(2019) 1 SCR 682 : (2019) 3 SCC 620 : (2019) 2 Scale 171 : (2019) 1 ACC 651 : (2019) 2 Curcc 36 : (2019) 3 GLR 1844 : (2019) 2 SLT 279 : (2019) 2 BC 47 : (2019) 2 BCR 873 : (2019) 3 CTC 782 : (2019) 2 RCR(Civil) 66 : (2019) 135 ALR 730

Supreme Court Of India

Case No: Civil Appeal No. 1291, 1292, 1293, 1294 Of 2019

Swaraj Infrastructure Pvt. Ltd	APPELLANT
Vs	
Kotak Mahindra Bank Ltd	RESPONDENT

Date of Decision: Jan. 29, 2019

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 17, 18, 19(19), 25, 34
- Companies Act, 1956 - Section 433, 433(e), 434, 434(1), 434(1)(a), 434(1)(b), 439, 439(2), 441, 441(1), 441(2), 442, 446, 528, 529, 529A, 529(1), 529(1)(c), 537
- Provincial Insolvency Act, 1920 - Section 9(2), 47
- State Financial Corporation Act, 1951 - Section 29, 31

Citation: (2019) 1 SCR 682 : (2019) 3 SCC 620 : (2019) 2 Scale 171 : (2019) 1 ACC 651 : (2019) 2 Curcc 36 : (2019) 3 GLR 1844 : (2019) 2 SLT 279 : (2019) 2 BC 47 : (2019) 2 BCR 873 : (2019) 3 CTC 782 : (2019) 2 RCR(Civil) 66 : (2019) 135 ALR 730

Hon'ble Judges: R.F. Nariman, J; Navin Sinha, J

Bench: Division Bench

Advocate: K. Parameshwar, M.V. Mukunda, Udit Gupta, Shyam Divan, Sonia Dube, S. Chakraborty, Kanchan Yadav, Anurag Singh, Surbhi Anand, Harshita Verma

Final Decision: Dismissed

Judgement

R.F. Nariman, J

1. Leave granted.

2. The present case involves the right of a secured creditor to file a winding up petition after such secured creditor has obtained a decree from the

Debts Recovery Tribunal [Ã¢â‚¬Å“DRTÃ¢â‚¬â€] and a recovery certificate based thereon.

3. Several appeals were taken up together for hearing by the Division Bench of the Bombay High Court. The brief facts necessary to decide the

present appeals are as follows:

The respondent, Kotak Mahindra Bank Limited, advanced various loans to the companies in question. The outstanding amount against these

companies as on date, together with interest, is stated to be in the region of INR 48 crores. The respondent approached the Debts Recovery Tribunal,

Mumbai by filing three separate original applications to recover the debt owed to them. The Debts Recovery Tribunal delivered three separate

judgments on 16.01.2015 allowing the applications filed by the respondent bank. Apparently, the said orders are final as no appeals have been

preferred to the Debts Recovery Appellate Tribunal [Ã¢â‚¬Å“DRATÃ¢â‚¬], Mumbai. Recovery certificates dated 12.08.2015 for the said amounts were then

issued by the Recovery Officer under Section 19(19) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [Ã¢â‚¬Å“Recovery of

Debts ActÃ¢â‚¬]. We have been informed that various attempts were made to auction the properties that were security for the loans granted, but each of

these attempts has yielded no results.

In the meanwhile, the respondent issued statutory notices dated 15.04.2015 under Sections 433 and 434 of the Companies Act, 1956. As no payments

were forthcoming, a company petition was filed before the Bombay High Court on 03.07.2015. By an order dated 26.07.2017, the said petition was

admitted as the companies in question were said to be commercially insolvent. In the appeals that were filed to the Division Bench of the Bombay

High Court, the main point argued was that once a secured creditor has obtained an order from the DRT, and a recovery certificate has been issued

thereupon, such secured creditor cannot file a winding up petition as the Recovery of Debts Act is a special Act which vests exclusive jurisdiction in

the DRT. Also, a secured creditor can file a winding up petition only on giving up its security, which has not been done in the present case. These

contentions did not find favour with the Division Bench who then dismissed the appeals in question.

