

2016 (0) AIJEL-HC 236285

GUJARAT HIGH COURT

Hon'ble Judges: Anant S. Dave and R.P. Dholaria JJ.

Authorized Officer Versus O.L. Of Jhagadia Copper

O.J. APPEAL No. 9 of 2016 ;

MISCELLANEOUS Civil Application No. 204 of 2015 ; *J.Date :- SEPTEMBER 2, 2016

- [COMPANIES ACT, 1956](#) Section - [483](#), [529](#), [529A](#), [530](#), [433](#), [434](#)
- SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

Cases Referred To :

1. Allahabad Bank Vs. Canara Bank, 2000 4 SCC 406
2. Bharat Petroleum Corporation Ltd. Vs. N.R. Vairamani, 2004 8 SCC 579
3. Delhi Financial Corporation V. Rajiv Raviv Anand, 2004 11 625
4. Employees Provident Fund Commissioner Vs. Financial Liquidator Of Esskay Pharmaceuticals Limited, 2011 10 SCC 727
5. Haryana State Industrial & Infrastructure Development Corporation Vs. Haryana Concast Ltd. Hisar, 2010 2 ILR(P&H) 284
6. Herrington Vs. British Railways Board, 1972 2 WLR 537
7. Kotak Mahindra Bank Ltd. V. Megnostar Telecommunications Pvt. Ltd. & Anr., 2013 176 CompCas 246
8. Mardia Chemicals Ltd. V. Union Of India, 2014 4 SCC 311
9. Official Liquidator Vs. Dayanand, 2008 10 SCC 1
10. Pegasus Assets Reconstruction Pvt. Ltd. V. M:s. Haryana Concast Limited & Anr., 2016 4 SCC 47
11. Sushil Suri Vs. Cbi, 2011 5 SCC 708
12. U.P. State Electricity Board Vs. Pooran Chandra Pandey, 2007 11 SCC 92

Equivalent Citation(s):

2016 JX(Guj) 1404 : 2016 AIJEL_HC 236285

JUDGMENT :-

ANANT S.DAVE, J.

1 The appellant Asset Reconstruction Company India Limited [for short, 'ARCIL'] has filed this appeal under Section 483 of the [Companies Act, 1956](#) against order dated 26.02.2016 passed in OJMCA No.204 of 2015 and order dated 14.10.2015 passed in Official Liquidator Report No.5 of 2015 in Company Petition No.42 of 2010.

1.1 The appellant has also filed OJCA No.169 of 2016 in OJ Appeal No.9 of 2016 for stay of implementation of order dated 26.02.2016 passed in OJMCA No.204 of 2015

Shri K. S. Nanavati
Sr. Advocate

and order dated 14.10.2015 passed in Official Liquidator Report No.5 of 2015 in Company Petition No.42 of 2010.

2 The learned Company Judge vide impugned orders dated 26.02.2016 passed in OJMCA No.204 of 2015 and order dated 14.10.2015 passed in Official Liquidator Report No.5 of 2015 permitted the Official Liquidator to constitute the Sale Committee comprising of the Official Liquidator and secured creditors, union of workmen and also permitted the Official Liquidator to invite claims from the workers and secured creditors under Sections 529, 529A and 530 of the Companies Act, 1956 by publishing advertisement in the newspaper.

3 The appellant filed OJMCA No.204 of 20153 to recall and/or to modify the order dated 14.10.2015, which came to be rejected. Hence, this appeal.

4 The appellant herein is holding 76% of debts of the company in liquidation and of the secured assets are in custody of ARCIL, and the appellant conducted auction under the provisions of The Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for short, `SARFAESI Act, 2002'].

5 Mr. Mihir Thakor, learned Senior Advocate appearing for the appellant and Mr. K.S.Nanavati, learned Senior Advocate appearing for the respondent have relied on orders passed in the earlier proceedings of company petition to which we have to make reference as they also cover the circumstances under which Company Petition No.42 of 2010 was filed by GIIC for winding up respondent Jhagadia Copper Limited under Sections 433 and 434 of the Companies Act, 1956. Along with above company petition, Company Petition Nos.174 of 2010 and 42 of 2010 also were filed which came to be admitted. For the sake of convenience order dated 11.06.2014 passed by the learned Company Judge [Coram : Hon ble Mr. Justice S.R.Brahmbhatt], while admitting the above petition, is reproduced herewith:

"1. The counsels have indicated that there is no objection from any quarter for passing winding-up orders in these winding-up petitions. Formal order of admission was not made in Company Petition No.174 of 2010 and Company Petition No.42 of 2010, hence it is ADMITTED.

2. Heard learned advocate for the parties. All the petitions are seeking up appropriate relief in terms of winding-up of the respondent company and in one of the matter i.e. Company Petition No.295 of 2008 this Court while admitting the matter has elaborately observed the requirement and justification for admission of the matter. The same is reproduced as under :

1. Present Company Petition has been preferred by the petitioner-Creditor, Gujarat Industrial Investment Corporation Ltd. (GIIC) for winding up of the respondent Jhagadia Copper Limited under Section 433 and 434 of Companies Act, 1956.

2. It is the case on behalf of the petitioner that an amount of Rs.2290.69 lacs is due and payable by the respondent-Company to the petitioner by way of total amount outstanding as on 15.8.2007 towards the term loan amount, out of which Rs.1685.60 lacs is the principal and amount of Rs.605.08 lacs is towards interest upto 15.8.2007. It is the case on behalf of the petitioner that thus, huge outstanding amount remained unpaid by the respondent-Company. It is also the case on behalf of the petitioner that as the respondent-Company has defaulted in payment of installment of principal

Shri K. S. Nanavati
Sr. Advocate

amount which has accrued and comes to Rs.203.67 lacs out of total principal unpaid amount and therefore, the petitioner is entitled to recover the entire amount of term loan including the interest accrued thereon. Thus, outstanding dues as on 15.2.2008 are Rs.24,54,01,590/-. It is the case on behalf of the petitioner that petitioner served legal notice dated 15.10.2007 by Registered AD Post upon the respondent-Company for winding up of respondent-Company under Section 433 and 434 of the Indian Companies Act, 1956 which has been duly served on the respondent-Company at its registered office. It is submitted that in response thereto, vague and evasive reply has been given by the respondent-Company through its Company Secretary. It is further submitted that as such, the respondent-Company has already closed and is indebted to so many other creditors and financial Institution. It is further submitted that as per the last audited balancesheet for the years 200608, considering the Profit & Loss Account, Company has incurred a loss of Rs.27,001.78 lacs from 1.10.2006 to 31.3.2008 and loss carried to balance sheet comes to Rs.32,659.41 lacs. It is submitted that thus Company is running into heavy losses. Therefore, it is requested to admit the present company petition for winding up of respondent-Company.

