CASE NO.:
Appeal (civil) 2332 of 2006

PETITIONER:
ICICI BANK LTD.

RESPONDENT:
SIDCO LEATHERS LTD. & ORS.

DATE OF JUDGMENT: 28/04/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (C) No.23360/2004)

S.B. SINHA, J :

Leave granted.

Interpretation of Sections 529 and 529-A of the Companies Act, 1956 is involved in this appeal, which arises out of a judgment and order dated 4.8.2004 passed by the High Court of Judicature at Allahabad in Special Appeal No.698 of 2002 affirming the judgment and order dated 24.5.2002 passed by a learned Singh Judge of the said Court.

The appellant herein is a Banking Company. It, along with Industrial Finance Corporation of India (IFCI) and Industrial Development Bank of India (IDBI), advanced the following amounts by way of loan to Respondent No.1 with a view to give financial assistance to it in setting up a plant for manufacture of leather boards:

a) IDBI Rupee Term Loans of Rs.193.2 lacs and Foreign Currency loan of Italian Lira 1380900,000.

b) IFCI Rupee Term Loans of Rs.196.74 lacs, Central Investment subsidy of Rs.25 lacs and Foreign Currency loan of DM 2127,565.

c) ICICI Rupee Term Loans of Rs.96.61 lacs and Foreign Currency loan of Italian Lira 1380900,000.

The Punjab National Bank (PNB) also advanced a loan to the said Respondent for providing working capital funds. The 1st Respondent, in order to secure the amounts lent to it, created a first charge in favour of the appellant along with other financial institutions, i.e., Respondent Nos.3 (IFCI) and Respondent No.4 (IDBI) herein by way of equitable mortgage by deposit of title deeds of its immovable property. A second charge was created in favour of PNB by way of constructive delivery of title deeds remaining in deposit with Respondent No.3 herein, clearly indicating that the charge in favour of the latter was subject and subservient to charges in favour of IFCI, IDBI and ICICI.

On an application for winding up of the 1st Respondent made before the High Court of Judicature at Allahabad, an order was passed on 16.12.1993 directing its winding up whereupon an Official Liquidator was appointed. The borrowing facilities of the said Respondent had been terminated. A suit for recovery of the credited sum was filed by the

appellant along with the Respondent Nos.3 and 4 herein against the 1st Respondent in the High court of Judicature at Bombay, which was numbered as Suit No.2789/1995. The said suit was thereafter transferred to the Debt Recovery Tribunal, Bombay. Recovery proceedings are admittedly pending adjudication.

The Official Liquidator was one of the defendants. Liberty was granted by the Debt Recovery Tribunal to the appellant herein and the other respondents to obtain permission of the Company Court, i.e., High Court of Judicature at Allahabad to continue the prosecution of the said suit. Thereupon, an application under Section 446 of the Companies Act, 1956 was filed by the plaintiffs in the said suit stating that they were Secured Creditors and had decided to remain outside the winding up proceedings being desirous of realizing the Security in the suit. The permission to continue the proceedings in the said Suit No.2789/95 was granted by the High Court of Judicature at Allahabad on 30.8.1995. In the said suit, however, the Respondent No.2 herein, PNB, was not impleaded as a party.

PNB filed a Civil Suit in the Court of Civil Judge, Fatehpur (U.P.) on 15.10.1998, which was numbered as Suit No.2/98, for recovery of money payable to it by the 1st Respondent. In its plaint it was, inter alia, averred:

"That the defendant No.1 company had secured various other financial facilities from the Defendant Nos.4, 5 and 6 in whose favour the Defendant No.1 company had created Equitable mortgage as Collateral Security by deposit of original title deeds in respect of land, building and plant and machineries situated at Village Kauriya, Tehsil Binkdi, District Fatehpur (U.P.), but, then the Defendant No.1 company agreed to secure the second charge on the said mortgaged property in favour of the plaintiff Bank, after the defendant Nos.4, 5 and 6 gave their consent to the effect that the title deeds in respect of the aforesaid properties shall remain with the Defendant No.4, for and on behalf of the Joint First charge holders, viz. Defendant No.4, 5 and 6 and the said title deeds shall also be retained by the Defendant No.4, as agents, for and on behalf of the plaintiff Bank as a Second charge holder in respect of the aforesaid properties.

xxx xxx xxx

12. That the said Charge of the Plaintiff Bank regarding the grant of cash credit hypothecation limit and creation of Second Charge in respect of immoveable properties of the Defendant No.1 company in favour of the Plaintiff Bank, was duly registered with the Registrar of Companies (U.P.) at Kanpur, on the basis of submission of the Defendant No.1 company with the Registrar of Companies (U.P.) Kanpur."