4. Shri K. Parameshwar, learned advocate, appearing on behalf of the appellants, has urged a number of points before us. He first argued that this

Court has held that the Recovery of Debts Act is a special statute qua the general statute of the Companies Act, 1956, and that this Court has further

held that exclusive jurisdiction is vested in the DRT under the Recovery of Debts Act to the exclusion of the Company Court. As this is so, once the

DRT has been approached, the necessary corollary is that a winding up petition to realize the same debt would be expressly barred on a conjoint

reading of Sections 17 and 18 of the Recovery of Debts Act. He further argued that in any case, the secured creditor is put to an election where it

must either relinquish its security and stand in line in the winding up proceeding or realize its security outside the winding up proceeding. On the facts

of the present case, it has filed a successful action to realize its security outside the winding up proceeding, as a result of which, the winding up

proceeding filed by it, without giving up the mortgaged security, would not be maintainable. It was further argued that, in any event, Section 434(1)(b)

of the Companies Act, 1956 would be attracted, and not Section 434(1)(a), and that since the security has not yet been realized, the winding up petition

dressed up under Section 434(1)(a), but really under Section 434(1)(b), would not be maintainable. Also, reliance on certain High Court judgments by

the impugned judgment is completely misplaced for the reason that the provisions of the Companies Act, 1956 would show that the secured creditor

has to relinquish its security when it files a winding up petition, and not thereafter, as has been held in these judgments.

5. In answer to these contentions, Shri Shyam Divan, learned Senior Advocate appearing on behalf of the respondent, has argued, relying upon Section

439 of the Companies Act, 1956 in particular, that a secured creditor can maintain a winding up petition in the fact situation as obtains in the present

case. According to him, the judgment relied upon by the appellant, namely, Allahabad Bank v. Canara Bank, (2000) 4 SCC 406, is distinguishable in

that the context of that judgment was whether leave had to be obtained from the Company Court when a winding up proceeding is either pending, or a

winding up order is made, in order to pursue a debt recovery proceeding under the Recovery of Debts Act. He also argued before us that the election

that is to take place with the secured creditor giving up its security is at the stage of proof of claims, which is only after a winding up order has been

passed, and which stage has not yet arrived on the facts of the present case. Also, according to him, the petition has been filed only on the ground of

inability to pay debts, and once the statutory presumption is raised under Section 434(1)(a) of the Companies Act, 1956, it is clear that winding up must

follow in the absence of payment of outstanding amounts of debts owed. According to the learned Senior Advocate, his client has gone from pillar to

post in an attempt to recover the loans made to the appellants and has not yet succeeded in any endeavour to do so. Also, nothing has been repaid so

far and the debt owed by these companies, which is mounting, amounts to a staggering figure of INR 48 crores. According to the learned counsel,

therefore, the High Court was right in dismissing the appeal filed by the appellants.

6. After hearing learned counsel for both sides, it is important to first set out the relevant provisions of the Companies Act, 1956 and the Recovery of

Debts Act, 1993.

Section 434(1) of the Companies Act, 1956 reads as follows:

Ã¢â‚¬Å“434. Company when deemed unable to pay its debts.Ã¢â‚¬"(1) A company shall be deemed to be unable to pay its debtsÃ¢â‚¬

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the

company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay

the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable

satisfaction of the creditor;

(b) if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor of the company is returned unsatisfied in

whole or in part; or

(c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay

its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

xxx xxx xxxÃ¢â‚¬â€‹

Section 439(1)(b) and Section 439(2) of the Companies Act, 1956 read as follows:

Ã¢â‚¬Å“439. Provisions as to applications for winding up.Ã¢â‚¬

(1) An application to the Tribunal for the winding up of a company shall be by petition presented, subject to the provisions of this sectionÃ¢â‚¬

xxx xxx xxx

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or

xxx xxx xxx

(2) A secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have been appointed in respect

of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (b) of

sub-section (1).

xxx xxx xxxÃ¢â‚¬â€‹

Section 441, which deals with commencement of winding up, reads as follows:

Ã¢â‚¬Å“441. Commencement of winding up by Tribunal.Ã¢â‚¬"(1) Where, before the presentation of a petition for the winding up of a company by the

Tribunal, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced

at the time of the passing of the resolution, and unless the Tribunal, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in

the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the

winding up.Ã¢â‚¬â€‹

Section 529(1) of the Companies Act reads as follows:

Ã¢â‚¬Å“529. Application of insolvency rules in winding up of insolvent companies.Ã¢â‚¬"(1) In the winding up of an insolvent company, the same rules shall

prevail and be observed with regard toÃ¢â‚¬¬

(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:

xxx xxx xxxÃ¢â‚¬â€‹

The reference made in Section 529 of the Companies Act, 1956 is to Section 47 of the Provincial Insolvency Act, 1920 which reads as follows:

Ã¢â‚¬Å“47. Secured creditors.Ã¢â‚¬"(1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net

amount realised.

