

Sayali Upasani

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

**OFFICIAL LIQUIDATOR'S REPORT NO- 71 OF 2019
IN
COMPANY PETITION NO. 753 OF 2004**

In the matter of Malhotra Steel (Bombay) Ltd. (In Liquidation)

B.I.F.R.

...Petitioner

Mr. Aditya Pimple, for Applicant.

Mr. Rohit Gupta with Mr. Nikhil Rajani with Ms. Jyoti Sanap
i/b V. Deshpande and Co., for Kotak Mahindra Bank.

Mr. A.B. Shinde for Workmen.

Mr. Shatrughan Chauhan, Dy. Official Liquidator, Present.

<u>CORAM:</u>	N. J. JAMADAR, J.
<u>RESERVED ON :</u>	14th DECEMBER, 2022
<u>PRONOUNCED</u>	19th APRIL, 2023
<u>ON :</u>	

JUDGMENT:-

1) The Official Liquidator has filed this report seeking, inter alia, directions to Kotak Mahindra Bank Ltd., the secured creditor of Malhotra Steel (Bombay) Ltd., (in liquidation) to deposit an amount of Rs.86,89,421/-, towards workers dues.

2) The report arises in the backdrop of the following facts:-

(a) Pursuant an order dated 15th October, 2008 passed in Company Petition No.753 of 2004 in B.I.F.R. Case No. 50 of 1994, the Official Liquidator came to be appointed as the Provisional

Liquidator of Malhotra Steel (Bombay) Ltd., with usual powers under the Companies Act, 1956 (“the Act, 1956”). By a further order dated 16th July, 2009, the company was ordered to be wound up and the Official Liquidator came to be appointed as the Liquidator of the company in liquidation.

(b) The Official Liquidator, based on the inspection of the records maintained by the Registrar of Companies, claimed to have had correspondence with the secured creditors of the company, the Ex-directors of the company and meetings with the Ex-directors and secured creditors of the company in liquidation. Kotak Mahindra bank Ltd., (“the Bank”), the Noticee, informed the Official Liquidator under cover of the letter dated 16th February, 2009 that ICICI Bank Ltd., IDBI and State Bank of India, the secured creditors of the company in liquidation, had assigned their rights to the Noticee. The Official Liquidator claims despite repeated requests the Bank had not shared the Deeds of Assignments.

(c) In the meanwhile, the Official Liquidator has adjudicated the claims of workers. The Official Liquidator claims a certified list of Proof of Debts of claims of workers as of 3rd October, 2017 aggregating to Rs.86,89,421/-, has been filed. It is further

asserted that the Official Liquidator was apprised of the proceedings before the DRT along with copies of the orders passed therein which indicated that sale of assets of the company in liquidation by DRT has generated proceeds of Rs.8,54,00,000/-.

3) On the strength of the documents furnished on behalf of the workers, the Official Liquidator issued a letter dated 12th December, 2017 to the Bank requesting it to deposit a sum of Rs.8,49,434/-, towards the workers dues. In response vide letter dated 27th December, 2018, the Bank disputed the liability on the count that properties of the company in liquidation were sold prior to the appointment of the Official Liquidator. Thus there was no question of application of the provisions contained in Section 529A of the Act, 1956. It was further contended that DRT had adjudicated their claim against the company in liquidation in the sum of Rs.8,53,70,641/-.

4) In the light of the aforesaid claim of the Bank, the Official Liquidator asserts since the claim of the Bank has been adjudicated for an amount of Rs.8,53,70,641/- the workers have a *pari-passu* charge under Section 529A of the Act, 1956. The

Bank be thus directed to deposit a sum of Rs.86,89,421/- with the office of Official Liquidator.

5) A number of affidavits have been filed on behalf of the Bank as well as the Official Liquidator. It would be unwarranted to refer to all the affidavits filed by the parties as the controversy between the parties gradually got narrowed down to the question as to at what point of time there was a full and final disbursal of the amount received by the Bank. The Bank was directed to file an affidavit categorically stating the dates on which the amounts were received supported by the entries in the accounts. The Bank was also directed to explain in the affidavit the dates on which it became assignee of prior lenders of the company in liquidation and the particulars of the Deed of Assignments.

6) The Bank filed an additional affidavit dated 29th August, 2022, furnishing the requisite details. In the context of the controversy, the averments in paragraph Nos. 12, 14, 15 and 19 of the affidavit become relevant.

7) A conjoint reading of these paragraphs would indicate that the Bank received total sum of Rs.11,32,95,352/-. Out of this sum of Rs.6,71,79,912/-, was received from sale of assets of the

company in liquidation, a sum of Rs.3,93,84,855/- from the sale of the assets belonging to the guarantors, a sum of Rs.18,06,210/- by way of rent, which was deposited pursuant to the order of this Court in Suit No.4928 of 1993 and interest thereon, and Rs.49,24,375/- towards reimbursement of expenses. Out of this a sum of Rs.90,50,124/-, was received by Bank from the sale of the other properties of the company in liquidation on 29th April, 2008 and a sum of Rs.18,06,210/-, was paid to Bank by the Tribunal-Receiver on 12th November, 2008.

