

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 2243/2003

Khandelwal Tube Mill Kamgar Sangh
(Registered No.NGP-426) By its Vice President
At Post Khandelwal Nagar, Kanhan, Tah. Parseoni,
District – Nagpur.

PETITIONER

-VERSUS-

1. The Government of Maharashtra,
Industries, Energy & Labour Deptt.
Mantralaya, Mumbai – 400 032.
2. The Additional Commissioner of Labour,
Bhonsla Chambers, Civil Lines, Nagpur.
3. Khandelwal Brothers Limited,
Through Rajeev Khandelwal, Director,
Khandelwal Nagar, Kanhan,
Tah. Parseoni, District – Nagpur.
4. Khandelwal Brothers Limited,
269, Dr.D.N. Road, Fort, Mumbai-400 001.
5. Asset Reconstruction Company (India) Limited,
a company regd. under the Companies
Act, 1956, and having its registered office at
17th Floor, Express Towers, Nariman Point,
Mumbai – 400 021.
6. Lalsingh Yadao, Labour Representative
Khandelwal Tube Mill Kamgar Sangh,
Khandelwal Nagar, Kanhan, Tah. Parseoni,
District – Nagpur.
7. The Collector, Nagpur.
8. The Income Tax Officer,
Ward 2(2)(2), Ayakar Bhavan, Mumbai-400020.
9. Union of India,
Through Defence Estates Officer, Mumbai
Circle, Colaba, Mumbai – 400 005.

RESPONDENTS

Shri R.B. Puranik, counsel for the petitioner.
Shri D.P. Thakare, Additional Government Pleader for the respondent nos.1, 2
and 7.
Shri H.V. Thakur, counsel for the respondent nos.3 and 4.
Shri A.C. Dharmadhikari, counsel for the respondent nos.5.
Shri S.M. Puranik, counsel for the Intervenor.

CORAM : A. S. CHANDURKAR AND URMILA JOSHI-PHALKE, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : 28TH JULY, 2022.

DATE ON WHICH JUDGMENT IS PRONOUNCED : 30TH AUGUST, 2022.

JUDGMENT (PER : A.S. CHANDURKAR, J.)

The question of *inter se* priority in recovering dues from a company that has become non-functional but has not been wound up arises for adjudication in this writ petition. The Employees' Union and the Secured Creditor claim to have priority over each other with regard to their respective dues.

2. Khandelwal Tube Mill (for short, hereinafter referred to as 'the Company') was engaged in the business of production and sale of steel pipes. It had engaged about 350 employees whose service conditions were governed by the provisions of the Maharashtra Industrial Relations Act, 1946 (for short, hereinafter referred to as 'the Act of 1946'). Khandelwal Tube Mill Kamgar Sangh (for short, hereinafter referred to as 'the Union') is a representative Union under Section 14 of the Act of 1946 representing all employees at the Company. The Company was not regular in paying the wages to its employees on the agreed dates and hence the Union filed Complaint (ULP) No.219 of 1999 in the Industrial Court, Nagpur alleging commission of an unfair labour practise. That complaint was decided on 02.04.2002 and the Company was directed to pay wages to its employees on every 7th and 22nd day of each month. Despite the aforesaid order, the wages were not being paid as directed. The Union therefore approached the State Government for resolving the

aforesaid issue. A meeting of representatives of the Union, the Company and the Punjab National Bank (for short, hereinafter referred to as 'the Secured Creditor') was held on 24.09.2002. It was agreed that all assets of the Company could be disposed of and from the sale proceeds received, 50% of the same would go to the Secured Creditor and the remaining 50% would be utilized for disbursing the wages of the employees. In accordance with the consensus arrived at, the State Government issued a Government Resolution on 11.10.2002. With a view to implement the said Government Resolution, the Assistant Commissioner of Labour took steps in that regard. The Secured Creditor however was not inclined to act in accordance with the said Government Resolution. In such situation, the Union preferred the present writ petition seeking a writ of mandamus for implementation of the Government Resolution dated 11.10.2002. Another prayer made was for seeking adjudication of an application pending before the Labour Court under Section 33-C(2) of the Industrial Disputes Act, 1947 (for short, hereinafter referred to as 'the Act of 1947') in the matter of payment of wages due.

3. On 05.08.2003 Writ Petition No.2243 of 2003 was decided. Various directions were issued by which the Labour Court was directed to decide the application pending before it under Section 33-C(2) of the Act of 1947 for determining the amount due and payable to the employees and thereafter issue certificate under Section 33-C(4) of the Act of 1947

consequent upon such determination. The Collector was directed to recover the amounts under the certificate by keeping in mind the aspect that the employees' dues would have priority over the claims of the Secured Creditor. The writ petition was accordingly disposed of.