3. Shri S.P.Majmudar, learned advocate appearing on behalf of the respondent-Company has opposed the admission of the present company petition by submitting that as the petitioner has other statutory remedy available for recovering the amount due and payable to the petitioner and infact as it has instituted the suit and has taken the action under Section 29 of the Gujarat State Financial Corporation Act (GSFCA), the present petition for winding up, at the instance of the petitioner, is not maintainable and/or is not required to be entertained. It is also further submitted by Shri Majmudar, learned advocate appearing on behalf of the respondent-Company that the respondent-Company is an institutional Company and there are number of financial institutions, who are the shareholders of the respondent-Company inclusive of the petitioner, and, therefore, it is submitted that it can be said that it is one of the shareholders of the respondent-Company, which would not be in the interest of the petitioner. He has also further submitted that the respondent-Company is in search of one strategic investor. It is submitted that even other financial institutions like ARCIL will not be in favour of winding up of the respondent-Company and, therefore, it is requested to issue notice to financial institution like ARCIL, who is the major shareholder of the respondent-Company.

4. Shri S.N.Soparkar, learned senior advocate appearing on behalf of the petitioner has submitted that as such, when the petitioner initiated the proceedings to recover the amount by taking steps under Section 29 of the Act, the respondent challenged the same and is not permitting the petitioner to recover the amount and, therefore, the respondent cannot be permitted to say that as the petitioner has statutory remedy available to recover the amount under Section 29 of the Act, the present winding up petition is not maintainable. It is submitted that to initiate the proceedings for winding up of the respondent-Company are different and distinct and there is no law point out that once the suit is filed and/or other remedies to recover the amount are initiated the winding up petition is not maintainable. It is submitted that once the case falls within Sections 433 and 434 of the Companies Act, the petition for winding up of Company is maintainable and Company is required to be ordered to be wound up. It is further submitted that there is no material on record to show other candidate should suffer in the respondent-company and/or they are proposing some viable scheme. It is submitted that on the contrary even ARCIL has taken steps under the Secularization

Shri K. S. Nanavati
Sr. Advocate

and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by issuing notice under Section 13 of the said Act. Therefore, it is requested to admit the present petition and appoint provisional liquidator.

5. Heard, Shri S.N.Soparkar, learned Senior advocate with Shri R.D.Dave, learned advocate appearing on behalf of the petitioner-Company and Shri S.P.Majmudar learned advocate appearing on behalf of the respondent-Company. From the facts stated herein above and considering the averments made in the petition and huge sum / amount of Rs.2290.69 lacs as on 15.8.2007 is due and payable by the respondent-Company to the petitioner, it appears that even the respondent-Company is also indebted to other financial Institutions and the Creditors with huge amount. It also appears that the respondent-Company is running into huge loss and other financial Institutions have also taken steps to recover the amount due to them from the respondent-Company. It, prima-facie, appears that the respondent-Company is not in a position to pay the debts to the other creditors and is not a running concern and as loss substratum.

6. So far as the contention raised on behalf of the respondent-Company, the petitioner-Company has other statutory remedy available for recovering the amount due and payable to the petitioner inclusive of remedy under Section 29 of the Gujarat State Financial Corporation Act. So far as contention raised in present company petition for winding up of the respondent-Company at the instance of the petitioner that petition is not maintainable is concerned, the same has no substance and/or cannot be accepted. First of all, it is to be noted that the petitioner initiated proceedings to recover the amount under Section 29 of the Act from respondent-Company and has challenged the same and is not permitted to recover the amount under Section 29 of the Gujarat State Financial Corporation Act. Therefore, it is not open for the respondent-Company now to contend that as the petitioner-Company has other remedy available, winding up petition, at the instance of the petitioner, is not to be entertained. As such, there is no law and/or decision pointed out by the learned advocate appearing on behalf of the respondent that as other remedy is available to recover the amount due and payable by the Company, winding up petition is not maintainable. If the case falls within Sections 433 and 434 of the Companies Act, 1956, Company Petition is maintainable and an appropriate case being made out, company can be ordered to be wound up.

7. Now so far as the reliance placed upon the decision of the learned Single Judge in the case of American Express Bank Ltd. (supra) is concerned, considering the facts narrated herein above, and the totality of the facts and huge loss incurred by the respondent-Company, the respondent-Company is indebted to the petitioner and other financial institutions and other creditors for a huge amount and the respondent-Company is not a running company. On the aforesaid prima-facie finding, this is a fit case to admit the present company petition.

8. Hence, ADMIT.

9. Fixed for final hearing on 29.6.2010.

10. Notice of admission and the date of final hearing be published by giving advertisement in two local newspapers, Indian Express (English daily) and Gujarat

Shri K. S. Nanavati
Sr. Advocate

Samachar (Gujarati daily), both Vadodara editions. Publication in the Government gazette is dispensed with.

11. On the next date of hearing, if by chance and or for if any reasons the petition is not heard finally, appropriate order to appoint the provisional liquidator shall be considered by this Court. In the meantime, the respondent-Company is hereby restrained from transferring, alienating, and/or dealing with any of the properties of the respondent-Company. The reasoning stated herein above in the order, indicates that the case for winding-up is existing and today also during the course of hearing, no one has canvassed any submission against the winding-up of the company. However, before passing of the order of winding-up, it is required to be noted that on account of the proceedings under SARFAESI Act, 2002, the companies assets have been in the custody of Assets Reconstruction Company (India) Ltd., (hereinafter referred to as ARCIL for the sake of brevity) and ARCIL being in custody of the assets, had not been objected to by anyone. Therefore, the appointment of Official Liquidator though is required to be made, is made only with a view that he may associate with the sale procedure along with the Gujarat Industrial Investment Corporation (hereinafter referred to as GIIC for the sake of brevity) as agreed by all.