8) In response to the additional affidavit, the Official Liquidator filed an additional affidavit-in-reply. It was contended that in the meeting held on 25th April, 2022 to compute the ratio of the secured creditors and the workmen as also the workmen's portion over the security sold by the Bank, the ratio of workmen's dues was arrived at 0.35%. The workmen's portion thus comes to Rs.2,95,769.427/-. The liability of the Bank in the ratio of 85.87% comes to Rs.2,53,977.20/- and the balance amount, in the ratio of 13.71%, is to be contributed by IFCI Ltd.

9) It was further contended that two sale certificates, dated 23rd March, 2009 and 19th May, 2009, were executed after the

date of the appointment of the Provisional Liquidator. Since the full and final disbursement of the sale proceeds was not complete before the appointment of the Provisional Liquidator, the Bank is liable to bring back the said amount of Rs.2,53,977.20/-. The Official Liquidator further asserts that the Bank received a sum of Rs.18,06,210/-, towards the rent and interest initially deposited with the Court Receiver, High Court and later on transferred to DRT Receiver on 12th November, 2008, again after the appointment of the Provisional Liquidator on 5th October, 2008. The Bank thus is liable to bring back the said amount as well. The contention of the Bank that the said sum of Rs.18,06,210/-, does not constitute an asset of the company in liquidation was sought to be refuted. Reserving the right to prefer an appropriate report for further reliefs, the Official Liquidator contended that, in the least, the Bank is liable to bring back the sum of Rs.2,53,977.20/- from aforesaid amounts.

10) In the backdrop of the aforesaid facts and pleadings, I have heard Mr. Pimple, the learned Counsel for the Official Liquidator, Mr. Rohit Gupta, the learned Counsel for the Kotak Mahindra Bank Ltd., and Mr. A.B. Shinde, the learned Counsel for the Workmen.

11) Mr. Pimple, submitted that from the contentions in the additional affidavit-in-reply of the Bank, it becomes clear that there is not much controversy over the workers dues of Rs.86,89,421/-. Mr. Pimple would further urge that the liability of the secured creditor to bring back the workers portion out of the sale proceeds of the secured assets is also incontestable. Since there was no final distribution of the proceeds in respect of few of the secured assets and other properties of the company in liquidation before the appointment of the Provisional Liquidator, the statutory charge created in respect of the workmen's dues over the security of the secured creditor operates over the sale proceeds. Thus, the Bank cannot avoid the liability to bring back the workmens portion of Rs.2,53,977.20/-.

12) Mr. Pimple would further urge that the receipt of a sum of Rs.18,06,210/- by the Bank from the receiver of DRT on 12th November, 2008, much after the appointment of the Provisional Liquidator, is indubitable. Since the said amount represented the rent which was receivable by the company in liquidation, the character of the said amount as the asset of the company in liquidation can not be put in contest, urged Mr. Pimple.

13) Mr. Gupta, countered the submissions on behalf of the Official Liquidator. It was urged that all the assets of the company in liquidation were sold and proceeds realised prior to the date of the appointment of the Provisional Liquidator, except the sum of Rs.18,06,210/- which was received on 12th November, 2008. Controverting the character of the said amount, as the asset of the company in liquidation, Mr. Gupta would urge that the said amount came to be deposited with the receiver appointed by this Court in Suit No.4928 of 1998, instituted by ICICI Ltd., the Assignor of the Bank. Therefore, the rent so received by Court Receiver can not be said to have retained the character of the property of the company in liquidation.

14) Mr. Gupta would further urge that the fact that sale certificate came to be issued subsequent to the date of the appointment of the Provisional Liquidator and the amount was actually transmitted later is of no significance. It is the date of the sale which is determinative and since all the assets of the company in liquidation were sold before the appointment of the Provisional Liquidator, the provisions contained in Section 259A of the Act, 1956 have no application to the facts of the case.

15) Mr. Shinde, would urge that the statements of account placed by the Bank do not reveal a true picture. Inviting attention of the Court to few entries in the statement of account (Exhibit-U collectively to the affidavit-in-reply), Mr. Shinde submitted that those entries do not disclose the identity of the person from whom the amounts were received.

16) I have given careful consideration to the aforesaid submissions. Few facts deserve to be noted to determine the question in controversy in a correct perspective. In Company Petition No.753 of 2004, Provisional Liquidator came to be appointed on 15th October, 2008. Winding up order was passed on 6th July, 2009. Certificates of Sale were issued in respect of the properties at Ajiwali, Horale on 23rd March, 2009 and certain other properties at Horale, Tal. Khalapur, Dist. Raigad on 19th May, 2009. Those certificates of sale were issued post the appointment of the Provisional Liquidator. The sum of Rs.18,06,210/-, was received on 12th November, 2008.