(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) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any

valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.Ã¢â‚¬‹

7. The relevant provisions of the Recovery of Debts Act, 1993, read as follows:

Ã¢â‚¬Å“17. Jurisdiction, powers and authority of Tribunals. Ã¢â‚¬"(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and

authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(1-A) Without prejudice to sub-section (1),Ã¢â‚¬

(a) the Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain and

decide applications under Part III of Insolvency and Bankruptcy Code, 2016;

(b) the Tribunal shall have circuit sittings in all district headquarters.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order

made, or deemed to have been made, by a Tribunal under this Act.

(2-A) Without prejudice to sub-section (2), the Appellate Tribunal shall exercise, on and from the date to be appointed by the Central Government, the

jurisdiction, powers and authority to entertain appeals against the order made by the Adjudicating Authority under Part III of the Insolvency and

Bankruptcy Code, 2016.Ã¢â‚¬‹

Ã¢â‚¬Å“18. Bar of jurisdiction.Ã¢â‚¬"On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers

or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the

matters specified in Section 17:

Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement

of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act,

2002 ((39 of 2002) shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings.Ã¢â‚¬â€‹

Ã¢â‚¬Å“19. Application to the Tribunal.Ã¢â‚¬

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(19) Where a certificate of recovery is issued against a company as defined under the Companies Act, 2013 (18 of 2013) and such company is under

liquidation, the Tribunal may by an order direct that the sale proceeds of secured assets of such company be distributed in the same manner as

provided in Section 326 of the Companies Act, 2013 or under any other law for the time being in force.

xxx xxx xxxÃ¢â‚¬â€‹

Ã¢â‚¬Å“34. Act to have overriding effect.Ã¢â‚¬"(1) Save as provided under sub-section (2), the provisions of this Act shall have effect notwithstanding

anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than

this Act.

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8. In Allahabad Bank v. Canara Bank (supra), this Court dealt with whether the secured creditor, namely, Allahabad Bank in that case, was obliged to

seek the leave of the Company Court under the Companies Act, 1956, and whether the Company Court can stay recovery proceedings which had

been initiated under the Recovery of Debts Act in the event of a winding up order being passed under the Companies Act, 1956. In this context, this

Court held, adverting to Sections 17 and 18 of the Recovery of Debts Act, that the jurisdiction of the Tribunal in regard to adjudication of applications

for recovery of debts under Section 17 is exclusive. No dual jurisdiction is contemplated, particularly having regard to Section 34 of the said Act,

which has overriding effect over other statutes including the Companies Act, 1956 Ã¢â‚¬" see paragraphs 21 to 23. The said judgment further goes on to

state:

Ã¢â‚¬Å“23. Ã¢â‚¬Â¦Ã¢â‚¬Â¦ The provisions of Section 34(1) clearly state that the RDB Act overrides other laws to the extent of Ã¢â‚¬Å“inconsistencyÃ¢â‚¬â€‹. In our opinion,

the prescription of an exclusive Tribunal both for adjudication and execution is a procedure clearly inconsistent with realisation of these debts in any

other manner.Ã¢â‚¬â€‹

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Ã¢â‚¬Å“25. Thus, the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive

jurisdiction of the Tribunal and the Recovery Officer and no other court or authority much less the civil court or the Company Court can go into the

said questions relating to the liability and the recovery except as provided in the Act. Point 1 is decided accordingly.Ã¢â‚¬â€‹

(emphasis in original)

9. In answering whether the Recovery of Debts Act overrides the provisions of Sections 442 and 537 and 446 of the Companies Act, 1956, this Court

held that the Recovery of Debts Act is a special statute which would necessarily override the aforesaid provisions of the more general statute, namely,

the Companies Act, 1956. Even otherwise, if both are treated as special laws, since the Recovery of Debts Act is later in point of time, together with

a non-obstante clause contained in Section 34, the said Act will prevail to the extent set out in the Recovery of Debts Act. This Court then concluded:

Ã¢â‚¬Å“50. For the aforesaid reasons, we hold that at the stage of adjudication under Section 17 and execution of the certificate under Section 25 etc. the

provisions of the RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to banks and

financial institutions and there can be no interference by the Company Court under Section 442 read with Section 537 or under Section 446 of the

Companies Act, 1956. In respect of the monies realised under the RDB Act, the question of priorities among the banks and financial institutions and

other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529-A of the

Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above extent inconsistent with the provisions of the

Companies Act, 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding-up

petition against the debtor Company and also after a winding-up order is passed. No leave of the Company Court is necessary for initiating or

continuing the proceedings under the RDB Act, 1993. Points 2 and 3 are decided accordingly in favour of the appellant and against the respondents.Ã¢â‚¬â€‹

10. It is important to note that the aforesaid statement of the law was made in the context of non-requirement of leave of the Company Court to

initiate, continue with, and execute orders passed under the Recovery of Debts Act. What is important to note is that the Companies Act, 1956 is

overridden to the extent of the inconsistency between the Companies Act, 1956 and the Recovery of Debts Act only qua recovery of debts due to

banks and financial institutions.

