IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 11TH DAY OF DECEMBER 2013

BEFORE:

THE HON'BLE MR. JUSTICE ANAND BYRAREDDY

COMPANY APPLICATION No.2214 OF 2013
IN
COMPANY PETITION No.164 OF 2013

BETWEEN:

Kingfisher Airlines Limited,
A company registered under
the Provisions of the Companies Act,
and having its registered office at
UB City, 24, Vittal Mallya Road,
Bangalore – 560 001,
Represented by its
Authorised Signatory.

…APPLICANT

(By Shri. K.G. Raghavan, Senior Advocate for M/s. Rajesh and Rajesh)

AND:

1. State Bank of India,
A banking corporation constituted
Under the State Bank of India Act,
1955 (23 of 1955),
Having its Corporate Centre
At State Bank Bhavan,
Madame Cama Road,

Nariman point,
Mumbai – 400 021,
And having its Industrial
Finance branch at
61, Residency Plaza,
Residency Road,
Bengaluru – 580 025.

2. Axis Bank Limited,
A company incorporated under
The Companies Act, 1956 and
A Banking company within the
Meaning of Section 5(c) of the
Banking regulation Act, 1949
And having its registered office
At Trishul, Third Floor,
Opposite Samartheswar Temple,
Law Garden, Ellisbridge,
Ahmedabad 380 006,
Gujarat, India.

And having its corporate office at
Axis House, C-2, Wadia International
Centre, Pandurang Budhkar Marg,
Worli, Mumbai – 400 025.

3. Bank of Baroda,
A body corporate under the
Banking Companies
(Acquisition and Transfer of
Undertaking) Act, 1970
(5 of 1970),
Having its head office at
Baroda House,
P.B.No.506, Mandavi,

Vadodara – 396 006.

Acting through its
Branch office at P.O.Box 11745,
Samata Building,
General Bhosale Marg,
Nariman Point,
Mumbai – 400 021.

4. Bank of India,
A body corporate constituted under the
Banking Companies
(Acquisition and Transfer of
Undertaking) Act, 1970
Having its Head Office at
Star House, C-5,
G Block, Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051.

And having its large Corporate Branch
At Ground Floor,
Oriental Building,
364, D.N.Road, Fort,
Mumbai – 400 001.

5. Central Bank of India,
A body corporate constituted
under the Banking Companies
(Acquisition and Transfer of
Undertaking) Act, 1980
Having its Corporate office at
Chandramukhi,
Nariman Point,
Mumbai – 560 021.

And having its Corporate Finance Branch (earlier known as Industrial Finance Branch) at Chandramukhi, Mumbai – 560 021.

6. Corporation Bank,
A body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1980 (40 of 1980) having Its Corporate office at Mangaladevi Temple Road, Pandeshwar, Mangalore – 575 001.

And having its Industrial Finance Branch, at Rallaram Memorial Building, 1st Floor, CSI Compound, Mission Road, Bengaluru – 560 027.

7. The Federal Bank Limited,
A company within the Meaning of the Companies Act, 1956 Having its registered office at Federal Towers, Aluva – 683 101, Kerala

And having its branch Office at St. Marks Road, 9, Halcyon Complex, St. Marks Road, Bangalore – 560 001.

8. IDBI Bank Limited,
A company incorporated
Under the Companies Act, 1956
And a banking company within the
Meaning of the Banking Regulation
Act, 1949 having its Head Office
At IDBI Tower, WTC Complex,
Cuffe Parade, Mumbai – 400 005,
Maharashtra, India.

And acting through its branch
Office at Corporate Banking
Group-FAMG WTC Complex
Cuffe Parade, Colaba,
Mumbai – 400 005,

9. Indian Overseas Bank,
A body corporate under the
Banking Companies
(Acquisition and Transfer of
Undertaking) Act, 1970
Having its Central office at
763, Anna Salai,
Chennai – 600 002.

And its branch office at
'Harikripa', 26-A,
S.V Road, Santacruz (W),
Mumbai – 400 054.