4. The Secured Creditor being aggrieved by the direction to the Collector to bear in mind the priority of the employees' dues over the claims of the Secured Creditor challenged the same before the Hon'ble Supreme Court. On 05.08.2004 the Hon'ble Supreme Court decided the proceedings in *Punjab National Bank Versus Khandelwal Tube Mills Kamgar Sangh & Others* [(2005) 9 SCC 350]. It was held that the conclusion recorded by this Court that the employees' dues would have priority over the claim of the Secured Creditor was without any discussion and without giving any reasons. It noted that while the Secured Creditor was relying upon the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, hereinafter referred to as 'the Act of 2002'), the Union was relying upon the fact that the employees' dues would have priority in view of the fact that they are deemed to be the arrears of land revenue recoverable by the Collector. In this context, the Hon'ble Supreme Court after setting aside the judgment dated 05.08.2003 has remitted the said proceedings for a fresh consideration insofar as the question of *inter se* priority is concerned. It is in this backdrop that the writ petition has been heard.

5. Shri R.B. Puranik, learned counsel for the Union apprised the Court of various factual details that led to the stopping of the production activity at the Company. He submitted that on 26.07.2002 the Secured Creditor had issued a notice under Section 13 of the Act of 2002 to the Company demanding its dues. In that notice, the Secured Creditor had indicated that it would take further steps under the Act of 2002 to enforce its security interest. Despite issuing notice under Section 13(2) of the Act of 2002 the Secured Creditor agreed in the meeting dated 24.09.2002 to sell the assets of the Company which included its security interest and thereafter appropriate the sale proceeds equally. This resulted in issuance of the Government Resolution dated 11.10.2002. In the meanwhile the proceedings under Section 33-C(2) of the Act of 1947 were decided and the Collector was requested to implement the said order. He then invited attention to the events that occurred after the proceedings were remitted by the Hon'ble Supreme Court.

According to him, though the notice dated 13.09.2004 was issued by the Secured Creditor under the Act of 2002 to the Company for taking possession of the secured assets, it was clear that it had not taken physical possession of the same. On the contrary, a Court Receiver was appointed to sell the properties of the Company by public auction. This was in view of the order dated 21.12.2004 passed on Civil Application No. 7904 of 2004. According to the learned counsel, the observations in that order clearly indicate that the Secured Creditor had not taken possession and

had consented for sale of the assets. This order was subsequently modified on 10.02.2005 and instead of the Court Receiver it was the Collector, Nagpur who was directed to take necessary steps to dispose of the assets of the Company. On 03.03.2005 the Collector was permitted to appoint Security Guards to safeguard the said property since it was the grievance of the Union that there were some thefts at the site. The said expenses were to be borne by the Secured Creditor. Ultimately on 06.06.2005 the property was auctioned and sold. Thereafter on 20.06.2005 the Asset Reconstruction Company (India) Limited was substituted in place of the Punjab National Bank. The learned counsel invited attention to the order dated 11.08.2005 and especially paragraph 3 thereof to urge that the Company had become non-functional since July-2000 though no closure as contemplated by law was effected. Since the assets of the Company were sold on 06.06.2005, the said date was considered as the date for the purpose of agitating the claim of dues of the employees' on the date of closure. He emphasized the fact that despite absence of any order of closure or a formal order of winding up, the substratum of the Company had disappeared. He also invited attention to the provisions of Section 13 of the Act of 2002 to urge that only if steps under Section 13(4) of the Act of 2002 are taken would the provisions of Section 13(7) of the Act of 2002 come into play. On the contrary, on 25.02.2005 the Secured Creditor had filed an Original Application before the Debts Recovery Tribunal, Mumbai for recovering its

dues but this aspect was not brought on record in the writ petition by the Secured Creditor. According to him, despite issuing notice under Section 13(2) of the Act of 2002 on 26.07.2002 the same was not taken to its logical end. The order directing sale of the assets of the Company was also not challenged by the Company and as the Original Application filed by the Secured Creditor before the Debts Recovery Tribunal was still pending its claim for priority was not sustainable in law.

On the contrary in view of the order passed under Section 33-C(2) of the Act of 1947 the Union had a right to recover the dues adjudicated. If only the sale of the secured assets was under the provisions of the Act of 2002 would the provisions of Section 13(7) of the Act of 2002 come into play. The same was not the case here. Placing reliance on the decision in *Central Bank of India Versus State of Kerala & Others* [2009] 4 SCC 94], it was submitted that the employees' dues had a *pari passu* charge over the proceeds and the Union was entitled for such charge. He further submitted that in *Asstt. General Manager, Karnataka State Financial Corporation Versus General Secretary, Mysore Division, Industrial Workers General Union & Others* [2014 II CLR 285], the Hon'ble Supreme Court considered the challenge raised to an order passed by the Karnataka High Court wherein preference was given to the dues of the workers on principles analogous to those applicable when the company goes into liquidation. The Hon'ble Supreme Court had refused to interfere with said order. He submitted that a similar course ought to

be followed in the present proceedings. He fairly brought to the notice of the Court the decision in *Maharashtra State Cooperative Bank Limited Versus Babulal Lade & Others* [(2020) 2 SCC 310] with regard to recovery of dues as if they were dues of land revenue. He therefore submitted that in view of provisions of Sections 35 and 37 of the Act of 2002 by which the provisions of the Act of 2002 were not to operate to the derogation of any other law, it was clear that the dues of the employees' ought to have priority over the dues of the Secured Creditor, if not a *pari passu* charge.

