2023INSC746

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

CIVIL APPEAL NO. 2568 OF 2013

INDUSTRIAL DEVELOPMENT BANK OF INDIA (THROUGH STRESSED ASSETS STABILIZATION FUND CONSTITUTED BY THE GOVERNMENT OF INDIA) ..... APPELLANT

VERSUS

SUPERINTENDENT OF CENTRAL EXCISE AND CUSTOMS AND OTHERS ..... RESPONDENTS

J U D G M E N T

SANJIV KHANNA, J.

This appeal by Industrial Development Bank of India[1] takes exception to the judgment dated 26th August 2008 passed by the full bench of the Andhra Pradesh High Court in Original Side Appeal No. 1 of 2005[2], whereby it has been held that notwithstanding the winding up order dated 1st December 2003 in the case of M/s. Sri Vishnupriya Industries Limited[3], and the provisions of Section 529A and 530 of the Companies Act, 1956[4],

1 For short, 'IDBI'.
2 *The Superintendent of Central Excise and Customs* v. *M/s. Sri Vishnupriya Industries Ltd. (in liqn.) and Others*.
3 For short, 'the Company'.
4 For short, 'Companies Act'.

the customs authorities have the first right to sell the imported goods under the Customs Act, 1962[5] and adjust the sale proceeds towards payment of customs duty.

2. The Company, during the period 1994-2000, was granted and availed of financial assistance from the appellant – IDBI. As a security, the Company had hypothecated movable properties and created equitable mortgage of immovable properties by depositing title deeds. The charge was duly registered with the Registrar of Companies. In addition, the promoters and guarantors had furnished personal guarantees.

3. In the present case, we are concerned with the hypothecated movable property, namely, machinery and its components, imported from Italy during the years 1998-1999. The goods, packed in 128 wooden containers, were warehoused in a private bonded warehouse by executing bond in terms of Section 59(1) of the Customs Act. The goods were initially warehoused for one year, which period was extended. However, as the goods were not cleared for home consumption in terms of Section 47 of the Customs Act, even after expiry of the extended period of warehousing, show-cause notices were issued[6], and after considering the explanation given by the Company, orders-in-

5 For short, 'Customs Act'.
6 Show Cause Notices dated 17th February 2000 and 10th April 2000.

original dated 15th September 2000[7] and 10th October 2000[8] were passed confirming levy of customs duty of Rs.3,27,22,191/- and Rs.10,48,29,017/-, respectively. When the Company did not pay the duty, the authorities had passed an order[9] dated 19th December 2000 for sale of the warehoused goods for recovery of the customs duty, relying on the powers conferred under Section 72(2) read with Section 142 of the Customs Act. Thereafter, another order[10] under Section 72(2) of the Customs Act was passed on 27th February 2002 for detention and sale of the warehoused goods for recovery of Rs.22,20,38,112/-. On failure to pay the duty, steps were initiated for auctioning the imported goods and the Company was informed.

4. In the meanwhile, Company Petition No. 168 of 2002 was filed before the Andhra Pradesh High Court for winding up of the Company. This petition was admitted on 1st April 2003. The Company was directed to be wound up *vide* the order passed on 1st December 2003. Thereupon, the Official Liquidator filed an application[11] under Section 468 of the Companies Act read with Rules 9 and 11(b) of the Companies (Court) Rules, 1959[12] for directing the customs authorities to handover possession of the

7 Order in Original No. 1/2000 (Customs).
8 Order in Original No. 2/2000 (Customs).
9 C. No.VIII/16/1/2000-Adjn.
10 C. No.VIII/72/1/98-Customs.
11 C.A. No. 906/2004.
12 For short, 'Company Court Rules'.

