree creating a charge. It is for this reason that in *Indian Bank (Supra)* case, which was a mortgage suit, it was held that the preliminary decree did not require to be registered. However, parties had agreed in that case that the asset was to be the security for the creditor and the legal proceedings had been taken out to enforce the security. In the present case, the Recovery Certificate is only a summary procedure for recovery of money and does not create a charge or even refer to any property being the security. As set out above, the Recovery Certificate is a plain and simple money decree and therefore, no analogy or parallel can be drawn with the *Indian Bank (Supra)* case. The same is completely distinguishable on facts.

31 Applicant contends that since the attachment of the Company's assets and issuance of pre-auction sale notice took place prior to the winding up order, it amounts to creation of a charge and thus ought to be entitled to the sale consideration. This contention also is completely misconceived. The Hon'ble Supreme Court in *Kerala State Financial Enterprises (Supra)* and this Hon'ble Court in this Hon'ble Court in *Board for Industrial and Financial Reconstruction (B.I.F.R.) vs Coromandel Garments (Supra)* have held that the attachment of a property does not create a charge.

32 Moreover, the fact that the Company's properties have been attached prior to the winding up order dated 19th July 2007 is totally irrelevant. The Hon'ble Supreme Court in *Bank of Maharashtra V/s. Pandurang Keshav Gorwardkar*¹¹, has held that the relevant date on which the legal status of parties for the purposes of Sections 529 and 529-A of the Companies Act, 1956 are determined is the date of the winding-up order. The Hon'ble Court further held that even if the assets of the company in liquidation have been sold (let alone attached) prior to the date of the winding-up order, if the proceeds of the sale have not been realized by the secured creditor as of the date of the winding-up order, such sale proceeds cannot be said to belong exclusively to the secured creditor and the workmen will have a *pari passu* charge on the company's assets, including

11. (2013) 7 SCC 754

the sale proceeds, as of the date of the winding-up order. The Hon'ble Supreme Court held:

“67.2. Where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is pari passu with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the debtor company.

67.3. The above position is equally applicable where the assets of the debtor company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realized from such sale could be fully and finally disbursed, the company had gone into liquidation. In other words, pending final disbursement of the proceeds realized from the sale of security in execution of the recovery certificate issued by the Debts Recovery Tribunal, if debtor company becomes company in winding up, Section 529-A read with Section 529(1)(c) proviso come into operation and statutory charge is created in favour of workmen in respect of their dues over such proceeds.

67.4. The relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the debtor company is the date of the winding up order and not the date of sale.”

33 Therefore, it is only if a creditor has realized the proceeds of sale of an asset of the Company prior to the winding-up order can such creditor claim to have prior rights over such asset/its sale proceeds. In the present case, the mere fact that the Company's properties have been attached, not even sold, prior to the winding-up order dated 19th July 2007 does not have any consequence on its status as an unsecured creditor at all.

34 In light of the aforesaid, in the absence of a charge having been registered by applicant prior to the winding up order dated 19th July 2007, applicant cannot be considered as a secured creditor. The Recovery

Certificate dated 16th November 2004 does not create any charge in favour of applicant, either by itself or when read along with any of the provisions of the Act or the Rules. In such circumstances, the mistaken categorization of applicant as a secured creditor has to be corrected and changed into an unsecured creditor.

35 OLR no.116 of 2018 and company application no.314 of 2017 accordingly disposed.

(K.R. SHRIRAM, J.)