It is, however, not in dispute that in the meantime the assets of the Company were sold and the Official Liquidator, against the said assets, received a sum of Rs.65,72,311/-. As on 31.10.2001, the Official Liquidator had a sum of Rs.71,00,351/- available with him for distribution to the creditors of the Company. An advertisement was issued by the said Official Liquidator being Notice in Form No.63 prescribed under Rule 148(1) of the Companies (Court) Rules, 1959, inter alia, stating:

"Any creditor so fails to submit his affidavit of proof within the time limited as aforesaid will be excluded from the benefit of any distribution of dividend before the debt is proved or as the case may be from objecting to such distribution.

Any creditor who has sent in his proof, if so required by notice in writing from the Official Liquidator shall either in person or by his advocate, attend the investigation of such debt or claim at such time and place as shall be specified in such notice and shall produce such further evidence of his debt or claim as may be required."

In response to the said notice, the appellant herein lodged a claim stating as under:

S.No.	Name of Secured Creditor	Amount Claimed	To be disbursed 1.6 paise
1.	xx	xx	xx
2.	ICICI	26,18,44,044.00	41.89,506.00

Although, before us the factual aspect of the matter that Respondent No.2 was the second charge holder, whereas the appellant and IFCI and IDBI were the first charge holders is not in dispute, we may, however, notice that Respondent No.2, in its letter dated 20.11.1989, addressed to the appellant and Respondent Nos. 3 and 4 categorically stated:

"We, Punjab National Bank, hereby confirm that notwithstanding anything to the contrary contained in or by virtue of the various securities created/to be created by M/s. Sidco Leathers Ltd. (hereinafter referred to as the Company) in favour of Punjab National Bank on the immovable and movable properties (save and except book debts) of the Company, the charges created to be credited by the Company in favour of Punjab National Bank for its working capital facilities being Cash Credit limit of Rs.80 lac and bills discounting of Rs.54 (Fifty four lac only) shall be subject and subservient to the charges created/to be created by the Company in favour of:

(1)(a) rupee term loan of Rs.277.00 lac in Participation with IDBI and ICICI to the extent mentioned below:

IFCI \026 Rs.112.00 lac
IDBI \026 Rs.110.00 lac
ICICI \026 Rs. 55.00 lac
xx xx xx
We further agree and confirm as follows:

i) We shall not be entitled to call upon IFCI/IDBI/ICICI and other pari passu charge holders, if any, (hereinafter referred to as 'the first charge holders') to exercise or enforce any of the rights under their securities or otherwise.

ii) We shall not resort to any legal proceedings for the sale of the mortgaged properties or for the exercise of our any other right (a) against the Company unless \026 (a) we exhaust our remedies as a first charge holders on the current assets of the Company, (b) we give to the first charge holders a notice of minimum period of 60 days of our intention in this regard and (c) we obtain prior written approval of IFCI/IDBI/ICICI and other first charge holders in this regard.

iii) We, in our capacity as a second charge holder, take steps to enforce the security for realization of our dues consequent on default or breach committed by the Company after giving notice to and obtaining prior approval of the first charge holders as at (ii) above, the first charge holders, shall also be at liberty (but without obligation) to call upon the Company to repay forthwith their respective loans and advances as if they have become due under their respective loan documents and shall also be at liberty to exercise and/or all the right and remedies available to them as first mortgages or under any law for the time being in force."

In the Memorandum of Entry, acting also on behalf of the Respondent No.1, the Bank stated:

"2. The said Shri M. Zafrulla stated that the documents of title, evidences, deeds and writings more particularly described in the First Schedule hereunder written (hereinafter called "the said deeds") in respect of the Company's all immovable properties situated at Village Klauriya Mustaquil, Tehsil Binki, District Fatehpur in the State of Uttar Pradesh were deposited on the 11th day of August, 1988 and further deposited by way of constructive delivery on the 8th day of November, 1989 by the Company with IFCI and IFCI acting for itself and as agent of

Industrial Development Bank of India

The Industrial Credit & Investment Corporation of India Ltd.

in order to create security, by way of joint mortgage by deposit of title deeds, on the Company's all immovable properties together with the buildings and other structures, fixed plant and machinery, fixtures and fittings, constructed or erected or installed thereon or to be constructed, erected or installed thereon, for securing the due repayment, discharge and redemption by the Company."