imported goods, which had been put up for auction for payment of the customs duty. This application was allowed by a single judge of the High Court *vide* the order dated 3rd September 2004 observing, *inter alia*, that the customs authorities had not followed the procedure contemplated under the Customs Act before passing the order under Section 72 of the Customs Act, in the absence of which the detention orders were void *ab initio* and *non-est* in the eyes of law. Secondly, on an order of winding up being passed, in terms of Section 456 of the Companies Act, the assets of the company in liquidation, by operation of law, vest in the Official Liquidator, who alone was entitled to deal with the effects and actionable claims. Reference was also made to Section 447 of the Companies Act[13]. Consequently, as the winding up order had been passed against the Company but sale was yet to be effected, the Official Liquidator was duty bound to take into his custody and control all properties, effects and actionable claims, including the movable property, that is, the imported goods. Official Liquidator, as the custodian of all the properties of the Company, functions under the directions of the Company Court. Any person making any claim against the Company has to prove his claim before the Official Liquidator by placing necessary

13 We shall subsequently refer to Sections 456 and 447 of the Companies Act, as these provisions are of relevance.

material in support. Accordingly, the submission regarding the custom authorities' entitlement and right under the Customs Act to sell the imported goods to realise their dues was rejected.

5. On the customs authorities preferring an intra-court appeal, the mater was referred to the full bench of the Andhra Pradesh High Court on the question of whether the claim of a secured creditor has precedence over the right of the customs authorities to recover the customs duty. The full bench, relying on and approving the ratio of the Calcutta High Court in ***Collector of Customs*** v. ***Dytron (India) Ltd.***[14], disagreed with the view expressed by a full bench of the Madras High Court in ***UTI Bank Ltd.*** v. ***Deputy Commissioner of Central Excise and Another***[15]. The full bench of the Andhra Pradesh High Court has held that Section 468[16] of the Companies Act has no application as it empowers the Company Court to require the 'contributory' to pay, deliver, surrender or transfer any money, property or books and papers in his custody or control. The word 'contributory', defined in Section 428 of the Companies Act, does not include the customs department/authorities. Observations relying on the ratio in

14 1998 SCC OnLine Cal 674.
15 (2007) 135 Company Cases 329 (Mad.). On the aspect of the Karnataka Land Revenue Act, 1964, see judgment of this Court in *Dena Bank* v. *Bhikhabhai Prabhudas Parekh & Co. and Others*, (2000) 5 SCC 694.
16 Section 468 of the Companies Act has been quoted subsequently.

Dytron (India) Ltd. (supra) have been made, a decision which we would advert to later.

6. Aggrieved, the appellant – IBDI, as a secured creditor, has filed the present appeal. While issuing notice in the appeal *vide* order dated 3rd May 2010, it was directed that *status quo* shall be maintained. Thereafter, *vide* order dated 5th October 2017, the customs authorities, along with the appellant – IDBI and the Official Liquidator, were permitted to sell the goods subject to deposit of the auction sale proceeds with the Registry of this Court. The sale proceeds *vide* two demand drafts of Rs. 1,39,34,208/- and Rs. 33,343/- dated 20th January 2023 have been deposited in this Court and converted into a fixed deposit receipt. The auction proceeds are to be paid as per the outcome of the present appeal.

7. In the context of the present appeal, we would like to reproduce Sections 529A and 530 of the Companies Act, which read as under:

> "**529A. Overriding preferential payments.—**(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company,—
>
> (a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 *pari passu* with such dues,

shall be paid in priority to all other debts.

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

"**530. Preferential payments.—**(1) In a winding up, subject to the provisions of Section 529-A, there shall be paid in priority to all other debts—

(a) all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub-section (8) and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date, subject to the limit specified in sub-section (2);

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before or by the effect of, the winding up order or resolution;

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions payable during the twelve months next before the relevant date, by the company as the employer of any persons, under the Employees' State Insurance Act, 1948, (34 of 1948), or any other law for the time being in force;

(e) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in Section 14 of the Workmen's Compensation Act, 1923, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;

(f) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by the company; and

(g) the expenses of any investigation held in pursuance of Section 235 or 237, in so far as they are payable by the company.