10. Jammu and Kashmir Bank Limited,
A banking company incorporated
Under the provisions of the
Jammu and Kashmir Companies
Act No.XI of 1977 (Samvat),

Having its registered office at
Corporate Head Quarter,
Maulana Azad Road,
Srinagar,
Kashmir – 190 001.

And its branch office at
Syed House, 124,
S.V. Savarkar Marg,
Mahim (West),
Mumbai – 400 016.

11. Punjab and Sind Bank,
A body corporate under
Banking Companies (Acquisition
And Transfer of Undertaking) Act, 1980
Having its Head Office at
21, Rajendra Place,
New Delhi – 110 008.

And having amongst others,
A branch office at
J.K. Somani Building,
British Hotel Lane,
Fort, Mumbai – 400 023.

12. Punjab National Bank,
A body corporate under the
Banking Companies
(Acquisition and Transfer of
Undertaking) Act, 1970
(5 of 1970) having its
Head Office at 7,
Bhikaji Cama Place,
New Delhi – 110 607.

Acting through its large
Corporate Branch at Centenary
Building, 28, M.G.Road,
Bengaluru – 560 001.

13. State Bank of Mysore,
A body corporate constituted
Under the State Bank of India
(Subsidiary Banks)Act, 1959,
Having its Head Office at
Kempe Gowda Road,
Bengaluru – 560 009.

And its Corporate Accounts
Branch at No.18,
Ramanashree Arcade,
M.G.Road,
Bangalore – 560 001.

14. Uco Bank,
A body corporate constituted
Under the Banking Companies
(Acquisition and Transfer of
Undertakings) Act, 1970
And having its Head Office
At 10, BTM Sarani,
Kolkata – 700 001,
West Benagal, India.

And its Branch Office at
1st Floor, 13/22,
K.G.Road,
Bengaluru – 560 009.

15. United Bank of India,

A body corporate under the
Banking companies
(Acquisition and Transfer of
Undertakings) Act, 1970
(5 of 1970) having its
Head Office at 11,
Hemanta Basu Sarani,
Kolkata – 700 001.

Acting though its branch
Office at 40, K.G.Road,
Bengaluru – 560 009.

…RESPONDENTS

(By Shri. S.Naganand, Senior Advocate for Shri.George Joseph, Advocate)

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This Company Application Petition filed under Section 151 of the Code of Civil Procedure, 1908, read with Section 443 of the Companies Act, 1956 read with Rules 6 and 9 of the Companies (Court) Rules, 1959, praying to order and direct the respondent Banks to instruct and/or cause SBICAP Trustee Company Limited not to proceed further with Miscellaneous Application No.342 of 2013 filed under Section 14 of SARFAESI Act before the Court of the Chief Metropolitan Magistrate, Esplanade, at Mumbai and order and direct that SBICAP Trustee Company Limited shall not take physical possession of Kingfisher House until further orders of this Court.

This Company Application having been heard and reserved on 06.12.2013 and coming on for Pronouncement of Orders this day, the Court delivered the following:-

O R D E R

The present application is filed by the respondent - company, contending that the petitioners, who are a consortium of banks, lead by, M/s State Bank of India are said to have filed an application under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Hereinafter referred to as the 'SARFAESI Act', for brevity) before the Court of the Chief Metropolitan Magistrate, Esplanade, Mumbai, in Mis.Application no.342/2013, contending that the petitioners who were entitled to take physical possession of the building known as "Kingfisher House", Andheri, Mumbai, under the provisions of the SARFAESI Act, apprehend resistance and were seeking the assistance of the Court.

The said property, consisting of a basement, lower ground, ground and an upper floor, with a built up area of 1586.24 Square Metres, was admittedly mortgaged by the respondent in favour of

the petitioners to secure the various credit facilities made available to the respondent.