6. Shri H.V. Thakur, learned counsel for the Company supported the stand of the Union. According to him, the Hon'ble Supreme Court had noted that the Company had become non-functional since July-2000. This Court had observed in the order dated 11.08.2005 that the substratum of the Company had disappeared and hence the effect of situation arising therefrom could be granted in the light of Section 529-A of the Companies Act, 1956 (for short, hereinafter referred to as 'the Act of 1956'). He submitted that despite the Secured Creditor issuing a notice under Section 13(2) of the Act of 2002 on 26.07.2002 the same was not pursued and instead it was the Secured Creditor which filed proceedings before the Debts Recovery Tribunal and sought adjudication of its dues. The Company had never admitted the claim made by the Secured Creditor and it was contesting the said proceedings on merits.

The claim of the Secured Creditor was seriously disputed and an application for deleting the names of some of the Directors had been moved before the Tribunal. He referred to the judgment of the Karnataka High Court in *The General Secretary, Mysore Division Industrial Workers General Union, Mysore Versus The Deputy Commissioner, Mysore & Others* [2010 (2) AIR Kar R 540] which decision was subsequently challenged before the Hon'ble Supreme Court but the same was upheld in *Asstt. General Manager, Karnataka State Financial Corporation Versus General Secretary, Mysore Division, Industrial Workers General Union & Others* [2014 II CLR 285]. It would therefore be safe to assume that in a situation where the substratum of the Company had disappeared and it was non-functional for a long period, the same was akin to winding up. The modalities prescribed by Section 529-A of the Act of 1956 ought to be followed. He also referred to the decisions in *Jitendra Nath Singh Versus Official Liquidator & Others* [(2013) 1 SCC 462] and *Bombay Stock Exchange Versus V.S. Kandalgaonkar & Others* [(2015) 2 SCC 1] to urge that there ought to be a *pari passu* charge as regards the dues of the employees alongwith the dues of the Secured Creditor in the facts of the present case.

Shri S.M. Puranik, learned counsel representing the Intervenors also supported the contentions raised by the learned counsel appearing for the Union.

7. Shri A.C. Dharmadhikari, learned counsel for the Secured Creditor opposed the aforesaid submissions. According to him, Punjab National Bank alone was the Secured Creditor. Inviting attention to various provisions in the definition clause of the Act of 2002, it was submitted that though notice under Section 13(2) of the Act of 2002 was issued, the same was not contested by the Company nor was any objection under Section 13(3-A) ever raised. For this reason a right was created in favour of the Secured Creditor in the assets of the Company and the debt in question was not in dispute. The Secured Creditor had been agitating its rights since beginning and in view of the provisions of Section 26-E of the Act of 2002, it would have priority over the employees' dues. The fact that the Company had borrowed amounts and had also mortgaged its properties was not in dispute. He also referred to the provisions of Section 31-B and Section 34 of the Recovery of Debts and Bankruptcy Act, 1993 (for short, hereinafter referred to as 'the Act of 1993'). Though liberty was granted to the Union to seek winding up of the Company, the same was not utilized. As such right was given up by the Union, it could not now turn around to urge that it had priority over the debts of the Secured Creditor. Reference was also made to Civil Application No.801 of 2006 by which modification of the order dated 11.08.2005 was sought by the Company. It was submitted that the Secured Creditor could not be directed to bring back and deposit the amount of Rupees Five Crores in this Court that was paid to it during pendency of the proceedings.

According to him, in view of the decision in *Maharashtra State Co-operative Bank Limited* (supra), the Secured Creditor had a priority to recover its dues prior to those of the employees'. He thus submitted that the right of the Secured Creditor ought to be recognized in that regard.

Shri D.P. Thakare, learned Additional Government Pleader appearing for the State Government as well as the Additional Commissioner of Labour and the Collector referred to the steps taken by the said respondents while complying with various orders.

8. We have heard the learned counsel for the parties at length and we have also perused the various documents placed on record. It can be seen from the order passed by the Hon'ble Supreme Court in *Punjab National Bank* (supra) that the conclusion recorded by this Court earlier in its order dated 05.08.2003 passed in the present writ petition that the employees' dues would have priority over the claim of the Secured Creditor was not supported by any discussion or by giving any reasons. It is in that context that the proceedings were remitted to this Court to decide the aspect of priority *inter se* between the Secured Creditor on one part and the Union on the other amongst others. While according to the Union the employees' dues as determined by the Industrial Court in proceedings under Section 33-C(2) of the Act of 1947 ought to have a first right over the dues of the Secured Creditor, according to the Secured Creditor it had first priority in recovering its dues in the light of the provisions of the Act of 2002.