2. Shri Shalin Mehta, learned advocate for ARCIL, at this stage submits that as his client ARCIL is agreed to associate the Official Liquidator and GIIC, let there be sale proceedings in accordance with SARFAESI Act, 2002. It goes without saying that this Court has specifically directed ARCIL to associate with GIIC as well as the Official Liquidator after recording ARCILs consent through its counsel, it goes without saying that the sale proceedings have to be in accordance with law.

3. In view of this, the company is hereby ordered to be wound-up. The Official Liquidator is appointed and in view of the observations made hereinabove, the ARCILs custody of the assets is not to be disturbed and ARCIL is to proceed with the sale of the assets of the company and as ARCIL is agreed, it shall associate in the procedure GIIC and Official Liquidator.

4. The finalization of sale proceedings will be subject to sale being confirmed by this Court.

5. The petitions are disposed of. Office is directed to place copy of this order in each matter." [emphasis supplied]

5.1 Thereafter, the learned Company Judge [Coram : Hon ble Ms. Justice Harsha Devani] passed order dated 27.01.2015 in Company Application No.16 of 2015 in Company Petition No.295 of 2008. Paras 12 to 17 of the above order reads as under:

"12.A perusal of the list of secured creditors, Annexure I to the application, reveals that most of the secured creditors having majority stakes are represented before the court and have no objection if the sale is confirmed.

13. On behalf of the applicant, an undertaking has been filed by Shri Jayachandran G., Assistant Vice President of the applicant company, undertaking that the amount due to any secured creditors and workers will be disbursed by ARCIL in accordance with their share and under the provisions of section 529A of the Companies Act.

Shri K. S. Nanavati
Sr. Advocate

14. Having regard to the factual background as mentioned in the application and as submitted by the learned counsel for the applicant, it appears that various attempts have been made by the applicant to revive the company (in liquidation) and subsequently, to dispose of the movable and immovable assets of the company through public auction as recorded hereinabove. Despite several attempts, no proper bid has been received till date. Lastly, pursuant to the advertisement published on 17th November, 2014, only one bid came to be received from M/s Hindustan Copper Ltd., which is just and almost equal to the estimated reserved price, namely, Rs.210 crores. Ordinarily, when only one bid is received pursuant to the tender advertisement, this court would be reluctant to confirm the sale in favour of such party. However, in the backdrop of the facts as narrated hereinabove, various attempts have been made, and finally, only one offer is received from M/s Hindustan Copper Ltd. which is just above the reserved price of Rs.210 crores, this court is of the view that the same requires consideration.

15. It has been emphatically urged by the learned counsel for the applicant that after tremendous efforts, an offer has been received from M/s Hindustan Copper Ltd. and that in case such offer is not finalized at the earliest, the said bidder may also back out. Under the circumstances, it is in the interest of creditors as well as the workers that the sale is confirmed at the earliest.

16. In the aforesaid premises and having regard to the fact that any further delay would lead to deterioration of the plant and machinery of the company; that the offerer M/s Hindustan Copper Ltd. is a public sector of the Government of India and therefore, the offer made by the said company can be held to be a genuine offer; this court is of the view that it would be in the interest of all concerned if the sale is confirmed in favour of the said party, more so, when all the major secured creditors have no objection to the same.

17. For the foregoing reasons, the application is allowed. The sale in favour of M/s. Hindustan Copper Limited pursuant to the auction held on 6th January, 2015 conducted by the applicant, Asset Reconstruction Company (I) Ltd. is hereby confirmed. The applicant, in terms of the undertaking filed by it before this court, shall ensure that the amount due to any secured creditors and workers shall be disbursed in accordance with their share and under the provisions of section 529A of the Companies Act, 1956. The application stands disposed of accordingly". [emphasis supplied]

5.2 By the aforesaid order, sale in favour of M/s. Hindustan Copper Ltd. pursuant to auction held and conducted on 06.01.2015 conducted by ARCIL came to be confirmed. It was further directed that the undertaking is to be filed by the appellant before the Company Court to ensure that the amount due to any secured creditors and workers shall be disbursed in accordance with their share and under the provisions of Section 529A of the Companies Act, 1956.

5.3 The above directions were issued in view of filing of undertaking by the Vice President of the appellant company that the amount due to any secured creditors and workers will be disbursed by ARCIL in accordance with their share and under the provisions of Section 529A of the Companies Act.

Shri K. S. Nanavati
Sr. Advocate

5.4 Thereafter, the learned Company Judge [Coram : Hon ble Mr. Justice Vipul Pancholi] vide order dated 26.02.2016 passed in OJMCA No.204 of 2015 refused to recall and modify oral order dated 14.10.2015 passed in OLR No.5 of 2015 by which Official Liquidator was permitted to invite claim from all secured creditors and dismissed OJMCA No.204 of 2015. The following directions issued in para 5 of order dated 14.10.2015 accepting OLR No.5 of 2015, are under challenge in this appeal. Para 5 of order dated 14.10.2015 reads as under:

"5. The Official Liquidator is permitted to constitute the sale committee comprising the Official Liquidator and secured creditors, workers union, if any as members. In the meantime, the Official Liquidator is also permitted to invite claims from the workers and secured creditors under Section 529, 529A and 530 of the Companies Act, 1956 by publishing advertisement in the newspaper. The matter is adjourned for further hearing on 30.10.2015."

6 One of the main contentions of the appellant is that as a secured creditor it is open for the appellant to remain outside winding up proceedings and to get its dues realized by exclusive proceedings under SARFAESI Act, 2002 and as per law the appellant is not under any legal obligation to stake its claim before the Official Liquidator under the provisions of the Companies Act, 1956.

6.1 Mr. Mihir Thakor, learned Senior Advocate appearing for ARCIL would contend that learned Company Judge committed an error while granting permission to Official Liquidator to invite claims from the secured creditors under Section 529A of the Companies Act, 1956 in which no opportunity is provided to the applicant, who is the owner of 76% of the debt of the company, which is to be realized without relinquishing its rights and proceed under SARFAESI Act have been instituted and the sale has already taken place of the immovable properties and that shall prevail over provisions of the Companies Act, 1956 by virtue of Section 13(9) of the SARFAESI Act and, therefore, under Section 13(9) of the SARFAESI Act, the present appellant being the secured creditor is at liberty to stay out of liquidation proceedings. Learned Senior Advocate has relied on provisions of Section 13(9) of the SARFAESI Act and Section 529A of the Companies Act, 1956 and submitted that merely because ARCIL has associated with the Official Liquidator and Gujarat Industrial Investment Corporation [GIIC], the petitioner who filed company petition for liquidation of M/s. Jhagadia Copper, now in liquidation, in constitution of Sale Committee shall not bring the appellant under the purview of liquidation proceedings in view of decision in the case of Pegasus Assets Reconstruction Pvt. Ltd. v. M/s. Haryana Concast Limited & Anr. [(2016)4 SCC 47] .