2. The respondent has hence sought that this court direct the petitioner - banks or its representative not to take physical possession of the said property. The application being listed for "Orders" before this court on 18.11.2013, the following order was passed :

"Call on 6.12.2013 along with Co.P No.214/2012."

This application was however, not listed before the court today, though it ought to have been posted along with a batch of petitions, involving the respondent, which were on the board of the court. However, at the instance of counsel for both the parties, the same was directed to be placed before the Court and the matter was heard at length.

3. The learned Senior Advocate Shri K.G.Raghavan, appearing for the Counsel for the respondent – applicant, contends that by invoking the jurisdiction of this court, the petitioner - banks are deemed to have relinquished and surrendered all security interest held by the petitioner - banks over such assets of the respondent. Therefore, the petitioners seeking to invoke Section 14 of the SARFAESI Act, after filing the present petition, is wholly illegal and without jurisdiction.

It is also pointed out that the said proceedings would jeopardize the interest of a large number of shareholders, other creditors and employees of the respondent, apart from the respondent company itself.

It is pointed out that a large number of petitions seeking the winding-up of the respondent are pending before this court. The same are at the stage of "Admission". The same are under contest by the respondent. The earliest of the petitions is filed as on 16.4.2012. In the event that the petition is allowed, then such

winding up would be deemed to have commenced at the time of presentation of the petition and would date back to 16.4.2012 and all matters pertaining to the respondent, including the assets of the company, would in any case come within the jurisdiction of this court. It is hence contended that the petitioners seeking to take possession of the property of the respondent with undue haste, ought to be restrained.

It is also contended that the Office of the Assistant Commissioner of Service Tax had, by an Order dated 13.7.2012, attached the very same building, exercising the powers vested in him. The legal consequence of the same is apparently trivialized.

It is contended that M/s SBICAP Trustee Company Limited, said to be the Security Trustee appointed by the petitioner - banks, is said to have issued notices under Section 13(2) of the SARFAESI Act to the respondent and a guarantor, M/s UB (Holdings) Limited, apart from its Chairman. Thereafter, without affording any opportunity to the respondent or the others

and without regard to the time frame of 60 days prescribed under the SARFAESI Act, the petitioner - banks had filed an application before the Debts Recovery Tribunal, in OA 766/ 2013, under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (Hereinafter referred to as the '1993 Act', for brevity). The same was opposed by the respondent to contend that prior to filing of OA 766/2013, the petitioner - banks had invoked the provisions of the SARFAESI Act, and hence the same was not maintainable .

It is stated that SBICAP had issued a notice dated 10.8.2013 under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (Hereinafter referred to as the "Enforcement Rules', for brevity) in respect of the " Kingfisher House" building, which was duly published in a daily news paper on 10.8.2013.

It is stated that by an Order dated 14.8.2013, the Tax Recovery Officer (TDS) is said to have attached the very same "Kingfisher House".

It is thereafter, on 19.8.2013 that the petitioner - banks had filed the above company petition under Section 433(e) and (f) of the Companies Act, 1956. The petitioner - banks had also filed a writ petition before this court in its writ jurisdiction, on 29.8.2013, in WP 38870-/2013 and connected cases, seeking a direction to the Debts Recovery Tribunal (DRT) to consider certain pending applications. There was an order passed in the said writ proceedings restraining the respondent herein from alienating its assets.

While reiterating the above sequence of events, the learned Senior Advocate Shri Raghavan, would contend that the petitioners being secured creditors, would have the option of enforcing their security, while choosing to stand outside the winding up proceedings, but if once the petitioners have invited themselves before this court and have sought the winding up of

the respondent, the petitioners would be precluded from seeking to lay claim to properties of the respondent with reference to the proceedings under the SAFREASI Act, when the jurisdiction of this court would overlap and requires the protection of the assets of the respondent - company for a more beneficial winding up, in the interest of the several participants, should the eventuality arise.

Reliance is placed on several authorities in support of the application.

4. On the other hand, the learned Senior Advocate Shri S.Naganand would contend that the present application is misconceived and is not maintainable.