9. For considering this aspect, it would be necessary to refer to certain admitted factual aspects that are found relevant for determining the said issue. The Company had obtained financial assistance from the Punjab National Bank (Secured Creditor) but had thereafter defaulted in making regular repayment. From 10.07.2000 the production activity at the Company had stopped and from July-2000 the payment of wages to the members of the Union was discontinued. In the meanwhile, the complaint that was preferred by the Union before the Industrial Court came to be allowed on 02.04.0002 and the Company was directed to pay wages to the members of the Union on every 7th and 22nd day of each month. The Company's account was classified as 'Non Performing Asset' and the Secured Creditor on 26.07.2002 decided to invoke the provisions of the Act of 2002. Accordingly, notice under Section 13(2) of the Act of 2002 was issued to the Company calling upon it to repay the amount of Rs.4,66,65,851.38 Ps. with interest at the rate of 15.5% per annum alongwith penal interest. With a view to resolve the dispute with regard to the employees' dues, the State Government held a joint meeting between the Union and the Secured Creditor. On 24.09.2002 the Secured Creditor agreed to the sale of the assets of the Company and thereafter appropriate its dues. Accordingly, Government Resolution dated 11.10.2002 was issued and it was resolved that after sale of the movable and immovable properties of the Company, 50% of the sale proceeds would be paid to the members of the Union and the remaining 50%

would be paid to the Secured Creditor. It is thereafter that the present writ petition was filed seeking issuance of a writ of mandamus for implementation of the aforesaid Government Resolution. In the interregnum on 13.09.2004 the Secured Creditor issued another notice to the Company calling upon it to deliver possession of its secured assets failing which it was stated that the possession of the same would be taken by the Secured Creditor on or after 22.09.2004. It is undisputed that pursuant to this notice the Secured Creditor did not take over possession of its secured assets. On the contrary, by virtue of an interim order passed on 21.12.2004 a Court Receiver was appointed to take control of the assets of the Company. In this regard, it is necessary to refer to the order dated 21.12.2004 passed in the writ petition wherein the Court recorded that the Secured Creditor had opposed the disposal of the secured assets.

In paragraphs 11 and 12 of the said order it was observed as under:-

“11. It is clear that the properties require to be protected. None of the parties have agreed to assume the responsibility of protecting the properties. Respondent No.5 has before us clearly stated that it is neither interested in nor able to either protect the property or sell the same and that it is not willing to even pay the costs for protecting the properties. Respondent No.5 however refuses to either raise the attachment levied by it under the Securitisation Act nor take any steps pursuant thereto qua the properties to recover its dues. This cannot be permitted. In the circumstances, in our opinion, appropriate orders are required to be passed which in fact would enure to the benefit of all the creditors including Respondent No.5. The following order is therefore passed:-

i) The Court Receiver, High Court Bombay is directed to sell the properties of Khandelwal Tube Mills division of Respondent No.4 by public auction. The Court Receiver shall appoint suitable valuers from the panel of the Court Receiver for the purpose of ascertaining the value of the properties and for fixing the reserve bid, if necessary. The valuers shall also suggest the most suitable manner of sale of all the properties.

ii) In the first instance, Respondent No.5 is directed to deposit amounts to be determined by the Court Receiver towards the costs for providing security for protecting the said properties. The same shall be subject to further orders of this Court.

iii) Liberty to Respondent No.5 to apply for reimbursement of the same after realization of the sale proceeds.

12. Mr. Dharmadhikari applied for a stay of the operation of this order to enable Respondent No.5 to carry the matter higher. It is however, not necessary to grant a stay, as the process involved in implementing this order itself will take time enough to enable Respondent No.5 to challenge this order.”

10. The order appointing the Court Receiver was subsequently modified on 10.02.2005. Instead of the Court Receiver of this Court acting as a Receiver of the properties of the Company it was directed that the Collector, Nagpur would be substituted as the Court Receiver. It was also noted by this Court that though initially the Secured Creditor had submitted that it intended to challenge the orders passed on 21.12.2004 and thereafter on 10.02.2005 before the Hon'ble Supreme Court, it did not file any Special Leave Petition against those orders. On 03.03.2005 the Collector, Nagpur was permitted to appoint Security Guards to safeguard the secured assets of the Company and recover expenses

therefrom. Ultimately on 06.06.2005 public auction was held and the immovable properties of the Company came to be sold. Since the said property was sold on 06.06.2005 that date was chosen as the date for determination of the dues of the parties. Subsequently on 20.06.2005, the respondent no.5-Asset Reconstruction Company (India) Limited was substituted in place of the Secured Creditor. On 11.08.2005 when the writ petition was being considered, the submission made on behalf of the Secured Creditor that it should be paid a sum of Rs.6.26 Crores towards full satisfaction of its dues came to be recorded. It was also found by the Court that though there was no formal order of winding up of the Company, the substratum of the Company had disappeared and that it ought to be wound up as its objects could no longer be achieved. On 25.02.2005 ultimately the Secured Creditor filed recovery proceedings before the Debts Recovery Tribunal, Mumbai. It is stated that the said proceedings are still pending.