(2) The sum to which priority is to be given under clause (b) of sub-section (1), shall not, in the case of any one claimant, exceed such sum as may be notified by the Central Government in the Official Gazette:

(3) Where any compensation under the Workmen's Compensation Act, 1923 (8 of 1923), is a weekly payment, the amount due in respect thereof shall, for the purposes of clause (e) of sub-section (1), be taken to be the amount of the lump sum for which the weekly payment could if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

(4) Where any payment has been made to any employee of a company,—

(i) on account of wages or salary; or

(ii) to him, or in the case of his death, to any other person in his right on account of accrued holiday remuneration,

out of money advance by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee or other person in his right, would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(5) The foregoing debts shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

(7) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(8) For the purposes of this section—

(a) any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period;

(b) the expression “accrued holiday remuneration” includes, in relation to any person, all sums which by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday;

(bb) the expression “employee” does not include a workman; and

(c) the expression “the relevant date” means—

(i) in the case of a company ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound up voluntarily before that date; and

(ii) in any case where sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company.

(9) This section shall not apply in the case of a winding up where the date referred to in sub-section (5) of Section 230 of the Indian Companies Act, 1913 (7 of 1913), occurred before the commencement of this Act, and in such a case, the provisions relating to preferential payments which would have applied if this Act had not been passed, shall be deemed to remain in full force.”

8. Section 529A of the Companies Act, a *non-obstante* provision, is to be given primacy in case of conflict, and consequently, in case of disharmony, this section will override the discordant provisions of the Companies Act and all other enactments in force. Section 529A of the Companies Act was enforced by Act No. 35 of 1985 with effect from 24th May 1985. Therefore, when there is a clash and disagreement between section 529A of the Companies Act and another provision of the Companies Act or any other enactment in force on 24th May 1985, Section 529A prevails and the debts are to be paid in terms of Section 529A of the Companies Act.

9. As per clause (b) of sub-Section (1) to Section 529A of the Companies Act, the debts due to secured creditors to the extent such debts under clause (c) of the *proviso* to sub-Section (1) to Section 529[17] rank *pari passu* with the workmen's dues[18], are to be paid in priority to all other debts. Sub-section (2) to Section 529A states that the debts payable under clauses (a) and (b) of sub-Section (1) to Section 529A shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

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17 Clause (c) to the *proviso* to Section 529 has been quoted subsequently.

18 The expression 'Workmen's dues' in Sections 529, 529A and 530 of the Companies Act is defined and restricted under sub-section (3)(b) to Section 529 of the Companies Act.

10. In the present case, we are not required to examine the inter-play and principle of proportionality with reference to clauses (a) and (b) to Section 529A of the Companies Act, *albeit* we must give full effect to and enforce the *non-obstante* nature of Section 529A of the Companies Act, whereby, notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force on 24th May 1985, on winding up of a company, the debt due to the workmen and the debt due to secured creditors as specified, rank *pari passu* and are to be paid in the manner prescribed therein in priority to all other debts.

11. Section 530 of the Companies Act, which was amended and substituted by Act No. 35 of 1985 with effect from 24th May 1985, states that Section 530 is subject to provisions of Section 529A of the Companies Act. Section 530 of the Companies Act deals with preferential payments that are a level below the overriding preferential payments under Section 529A of the Companies Act. Clause (a) to Section 530(1) of the Companies Act confers preferential status to all revenue taxes, cesses, and rates 'due' to the Central or the State government or to a local authority on the 'relevant date' as defined in clause (c) to sub-section (8) to Section 530 of the Companies Act, which have become 'due and

payable' within the twelve months next before the relevant date. The taxes, cesses and rates due to the Central and State governments or local authorities under Section 530 of the Companies Act cannot be given priority over the payments/debts mentioned in Section 529A of the Companies Act. It is, therefore, beyond debate that the provisions of Section 529A of the Companies Act prevail over Section 530 of the Companies Act.