It is not in dispute that the suit filed by Respondent No.2 has been decreed; whereas the proceedings before the Debt Recovery Tribunal (DRT) initiated by the appellant and others is still pending. It is furthermore not in dispute that the appellant along with Respondent Nos. 3 and 4 filed a Company Application before the learned Company Judge of the High Court of Judicature at Allahabad, inter alia, praying for that their claim for a sum of Rs.4,56,06,736 as on 16.12.1993 should be considered on pro-rata basis and further prayed that the claim of PNB be excluded from the movable and immovable assets of the Company.

By an order dated 9.1.2002, the first prayer of the appellant was allowed. However, as regards the second prayer, order was reserved. By an order dated 24.5.2002, relying on or on the basis of the decision of this Court in Allahabad Bank vs. Canara Bank & Anr. [AIR 2000 SC 1535] it was held:

"The test in law, as emerges from the aforesaid discussion is that where the secured creditors even if it has first charge over mortgaged assets, in preference to other secured creditors, having second charge over the same assets, opts to prove his debts before Official

Liquidator and claim dividend by joining winding up proceedings, relinquishes his claim over the assets and ranks equal to other secured creditors, including those who have second charge over the assets and shall be entitled to pro rata share out of the sale proceeds subject to the claim of workmen to be determined as provided under Section 529-A of the Companies Act, 1956.

I may add here that IFCI, IDBI and ICICI had given foreign currency loan and term loans to the company (in liquidation) by connotation, the rate of interest and liquidated damages were claimed. Punjab National Bank had second charge over the fixed assets of the company for working capital of Rs.134 lacs by deposit of title deeds created by the company in favour of Punjab National Bank on 21st November 1989 at IFCI office. The second charge in favour of Punjab National Bank was subject to first charge of IFCI, IDBI and ICICI. It is admitted to the applicant that Punjab National Bank might have first charge on the current assets of the company but that claim of Punjab National Bank as second charge holder of Rs.1,32,22,539/- has to be excluded and that the Punjab National Bank may get its share out of the sale proceeds of current assets. Since the applicants \026 IFCI and IDBI have joined the winding up proceedings and have submitted proof of their debts before the Official Liquidator, as held above, they shall be taken to have given up their securities and thus they can not claim any priority over the assets of Punjab National Bank on the fixed assets."

An intra-court appeal known as Special Appeal thereagainst was filed by the appellant before the Division Bench of the High Court. Having regard to the provisions contained in Section 47 of the Provincial Insolvency Act, 1920, it was held that the appellant having opted to remain outside the liquidation proceedings by expressing its desire to continue with its suit, in respect of the second claim of beneficial right, Section 48 of the Transfer of Property Act will have no application in the instant case. It was further opined that in view of the terminology used in Section 529-A of the Companies Act, the right of Secured Creditors being a contingent right, the appellant shall rank with unsecured creditors and has to take his dividend as provided under Section 529(2) of the Act.

The High Court relying upon Allahabad Bank (supra) further held:

"The second class of secured creditors are those who come under section 529(1)(b) read with proviso (c). These are those who opt to stand outside the winding up to realize their security. Section 19(19) of the RDB Act, 1993 permits distribution to secured creditors only in accordance with Section 529-A of the Companies Act, 1956 which includes the creditors who stand outside the winding up. These secured creditors in certain circumstances can come before the Company Court and claim priority over all other creditors to realize the amounts out of other moneys lying in the Company Court. This limited priority is declared in Section 529-A (1). It is however restricted only to the extent specified in clause (b) of Section 529-A(1). The Canara Bank had laid claims against realizations by other creditors. The Supreme Court found that it has not exercised its option to remain outside the winding up proceedings and thus it was held that the question of such claim can be raised only if the Canara Bank had stood outside the winding up

and had realized the amount and if it shows that out of the amounts privately realized by it, some portion has been rateably taken away by the liquidator under sub-clause (a) and (b) of the proviso to Section 529(1). It is only then that it can claim that it should be reimbursed at the same level as a secured creditor with priority over the realizations of other creditors lying the Tribunal."