In the aforesaid factual backdrop the question as regards *inter se* priority would be required to be adjudicated.

11. Insofar as the Secured Creditor is concerned it has on 26.07.2002 sought to enforce its security interest by issuing notice under Section 13(2) of the Act of 2002. Insofar as the Company is concerned, it is to be noted that the provisions of the Act of 2002 were amended by Act No.XXX of 2004 and sub-Section (3-A) came to be inserted in Section 13 of the

Act of 2002 with effect from 11.11.2004 under which it was open for a borrower to make a representation or raise any objection to the notice issued by the secured creditor under Section 13(2) of the Act of 2002. Since notice under Section 13(2) of the Act of 2002 was issued on 26.07.2002 when the provisions of Section 13(3-A) were not in the Statute Book there is no question of the Company making any representation or raising any objection to the notice issued under Section 13(2) of the Act of 2002.

12. With regard to the steps taken by the Secured Creditor for enforcement of its security interest it would be necessary to note its conduct depicting its disinterest in enforcing its security interest under Section 13 of the Act of 2002. After issuing the notice dated 26.07.2002 under Section 13(2) of the Act of 2002 the Secured Creditor did not take any further step in terms of Section 13(4) of the Act of 2002. On the contrary, it consented to the sale of the assets of the Company in the joint meeting held on 24.09.2002 at the behest of the State Government. With a view to implement the terms that were agreed by the representatives of the Union and the Secured Creditor in the presence of the Assistant Labour Commissioner, the State Government passed a resolution on 11.10.2002 in which it was stated that after the property of the Company was sold, the Union and the Secured Creditor would be entitled to 50% share each in the sale proceeds. This Government Resolution has not

been challenged by the Secured Creditor and it is the Union that has sought enforcement of the same in the writ petition. The stand of the Secured Creditor has also been noted in the order dated 21.12.2004 referred to hereinabove. It was clearly recorded that the Secured Creditor was neither interested in the said secured assets nor was it able to protect the same nor was it willing to sell the same and/or to pay costs for protecting the said properties. It was also not willing to raise the attachment levied by it nor was it keen to take steps to recover its dues. Though the Secured Creditor indicated its inclination to challenge the said order dated 21.12.2004 it is an admitted position that it did not file any further proceedings and ultimately the secured assets were required to be sold in public auction by the Collector who was appointed as the Court Receiver. It is also to be noted that having issued notice under Section 13(2) of the Act of 2002 seeking to enforce its security interest, the Original Application was filed by the Secured Creditor under Section 19 of the Act of 2002 before the Debts Recovery Tribunal only on 25.02.2005. This fact of filing of the Original Application was not brought to the notice of the Court when it considered the proceedings on 11.08.2005 and ordered disbursement of some amounts in favour of the Assistant Commissioner of Labour for being paid to the members of the Union and an amount of Rupees Eighty Five Lakhs was directed to be invested in fixed deposit. By that order an amount of Rupees Five Crores was also released in favour of the Secured Creditor. Thus, the option of

enforcing the security interest by resorting to the mode prescribed by Section 13(4) of the Act of 2002 was not availed of by the Secured Creditor for reasons best known to it. It was also not inclined to take possession of the secured assets and was also not interested in paying the expenses for protecting its security interest. Though it is true that the aspect of priority *inter se* would have to be determined in the light of various statutory provisions, the aforesaid conduct of the Secured Creditor of accepting the sale of the assets of the Company by the Collector as Court Receiver and consenting to accept 50% amount as realised cannot be totally disregarded.

13. Undisputedly, the Company has not gone under winding up. No proceedings have been initiated for its winding up and the question whether the Union through its Members could maintain a petition for winding up was considered in the present proceedings by the order dated 11.08.2005. It was held by the said order that a workman who is a creditor in terms of Section 439(b) of the Act of 1956 is entitled to present a petition for winding up. The question whether the Union could file such winding up petition was left open by observing that the workmen had an independent right to maintain such company petition. Be that as it may, the fact remains that no winding up proceedings have been filed against the Company. It has been factually recorded in the order dated 11.08.2005 passed in the present proceedings that after the production activity of the Company came to a standstill from 10.07.2000,

even in the absence of any formal order of winding up the substratum of the Company had disappeared and the Company ought to be wound up as its objects could no longer be achieved. The fact that the Company had become non-functional since July-2000 has also been noted by the Hon'ble Supreme Court in its order passed in *Punjab National Bank* (supra). The position on record thus which is not in dispute is that since 10.07.2000 the production activity of the Company has stopped and the substratum of the said Company no longer exists.