12. We shall subsequently interpret the expression debts 'due' in the first portion of clause (a) to Section 530(1) of the Companies Act and the words 'become due and payable within the twelve months next before that date' in the latter portion of clause (a) to Section 530(1) of the Companies Act, but at this stage, it is relevant to take on record the 'relevant date' as defined in clause (c) to sub-Section (8) to Section 530 of the Companies Act. As per sub-clause (i) to clause (c) to sub-Section (8) to Section 530 of the Companies Act, the 'relevant date' in case where a company has been ordered to be wound up compulsorily, shall be the date of appointment or first appointment of a provisional liquidator, or if no such appointment is made, the date of the winding up order, unless the company had commenced to be wound up voluntarily before that date. The present case is one of compulsory winding up and, therefore, the 'relevant date', in the absence of

appointment of a provisional liquidator, would be the date on which the winding up order was passed against the Company, which is 1st December 2003[19].

13. Again, before we proceed to interpret the expressions debt 'due' and debt 'due and payable' in clause (a) to Section 530(1) of the Companies Act, it is relevant to take note of the effect of Sections 447, 456, 468, 528 and 529 of the Companies Act, as well as the object and purpose behind these provisions. The relevant sections read as follows:

> "**447. Effect of winding up order.—** An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if it had been made on all the joint petition of a creditor and of a contributory."
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> "**456. Custody of company's property—**(1) Where a winding up order has been made or where a provisional liquidator has been appointed the liquidator or the provisional liquidator, as the case may be, shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.
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> (1-A) For the purpose of enabling the liquidator or the provisional liquidator, as the case may be, to take into his custody or under his control, any property, effects or actionable claims to which the company is or appears to be entitled, the liquidator or the provisional liquidator, as the case may be, may by writing request the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction such property, effects or actionable claims or any books of account or other documents of the company may be found, to

19 The Official Liquidator was appointed by the High Court *vide* the order dated 1st December 2003 in Company Petition No. 168 of 2002.

take possession thereof, and the Chief Presidency Magistrate or the District Magistrate may thereupon after such notice as he may think fit to give to any party, take possession of such property, effects, actionable claims books of account or other documents and deliver possession thereof to the liquidator or the provisional liquidator.

(1-B) For the purpose of securing compliance with the provisions of sub-section (1-A), the Chief Presidency Magistrate or the District Magistrate may take or cause to be taken such steps and use or cause to be used such force as may in his opinion be necessary."

"468. Delivery of property to liquidator.—The Tribunal may, at any time after making a winding up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, officer or other employee of the company, to pay, deliver, surrender or transfer forthwith, or within such time as the Tribunal directs, to the liquidator, any money, property or books and papers in his custody or under his control to which the company is prima facie entitled."

"**528. Debts of all descriptions to be admitted to proof.—** In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of insolvency), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible, to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value."

"**529. Application of insolvency rules in winding up of insolvent companies.—** (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to—

(a) debts provable;

(b) the valuation of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors;

as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,—

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

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

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

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

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

(3) For the purposes of this section, Section 529-A and Section 530,—

(a) “workmen”, in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947;

(b) “workmen's dues”, in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:—

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947;

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in Section 14 of the Workmen's Compensation Act, 1923, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under

the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) “workmen's portion”, in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of—

(i) the amount of workmen's dues; and

(ii) the amounts of the debts due to the secured creditors.”

14. As per Section 447 of the Companies Act, an order for winding up of a company operates in favour of all the creditors as if it had been made on a joint petition of a creditor. All creditors are treated as petitioning creditors. Section 456 of the Companies Act requires a provisional liquidator or a liquidator, as the case may be, to take all properties and action claims, to which the company is or appears to be entitled, into his custody or under his control. Sub-section (1A) to Section 456 of the Companies Act entitles the liquidator or the provisional liquidator to write a request to the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction such property, effects or actionable claims etc. of the company may be found, and, thereupon, these officers,

after giving notice to the party, are to take possession of the properties, effects, actionable claims, books of accounts, etc and deliver the possession to the liquidator or provisional liquidator. Sub-section (1B) to Section 456 of the Companies Act permits the Chief Presidency Magistrate or the District Magistrate to take such steps or use such force, as in his opinion may be necessary. Section 468 of the Companies Act permits the tribunal/court to direct any contributory, trustee, receiver, banker, agent, officer or other employee of the company to pay, deliver, surrender or transfer forthwith, or within such time as directed, to the liquidator, any money, property, or books and papers in his custody and control to which the company is *prima facie* entitled.