On the aforementioned findings, the said special appeal was dismissed.

Mr. Rajiv Shakdher, learned Senior Counsel appearing on behalf of the appellant would submit that:

(i) The High Court misread and misinterpreted the judgment of this Court in Allahabad Bank (supra), as therein this Court was primarily concerned with interpretation of Section 446 of the Companies Act vis-'-vis the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('RDB Act', for short), i.e., as to whether for instituting or continuing proceedings under RDB Act interference of the Company Court was required under Section 446 thereof, as would appear from the subsequent decision of this Court in Rajasthan State Financial Corporation vs. Official Liquidator reported in (2005) 8 SCC 190. It even failed to consider the observations made in paragraph 37 of judgment in Allahabad Bank (supra).

(ii) The High Court failed to appreciate the true and correct scope and purport of Section 47 of the Provincial Insolvency Act, 1920 which comes into play by reason of the provisions of Chapter V of the Companies Act, 1956.

(iii) The High Court committed a serious error in relying upon Sub-section (2) of Section 47 of the Provincial Insolvency Act and ignoring the other provisions thereof.

(iv) The first charge holders and second charge holders could not have been equated having regard to the fact situation obtaining herein:

(v) PNB, also having filed a claim before the Official Liquidator, it should not have been given any preferential treatment;

(vi) Right of the Secured Creditor, in terms of Section 48 of the Transfer of Property Act which is a specific provision dealing with the priority against mortgage and there being no such specific provision in the Companies Act dealing with a similar matter, does not get obliterated only because the appellant responded to the public notice;

(vii) Section 48 of the transfer of Property Act would override the provisions of Section 529 of the Companies Act.

Mr. M.T. George, learned counsel appearing on behalf of Punjab National Bank, on the other hand, would submit:

(a) Having regard to the fact that Section 529-A of the Companies Act provides for a non-obstante clause and no distinction having been made therein as regard the priority over the claim amongst the secured creditors inter se, the Appellant cannot have a priority over the claim of the Second Respondent.

(b) Proviso appended to sub-section (1) of Section 529 of the Companies Act and Section 529-A having been enacted by the Parliament subsequent to the enactment of the Transfer of Property Act, Section 48 thereof must be held to be subservient thereto.

(c) The claim of the Appellant shall rank pari passu only with all

other secured creditors and, thus, it cannot claim a preferential right over other secured creditors.

(d) Section 47 of the Provincial Insolvency Act shall apply to the instant case in terms whereof the Appellant had three options:

(i) He can realize his security and if there is something left due to him, then come and prove its claim for the balance; or

(ii) He has to give up his security and to come into liquidation ranking with other creditors and take share in the distribution of the dividends; or

(iii) To value his security and to come into liquidation and prove for any dues that according to him remain outstanding in respect of his debt on the valuation of his security.

Having regard to the fact that the Appellant had not exercised his option in regard to the same, its claim was extinguished.

The learned counsel appearing on behalf of the Official Liquidator submitted that having regard to the provisions of sub-section (2) of Section 47 of the Provincial Insolvency Act, the Appellant would be deemed to have relinquished its rights.

The questions therefor which arise for our consideration are:

(a) Whether significance is lost in respect of inter se right of priority between two sets of secured creditors in view of Section 529-A of the Companies Act?

(b) Whether Section 48 of the Transfer of Property Act stands over-ridden by Section 529-A of the Companies Act.

(c) Whether the Appellant can be said to have relinquished his right to claim as a secured creditor as it had not opted in terms of Section 47 of the Provincial Insolvency Act.

Some legal propositions, which are not in controversy, may also be noticed at this stage.

There are two categories of secured creditors, namely, (i) those who are desirous of going before the Company Court and; (ii) those who stand outside the winding up proceeding.

Corporate insolvency procedures serve a variety of functions which include collective execution by unsecured creditors, facilitation of corporate rescue and the enforcement of security which would include certain public goals as for example, corporate morality. In an insolvency proceeding, the fundamental questions, which go to the root of the procedure, are:

(i) which parties are involved;
(ii) which assets are to be included; and
(iii) how proceedings are to be funded.