6.2 Mr. Thakore, learned Senior Advocate would further contend that sale was conducted by the appellant under the provisions of the SARFAESI Act and the sale certificate has been executed under the prescribed format by the very Act and other formalities were also completed by the authorized officer of the appellant appointed under the provisions of the SARFAESI Act, permitting the Official Liquidator to invite the claim from all secured creditors under the provisions of Sections 529, 529A and 530 of the Companies Act, 1956 is contrary to law and therefore, orders impugned be quashed and set aside. It is further submitted that when the appellant opted to realize its security under the provisions of SARFAESI Act instead of

relinquishing its security and proving its debts under proviso to subsection 529 of the Companies Act, no order could have been passed by learned Company Judge.

6.3 According to learned Senior Advocate, at this stage viz. post sale stage, the rights of the parties in other secured creditors, including workers are taken care by Section 13(9) of the SARFAESI Act, which specifies that in case of winding up of the company, the sale proceeds have to be distributed under the provisions of Section 529A of the Companies Act, 1956 and, therefore, role of the Official Liquidator is limited to inform dues of the workers to the secured credits. Thus, secured creditor, in case of sale under SARFAESI Act is entitled to retain sale proceeds of its secured assets after depositing dues of the workers with Official Liquidator in accordance with the provisions of Section 529A of the Act and when it is not possible to ascertain dues of the workman, the Official Liquidator may communicate the estimate of such dues, which secured creditors have to deposit with the Liquidator.

6.4 According to learned counsel for the appellant, following particulars about various immovable properties and raw materials and possession thereof remain undisputed:

Sr. No.	Particulars	Status
01	All piece and parcel of land including plants, machineries, the ARCIL and ARCIL spares, tools and accessories, has raw material etc., lying at dated 27.01.2015 Plot No. 74 in the Jhagadia Industrial Estate, within of 2015 sold to village limit of Fulwadi Taluka Jhagadia, District Bharuch.	Possession had with vide order COM no.16 Hindustan Copper Ltd.

- 02 Land admeasuring 16,4 97 Possession with the square meters, situated at S. Official No.42/14, along N.HNo.8, Post Liquidator. : Motali, Taluka Ankleshwar, District Bharuch.
- 03 Land admeasuring 31.23 Possession with the Hectare, with Gut No. 03 to Official 401, Village Khatvira, Liquidator. Medhekhar and Village Kusumbale, at Post Poyand, Taluka Alibaug, District Raigadh
- 04 Office NO.616 to 619, Sixth Possession Floor, Siddharth Complex, R.C.Dutt Road, Alkapuri, with the Vadodara. Official Liquidator.

05 Raw Material pledged to State Possession with the Trading Corporation lying in Official JCL Warehouse under the Liquidator. custody of Central Warehouse Corporation.

That purpose and purport of SARFAESI Act is to recover dues of secured creditors as expeditiously as possible and provisions of the Companies Act, 1956 have been incorporated in SARFAESI Act for harmonizing this Act with Companies Act, 1956 and nobody will be deprived especially of workmen of their dues which remained protected. It is, therefore, submitted that this appeal deserves to be allowed by quashing and setting aside the impugned orders.

7 Mr. K.S.Nanavati, learned Senior Advocate appearing for the respondent Nos.15 & 16 oppose all submissions made by learned Senior Advocate for the appellant and would contend that at this stage learned Company Judge has only invited claims under Sections 529, 529A and 530 of the Companies Act, 1956 and no decision is taken to disburse the amount from sale proceeds, this appeal is premature since no cause of action has arisen in favour of the appellant and no adverse order is passed infringing the right of the appellant, a secured creditor under SARFAESI Act and, therefore, the appeal deserves to be dismissed.

8 Heard learned counsels for the parties and perused the record of the case.

8.1 Relevant provisions of Sections 529, 529A and 530 of the Companies Act, 1956, read as under:

"529. Application of insolvency rules in winding up of insolvent companies.

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

a] debts provable;

[b] the valuation of annuities and future and contingent liabilities; and

[c] the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion

Shri K. S. Nanavati
Sr. Advocate

therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,

[a] the liquidator shall be entitled to represent the workmen and enforce such charge;

[b] any amount realised by the liquidator by way of enforcement of such charge shall be applied ratably for the discharge of workmen' s dues; and

[c] so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen' s portion in his security, whichever is less, shall rank paripassu with the workmen' s dues for the purposes of section 529A.]

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

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to 3 pay his portion of the expenses] incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor.]

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

[3][a] "workman" [3][b] "workmen's dues" [3][c] "workmen's portion", are defined to which we are not concerned.

529A. Overriding preferential payment. Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force in the winding up of a company[

a] workmen' s dues; and

[b] debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to subsection (1) of section 529 paripassu with such dues, shall be paid in priority to all other debts.

[2] The debts payable under clause (a) and clause (b) of subsection (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.]

530. Preferential payments

[1] In a winding up subject to the provisions of section 529A, there shall be paid in priority to all other debts enumerated in subsections (1)(a) to (g) in winding up

Shri K. S. Nanavati
Sr. Advocate

petition, etc. At present we are not concerned with [2] to [9]. Relevant provisions of Sections of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 read as under:

13. Enforcement of Security Interest.

[1] to [8] xxx

[9] In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to subsection (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors: PROVIDED that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 19 56 (1 of 1956):

PROVIDED FURTHER that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to subsection (1) of section 529 of the Companies Act, 19 56 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

PROVIDED ALSO that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

PROVIDED ALSO that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

PROVIDED ALSO that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues , if any.

Explanation : For the purposes of this subsection,[a] "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date; [b] "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor. [10] Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

Shri K. S. Nanavati
Sr. Advocate

[11] Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of subsection (4) in relation to the secured assets under this Act.