Thus, on one hand is the Secured Creditor which despite issuing notice under Section 13(2) of the Act of 2002 has left the matter at that stage and has not gone ahead for enforcing its security interest by resorting to the remedies available under the Act of 2002. Its conduct otherwise has been noted by this Court in its earlier orders. It has also not opposed the taking over of the secured assets by the Court Receiver and sale thereof in public auction. Despite filing proceedings under Section 19 of the Act of 2002 for recovering its dues, the matter has not been further pursued. On the other hand the members of the Union are armed with an order passed by the Industrial Court adjudicating its dues initially at Rs.2.41 Crores which fact has been referred to in *Punjab National Bank* (supra).

14. Reliance has been placed on the judgment of the Karnataka High Court in *The General Secretary, Mysore Division Industrial Workers*

General Union, Mysore (supra) by the Union as well as the Company. Thereunder, the Company had obtained finance from the Karnataka State Financial Corporation. The manufacturing activities at the factory came to a standstill in January-2002 resulting in dues of workmen towards closure compensation, gratuity, bonus and wages being unpaid. In the proceedings filed by the workers' union a recovery certificate pursuant to an order passed under Section 33-C(2) of the Act of 1947 came to be issued. In the meanwhile, the Karnataka State Financial Corporation proceeded to auction the properties of the factory so as to realize its dues. Since the workmen were not paid any amount despite having a recovery certificate with them and the State Financial Corporation having appropriated the entire sale proceeds, the members of the Union filed a writ petition seeking to recover their dues and they sought to stay further process pursuant to the said auction. The writ petition came to be dismissed by the learned Single Judge. The said order was challenged before the Division Bench in appeal. The point considered in the said appeal was whether the workmen were entitled to enforce their charge in respect of the assets of the factory as per their entitlement as a priority or whether they were entitled to preferential payment as compared to other dues of the factory including dues of the Financial Corporation. It was noted that there was no order winding up the said factory. Despite that, after finding that the manufacturing activities at the factory had completely stopped, the Court considered the provisions of Section 29

and 46-B of the State Financial Corporations Act, 1951 alongwith the provisions of Section 529-A of the Act of 1956. It was observed that in view of provisions of Section 46-B of the Act of 1951, it was necessary to harmonize the provisions of the said Act with that of the Act of 1956. The Karnataka State Financial Corporation did not have the authority to decide any dispute as regards apportionment between the dues of the workmen and its own dues. Its right as a secured creditor to sell the security by itself and outside winding up proceeding was subject only to the *pari passu* claim of the unpaid workmen. In paragraph 20 of the said decision it has been observed as under:-

“20. The analogy which is applicable by virtue of Sections 529, 529-A and 530 of the Companies Act in a case where a company is under winding up can also be applied to the facts of the present case where the company has stopped its manufacturing activities and despite there being no proceedings with regard to winding up, the fact remains that the workmen’s dues have priority viz-a-viz the dues to the financial institution namely the KSFC, and in the instant case whatever amounts are realized, they must be distributed subject to a pari passu charge in favour of the workmen to the extent of the workmen’s portion. Therefore, even in the case of the closure of manufacturing activity by a company in the context of there being workmen’s dues and dues to a secured creditor, it has to be held that the said dues have to be discharged on the analogy of Section 529 and Section 529-A of the Companies Act and as the said section begins with a non-obstante clause therefore, in the instant case the respondents would have to make the payments that are due to the workmen in terms of the Sections 529, 529-A and 530 of the Companies Act and therefore by taking note of the said Sections, we feel that the appeal filed by the appellants in the instant case would have to be

allowed and the same has to be disposed of by directing the respondents to comply with the procedure mentioned in Sections 529, 529-A and 530 of the Companies Act and accordingly distribute and discharge dues of the company to the workmen and also to the financial institutions.”

15. The aforesaid decision of the Karnataka High Court was challenged before the Hon’ble Supreme Court in *Asstt. General Manager, Karnataka State Financial Corporation* (supra). Referring to Section 46-B of the Act of 1951 it was observed that the provisions of that Act were in addition to and not in derogation of any other laws for the time being applicable to the industrial concern. It found that the rights of the workmen had been adjudicated in the year 2005 and it was held that they were entitled to their dues under Section 33-C of the Act of 1947 as well as under the Payment of Gratuity Act, 1972. Merely because the Financial Corporation sold the properties of the factory that by itself would not destroy the rights of the workmen which they had under the orders passed by various Courts. It noted that the Karnataka High Court had compared the claim of the Karnataka State Financial Corporation with the claim of the workmen when the company went into liquidation and had thereafter held that the dues of the workmen would have preference. The Hon’ble Supreme Court did not interfere with the order passed by the High Court and dismissed the Special Leave Petition.