17) In the backdrop of these facts, the crucial question that arises for consideration is whether the workmen's dues charge operates over the aforesaid amount.

18) For an answer, recourse to Sections 529 and 529A of the Act, 1956 becomes imperative. A conjoint reading of the provisions contained in Section 529 and 529A, would indicate that a secured creditor has the option to realise his security or relinquish his security. If the secured creditor exercises the option to realise his security, he is entitled to do so in a proceedings other than the winding up proceedings. The workmen of the company in winding up also acquire the status of secured creditors. Where a company is in liquidation, a statutory charge is created in favour of workmen in respect of 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 creditors of the company as illustrated by Section 529 of the Act.

19) A useful reference in this context can be made to a three Judge Bench judgment of the Supreme Court in the case of **Jitendra Nath Singh Vs. Official Liquidator and Others**¹, wherein the postulates with emerge on interpretation of the provisions contained in Section 529 and 529A of the Act, 1956 were enunciated as under:-

1 (2013) 1 SCC 462

“.....16. Our conclusions on interpretation of the provisions of Sections 529 and 529A of the Companies Act, therefore, are as follows:

16.1 A secured creditor has only a charge over a particular property or asset of the company. The secured creditor has the option to either realize his security or relinquish his security. If the secured creditor relinquishes his security, like any other unsecured creditor, he is entitled to prove the debt due to him and receive dividends out of the assets of the company in the winding up proceedings. If the secured creditor opts to realize his security, he is entitled to realize his security in a proceeding other than the winding up proceeding but has to pay to the liquidator the costs of preservation of the security till he realizes the security.

16.2 Over the security of every secured creditor, a statutory charge has been created in the first limb of the proviso to clause (c) of sub- section (1) of Section 529 of the Companies Act in favour of the workmen in respect of their dues from the company and this charge is pari passu with that of the secured creditor and is to the extent of the workmen's portion in relation to the security of any secured creditor of the company as stated in clause (c) of sub- section (3) of Section 529 of the Companies Act.

16.3 Where a secured creditor opts to realize the security then so much of the debt due to such secured creditor as could not be realized by him by virtue of the statutory charge created in favour of the workmen shall to the extent indicated in clause (c) of the proviso to sub-section (1) of Section 529 of the Companies Act rank pari passu with the workmen's dues for the purposes of Section 529A of the Companies Act.

16.4 The workmen's dues and where the secured creditor opts to realize his security, the debt to the secured creditor to the extent it ranks pari passu with the workmen's dues under clause (c) of the proviso to sub-section (1) of Section 529 of the Companies Act shall be paid in priority over all other dues of the company.....”

20) In the case at hand, as noted above, the controversy essentially revolves around the point at which the secured creditor realised his security standing outside the liquidation process. It is well recognized that the filing of a Petition for winding up of a company does not preclude the secured creditor from enforcing his security. It is only when Liquidator is appointed, the secured creditor becomes liable to associate the Liquidator in sale assets of the company in liquidation. The fact that after the sale of the assets of the company in liquidation by the secured creditor by resorting to the provisions contained in the Recovery of Debts Due to banks and Financial Institutions Act, 1993 and/or The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Company goes into liquidation does not warrant the reopening of the sale and appropriation of the sale proceeds by the secured creditor.

21) With the incorporation of Section 529 A of the Act, 1956, the workmen's dues rank *pari passu* with secured creditors. To put it differently, the workmen of the company in winding up acquire the status of secured creditors. This position is further reinforced by the proviso to Sub Section (1) of Section 529 of the

Act, 1956 which provides that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion. This would imply that the workmen become entitled to distribution of sale proceeds in the ratio as explained in the illustration appended to Section 529 (3) (c) of the Act, 1956. The moot question is as to at what point the workmen become entitled to distribution of sale proceeds ?

22) A three Judge Bench judgment of the Supreme Court in the case of **Bank of Maharashtra Vs. Pandurang Keshav Gorwadkar and Others²** wherein the legal position was expounded by the Supreme Court, illuminates the path. The propositions read as under:-

“.....**67.** In light of the above discussion, we sum up our conclusions thus:

67.1. If the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act.

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 debt recovery tribunal, if debtor company becomes company in winding up, Section 529A read with Section 529(1) 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.

67.5. The conclusions (ii) to (iv) shall be mutatis mutandis applicable where provisional liquidator has been appointed in respect of the debtor company.