Liquidation proceeding although is a collective enforcement mechanism for the benefit of unsecured creditors, the question which invariably arises is what would be the meaning of the asset of the company in the Indian context. For the said purpose, the court has to be bear in mind that the liquidation is also the occasion for the termination of the company's

affairs. Assets of the company would include debentures holder assets, free hold assets and sometimes floating assets.

Applying pari passu principles, creditors' claim are to be treated alike, a single point of time at which the assets are liable to be quantified must be pinpointed, but then, subsequent events are also required to be considered.

For those who desire to go before the Company Court for dividend by relinquishing their security, in accordance with the Insolvency Rules, Section 529 of the Companies Act would be attracted.
The relevant portion of Section 47 of the Provincial Insolvency Act reads as under:

"47. Secured creditors.-(1) where a secured creditor realises his security, he may prove for the balance due to him; after deducting the net amount realized.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the Schedule, state in his proof the particulars of his security and the value at which he assesses it and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) \005

(5) \005

(6) Where a secured creditor does not comply with the provision of this section, he shall be excluded from all shares in any dividend."

The second class of the secured creditors are those who come under Section 529-A (1)(b) of the Companies Act, i.e., those who opt to stand outside the winding up to realize their security. They also can, in certain circumstances, go before the Company Court.

In Allahabad Bank (supra), Jagannadha Rao, J., referring to the Tiwari Committee Report, 1981 as regard framing of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 Act (for short "RDB Act"), stated the law in the following terms:

"Even in regard to "priorities" among creditors, the said Committee stated in Annexure I as follows:

"The Adjudication Officer will have such power to distribute the sale proceeds to the banks and financial institutions being secured creditors, in accordance with inter se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priorities in the law."

The above recommendations as to working out "priorities" have now been brought into the Act with greater clarity under Section 19(19) as substituted by Ordinance 1 of 2000, inter alia, whereof Priorities, so far as the amounts realized under the RDB Act are concerned, are to be worked out only by the Tribunal under the RDB Act. Section 19(19) of the RDB Act reads as follows:

"19. (19) Where a certificate of recovery is issued against a company registered under the Companies Act, 1956, the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529-A of the Companies Act, 1956 and to pay the surplus, if any, to the company." (Emphasis supplied)

Section 19(19) is clearly inconsistent with Section 446 and other provisions of the Companies Act. Only Section 529-A is attracted to the proceedings before the Tribunal. Thus, on questions of adjudication, execution and working out priorities, the special provisions made in the RDB Act have to be applied."

In that case, this Court was not called upon to decide the question as to whether having regard to the provisions contained in Section 529-A of the Companies Act those who stand outside the winding up proceedings will have to proceed with the proceedings initiated by them. Therein, the court was concerned with the interpretation of Section 446 of the Companies Act, 1956 vis-'-vis the provisions of the RDB Act, namely, as to whether for instituting or continuing proceedings thereunder, permission of the Company Court was required to be obtained. Having regard to the finding that the RDB Act was a special statute enacted by the Parliament much after the Companies Act came into force, it was opined that no permission was required since the Debt Recovery Tribunal had exclusive jurisdiction with respect to matters concerning recovery of dues by banks and financial institutions.

This legal position was considered by a Bench of this Court in Rajasthan State Financial Corpn. & Anr. v. Official Liquidator & Anr. [(2005) 8 SCC 190] wherein one of us (Balasubramanyan, J.) was a member. It was stated:

"In Allahabad Bank v. Canara Bank the question of jurisdiction of the Debts Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, vis-'-vis the Company Court arose for decision. This Court held that even where a winding-up petition is pending, or a winding-up order has been passed against the debtor company, the adjudication of liability and execution of the certificate in respect of debts payable to banks and financial institutions, are respectively within the exclusive jurisdiction of the Debts Recovery Tribunal and the Recovery Officer under that Act and in such a case, the Company Court's jurisdiction under Sections 442, 537 and 446 of the Companies Act stood ousted. Hence, no leave of the Company Court was necessary for initiating proceedings under the Recovery of Debts Act. Even the priorities among various creditors, could be decided only by the Debts Recovery Tribunal in accordance with Section 19(19) of the Recovery of Debts Act read with Section 529-A of the Companies Act and in no other manner. The Court took into account the fact that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was a legislation subsequent in point of time to the introduction of Section 529-A of the Companies Act by Act 35 of 1985 and it had overriding effect. But it noticed that by virtue of Section 19(19) of the Recovery of Debts Act, the priorities among various creditors