It is urged by the learned counsel for the Union as well as the Company that the course adopted by the Karnataka High Court ought to be followed especially as even in the present case there is no winding up

order but the manufacturing activity of the Company had come to a standstill. The dues of the members of the Union have also been adjudicated.

16. Section 35 of the Act of 2002 gives an overriding effect to the said Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. At the same time under Section 37, the provisions of the Act of 2002 and the Rules made thereunder are stated to be in addition to and not in derogation of the Statutes mentioned therein which includes the Act of 1956.

17. *Pari passu* would mean equally and without preference. The aspect of *pari passu* charge has been referred to in Section 529(1) of the Act of 1956 while Section 529-A refers to the overriding preferential payments. Section 529(1) as well as Section 529-A would undoubtedly operate when an order of winding up is passed. Under the said provision the security of a Secured Creditor is deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmens' portion therein. Similarly the provisions of Section 19(19) of the Recovery of Debts and Bankruptcy Act, 1993 contemplate issuance of certificate of recovery against a company that is under liquidation whereunder the Tribunal can direct the secured assets of such company to be distributed in the manner provided by the Act of 1956. That the said provisions do

not operate when the company is not in liquidation has been held in *Bank of Maharashtra Versus Pandurang Gorwadkar* [(2013) 7 SCC 754].

When a secured creditor takes resort to the provisions of Section 13 of the Act of 2002 he can take recourse to the measures prescribed under Section 13(4) thereof. After taking such action and after all costs, charges and expenses that have been incurred by the secured creditor are received by it, in absence of any contract to the contrary the amounts received are to be held in trust for being applied firstly to the payment of such costs, charges and expenses and thereafter in discharge of the dues of the secured creditor. The residue of the money so received is to be paid to the person entitled thereto in accordance with his rights and interest. Admittedly in the present case the Secured Creditor has not taken recourse to the measures prescribed by Section 13(4) and therefore there would be no occasion for the contingency as prescribed under Section 13(7) of the Act of 2002 to operate.

18. Another aspect to be considered is whether under the Act of 1993 or the Act of 2002 any first charge has been created in favour of banks, financial institutions and other secured creditors? In *Central Bank of India* (supra) it has been noted by the Hon'ble Supreme Court after considering its various earlier decisions that it was not held in its earlier decisions that by virtue of the provisions contained in the Act of 1993 or the Act of 2002, a first charge had been created in favour of banks, financial institutions, etc. In the context of the provisions of Section 38-C

of the Bombay Sales Tax Act, 1959 and Section 26-B of the Kerala General Sales Tax Act, 1963, the Act of 1993 as well as the Act of 2002 did not create first charge in favour of the banks, financial institutions and other secured creditors. The provisions of the aforesaid two Acts were not inconsistent with the provisions of the Act of 1993 and the Act of 2002 so as to attract the non-obstante clauses in Section 34(1) of the Act of 1993 or Section 35 of the Act of 2002.

19. This Court in its order dated 11.08.2005 has also noted that there was an omission in the Act of 2002 to meet a situation where there were no proceedings for winding up but the substratum of the Company had disappeared. Thereby moneys available and realised from sale of the assets of the Company would not be available to the workmen under Section 529-A of the Act of 1956 or that due to sale of its assets the objectives of the Company cannot be carried out. In paragraph 4 of the order dated 11.08.2005 it has been observed as under:-

“4. In the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Securitisation Act) there appears to be an omission by the Legislature for protection of workers’ dues in a case where there is no formal winding up or proceedings for winding up having been taken. We have noted the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Section 19(19) therein provides for payment of money received from assets sold in accordance with the provisions of Section 529 of the Companies Act. A Division Bench of this Court has taken a view that pursuant to these provisions the workers would also have a share in the sale proceeds along with secured

creditors as set out under Section 529A of the Act. The only provisions under the Securitisation Act is Section 13(9), that however only provides for payment in the case of company in liquidation or a company to be wound up but does not take care of a situation where no order for winding up is made or proceedings for winding up are not pending but on account of the sale of the secured assets the sub-stratum of the company has disappeared. Noting this omission we direct the Registrar to send a copy of this order to the Secretary (Law) Government of India.”

20. Under Section 26-E of the Act of 2002 after the registration of security interest, the debts due to any secured creditor have to be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. It is however to be noted that Chapter IV-A was inserted in the Act of 2002 by Act No.XLIV of 2016 and it has not been indicated in the present case that the security interest of the secured creditor has been registered with the Central Registry. Moreover, said provision does not recognize the priority of a secured creditor over the dues of workers.