67.6. Where the winding up petition against the debtor company is pending but no order of winding up has been passed nor any provisional liquidator has been appointed in respect of such company at the time of order of sale by DRT and the properties of the debtor company have been sold in execution of the recovery certificate and proceeds of sale realized and full disbursement of the sale proceeds has been made to the concerned bank or financial institution, the subsequent event of the debtor company going into liquidation is no ground for reopening disbursement by the DRT.

67.7. However, before full and final disbursement of sale proceeds, if the debtor company has gone into liquidation and a liquidator is appointed, disbursement of undisbursed proceeds by DRT can only be done after notice to the liquidator and after hearing him. In that situation if there is claim of workmen's dues, the DRT has two options available with it. One, the bank or financial institution which made an application before DRT for recovery of debt from the debtor company may be paid the undisbursed amount against due debt as per the recovery certificate after securing an indemnity bond of restitution of the amount to the extent of workmen's dues as may be finally determined by the liquidator of the debtor company and payable to workmen in the proportion set out in the illustration appended to Section 529(3)(c) of the Companies Act. The other, DRT may set apart tentatively portion of the undisbursed

amount towards workmen's dues in the ratio as per the illustration following Section 529(3)(c) and disburse the balance amount to the applicant bank or financial institution subject to an undertaking by such bank or financial institution to reconstitute the amount to the extent workmen's dues as may be finally determined by the liquidator, falls short of the amount which may be distributable to the workmen as per the above illustration. The amount so set apart may be disbursed to the liquidator towards workmen's dues on ad-hoc basis subject to adjustment on final determination of the workmen's dues by the liquidator.....”

23) The Supreme Court has ruled in clear and explicit terms that if the company goes into the liquidation, before the sale proceeds are fully and finally disbursed, Section 529A read with Section 529(1) proviso come into operation and statutory charge is created in favour of workmen in respect of their dues over such proceeds. The Supreme Court has made it clear that the relevant date to arrive at the ratio at which the sale proceeds are to be disbursed among the workmen and secured creditors of the company is the date of winding up order and not the date of sale. These principles apply even where the Provisional Liquidator has been appointed in respect of the company.

24) On the aforesaid touchstone, reverting to the facts of the case, it is pertinent to note that so far as the quantum of workmen's portion i.e. Rs.2,53,977.20/- which the Bank is stated to be liable to contribute, there is not much controversy. From

the affidavit of the Bank especially averments in paragraph No. 15 under the, “caption dates on which amount was received” it becomes evident that all the amounts except a sum of Rs.18,06,210/- were received by the Bank even before the appointment of the Provisional Liquidator. The controversy thus boils down to the consequences which ensue the receipt of the amount of Rs.18,06,210/-, by the Bank on 12th November, 2008 after the appointment of the Provisional Liquidator.

25) To ascertain the character of the said amount of Rs.18,06,210/-, it is necessary to note the circumstances in which the said amount came to be accumulated. By an order dated 22nd December, 1998 in Suit No. 4928 of 1998 instituted by ICICI Ltd., the Assignor of the Bank, the following directions were issued:-

“2. This motion is taken out by the plaintiff I.C.I.C.I. for recovery of its dues. Heard learned Counsel for the Plaintiff and the Defendants. Ad-interim order in terms of prayer Clause (a) is granted only in relation to the property described in Exh. A-2. The Receiver is appointed only for the purpose of receiving the lease money being paid to Defendant No. 1 by the lessee of the machinery. Ad-interim injunction in terms of prayer Clause (b) is granted, restricted to the property described in Exh. A-2.”

26) The submissions on behalf of the Bank that the said amount did not retain the character of the property of the

company in liquidation does not merit acceptance. The provisions of Section 456 of the Act, 1956 provide an answer.

“456. Custody of company' s property.- (1) Where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator ² [or the provisional liquidator, as the case may be,] shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

.....

(2) All the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order for the winding up of the company.”

27) Indisputably, the amount which came to be accumulated constituted the lease rent which the company in liquidation was entitled to receive. The lease rent clearly falls within the ambit of the property which forms part of the assets of the company in liquidation. In the circumstances, distribution qua the said amount paid to the Bank by the Tribunal-Receiver can not be said to have been fully and finally complete before the appointment of the provisional liquidator. The analogy of sale proceeds of the assets sold by secured creditor standing outside winding up can be applied to the said amount. Consequently, the provisions contained in Section 529 A read with the proviso to Section 529 (1) of the Act come into play and the charge of the workers dues operates on the said amount as well.

28) Hence, the following order.

:ORDER:

- (i)** The report stands partly allowed.
- (ii)** The Kotak Mahindra Bank Ltd., Noticee shall deposit a sum of Rs. 2,53,977.20/- with the Official Liquidator towards the workmen's dues, within four weeks from today.
- (iii)** No order as to costs.

At this stage, the learned Counsel for the Bank seeks stay to the operation of this order. In the light of the view taken in this order, the oral application for stay stands rejected.

[N. J. JAMADAR, J.]