15. Sections 528 to 530 of the Companies Act fall under Chapter V - '*Provisions Applicable to Every Mode of Winding Up*', under the sub-heading '*proof and ranking of claims*'. Section 528 of the Companies Act states that debts of all descriptions, including the debts payable on contingency, and claims against the company, present or future, ascertained or sounding only in damages, shall be admissible to proof against the company, on a just estimate being made of such debts as far as possible. Section 456 of the Companies Act, *inter alia*, provides that all the property and effects of the Company shall be deemed to be in the custody of the

tribunal/court as from the date of the order for the winding up of the Company.

16. The objective of giving jurisdiction to the Company Court/tribunal during the process of liquidation of the Company is two-fold: First, to ensure that the assets of a company in liquidation are amassed and constellated to prevent a scramble and dissipation of the assets of an insolvent company. Secondly, the Company Court/tribunal is entrusted with paying off debts from the sale proceeds of the assets so assimilated, according to the waterfall mechanism provided for and specified under Sections 529, 529A and 530 of the Companies Act. Accordingly, and with this objective, Section 529A of the Companies Act refers to the doctrine of *pari passu* in the *proviso* to sub-section (1) to Section 529, with reference to the claims *inter se* the workmen and the secured creditors. Even otherwise, on a conspectus of these sections, the principle applicable and underlying these provisions is to stop alienation and preserve the assets on the date of the bankruptcy, which date, in some cases, can relate back to the date of filing of the winding up petition, as in case of execution of a decree. This preservation is with a view to ensure the division and application of the assets of the company being wound up, as it

stood on the relevant date.[20] The payment must be made in terms of the priority prescribed.

17. This Court in ***J.K. (Bombay) (P) Ltd.*** v. ***New Kaiser-I-Hind Spg. and Wvg. Co. Ltd.***[21] has held that once a winding up order is passed, the assets of the company under liquidation are passed under the control of the liquidator, whose statutory duty is to realize them. Thereafter, the creditors are paid out by the liquidator from the sale proceeds of the assets of the liquidated company. The creditors have to be paid in terms of the waterfall or priority mechanism. Therefore, payment has to be first made in terms of Section 529A of the Companies Act to overriding preferential creditors, then to preferential creditors in terms of Section 530 of the Companies Act and lastly, payment has to be made and distributed *pari passu* among the ordinary or unsecured creditors. This objective and intent is also apparent when we examine the Company Court Rules, as per which the liquidator is to fix a date on or before which all creditors of the company are to prove their debts or claims and to establish any title they may have to priority under Section 530 of the Companies Act.[22] Not only this, the rules enable a creditor to claim interest up to the date of the winding up order, and in certain circumstances,

20 See – *In Re Savin*, [1872] L.R. 7 Ch. App. 760, 764.
21 (1970) 40 Comp Cas 689.
22 See – Rule 147, Companies (Court) Rules, 1959.

payment of interest subsequent to the date of winding up.[23] There is, however, an exception to the two-fold method, as has been held in ***Dena Bank*** v. ***Bhikhabhai Prabhudas Parekh & Co. and Others***[24], which we will subsequently elucidate.

18. This brings us to the interpretation of the expressions debt 'due' and debt 'due and payable' in Section 530(1)(a) of the Companies Act. The interpretation is no longer debatable in view of the judgment of this Court in ***Rajratha Naranbhai Mills Co. Ltd.*** v. ***Sales Tax Officer, Petlad***[25], which has approved the view taken by D.A. Desai, J., in his judgment in ***Sales Tax Officer, Petlad*** v. ***Rajratna Naranbhai Mills Co. Ltd. and Another***[26], a judgment, which, we respectfully submit, forms the foundation of our reasoning and ratio in the present case. This Court in ***Rajratha Naranbhai Mills Co. Ltd.*** (supra), agreeing with the views expressed by D.A. Desai, J. in ***Sales Tax Officer, Petlad*** (supra), overruled the judgment of the division bench under challenge, for several reasons, to hold that the words debt 'due' occurring in the first part and the words debt 'due and payable' in the latter part of Section 530(1)(a) of the Companies Act are different expressions meant to convey different and not the same meaning. Therefore,