It is stated that SBICAP is neither a party to the main petition or the Application and hence any relief claimed would not bind the said entity.

It is contended that the Company Petition is yet to be admitted and even at this stage, it would not be possible to invoke Section 443 of the Companies Act, 1956.

That there is direct bar of jurisdiction for this Court to intervene in terms of Sections 34 and 35 of the SAFFAESI Act. The remedy, if any, of the respondent - company is in terms of Section 17 of the SARFAESI Act and an appeal may be filed before the DRT, in respect of the measures under Section 13(4) of the SARFAESI Act.

It is also sought to be pointed out that the interim relief claimed by the respondent does not arise out of the same cause of action on which the main petition is filed and therefore on principle, the respondent, who is in the position of a defendant is precluded from seeking such relief as against the petitioners who are in the position of plaintiffs. The cause of action arising under the SARFAESI Act and the basis for the Company Petition are not the same and cannot be mingled. It is also contended that the position of law as regards an interim relief always being granted in aid of the main relief in a proceeding – would disentitle the respondent to any such relief as it is neither in aid of any main relief or ancillary thereto.

It is further contended that the petitioners have instituted the Company petition by standing outside the winding up in so far as their secured interests are concerned and without relinquishing their rights and interests as secured creditors. It is claimed that even if all the secured interests of the respondent are brought to sale, the petitioners are not in a position to realize all of their outstanding dues and hence have filed the Company Petition and that this is unequivocally stated in the Petition itself. It is contended that such dual or multiple proceedings are not barred.

It is contended that the Authorized Officer of SBICAP having rejected the replies by the respondent - company to the notices issued under Section 13(2) of the SARFAESI Act, is said to have taken "symbolic" possession of "Kingfisher House" on behalf of the petitioners on 10.8.2013. It is thereafter that an application is filed before the Court of the Chief Metropolitan Magistrate, Esplanade, Mumbai. It is hence contended that the petitioners have acted in accordance with law.

It is also stated that the reference to the attachment by the Office of the Tax Recovery Officer (TDS) or the Assistant Commissioner of Service Tax in respect of the same property, are irrelevant to the present application. In any event, it is stated that the rights created in favour of the secured creditors over the secured asset in question, has a precedence over charges, if any, of the Taxation Authorities.

Reliance is placed on several authorities to support the contentions of the Petitioners.

5. In the light of the rival contentions very forcefully presented by the learned Senior Counsel on either side, the points that would arise for consideration in this application are as follows:-

a. Whether there is a bar of jurisdiction, in terms of Sections 34 and 35 of the SARFAESI Act, for this Court, as the Company Court, to grant the relief as prayed for.

b. Whether the Petitioner - banks could choose to stand outside the winding up, in seeking to enforce their secured interests, and simultaneously prefer a Company Petition also seeking the winding up of the respondent company, in respect of the balance of the debt not covered by such security.

c. Whether this court, as the Company court, could exercise jurisdiction over the property, whether before or after a winding up order is passed, in the circumstance that a petitioner before this court is seeking to take possession of the property of the respondent by recourse to the SARFAESI Act in the capacity of a secured creditor.

d. Whether the invalidity or the irregularity of proceedings under the SARFAESI Act, could be a reason for this Court to intervene, at the instance of the respondent.

In so far as the first point for consideration is concerned, a plain reading of Section 34 of the SARFAESI Act, would indicate that the jurisdiction of all civil courts to entertain any suit or

proceeding, in respect of any matter, which a DRT or an Appellate Tribunal is empowered to determine under the Act, is barred. And no injunction can be granted by any Court or other authority in respect of any action taken or to be taken pursuant to the aforesaid Act. The bar would apparently apply to this court as well.

Further, Section 35 of the SARFAESI Act would declare that the provisions of the Act would prevail over other laws notwithstanding anything inconsistent contained therein.