had to be decided by the Recovery Tribunal only in terms of Section 529-A of the Companies Act and Section 19(19) did not give priority to all secured creditors. Hence, it was necessary to identify the limited class of secured creditors who have priority over all others in accordance with Section 529-A of the Companies Act. The Court also held that the occasion for a claim by a secured creditor against the realisation by other creditors of the debtor under Section 529-A read with proviso (c) to Section 529(1) of the Companies Act could arise before the Debts Recovery Tribunal only if the creditor concerned had stood outside the winding up and realised amounts and if it is shown that out of the amounts privately realised by it, some portion had been rateably taken away by the Liquidator under clauses (a) and (b) of the proviso to Section 529(1). The Court has not held that Section 529-A of the Companies Act will have no application in a case where a proceeding under the Recovery of Debts Act has been set in motion by a financial institution. The Court there was essentially dealing with the jurisdiction of the Debts Recovery Tribunal in the face of Sections 442, 537 and 466 of the Companies Act."

Allahabad Bank (supra), therefore, is not an authority for the proposition that in terms of Section 529-A of the Companies Act the distinction between two classes of secured creditors does no longer survive. The High Court, thus, in our considered opinion, was not correct in that behalf.

In fact in Allahabad Bank (supra), it was categorically held that the Adjudication Officer would have such powers to distribute the sale proceeds to the banks and financial institutions, being secured creditors, in accordance with inter se agreement/ arrangement between them and to the other persons entitled thereto in accordance with the priority in law.

Section 529-A of the Companies Act no doubt contains a non-obstante clause but in construing the provisions thereof, it is necessary to determine the purport and object for which the same was enacted.

In terms of Section 529 of the Companies Act, as it stood prior to its amendment, the dues of the workmen were not treated pari passu with the secured creditors as a result whereof innumerable instances came to the notice of the court that the workers may not get anything after discharging the debts of the secured creditors. It is only with a view to bring the workman’s dues pari passu with the secured creditors, Section 529-A was enacted.

The non-obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. Only because the dues of the workmen and the debt due to the secured creditors are treated pari passu with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by.

A non-obstante clause must be given effect to, to the extent the Parliament intended and not beyond the same.

Section 529-A of the Companies Act does not ex facie contain a provision (on the aspect of priority) amongst the secured creditors and, hence, it would not be proper to read thereinto things, which the Parliament did not comprehend. The subject of mortgage, apart from having been dealt

with under the common law, is governed by the provisions of the Transfer of Property Act. It is also governed by the terms of the contract.

The Punjab National Bank granted loan to the 1st Respondent herein knowing fully well that, over the assets of the mortgagor, the Appellant held the first charge. It in no uncertain terms stated that the charges created by reason of the loan agreement entered into by and between itself and the 1st Respondent was subservient to the charges of the appellant as also the Respondent Nos. 3 and 4. The admission of the PNB in this behalf is absolutely clear and explicit. Even in the suit filed by it for recovery of the mortgage money as against the 1st Respondent, it not only in no uncertain terms stated that the Appellant and Respondent Nos. 3 and 4 herein were the first charge holders in respect of movable and immovable properties of the 1st Respondent, but its prayers in regard thereto were also limited, as would appear from prayer (f) made in the suit.

While enacting a statute, the Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of Section 48 of the Transfer of Property Act claim of the first charge holder shall prevail over the claim of the second charge holder and in a given case where the debts due to both, the first charge holder and the second charge holder, are to be realized from the property belonging to the mortgagor, the first charge holder will have to be repaid first. There is no dispute as regards the said legal position.

Such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, must be deemed to have been known to the Parliament. Thus, while enacting the Companies Act, the Parliament cannot be held to have intended to deprive the first charge holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [See Workmen of M/s Firestone Tyre and Rubber Co. of India (P.) Ltd. vs. Management & Ors. (1973) 1 SCC 813]

If the Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge holder, we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed in construing the statute. It is in fact the other way round and thus, a contrary presumption shall have to be raised.

Section 529(1)(c) of the Companies Act speaks about the respective rights of the secured creditors which would mean the respective rights of secured creditors vis-‘-vis unsecured creditors. It does not envisage respective rights amongst the secured creditors. Merely because Section 529 does not specifically provide for the rights of priorities over the mortgaged assets, that, in our opinion, would not mean that the provisions of Section 48 of the Transfer of Property Act in relation to a company, which has undergone liquidation, shall stand obliterated.