[12] The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

[13] No borrower shall, after receipt of notice referred to in subsection (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor".

8.2 In the case of Kotak Mahindra Bank Ltd. V. Megnostar Telecommunications Pvt. Ltd. & Anr. [2013(176) CompCas 246], wherein challenge was to the decision of learned Company Judge, the Delhi High Court relying on the judgment of the Division Bench of Punjab and Haryana High Court in the case of Haryana State Industrial & Infrastructure Development Corporation vs. Haryana Concast Ltd. Hisar (2010) ILR 2 P&H 284, in para 9 held as under:

"9 The learned Company Judge in the impugned judgment, relying on the judgment of the Division Bench of the Punjab & Haryana High Court in Haryana State Industrial & Infrastructure Development Corporation (HSIIDC) Vs. Haryana Concast Limited, Hisar (2010) ILR 2 P&H 284 has held that "once Official Liquidator had been appointed as the Provisional Liquidator of the company in liquidation, he should have been associated with the auction process and having not being so associated the sale by the bank on 24.08.2011 was bad". Consequently the bank has been directed to prepare a fresh draft sale notice in association with the Official Liquidator, after taking into account the valuation report obtained by the learned Company Judge and to refund the amount received from the auction purchaser. Axiomatically the applications of the bank as well as the auction purchaser have been dismissed".

In view of following contentions raised by learned counsel appearing for the appellant bank and also of the auction purchaser before the Division Bench of Delhi High Court, in para 10 it is recorded as under:

"10 The contention of the counsels for the bank and the auction purchaser before us is that the learned Company Judge has merely followed the judgment (supra) of the Division Bench of the Punjab & Haryana High Court without even discussing the arguments in differentiation thereof urged by them. It is contented that:

i] the SARFAESI Act in Section 13 (1) thereof provides for enforcement by a secured creditor of the security interest "without the intervention of the Court or Tribunal" and "in accordance with the provisions of this Act" i.e. the SARFAESI Act only;

ii] Section 13 (8) enables the borrower to, even after measures under Section 13 (4) have been taken, pay up the dues of the secured creditor;

iii] that such payment, being under the Statute, will not be treated as having been made by way of fraudulent preference;

iv] that the first proviso to Section 13 (9) provides for the amount realized from the sale of the secured assets to be distributed in accordance with the provisions of Section 529A of the Companies Act;

v] the same is indicative of provisions of the Companies Act coming into play only post-sale;

vi] thus there is no requirement for association of the Official Liquidator in the sale by the secured creditor under Section 13 of the Act and the only requirement is to pay the workmen s dues to the Official Liquidator;

vii] the last proviso to Section 13(9) also provides only for an undertaking from the secured creditor to the Official Liquidator to pay the balance of the workmen s dues;

viii] it is thus argued that the Legislature, wherever desired to protect the interests of the workmen of the company in liquidation, has provided so and having expressly omitted to provide for the association of the Official Liquidator in the sale, this court by its judgment ought not to do so. Reference is also made to Rules 4, 6 & 8 of the Security Interest (Enforcement) Rules, 2002 (SIE Rules) to demonstrate that no provision is made therein also for involvement/association of the Official Liquidator. Attention is next invited to Sections 35 and 37 of the SARFAESI Act to contend that the provisions thereof have an overriding effect. It is contended that if the literal interpretation of a Statute is clear, the occasion for applying the rule of purposive interpretation does not arise. Attention is next invited to the Statement of Objects and Reasons of the SARFAESI Act particularly to the part where the intent of the said Act has been described as to enable the Secured Creditors to sell their secured interests without the intervention of the court.

ix] Reliance is placed on :

a] Allahabad Bank vs. Canara Bank (2000) 4 SCC 406 Paras 36 to 39 in support of the proposition that the provisions of SARFAESI Act override the provisions of the Companies Act;

b] Bank of India v. O.L. of Phar East Laboratories Ltd. MANU/GJ/0741/2006 where a Single Judge of the Gujarat High Court held that subject to the compliance of the post-sale conditions specified in the second to the fifth proviso to Section 13 (9) of the Act, the secured creditor is entitled to retain the sale proceeds of the secured assets;

c] Delhi Financial Corporation v. Rajiv Raviv Anand (2004) 11 625; and

d] Unique Butyle Tube Industries (Pvt.) Ltd. v U.P. Corporation (2003) 2 SCC 455 both in support of the contention that despite clear and specific scheme prescribed by the Parliament by providing for the interplay between the rights of secured creditor and the workmen, the impugned order seeks to create a casus omissus where none exists".

After considering the decision of the Apex Court in the case of Rajasthan State Financial Corporation in (2005)8 SCC 190 on which reliance was placed by the Division Bench of the Punjab and Haryana High Court in the case of Haryana Concast Ltd. (supra) and also relied on by the learned Company Judge, a Division Bench of Delhi High Court after considering provisions of DRT Act, SARFAESI Act, Companies Act, in paras 29, 30 and 31 held as under:

"29 We are therefore of the view that, (even where the debtor/borrower/mortgagor is a company in liquidation) there is no necessity of associating the Official Liquidator in the sale in exercise of powers by a secured creditor under Section 13(4) of the SARFAESI Act. The sale, without associating the Official Liquidator cannot thus held to be bad or illegal. The dicta in Rajasthan Financial Corporation of associating the Official Liquidator in sale, in the context of the SFC Act and the DRT Act in both of which sale is through the intervention of the District Judge or the DRT, is not applicable to a sale under the SARFAESI Act, sale whereunder is without the intervention of the Court. As far back as in *Herrington Vs. British Railways Board* 1972 (2) WLR 537 it was observed that there is always a peril in treating the words of a judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of facts in a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases and disposal of cases by blindly placing reliance on a decision is not proper. The Apex Court in *Bharat Petroleum Corporation Ltd. Vs. N.R. Vairamani* (2004) 8 SCC 579 cited Lord Denning with approval opining that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. It was further held that the temptation to decide cases by matching the colour of one case against the colour of another is to be avoided. Similarly in *Official Liquidator Vs. Dayanand* (2008) 10 SCC 1 it was held that even one additional fact may make a lot of difference in the precedential value of a decision. The same sentiment was reiterated in *Sushil Suri Vs. CBI* (2011) 5 SCC 708 as well as in *U.P. State Electricity Board Vs. Pooran Chandra Pandey* (2007) 11 SCC 92.