21. The Secured Creditor having agreed to the sale of the secured assets of the Company and to accept 50% of the sale proceeds in apportionment of its dues in the meeting held on 24.09.2002 cannot now be heard to contend otherwise. The Government Resolution dated 11.10.2002 issued pursuant to the aforesaid agreement between the Union and the Secured Creditor has not been challenged by the Secured Creditor. The Secured Creditor cannot be permitted to wriggle out of the

conscious stand taken by it on 24.09.2002 since the agreement and the Government Resolution issued on that basis continue to operate even today. In the present proceedings that have been initiated by the Union seeking implementation of the Government Resolution dated 11.10.2002, the Secured Creditor cannot be permitted to take a stand contrary to what was agreed by it.

22. In the light of aforesaid and given the factual position, we are inclined to adopt the course as was followed by the Karnataka High Court in *The General Secretary, Mysore Division Industrial Workers General Union, Mysore* (supra). This is for the reason that firstly the members of the Union are armed with orders passed by the Industrial Court determining the dues of its members which orders are passed much prior to issuance of the notice under Section 13(2) of the Act of 2002. Secondly, despite issuing such notice on 26.07.2002 under Section 13(2) of the Act of 2002 the Secured Creditor has not sought to enforce its security interest in the manner prescribed by Section 13(4) of the Act of 2002. On the contrary it has refused to take possession of the secured assets. It has not objected to the sale of those secured assets by the Court Receiver under orders of the Court in the present proceedings initiated by the Union. Further despite filing proceedings before the Debts Recovery Tribunal under Section 19 of the Act of 2002 it has not taken any further steps to recover its dues. On the contrary by virtue of the interim order

dated 11.08.2005 passed in the present proceedings, an amount of Rupees Five Crores has been disbursed in favour of the Secured Creditor. The production activity of the Company has completely stopped from 10.07.2000 and it has been noted that the substratum of the Company has completely disappeared. A similar situation was noted by the Karnataka High Court in the aforesaid decision where too there was no order of winding up but the manufacturing activity of the factory therein had completely stopped. In that view of the matter, the amounts realized from the auction of the secured assets ought to be discharged and distributed in accordance with the provisions of Sections 529, 529-A and 530 of the Act of 1956. In absence of any first charge being created in favour of the Company such course can be adopted.

23. The learned counsel for the Union referred to the decision in *Maharashtra State Cooperative Bank Limited* (supra) and fairly submitted that the provisions of Section 50 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 had been considered therein. The Industrial Court in the said case had directed payment of unpaid salaries to the employees of the factory from the funds available. The recovery certificate issued was sought to be executed. However the secured creditor therein had initiated proceedings under the Act of 2002 by issuing a notice under Section 13(2) of the Act of 2002 and thereafter by taking possession of the mortgaged properties under Section 13(4) of the Act of 2002. It was noted that there was a material

difference between arrears of land revenue due on account of land and amounts other than arrears of land revenue but recoverable in the same manner as arrears of land revenue. The recovery certificate issued under Section 50 of the Act of 1971 permitted the employees' dues to be recoverable as arrears of land. Hence in view of Section 169 of the Maharashtra Land Revenue Code, 1966 the employees' dues would only take priority over unsecured claims. The Court thereafter noted the provisions of Section 167 of the Maharashtra Cooperative Societies Act, 1960 by which the provisions of the Act of 1956 were not to apply to the societies registered under the said Act. For that reason the Hon'ble Supreme Court held that Section 529-A of the Act of 1956 which gave workers' dues a priority over all other dues could not be applied in view of the bar contained in Section 167 of the Maharashtra Cooperative Societies Act, 1960. It also held that the bank did not enjoy any paramount charge over the sale proceeds. Since the bank had agreed to disburse the dues of the employees from the sale proceeds, the recovery certificate issued by the Industrial Court was directed to be executed in that manner.

In the present case, we are not concerned with any bar to the operation of the Act of 1956. On the contrary, Section 37 of the Act of 2002 specifically provides that the provisions of the Act of 2002 or the Rules made thereunder would be in addition to and not in derogation with the Act of 1956.

24. Hence for the aforesaid reasons it is held that the amounts realized from the sale of the secured assets of the Secured Creditor ought to be disbursed by following the modality as prescribed under Section 529 and Section 529A of the Act of 1956 inasmuch as the security of the Secured Creditor would be deemed to be subject to a *pari passu* charge in favour of the members of the Union. The sale proceeds shall accordingly be disbursed by following the said modality. It is noted that during the pendency of the proceedings various amounts have been disbursed from time to time and presently the amount lying in balance with this Court is Rs.1,28,41,431/-. The dues of the members of the Union as well as the dues of the Secured Creditor shall be disbursed *pari passu* after taking into account the amounts already disbursed to them.

25. The writ petition is accordingly disposed of with aforesaid directions. The parties shall bear their own costs. Rule accordingly.

(URMILA JOSHI-PHALKE, J.) (A.S. CHANDURKAR, J.)

APTE