If we were to accept that inter se priority of secured creditors gets obliterated by merely responding to a public notice wherein it is specifically stated that on his failure to do so, he will be excluded from the benefits of the Dividends that may be distributed by the Official Liquidator, the same would lead to deprivation of the secured creditor of his right over the security and would bring him at par with an unsecured creditor. The logical sequitor of such an inference would be that even unsecured creditors would be placed at par with the secured creditors. This could not have been the intendment of the legislation.

The provisions of the Companies Act may be a special statute but if the special statute does not contain any specific provision dealing with the

contractual and other statutory rights between different kinds of the secured creditors, the specific provisions contained in the general statute shall prevail.

In Maru Ram vs. Union of India and Others [(1981) 1 SCC 107], this Court distinguished between a specific provision and a special law holding that a specific provision dealing with a particular situation would override even a special law, which is inconsistent therewith.

Section 9 of the Companies Act only states that provisions thereof would override the Memorandum or Articles of Association of the company or any other agreement executed or resolution passed by the company. There does not exist any provision in the Companies Act which provides that the provisions of Section 48 of the Transfer of Property Act would not be applicable in relation to the affairs of a company. Unless, expressly or by necessary implication, such a provision contrary to or inconsistent therewith carrying a different intent can be found in the Companies Act, Section 48 of the Transfer of Property Act, cannot be held to be inapplicable.

Section 48 of the Transfer of Property Act reads as under:

"48. Priority of rights created by transfer \026 Where person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

The said provision, as noticed hereinbefore, deals with a specific situation. The exceptions to the provisions of Section 48 are as under:

(i) where parties execute a Registered Deed at any point in time which is subsequent to a prior but an unregistered deed. This is also subject to the doctrine of notice, i.e., that parties to the Registered Deed executed after the Unregistered Deed did not have notice of the same;

(ii) where there are exceptions carved out by a statute \026 for example, Section 98 of the Bengal Tenancy Act.

(iii) a mortgage executed on the directions of the Court to preserve a property;

(iv) where a 'salvage lien' is created, i.e., where lien is created for moneys advanced for the purposes of saving the property from destruction or forfeiture. The salvage lien is confined in English Law to maritime lien.

In Mulla's Transfer of Property Act, 9th edition, page 346-347, it is stated:

"Again, when a court for the purpose of preserving the property in suit, directs the receiver to execute a mortgage, it has jurisdiction to order that the mortgage shall take precedence over prior charges. This is an application of the equity which gives salvage liens, ie liens for money advanced for the purpose of saving the property from destruction of forfeiture, priority over all their encumbrances. With regard to such liens the general rule is reversed and they are entitled to priority in inverse order to their dates. Salvage liens are confined in English law to maritime liens. A salvage lien was claimed in an old Calcutta case in respect of an advance made for the purpose of carrying on an indigo factory,

and again in another case in respect of an advance made to enable the mortgagor to pay the rent of the premises mortgaged, but in both cases the claim was repelled.

The lien of a co-sharer for owelty money on partition is entitled to precedence over prior mortgages of property allotted to the co-sharer who is liable to pay owelty."

Section 47 of the Provincial Insolvency Act is attracted by virtue of Section 529(1) of the Companies Act. Sub-section (2) of Section 47 would become applicable where a secured creditor voluntarily relinquishes his security for the general benefit of the creditors.

The expression "relinquish" has a different connotation. In P. Ramanatha Aiyar's Advanced Law Lexicon at page 4047, it is stated:

"Relinquish: To give over possession or control of; to leave off."

It envisages a conscious act, i.e., an act where a person was aware of his right and then relinquishes the same. The same must be for the general benefit of the creditors. His action must lead to a conclusion that he, for one reason or the other, intended to stand in the queue for receiving money owed to him. It, however, does not stand obliterated only by the filing of an affidavit or proof of claim with the official liquidator. Such a claim had been filed pursuant to a notice issued by the official liquidator. If the creditor does not respond to the said notice, he would not be in a position to bring to the notice of the official liquidator, the existence of his right.