30 The remedies of the Official Liquidator with respect to such a sale are only before the DRT in accordance with Section 17 of the SARFAESI Act and not before the Company Court. SARFAESI Act being a latter legislation to the incorporation of Section 529A in the Companies Act thus prevails over the Companies Act and sale as provided for under the SARFAESI Act holds good during the pendency of winding up petition against the debtor/borrower/mortgagor and also after a winding up order is made and remains unaffected therefrom.

31 We are therefore, with respect, unable to agree with the dicta of Punjab & Haryana High Court in *Haryana Concast Limited* (supra) and axiomatically allow these appeals and set aside the judgment of the Learned Single Judge. The applications filed by the Bank and the auction purchaser for desealing of the property would thus stand allowed. However, the sale proceeds in custody of the bank are subject to the claims if any under Sections 529 and 529A of the Companies Act. The bank to accordingly comply, specially with the provisos to Section 13(9) of the SARFAESI Act. We may highlight that the Supreme Court recently in *Employees Provident Fund Commissioner Vs. Financial Liquidator of Esskay Pharmaceuticals Limited* (2011) 10 SCC 727 has also held the dues under the Employees ? Provident Fund and

Shri K. S. Nanavati
Sr. Advocate

Miscellaneous Provisions Act, 1952 to be a first charge on the assets of an establishment and to be paid in priority to all other debts while distributing the sale proceeds. However, since we have differed from the view taken by other High Courts, to give time for approaching the Supreme Court, we grant eight weeks time to the Official Liquidator to deseal the premises and to put the auction purchaser into possession of the property. The Official Liquidator, if of the view that the sale by the Bank is in contravention of the SARFAESI Act and the Rules framed thereunder, shall also have liberty to approach the DRT under Section 17 thereof, within the said time of eight weeks".

8.3 In the case of Pegasus Assets Reconstruction P. Ltd. [supra] the following question fell into consideration before the Apex Court that as to whether a Company Court can wield any control in respect of sale of a secured asset by a secured creditor in exercise of powers available to such creditor under the SARFAESI Act. After referring to para 19 of the order dated 15.12.2009 dismissing Company Appeal No.28 of 2009, which was under challenge before the Apex Court, in para 11 earlier decision of the Apex Court relied on by a Division Bench of Punjab and Haryana High Court for arriving at a conclusion in para 34 that the Company Court enjoys the jurisdiction to issue directions to a secularization company or a secured creditor who has opted to stay outside the winding up and undertakes its power under Section 13 of the SARFAESI Act was referred and the Apex Court was unable to subscribe to the aforesaid views and in para 12 considered judgment of the Delhi High Court in the case of Megnostar Telecommunications Pvt. Ltd. [supra] and the Apex Court was persuaded to approve its views for the reasons enumerated and explained in paras 18, 19, 20, 21, 22, 23 and 24 held as under:

18 The relevant case laws discussed in the two conflicting judgments are virtually the same but the error committed by the Division Bench in the case of Pegasus lies mainly in coming to a conclusion that there is no inconsistency between the Companies Act and the SARFAESI Act if the Company Judge issues supervisory directions to achieve the object of Section 529A which finds a clear mention in one of the provisos of Section 19(3) of the SARFAESI Act. This view is unacceptable for the reasons detailed by Delhi High Court in the case of Megnostar. Those reasons commend themselves to us also. We are particularly in agreement with the view in paragraph 26 of the judgment which is as follows :

"26. If it were to be held that the Official Liquidator (who acts under the dictates of the Company Court) is to be also associated with the sale, it will naturally open up the fora of the Company Court also for entertaining matters relating to such sale and which as aforesaid is not only likely to lead to conflicts but is also contrary to the spirit of the SARFAESI Act of sale being without the intervention of the Court."

19 However, there are certain areas covered by the Delhi High Court which need further elucidation and clarification. For that it will be relevant and necessary to first go through the ambit, scope and peculiarities of Statutes like the State Financial Corporations Act, 1951 (for brevity the SFCT Act) and The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for brevity the RDB Act) in contrast with the SARFAESI Act and some case laws which, in our view, are of special significance for better understanding of the issues.

20 All the aforesaid Acts are Central legislations enacted for specific purposes. The SFC Act enables the State Governments to establish a Financial Corporation for a State on the lines of Central Industrial Finance Corporation set up under Act XV of 1948 to provide medium and long term credit to industrial undertakings, somewhat outside the normal lending activities of Commercial Banks. This Act, inter alia, vests special privileges in the State Financial Corporations in the matter of enforcement of its claims against borrowers, through sections such as 29, 30, 31 and 32. Coercive steps including sale of secured property is, vide Section 31 required to be taken by moving appropriate application before the concerned District Judge as per procedure prescribed under Section 32. Section 46B does bestow overriding status on this Act over the then existing law but not over the Companies Act of 1956 which is a later law. Hence, in several judgments it has rightly been held that if the defaulter is a company under winding up, a State Financial Corporation can at best be a secured creditor who may opt to remain out of winding up but nonetheless it will be subject to orders passed in accordance with law under the Companies Act.

21 The RDB Act is of 1993, i.e. later to the Companies Act. Its avowed object is to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. This Act creates a special machinery for speedy recovery of dues of banks and financial institutions which, by an amendment of 2004 now include a registered Securitisation company or reconstruction company envisaged under the SARFAESI Act. Section 18 bars the jurisdiction of ordinary courts or authority in respect of matters falling within the jurisdiction of Tribunal as specified in Section 17. An Appellate Tribunal is provided under Section 20. The power of the tribunal extends to determining the debt due as well as its realization. Section 34 confers overriding effect upon this Act over any other law in force.

22 In contrast, the SARFAESI Act was enacted in 2002 to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. Inter alia, one of the main objects of this Act is to clothe the banks and financial institutions in India with power to take possession of securities and sell them. All its significant provisions have been noted in detail in *Mardia Chemicals Ltd. v. Union of India* [(2014)4 SCC 311] in which vires of this Act was examined and upheld.