23 See – Rules 156 and 179, Companies (Court) Rules, 1959.
24 (2000) 5 SCC 694.
25 (1991) 3 SCC 283.
26 (1974) 44 Comp Cas 65 (Guj).

for a government debt to be covered under clause (a) to Section 530(1) of the Companies Act, it must not only be a debt 'due', but it must also be a debt 'due and payable' within twelve months next before the relevant date. The requirements of the latter portion of clause (a) to Section 530(1) of the Companies Act are dual and cumulative, which is debt 'due and payable', and not one that is 'due'. The debt 'due' must have become payable at any time within twelve months next before the relevant date. The debt 'due and payable' prior to twelve months next to the relevant date is not a preferential debt in terms of Section 530(1)(a) of the Companies Act. Such debt will rank *pari passu* with ordinary or unsecured creditors, without any preferential treatment. In this regard, we quote the following passages from the decision of this Court in ***Rajratha Naranbhai Mills Co. Ltd.*** (supra):

> "**8.** We have gone through both the judgments afore-referred to very carefully and minutely and have heard learned counsel on the conflicting decisions. There are wide ranging discussions in the interpretative process relating to the word 'due' occurring in the earlier part of the provision and the words 'due and payable' in the later part, and whether they are different expressions meant to convey differently or they mean the same thing. With due respect to the High Court, we feel that relevant and important considerations and material though available, which could go to interpret the section purposively was overlooked, and at this juncture we wish to put it to use.
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11. In A. Ramaiya's The Companies Act (11th edn. 1988) it has been noticed at page 1320 that Section 530 of the Companies Act, 1956 has been largely recast and amended in the light of the following recommendations (excerpted) of the Company Law Committee in paragraph 218 of their Report:

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In this connection we should like to refer to a memorandum that we received from the Central Board of Revenue, on the question of a priority to be given to crown demands generally and, in particular, to arrears of income tax, super tax and corporation tax. It was suggested that there should be no time limit for the preferential payment of these crown debts and that Section 230 of the Indian Companies Act should be amended accordingly. The practical difficulty of giving effect to the suggestion is that it would place a great majority of the unsecured creditors of the company at the mercy of the income tax authorities, inasmuch as, whatever may be the nature of the security on which they may have lent money to a company at the time of the loan, the unforeseeable demands of the income tax authorities on the company without any time limit would rank over the claims of such creditors. In these circumstances, it may be extremely difficult for the company to raise capital for its working... We are aware of the large arrears of income and other taxes which are due by many companies, which are in liquidation, but we would venture to think that the remedy for this unsatisfactory situation is not the conferment of preferential rights without limit to the income tax authorities under Section 230 of the Indian Companies Act, but the energetic completion of assessment proceedings and vigorous measures for the collection of the assessed taxes.

xx xx xx

13. Both benches of the High Court, with due respect, gave to the provision a very wide and varied interpretation and that too on literality and grammaticals seemingly overlooking the legal philosophy which permeates the provision, the same