11. It is settled law that a winding up proceeding initiated under Section 433(e) and 434 of the Companies Act, 1956 is not a means of seeking to

enforce payment of a debt. This Court, in Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami and Ors., (1965) 35 Comp Cas 456

(SC) [Ã¢â‚¬Å“Amalgamated Commercial TradersÃ¢â‚¬â€‹], has held:

Ã¢â‚¬Å“13. It is well-settled that Ã¢â‚¬Å“a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed

by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may

be stigmatized as a scandalous abuse of the process of the court.Ã¢â‚¬â€‹

This statement of the law has subsequently been followed in several judgments, one of which is M/s IBA Health (India) Pvt. Ltd. v. M/s Info-Drive

Systems Sdn. Bhd., (2010) 10 SCC 553 (at paragraph 21).

12. However, it was pointed out that a subsequent judgment of this Court, of the selfsame strength of three learned Judges, in Harinagar Sugar Mills

Co. Ltd. v. M.W. Pradhan, (1966) 3 SCR 948 [Ã¢â‚¬Å“Harinagar Sugar MillsÃ¢â‚¬â€‹], has held as follows:

Ã¢â‚¬Å“5. Ã¢â‚¬Â¦Ã¢â‚¬Â¦ Can it be said that the petition filed by the Receiver for winding up of the Company is not a mode of realisation of the debt due to the

joint family from the Company? In Palmer's Company Precedents, Part II, 1960 Edn., at p. 25, the following passage appears:

Ã¢â‚¬Å“A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a

creditor against a company unable to pay its debts.Ã¢â‚¬â€‹

This view is supported by the decisions in Bowes v. Hope Life Insurance and Guarantee Co. [(1865) II HLC 388], Re General Company for

Promotion of Land Credit [(1870) LR 5 Ch D 380] and Re National Permanent Building Society [(1869) LR 5 Ch D 309]. It is true that Ã¢â‚¬Å“a winding

up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to itÃ¢â‚¬; but nonetheless it is

a form of equitable executionÃ¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬â€‹

13. It is true that this Court has stated that a winding up petition is a form of equitable execution of a debt, but this is qualified by stating that a winding

up order is not a normal alternative to the ordinary procedure for realization of debts due to a creditor. We are of the view that both the judgments

contained in Amalgamated Commercial Traders (supra) as well as in Harinagar Sugar Mills (supra), recognize the fact that a winding up proceeding is

not a proceeding that can be referred to as a proceeding for realization of debts and would, therefore, not be covered by the language of Section 17

read with Section 18 of the Recovery of Debts Act. When it comes to a winding up proceeding under the Companies Act, 1956, since such a

proceeding is not Ã¢â‚¬Å“for recovery of debtsÃ¢â‚¬ due to banks, the bar contained in Section 18 read with Section 34 of the Recovery of Debts Act would

not apply to winding up proceedings under the Companies Act, 1956.

14. In point of fact, a Division Bench of the Bombay High Court in Viral Filaments Ltd. v. Indusind Bank Ltd., (2001) 3 Mah LJ 552 reached this very

conclusion after closely examining the judgment in Allahabad Bank v. Canara Bank (supra) of this Court. We approve of the reasoning contained in

the aforesaid Bombay High Court judgment.

15. However, Shri K. Parameshwar, appearing on behalf of the appellants, also relied upon Rajasthan State Financial Corporation v. Official

Liquidator, (2005) 8 SCC 190, and paragraph 18 of the aforesaid judgment, in particular. Paragraph 18 reads as follows:

Ã¢â‚¬Å“18. In the light of the discussion as above, we think it proper to sum up the legal position thus:

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the

sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official

Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower

company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation,

the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions

issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the

sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in

motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with

the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation.Ã¢â‚¬‹

As a matter of fact, sub-paragraphs (i) and (iv) of paragraph 18 would show that proceedings before the DRT, and winding up proceedings under the

Companies Act, 1956, can carry on in parallel streams. That is why paragraph 18(i) states that a Debts Recovery Tribunal, acting under the Recovery

of Debts Act, would be entitled to order sale, and sell the properties of the debtor, even of a company in liquidation, but only after giving notice to the

Official Liquidator, or to the Liquidator appointed by the Company Court, and after hearing him.