Though it is found that Section 446(2) of the Companies Act, 1956 does indicate that notwithstanding anything contained in any other law, the Company Court shall have absolute jurisdiction to entertain and dispose of any suit or proceeding etc., against the company in winding up. It is significant to note that this would be the position, post a winding up order. Even otherwise, there is authority to indicate that in such situations, it

is the *non obstante* clause contained in the subsequent enactment that would normally prevail.

The apex court had occasion to consider such a situation in *Allahabad Bank v. Canara Bank ,(2000) 4 SCC 406* – and it is stated thus :-

> *"39. There can be a situation in law where the same statute is treated as a special statute vis-a-vis one legislation and again as a general statute vis-a-vis yet another legislation. Such situations do arise as held in Life Insurance Corporation of India vs. D.J.Bahadur, (1981)1 SCC 315. It was there observed:*
>
> > *"….for certain cases, an Act may be general and for certain other purposes, it may be special and the Court cannot blur a distinction when dealing with the finer points of law".*
>
> *For example, a Rent Control Act may be a special statute as compared to the Code of Civil Procedure. But vis-a-vis an Act permitting eviction from public premises or some special class of buildings, the Rent Control Act may be a general statute. In fact in Damji Valji Shah Vs. Life Insurance Corporation of India, AIR 1966*

SC 135, this Court has observed that vis-a-vis the LIC Act, 1956, the Companies Act, 1956 can be treated as a general statute. This is clear from para 19 of that judgment. It was observed:

> *"Further, the provisions of the Special Act, i.e. LIC Act, will override the provisions of the general Act, viz. the Companies Act which is an Act relating to companies in general".)*

Thus, some High Courts rightly treated the Companies Act as a general statute, and the RDB Act as a special statute overriding the general statute.

Special law v. special law:

40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, section 34. A similar situation arose in Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Limited, (1993)2 SCC 144, where

there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non-obstante clauses but that the

> *"1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non-obstante clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 statute is a special one".(SCC p.157, para 9)*

Therefore, in view of section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts."

Further, having regard to the objects of the SARFAESI Act, as indicated in the Statement of Objects and Reasons to the Act, it was found that unlike international banks, the banks and financial institutions in India did not have the power to take possession of securities and sell them, resulting in delayed

recovery of loans. It was in that direction that the Central Government had constituted certain Committees to examine the reforms necessary in the banking sector and it is on the basis of reports of those Committees, *inter alia*, suggesting the legislation for Securitization and empowerment of banks and financial institutions to take possession of the securities and sell them without the intervention of the court, that the SARFAESI Act had come into being. Hence, any intervention by any court or authority in respect of proceedings under the said Act would defeat the object of that Act.

Hence it is clear that this court would not have jurisdiction to interfere in the present circumstances of the case with the impugned action. This would also be the answer to point (d) framed for consideration above and the respondent - company would necessarily have to take recourse to an appeal under the Act, in respect of any irregularity in those proceedings.

In so far as the points for consideration at (b) and (c) above, are concerned, the following authorities may usefully be referred to :

The options open to a secured creditor has been considered by the Supreme Court in the case of *M.K.Ranganathan v. Government of Madras, (1955) 2 SCR 374*, under the Indian Companies Act, 1913, as amended by Act VII of 1936. The question involved was whether a sale effected by a respondent without leave of the winding up court was liable to be set aside on that count.

The apex court has pronounced thus :

> *"The position of a secured creditor in the winding up of a company has been thus stated by Lord Wrenbury in Food Controller v. Cork:*
>
> *"The phrase 'outside the winding up' is an intelligible phrase if used, as it often is with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is*

immaterial to me whether my mortgage is in winding up or not. I remain outside the 'winding up' and shall enforce my rights as mortgagee". This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say 'I will prove in respect of my debt'. If so, he comes into the winding up".