Sub-section (3) of Section 47 clearly envisages the position where he does not either realise or relinquish his security. He, in such a situation, may state in his Affidavit of Proof, the particulars of the security and value at which he assesses the same. The consequences therefor would ensue. If the Official Receiver proceeds to sell the security, the Court first has to pay the amount at which the security was valued to the secured creditor out of the sale proceeds.

In Mahindra and Mahindra Ltd. v. Union of India & Anr. [(1979) 2 SCC 529], it was stated:

"\005That has to be determined on an interpretation of Section 13(2) in the light of the context or setting in which it occurs and having regard to the object and purpose of its enactment. Now, one thing is clear that the power conferred under Section 13(2) is a corrective or rectificatory power and it is conferred in terms of widest amplitude. \005It is left to the discretion of the Commission whether the power should be exercised in a given case and if so, to what extent. But it must be remembered that this discretion being a judicial or in any event a quasi judicial discretion, cannot be "arbitrary, vague or fanciful" : it must be guided by relevant considerations. It is not possible to enumerate exhaustively the various relevant considerations which may legitimately weigh with the Commission in exercising its discretion, nor would it be prudent or wise to do so, since the teeming multiplicity of circumstances and situations which may arise from time to time in this kaleidoscopic world cannot be cast in any definite or rigid mould or be imprisoned in any strait-jacket formula\005"

The question came up for consideration before a learned Single Judge of Karnataka High Court in State Bank of Mysore v. Official Liquidator & Ors. [1985 (58) Company Cases 609], wherein the law was stated in the following terms:

"It will be thus plain that what section 47 provides is only for the benefit of the mortgagee and not to his detriment. He can follow any one of the three procedures suggested in the section. In this case, I do not think it can be validly argued that the mortgagee has relinquished his security. Exhibit B-1 makes it clear that he had no objection if the property is sold free of mortgage but a lien is kept in so far as the value he had assessed is concerned and is preferentially paid out of the sale proceeds. There are no words in Exhibit B-1 which warrant any conclusion that the mortgagee had relinquished his security\005

In fact, sub-section (3) of section 47 lends support to this method of payment to the mortgagee. If the official receiver proceeds to sell the security, the court first has to pay the amount at which the security was valued to the secured creditor out of the sale proceeds. Whatever may be the position in regard to the balance, in so far as the value of his assessment is concerned, he can be preferentially paid out of the sale proceeds.

If the sale was valid, I fail to see how the mortgagee could be deprived of his security, particularly when he had not relinquished. The property was sold with a clear understanding that the mortgagee will be paid firm from the sale proceeds. This mode of realization of security is not, in my view, derogatory either to section 47 or to section 59 of the Act."

It was further held:

"\005Sub-s. (3) of s. 47 of the Act does not come in the way of the official liquidator entertaining the application of the bank for payment of secured loans in accordance with the hypothecation agreement and the mortgage by deposit of title deeds, as proved by the bank. In the result, the bank is entitled to realize that amount on a preferential basis as a secured creditor notwithstanding the fact that it filed the affidavit indicating that it stands within liquidation but subject to the reservation of its security being continued."

A Division bench of the Gujarat High Court in Gujarat Steel Tube Employees Union & Anr. v. O.L. of Gujarat Steel Tubes Ltd. & Ors. [disposed of on 9.1.2006], held:

"\005 The Court is also of the view that simply because the secured creditors participate in the sale proceedings undertaken by the Court and they also became the members of the Sale Committee constituted pursuant to the directions issued by the Court does not mean that they have exercised their option of remaining outside the winding up and they have relinquished their security. As a matter of fact, relinquishment of security by the secured creditors require a positive action on the part of the secured creditors. They have never stated in any of the proceedings that they are relinquishing their securities.

On the contrary, they have made it clear that they remain outside the winding up and they participate in the sale proceeds only with a view to facilitate the sale proceeds so as to get the auction proceedings completed as expeditiously as possible. There is also substance in the say of the secured creditors that as soon as the assets of the companies are sold and realization is taken place, their securities are converted from the specified assets into cash and they have equal right in cash which is realized on sale of the assets of the Company in liquidation\005"

We agree with the said view.

For the aforesaid reasons, we are of the view that the High Court has overlooked salient aspects of the provisions of the relevant Acts including that of the Provincial Insolvency Act. Hence, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. The 1st Respondent shall bear the costs of the Appellant throughout.