16. To similar effect is the judgment of this Court in Official Liquidator v. Allahabad Bank, (2013) 4 SCC 381, where this Court held as follows:

Ã¢â‚¬Å“24. From the aforesaid authorities, it clearly emerges that the sale has to be conducted by DRT with the association of the Official Liquidator. We

may hasten to clarify that as the present controversy only relates to the sale, we are not going to say anything with regard to the distribution.

However, it is noticeable that under Section 19(19) of the RDB Act, the legislature has clearly stated that distribution has to be done in accordance

with Section 529- A of the 1956 Act. The purpose of stating so is that it is a complete code in itself and the Tribunal has the exclusive jurisdiction for

the purpose of sale of the properties for realisation of the dues of the banks and financial institutions.Ã¢â‚¬â€‹

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Ã¢â‚¬Å“31. The aforesaid analysis makes it luculent that DRT has exclusive jurisdiction to sell the properties in a proceeding instituted by the banks or

financial institutions, but at the time of auction and sale, it is required to associate the Official Liquidator. The said principle has also been reiterated in

Pravin Gada v. Central Bank of India [(2013) 2 SCC 101 : (2013) 1 SCC (Civ) 988].

32. Once the Official Liquidator is associated, needless to say, he has a role to see that there is no irregularity in conducting the auction and

appropriate price is obtained by holding an auction in a fair, transparent and non-arbitrary manner in consonance with the Rules framed under the

RDB Act.Ã¢â‚¬â€‹

17. The second important point raised by learned counsel for the appellant is that a conjoint reading of the Companies Act, 1956 and the Provincial

Insolvency Act, 1920, would make it clear that the secured creditor must, at the time of filing the petition for winding up, state that it has given up his

security, or else, such winding up petition would not be maintainable. In Hegde & Golay Limited v. State Bank of India, ILR 1987 KAR 2673, a

learned single Judge of the Karnataka High Court, Venkatachaliah, J. (as he then was), dealt with this point as follows:

Ã¢â‚¬Å“12. Re: Point (a):

The contention is that the Bank which is a secured creditor cannot maintain a winding-up petition without making an election either to give-up the

security or value it as required by Section 9(2) of the Provincial Insolvency Act, 1920. It is urged that by Section 529(1) of the Act, the Rules of

Insolvency in Section 9(2) are attracted.

Section 9(2) of the Provincial Insolvency Act reads:

Ã¢â‚¬Å“If the petitioning creditor, is a secured creditor, he shall in his Petition either state that he is willing to relinquish his security for the benefit of the

creditors in the event of the debtor being adjudged insolvent or given an estimate of the value of the security . In the latter case, he may be admitted

as a petitioning-creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an

unsecured creditorÃ¢â‚¬â€‹.

(emphasis in original)

13. The contention is that a secured-creditor may stand outside insolvency; but if he brings-up a creditorÃ¢â‚¬â„¢s winding-up petition he must, in his

petition, state that he is either willing to relinquish the security for the benefit of the body of creditors or give an estimate of the value of the security.

Learned Company-Judge has taken the view, if we may say so with respect, quite rightly, that this rule of Insolvency Law is not attracted to the

presentation of a winding-up petition.

14. Sri Shetty says that both in bankruptcy and winding-up the law is the same and the petitioning-creditor, if he is a secured creditor, must conform to

the rule in Section 9(2). He relied upon M.K. Ranganathan v. Government of Madras [AIR 1955 SC 604]and Hansraj v. Official Liquidators,

Dehradun Mussorie Electric Trading Company Limited [AIR 1929 Allahabad 353]. The observation in RanganathanÃ¢â‚¬â„¢s case [AIR 1955 SC 604]

relied upon is this:

Ã¢â‚¬Å“Section 229 recognises the position of the secured creditor generally as outside the winding up but enables him in the event of his desiring to take

the benefit of the winding up proceedings to prove his debt, to value the same and share in the distribution pro rata of the assets of the company just in

the same way as he would be able to do in the case of insolvency under the Presidency Towns Insolvency Act or the Provincial Insolvency ActÃ¢â‚¬â€‹.

In HansrajÃ¢â‚¬â„¢s case [AIR 1929 Allahabad 353] it was observed:

Ã¢â‚¬Å“Ã¢â‚¬Â¦Ã¢â‚¬Â¦.. I am, therefore, of opinion that the rules contained in any Section of the Provincial Insolvency Act, the rules, if any, made under the Act

and any appropriate established rules of practice in insolvency proceedings are imported into the Companies Act, unless there is something in the

Companies Act itself already providing for the matter in question, or in conflict with the rule which it is proposed to importÃ¢â‚¬â€¹.