It is also summarized in Palmer's Company Precedents Vo.II Page 415:

> *"Sometimes the mortgagee sells, with or without the concurrence of the liquidator, in exercise of a power of sale vested in him by the mortgage. It is not necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made".*

The secured creditor is thus outside the winding up and can realize his security without the leave of the winding up Court, though if he files a suit or takes other legal proceedings for the realisation of his security he is bound under section 231 (corresponding with section 171 of the Indian Companies Act) to obtain the leave of the winding up Court before he can do so

although such leave would almost automatically be granted."

Further, even in respect of a financial institution claiming the benefit of Section 29 of the State Financial Corporations Act, 1956 (Hereinafter referred to as the 'SFC Act', for brevity), and claiming a right to sell and realize the security held by it without reference to the Company Court, the apex court in the case of *International Coach Builders v. Karnataka State Financial Corporation, AIR 2003 SC 2012,* has held thus :

"Of course, even in such a situation, if the same property was mortgaged to more than one secured creditor, they had to either come to an agreement, or in the event of disagreement, there had to be a suit in which dissenting mortgagee had to be sued as a necessary party defendant. No doubt Section 29 of the SFC Act was intended to place the SFCs on a better footing. But, in our view, this better footing is available only so long as the debtor is not a company or is a going company. The moment a winding up order is

made in respect of a debtor company, the provisions of Section 529 and 529A come into play and whatever superior rights had been ensured to SFCs under the provision of the SFC Act are now subjected to and operate only in conjunction with the special rights given to the workmen, who as pari passu charge-holders are represented by the official liquidator. We are, therefore, of the view that the unhindered right hitherto available to the SFCs to realise their security, without recourse to the Court, no longer holds true as the right vested in the official liquidator is a statutory impediment to such exercise and has to be reckoned with. And since the official liquidator can do nothing without the leave or concurrence of the Court, all necessary applications must, therefore, come to the Company Court."

The following observation of the Apex court in *Allahabad Bank v. Canara bank, (2000) 4 SCC 406,* is relevant :

"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 the Canara Bank has not made it clear whether it wants to come under this category.."

"Can a Secured Creditor maintain a winding-up Petition without either giving up the security or valuing it ? "

In answering this question, a Division Bench of this Court in the case of *Hegde & Golay Ltd. v. State Bank of India, ILR 1987 Kar. 2673*, has expounded thus :

> *"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 :*
>
> > *"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 creditor".*

13. The contention is that a secured-creditor may stand outside insolvency; but if he brings-up a creditor'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…."

xxx

"……Section 529(1) of the 'Act' attracts the rules of insolvency to winding-up in relation to "the respective rights of secured and unsecured creditors" and confines these Rules so attracted to matters that arise between these two classes of creditors. Sections 528 and 529 of the 'Act' are in the chapter "Proof and Ranking of Claims" 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 "in winding-up of insolvent company"

in Section 529(1) of the 'Act' 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 'Act' 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 petition.

For this conclusion there is support both on principle and authority. In Palmer's Company Law, Volume-I, Twenty-third Edition, the position of law is stated thus :

> *"A debenture holder to whom the company is indebted in a sum presently payable can demand payment, and, if default is made, can Petition for the winding up of the company..... The holder of a mortgage debenture who applies for & winding-up order is not bound to give up his security".*

(See para 46.17)

The Law is stated in Pennington's Company Law (Fourth Edition) thus :

> *"The creditor need not value his security in his Petition, and will be entitled to a winding-up order although his debt is adequately covered by the value of his security.*
>
> *(See page-677 F.N.)*

In Buckley on the Companies Act, the following passage occurs :

> *"The section therefore did not introduce into winding-up the bankruptcy rules as to :.....liability of secured creditor presenting Petition to value his security".*
>
> *(See page-728)*

The Statement in Halsbury's Laws of England, Fourth Edition, Volume VII, is this :

> *"The following bankruptcy rules do not apply in winding up namely those relating to.....(5) the necessity for a petitioning creditor who is a secured creditor to offer by his petition to surrender his security or to estimate its value at an amount less than his debt".*
>
> *(vide para : 1277)*