23 A reading of Sections 9 and 13 of the SARFAESI Act leaves no manner of doubt that for enforcement of its security interest, a secured creditor has been not only vested with powers to do so without the intervention of the court or tribunal but detailed procedure has also been prescribed to take care of various eventualities such as when the borrower company is under liquidation for which proviso to subsection (9) of Section 13 contains clear mandate keeping in view the provisions of Section 529 and 529A of the Companies Act, 1956. Since significant amendments were introduced in Section 529 while inserting Section 529A through Amendment Act 35 of 1985, effective from 24.5.1985 and with the aid of a non obstante clause in subsection (1) of Section 529A workmen's dues were given preference over other dues and made to stand paripassu with dues of the secured creditors, in case of apparent conflict, this Court through various judgments has upheld the proceedings under the RDB Act as it happens to be a later Act with overriding effect over other laws. The interest of the workmen in respect of dues payable to them as per Section

529 and 529A of the Companies Act has been protected by permitting, wherever necessary, association of the Official Liquidator with the proceedings before the Debts Recovery Tribunal under the RDB Act. In our considered judgment, the same view is required to be taken in context of SARFAESI Act also, for the additional reason that Section 13 requires notice to the borrower at various stages which in the case of a company under winding up being a borrower would mean requirement of notice to the Official Liquidator. The Security Interest (Enforcement) Rules, 2002 (for brevity, the Rules) framed under the provisions of SARFAESI Act also require notice upon the borrower or his agent at different stages. For sale of immovable secured assets, as per Rule 8, the authorized officer can take possession by delivering a Possession Notice to the borrower and by affixing Possession Notice on the outer door or at some conspicuous place of the property. Before the sale also, the authorized officer is required to serve to the borrower a notice of 30 days. Thus the Rules also ensure that the Official Liquidator is in knowledge of the proceedings under the SARFAESI Act in case the borrower happens to be a company under winding up. As a borrower, the Official Liquidator has ample opportunity to get the details of the workers dues as ascertained under the Companies Act, placed before the authorized officer and seek proper distribution of the amount realised from the sale of secured assets in accordance with various provisos under subsection (9) of Section 13 of the SARFAESI Act.

24 The above discussion supports the view taken by Delhi High Court that no order is required by the Company Judge for association of the Official Liquidator in order to protect the interest of workers and to realize their dues. Sufficient provisions have been made for this purpose under the SARFAESI Act and the Rules framed thereunder".

The Apex Court in paras 30, 31, 32 and 33 held as under:

"30 Since we have held earlier in favour of views of Delhi High Court, it is not necessary to burden this judgment with the case laws which support that view and have been noted by the High Court. We are in agreement with the submissions advanced on behalf of respondent Kotak Mahindra Bank as well as respondent No.2 that there is no lacuna or ambiguity in the SARFAESI Act to warrant reading something more into it. For the purpose it has been enacted, it is a complete code and the earlier judgments rendered in the context of SFC Act or RDB Act vis- -vis the Companies Act, cannot be held applicable on all force to the SARFAESI Act. There is nothing lacking in the Act so as to borrow anything from the Companies Act till the stage the secured assets are sold by the secured creditors in accordance with the provisions in the SARFAESI Act and the Rules. At the post sale stage, the rights of the persons or parties having any stake in the sale proceeds are also taken care of by subsection (9) of Section 13 and its five provisos (not numbered). It is significant that as per subsection (9) a sort of consensus is required amongst the secured creditors, if they are more than one, for the exercise of rights available under subsection (4). If borrower is a company in liquidation, the sale proceeds have to be distributed in accordance with the provisions of Section 529A of the Companies Act even where the company is being wound up after coming into force of the SARFAESI Act, if the secured creditor of such company opts to stand out of the winding up proceedings, it is entitled to retain the sale proceeds of its secured assets after depositing the workmen s dues with the liquidator in accordance with the provisions of Section

Shri K. S. Nanavati
Sr. Advocate

529A of the Company Act. The third proviso is also meant to work out the provisions of Section 529A of the Companies Act, in case the workmen's dues cannot be ascertained, by relying upon communication of estimate of such dues by the liquidator to the secured creditor, who has to deposit the amount of such estimated dues with the liquidator and then it can retain the sale proceeds of the secured assets. The other two provisos also are in aid of the liquidator to discharge his duties and obligations arising under Section 529A of the Companies Act. Thus, it is evident that the required provisions of the Companies Act have been incorporated in the SARFAESI Act for harmonizing this Act with the Companies Act in respect of dues of workmen and their protection under Section 529A of the Companies Act. In view of such exercise already done by the legislature, there is no plausible reason as to take recourse to any provisions of the Companies Act and permit interference in the proceedings under the SARFAESI Act either by the Company Judge or the liquidator. As noted earlier, the Official Liquidator as a representative of the borrower company under winding up has to be associated, not for supplying any omission in the SARFAESI Act but because of express provisions therein as well as in the Rules. Hence the exercise of harmonizing that this Court had to undertake in the context of SFC Act or the RDB Act is no longer warranted in respect of SARFAESI Act vis-à-vis the Companies Act.

31 The aforesaid view commends itself to us also because of clear intention of the Parliament expressed in Section 13 of the SARFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the court or tribunal. At the same time, this Act takes care that in case of grievance, the borrower, which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Sections 17 and 18 of the SARFAESI Act.

32 On account of the above discussions, the Division Bench judgment of the Punjab and Haryana High Court under challenge by Pegasus fails to meet our approval and is therefore, set aside only for the purpose of clarifying the law. Since the sale already made has not been assailed by Pegasus, therefore that issue will abide by the views that we shall indicate hereinafter in respect of SLP(C) Nos. 117118 of 2011 preferred by Mr. Vinod Rajaliwala.