These observations, in our opinion, do not advance the contention of Sri Shetty any further. Section 529(1) of the Ã¢â‚¬ËœActÃ¢â‚¬â„¢ attracts the rules of

insolvency to winding-up in relation to Ã¢â‚¬Å“the respective rights of secured and unsecured creditorsÃ¢â‚¬ and confines these Rules so attracted to matters

that arise between these two classes of creditors. Sections 528 and 529 of the Ã¢â‚¬ËœActÃ¢â‚¬â„¢ are in the chapter Ã¢â‚¬Å“Proof and Ranking of ClaimsÃ¢â‚¬ and

deal with the question of proof of debts and the rights of secured and unsecured creditors. Section 529(2) itself, in so far it expressly envisages, and

provides for, the contingency that if a secured-creditor proceeds to realise his security he should pay the expenses incurred by the Liquidator, by

implication, rules out the construction contended for by Sri Shetty. The words Ã¢â‚¬Å“in winding-up of insolvent companyÃ¢â‚¬ in Section 529(1) of the

Ã¢â‚¬ËœActÃ¢â‚¬â„¢ has obvious reference to a post winding-up stage.

The point to note is that this rule of insolvency is attracted to winding-up in the matter of proof of debts. That is after the stage of the winding-up

order. A secured creditor is, under Section 439(2) of the Ã¢â‚¬ËœActÃ¢â‚¬â„¢ as much a creditor entitled to present a winding up petition as any other. The law

in regard to the right of a Secured Creditor to present a petition for adjudication under the Insolvency law is different from the right of a secured

creditor to present a winding-up petitionÃ¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬â€¹

Shri Parameshwar took exception to this statement of the law, and referred to Section 441 of the Companies Act, 1956, in particular, sub- section (2)

thereof, to state that this judgment has missed the fact that the winding up of a company shall be deemed to commence at the time of presentation of

the petition for winding up, and that, if this is so, the stage at which a secured creditor has to give up his security is at the stage of the filing of the

winding up petition itself. We are afraid that we cannot agree. First and foremost, it is important to notice that under Section 439 of the Companies

Act, 1956, a secured creditorÃ¢â‚¬â„¢s petition for winding up is maintainable without any requirement of it having to give up or relinquish its security. This

is in contrast to Section 9(2) of the Provincial Insolvency Act, 1920, which reads as follows:

Ã¢â‚¬Å“9. Conditions on which creditor may petition.Ã¢â‚¬" xxx xxx xxx

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the

creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as

a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an

unsecured creditor.Ã¢â‚¬â€‹

What is conspicuous by its absence is a provision akin to Section 9(2) of the Provincial Insolvency Act, 1920 in Section 439 of the Companies Act,

1956. In point of fact, Section 47 of the Provincial Insolvency Act, 1920 occurs only at the stage where an adjudication order has already been passed,

which is the stage referred to by Section 529 of the Companies Act, 1956. In fact, Section 529(1)(c) of the Companies Act, 1956 specifically refers to

the right of a secured creditor under the law of insolvency Ã¢â‚¬Å“with respect to the estates of persons adjudged insolventÃ¢â‚¬. The express language of

Section 529(1)(c) of the Companies Act, 1956 makes it clear that it is Section 47 of the Provincial Insolvency Act, 1920 alone that is attracted, and not

Section 9(2), as was contended by learned counsel for the appellants before us. We may also add that reliance on Section 441(2) of the Companies

Act, 1956 is misplaced for yet another reason. Section 441(2) has to be read with Section 441(1), and so read, makes it clear that it became necessary

to enact sub-section (2), because a petition for voluntary winding up of a company presented before the Tribunal would be said to commence at an

anterior point of time, namely, at the time of the passing of the resolution whereby the company resolves to voluntarily wind itself up. In contrast,

therefore, Section 441(2) says Ã¢â‚¬Å“in any other caseÃ¢â‚¬, i.e., in cases other than those falling under sub-section (1) of Section 441 of the Companies

Act, 1956, the winding up of a company by the Tribunal shall be deemed to commence at the time of presentation of the petition for winding up. The

context of the provision, therefore, makes it clear that it cannot be read so as to introduce Section 9(2) of the Provincial Insolvency Act, 1920 by the

back door, as it were, when no such provision is contained in Section 439 of the Companies Act, 1956 itself. The absence, therefore, of any provision

akin to Section 9(2) of the Provincial Insolvency Act, 1920 in Section 439 of the Companies Act, 1956; the language of Section 529(1)(c) of the