> *"A secured creditor need not prove at all, but may rely on his security. He may pursue the remedies which he possessed before the winding up. If a secured creditor of an insolvent company proves for his debt, the rules in bankruptcy applicable to proofs by secured creditors apply"*
>
> *(vide para : 1299)*

In Moor -v.- Anglo Italian Bank, 1879(10) Ch. 681, George Jessel M.R. referred to the Rule in Bankruptcy that secured-creditor, to obtain adjudication, must give up the security or value it asserting it to be of less value than his debt, said that such a Rule had no application to winding-up and that there was also no mode of applying it to winding up. Learned Master of the Rolls observed ;

> *"..... That is quite true in bankruptcy to obtain adjudication, but there is no such Rules in winding-up*
>
> *.....No such rule apply at all ; but the winding up is equally good whether it is obtained by a secured creditor or an unsecured creditor....."*

In the case of *Canfin Homes Ltd. v. Lloyds Steel Industries Ltd.,Vol. 106 (2001) Company Cases 52*, a learned single judge of the Bombay High Court has held as follows:

> *"A secured creditor who seeks to prove the whole of his debt in the course of the winding up proceedings is necessarily required to relinquish the security. That however, cannot be construed to mean that when he files a petition for winding up, a secured creditor must relinquish his security. In the present case, the petitioner has filed a suit in this Court and made it clear, therefore, that he seeks to enforce the security. When the stage for proving its of debt does arise, the petitioner would necessarily have to prove for the balance of the debt which is due and owing to it after the security in respect of which the petitioner is a secured creditor is realized."*

In coming to the above conclusion, the learned judge has followed three early judgments which 'express a consistent strand of thought which has been followed since' :

"In Ram Chand v. Bank of Upper India Ltd., Delhi. I.L.R 1922 Lah. 59, the position of the secured creditor was elucidated in the following words :

"As far as possible the Rules of bankruptcy are applicable to liquidation matters. When a company goes into liquidation, a secured creditor may realize his security and prove for any balance there may be outstanding. The remaining assets of the company would in that case only be liable for such principal and interest as was due on the date of the winding up order. A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings. The property hypothecated is thus liable for the whole claim, principal and interest upto the date of realization, and it is only the liability of the remaining assets that could be affected by the winding up order."

The same view was taken in Sharfuzzman v. H. Hunter., A.I.R. 1980 Oudh 20, which is thus :

> *"A secured creditor who has advantages of security may remain outside the Act. He can realize upon his security. The extent to which he realizes on his security will reduce the estate in insolvency. But he obtains at first no part in the dividend and is unaffected by the proceedings. Should. however, the amount of realization be less than the amount due to him he is given the special privilege of proving for the balance. This balance is the difference between the decretal amount and the amount realized. When he has proved he will not obtain any more than his proportionate share in the estate. He will be put then on the footing of an unsecured creditor."*

These judgments have been referred to with approval in a judgment of a learned Single Judge of the Madras High Court in Canara Bank v. Official Liquidator, reported in 1991 Bank.J. 364(Mad.) : 1991(70) Company Cases 295.

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 realized his security, he may prove for the balance due to him after deducting the net amount that has been realized. 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. Therefore, in my view, it would be wholly inappropriate and inapposite to require the secured creditor at the stage when he files Company Petition for winding up to exercise the option of relinquishing his security since that stage does not arise until the debt is to be proved.

On a consolidation of the above views expressed, it may be said that point (b) is to answered in the affirmative and point (c) in the negative.

Consequently, the application filed by the respondent is held to be not maintainable. The interim order granted earlier stands vacated and the application is dismissed.

Sd/-
JUDGE

nv*

ABJ: **CA 2214/2013 IN**
11/12/2013

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ORDER

Though the application was dismissed, respondents shall not eject the applicant summarily and shall afford reasonable opportunity to withdraw from the property.

The oral application seeking stay of the order to enable the applicant to prefer an appeal is rejected.

Sd/-
JUDGE

ln.