33 We grant leave in SLP(C) No.7074 of 2010 preferred by HSIIDC but only to dismiss this case as we have found the grievance of Pegasus to be justified; it was entitled not only to stay outside the winding up proceeding in view of provisions of SARFAESI Act which is a special and later Act but was also entitled to exercise its rights without any fetters that were erroneously placed upon it by the company Judge and were approved also by the Division Bench. Hence, the grievance of the HSIIDC that Pegasus should not have been permitted to stay outside the winding up proceeding is found merit-less. Consequently its appeal has to be dismissed". [emphasis supplied]

8.4 Having reproduced the provisions of Sections 529, 529A and 530 of the Companies Act, 1956, Section 13(9) of SARFAESI Act and the decisions relied on by the learned counsels extensively in the case of [i] Kotak Mahindra Bank Ltd.[supra] of Delhi High Court; [ii] Haryana State Industrial & Infrastructure Development Corporation [supra] of Division Bench of Punjab and Haryana High Court; and [iii] Pegasus Assets Reconstruction P. Ltd. [supra] and order dated 11.06.2014 passed by the Company Judge in Company Petition No. 42 of 2010 with Company Petition

Shri K. S. Nanavati
Sr. Advocate

No.295 of 2008 and Company Petition No.174 of 2010, it was clearly noted that on account of proceedings under SARFAESI Act, the company's assets have been in the custody of ARCIL and was not objected by anyone and appointment of OL was required to be made with a view that he may associate with the same procedure along with GIIC as agreed by all. Likewise, ARCIL also agreed to associate the OL and GIIC and sale proceeds to be conducted in accordance with SARFAESI Act. To the above procedure, consent of ARCIL was recorded through its counsels and thereafter the company was ordered to be wound up and OL was appointed with the observation that custody of the assets of the company with ARCIL was not to be distributed and ARCIL was to proceed with the sale of the assets of the company. The finalization of the sale proceeds will be subject to the confirmation of the Company Court.

8.5 In continuation of the proceedings further, upon seeking confirmation of the sale on 27.01.2015, learned Company Judge has taken on record an undertaking filed by Shri Jayachandran G., Assistant Vice President of the appellant company, who has undertaken that the amount due to any secured creditors and workers will be distributed by ARCIL in accordance with their share and under the provisions of Section 529A of the Companies Act, 1956 and keeping in mind and relying on the above unconditional undertaking, the application for confirming sale in favour of M/s. Hindustan Copper Ltd. pursuant to the auction held on 06.01.2015 conducted by ARCIL came to be confirmed. Further, in terms of the undertaking filed by the authorized representative of the ARCIL, it was directed that ARCIL was ensured that the amount due to any secured creditors and workers shall be distributed in accordance with their share and under the provisions of Section 529A of the Companies Act, 1956.

8.6 Thus, ARCIL has agreed to distribute the amount to secured creditors and workers in accordance with Section 529A of the Act and by the impugned order dated 14.10.2015 learned Company Judge has only permitted OL to constitute the Sale Committee comprising the OL, secured creditors, workers union and members further permitted the OL to invite claims from the workers and secured creditors under Section 529, 529A and 530 of the Companies Act, 1956 by publishing advertisement in the newspaper. By constituting the Sale Committee and inviting the claim from secured creditors and workers, as above, learned Company Judge at this stage has not determined any right or obligation in any manner detrimental to ARCIL and yet order is to be passed after considering the nature and amount of the claim made by secured creditor or any other stakeholders. Even for the purpose of determining pari passu claim of workers, creditors, it is incumbent upon the Official Liquidator to ascertain the outstanding dues / claim and for the above reason learned Company Judge has permitted the OL to undertake exercise by giving public advertisement in accordance with law and in the above context it cannot be said that ARCIL, a secured creditor who has opted to realise its dues / security by remaining outside the winding up proceedings, is in any manner affected. No order of disbursement is made to any of the secured creditor and the claim amount is to be scrutinized by OL subject to objections that may be raised by ARCIL and permissible in accordance with law. Even unnumbered proviso to subsection (9) of Section 13 of SARFAESI Act provides that in case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with provisions of Section 529A of the Companies Act, 1956 and in the facts of the case the amount realised by ARCIL from sale of secured assets shall have to be distributed as per the undertaking filed on

behalf of ARCIL and recorded by learned Company Judge in the order dated 27.01.2015 passed in Company Application No.16 of 2015 in Company Petition No.295 of 2008 in accordance with provisions of Section 529A of the Companies Act, 1956. Thus, the above unnumbered proviso is followed by another second proviso provide that in the case of company being wound up on or after commencement of SARFAESI Act, the secured creditor of such company, like ARCIL in this case, opts to realise its security in respect of relinquishing its security and proving its debt under proviso to subsection (1) of Section 529 of the Companies Act, may retain the sale proceeds of its secured assets after depositing workmen s due with the liquidator in accordance with provisions of Section 529A of the Companies Act, 1956. However, third unnumbered proviso cast duty upon the liquidator referred to in second proviso to intimate the secured creditors workmen s dues in accordance with provisions of Section 529A of the Companies Act, 1956 so that workmen dues can be ascertained, but if not so, then the liquidator shall have to intimate the estimated amount of workmen s dues under the section to concerned secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator. Other unnumbered provisos provide further procedure in case of circumstances so arise in the facts of this case. Without inviting claim from the stakeholders / secured creditors / workmen, it would not be possible for the Official Liquidator to determine the ratio of paripassu claim of workmen under Section 529A of the Companies Act, 1956.

8.7 Thus, if the above provisions of subsections (9) of Section 13 of the SARFAESI Act read with Section 529, 529A and 530 of the Companies Act, 1956, nowhere it restricts or prohibits OL from inviting claims from other secured creditors and workmen upon learned Company Judge passing an order. We are in agreement with proposition of law laid down by the Apex Court in the case of Pegasus Assets Reconstruction Pvt. Ltd. [supra] wherein view of the Delhi High Court in Kotak Mahindra Bank Ltd. V. Megnostar Telecommunications Pvt. Ltd. & Anr. [supra] came to be accepted. However, for the facts of this case and reasons stated hereinabove and ARCIL was directed to associate with Official Liquidator by order dated 11.06.2014 and subsequently clear undertaking was filed by representative of ARCIL and so recorded in earlier order dated 27.01.2015 in Company Application No.16 of 2015, we find no error of law committed by learned Company Judge in inviting claims of secured creditors and workmen by impugned orders dated 26.02.2016 in OJ Misc. Civil Application No.204 of 2015 in Official Liquidator Report No.5 of 2015 in Company Petition No.42 of 2010 and order dated 14.10.2015 passed in Official Liquidator Report No.5 of 2015 in Company Petition No.42 of 2010.

9 In view of the above discussion, this appeal fails and is hereby dismissed. Since the main appeal is dismissed, no order on Civil Application [OJ] No.169 of 2016 and accordingly it stands disposed of.

Shri K. S. Nanavati
Sr. Advocate