Companies Act, 1956, which expressly refers only to Section 47 and not to Section 9(2) of the Provincial Insolvency Act, 1920; and the context in

which Section 441(2) of the Companies Act, 1956 appears, namely, to contrast winding up petitions that have been filed under the Act with voluntary

winding up petitions, all lead to the conclusion that there is no need to revisit the correct statement of the law by the learned single Judge of the

Karnataka High Court. Indeed, this statement of the law has been followed subsequently by a Division Bench of the Bombay High court in Asian

Power Controls Ltd. v. Bubbles Goyal, (2013) 3 Mah LJ 811 as follows:

Ã¢â‚¬Å“10. Section 529(1) of the Companies Act, 1956, provides that 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.

Under sub-section (2) of section 529, 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 the

section. Section 529-A provides an overriding preferential priority to the dues of the workmen and to the debts due to secured creditors to the extent

to which such debts rank pari passu under clause (c) of the proviso to sub-section (1) of section 529 with such dues. The rules of insolvency which

are attracted to proceedings of winding up are inter alia those pertaining to the proof of debts. This is after the stage of the winding up order. This

principle has been enunciated in a judgment of Mr. Justice M.N. Venkatachaliah (as the learned Chief Justice then was) speaking for a Division

Bench of the Karnataka High Court in Hegde and Golay Limited v. State Bank of India, ILR 1987 KAR 2673. The judgment of the Company Judge

of this Court in Canfin Homes Ltd. (supra) has also followed the principle that the scheme of the provisions relating to winding up, particularly those in

sections 528 and 529 would indicate that the stage of proving a claim of a debt arises after an order of winding up is passed. In Canffin Homes Ltd.,

this Court held as follows:Ã¢â‚¬

Ã¢â‚¬Å“15. The secured creditor who seeks to prove the whole of his debt in the course of the proceedings of winding up must before he can prove his

debt relinquish his security for the benefit of the general body of the creditors. If he surrenders his security for the benefit of the general body of

creditors, he may prove the whole of his debt. If the secured creditor has realised his security, he may prove for the balance due to him after

deducting the net amount that has been realised. The stage for relinquishing security arises when a secured creditor seeks to prove the whole of his

debt in the course of winding up. If, he elects to prove in the course of winding up the whole of the debt due and owing to him, he has to necessarily

surrender his security for the benefit of the general body creditors.Ã¢â‚¬â€‹

(emphasis in original)

Having regard to the position in law as consistently followed in the judgments of the Madras, Calcutta and Karnataka High Courts and as reiterated in

the judgment of the Company Court in Canfin Homes Ltd., it is not possible to accept the submission which was urged on behalf of the appellant. The

law does not impose an unreasonable condition of requiring a secured creditor to forsake his security before he asserts a right to urge that a company

which is unable to pay its debts should be wound up. The respondent has stated before the learned Company Judge, when the petition for winding up

came up for hearing that it was not possible for the respondent to recover her dues by the sale of the land in respect of which a security has been

created in favour of the respondent. The claim of the respondent is still to be proved in the course of the winding up proceedings. A secured creditor

who has a mortgage, charge or lien on the property of the company as security for her debt may either: (a) enforce the security and prove in the

winding up for the balance of the debt after deducting the amount realised; or (b) surrender the security to the Liquidator and prove for the whole of

the debt as an unsecured creditor; or (c) estimate the value of the property subject to her security, and prove for the balance of the debt after

deducting the estimated value; or (d) rely on the security and not prove in the winding up proceedings.

[Pennington's Company Law (Fourth edition, page 762)]. A secured creditor has the option of relinquishing his security and/or proving the entirety of

his debt in the course of winding up. If the secured creditor does so in the course of winding up proceedings, the security will enure for the benefit of

the body of creditors. On the other hand, it is open to a secured creditor to prove in the course of winding up proceedings to the extent of debt which

has not been realised outside the proceedings for winding up by either accounting for the amount that has been so realised or by estimating the value

of the property subject to security so as to enable him to prove in respect of the balance of the debt. On either view of the matter, that stage is still to

arrive.Ã¢â‚¬â€‹

18. In fact, even in Jitendra Nath Singh v. Official Liquidator, (2013) 1 SCC 462, this Court, after referring to Section 47 of the Provincial Insolvency

Act, 1920 and Section 529 of the Companies Act, 1956, held as follows:

Ã¢â‚¬Å“16.1. A secured creditor has only a charge over a particular property or asset of the company. The secured creditor has the option to either

realise his security or relinquish his security. If the secured creditor relinquishes his security, like any other unsecured creditor, he is entitled to prove

the debt due to him and receive dividends out of the assets of the company in the winding-up proceedings. If the secured creditor opts to realise his

security, he is entitled to realise his security in a proceeding other than the winding- up proceeding but has to pay to the liquidator the costs of

preservation of the security till he realises the security.Ã¢â‚¬â€‹

(emphasis supplied)

xxx xxx xxx

Ã¢â‚¬Å“17. In support of our aforesaid conclusions, we may now cite some authorities. In Allahabad Bank v. Canara Bank [(2000) 4 SCC 406], a two-

Judge Bench of this Court speaking through M. Jagannadha Rao, J. discussed these rights of the secured creditors in paras 62, 63, 64 and 65 of the

judgment as reported in SCC, which are extracted hereinbelow: (SCC pp. 435-36)

Ã¢â‚¬Å“62. Secured creditors fall under two categories. Those who desire to go before the Company Court and those who like to stand outside the

winding up.

63. The first category of secured creditors mentioned above are those who go before the Company Court for dividend by relinquishing their security in

accordance with the insolvency rules mentioned in Section 529. The insolvency rules are those contained in Sections 45 to 50 of the Provincial

Insolvency Act. Section 47(2) of that Act states that a secured creditor who wishes to come before the Official Liquidator has to prove his debt and

he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors. In that event, he will rank with the unsecured

creditors and has to take his dividend as provided in Section 529(2). Till today, Canara Bank has not made it clear whether it wants to come under this

category.

xxx xxx xxxÃ¢â‚¬â€‹

19. We now come to the argument based on Section 434(1)(b) of the Companies Act, 1956. It is obvious that Section 434(1)(b) is attracted only if

execution or other process is issued in respect of an order of a Tribunal in favour of a creditor of the company is returned unsatisfied in whole or in

part. This is only one of three instances in which a company shall be deemed to be unable to pay its debts. If the fact situation fits sub-clause (b) of

Section 434(1), then a company may be said to be deemed to be unable to pay its debts. However, this does not mean that each one of the sub-

clauses of Section 434(1) are mutually exclusive in the sense that once Section 434(1)(b) applies, Section 434(1)(a) ceases to be applicable. Also, on

the facts of this case, we may state that the company petition was filed only on 03.07.2015, pursuant to a notice under Section 433 of the Companies

Act, 1956 dated 15.04.2015. This petition was filed under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956. At the stage at

which the petition was filed, it could not possibly have been filed under Section 434(1)(b) of the Companies Act, 1956, as execution or other process in

the form of a recovery certificate had not been issued by the Recovery Officer till 12.08.2015, i.e., till after the company petition was filed. For this

reason also, it is clear that this contention of the learned counsel appearing for the appellant must be rejected.

20. We may only end by saying that cases like the present one have to be decided by balancing the interest of creditors to whom money is owing, with

a debtor company which will now go in the red since a winding up petition is admitted against it. It is not open for persons like the appellant to resist a

winding up petition which is otherwise maintainable without there being any bona fide defence to the same. We may also hasten to add that the

respondent cannot be said to be blowing hot and cold in pursuing a remedy under the Recovery of Debts Act and a winding up proceeding under the

Companies Act, 1956 simultaneously. Here, it is important to refer to the judgment of Lord Atkin in Lissenden v. C.A.V. Bosch, Ltd., [1940] 1 All

E.R. 425, at 436-437, which says:

Ã¢â‚¬Å“The doctrine of election could have no place in the present case. The applicant is not faced with alternative rights. It is the same right that he

claims, but in larger degree. In Mills v. Duckworth, [1938] 1 All E.R. 318, a plaintiff who had been awarded damages for negligence had taken the

judgment sum out of a larger sum paid into Court and had then appealed against the quantum of damages, and was met by a similar objection to his

appeal. Greer, L.J., in overruling the objection, pointedly said, at p. 321:

Ã¢â‚¬Å“He [the plaintiff] said: Ã¢â‚¬Å“I am not going to blow hot and cold. I am going to blow hotter.Ã¢â‚¬â€‹

Here the applicant is not faced with a choice between alternative rights. He has exercised an undisputed right to compensation, and claims to have a

right to more. One has not lost oneÃ¢â‚¬â„¢s right to a second helping because one has taken the first.Ã¢â‚¬â€‹

When secured creditors like the respondent are driven from pillar to post to recover what is legitimately due to them, in attempting to avail of more

than one remedy at the same time, they do not Ã¢â‚¬Å“blow hot and coldÃ¢â‚¬, but they blow hot and hotter. The appeals are accordingly dismissed with no

order as to costs.