being that the debts due and payable, so as to claim priority, must be appropriated to the period within 12 months next before the relevant date and their liability for payment must be founded during that period and no other. To put it in simpler words, the State has a priority over debts, liability and obligation of which was born within the time frame of those twelve months and as such due and becoming due and payable within those twelve months next before the relevant date, ascertainable if necessary later, if not already ascertained. We are in respectful agreement with the interpretation put by the Court of Appeal to Section 264 of the English Companies Act in Airedale Garage case, analogous as it is to the provision in hand, warranting the same interpretation; more so when any other interpretation would lead to the results feared by the Company Law Committee extracted above. In such view of the matter, we need not elaborately comment, discuss or demolish, sentence by sentence, the reasoning given by the Single Bench as also the Division Bench of the High Court towards interpreting the provision. The words 'having become due and payable within 12 months next before the relevant date' need be understood to mean putting a restriction or cordoning off the amount for which priority is claimable and not in respect of each and every debt on account of taxes, rates and cesses etc. which may be outstanding at that time and payable. And further that such priority is in respect only of debts those of which become due and payable because the liability to those is rooted, founded and belonging to that period of twelve months prior to the relevant date and none other; both the conditions existing."

19. D.A. Desai, J., in his judgment in ***Sales Tax Officer, Petlad*** (supra) as a judge of Gujarat High Court, had examined the question of when a debt becomes payable, for this is a requirement to be satisfied, and only when the debt becomes 'due and payable' during the twelve months next before the relevant

date, does the debt get the character of a preferential debt. After elaborate discussion, D.A. Desai, J. has held that the debt becomes ‘due’ under the applicable taxing statute on the date when the sale, that is, the taxing event takes place. Tax may become ‘due’ but may be payable in future in terms of the statute. In the context of the Sales Tax Act in question[27], it was held that the sales tax became ‘due and payable’ when the returns were filed. Determination or quantification of the tax at the time of passing of the assessment order in terms of the Sales Tax Act, ***Sales Tax Officer, Petlad*** (supra) holds, was not relevant. We need not refer to the Sales Tax Act relevant in ***Sales Tax Officer, Petlad*** (supra) for the purpose of the present case. On the other hand, we would have to refer to the provisions of the Customs Act to ascertain the date on which the customs duty in respect of the goods in question became ‘due and payable’. We are answering this question, though not necessary, as the appellant – IDBI is an overriding preferential creditor under Section 529A of the Companies Act and at best, if the requirements of clause (a) to Section 530(1) of the Companies Act are satisfied, the customs dues would fall under Section 530 of the Companies Act and will be categorized as preferential payment. To decide this question, we shall also be examining the question of whether the Customs

27 Bombay Sales Tax Act, 1953 and Central Sales Tax Act, 1956.

Act creates a first charge overriding the charge in favour of the secured creditor, namely, the appellant – IDBI.

20. This Court in ***Dena Bank*** (supra), while examining the issue of priority of government dues or Crown debts over the dues of other creditors, opined that the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law principles of equity and good conscience, as applicable in India and the common law of England, do not accord the government or Crown dues a preferential right for recovery of dues or debts over a mortgagee, pledgee of goods or a secured creditor. The common law doctrine giving preferential rights to the Crown debts confined to ordinary or unsecured creditors constitutes 'law in force' within the meaning of Article 372(1) of the Constitution of India, and accordingly, this law continues to be in force. This Court in ***Dena Bank*** (supra) specifically refers to and approves the statement of law made in '*Rashbehary Ghose: Law of Mortgage*'[28] – "*It seems a government debt in India is not entitled to precedence over a prior secured debt*." This principle also emanates from the decision of the Constitution bench of this Court in ***Builders Supply Corporation*** v. ***Union of India and Others***[29], which was followed by a three

28 TLL, 7th Edn., p. 386.
29 (1965) 2 SCR 289.

judges' bench in ***Collector of Aurangabad and Another*** v. ***Central Bank of India and Another***[30]. At the same time, we must record for clarity that this principle, which vents from the 'law in force' within the meaning of Article 372(1) of the Constitution of India, must give way to a statutory charge which may be created by an enactment, whereby a first charge is given to government dues or Crown debts, notwithstanding the charge of the secured creditors.

21. Having considered the provisions of the Companies Act, and the general principles of law, we would now proceed to examine whether the Customs Act creates a first charge for payment of the customs dues, and if so, harmonise and resolve the conflict between the Companies Act and the Customs Act.

22. We would begin by quoting Section 15 of the Customs Act:

> "**15. Date for determination of rate of duty and tariff valuation of imported goods.—**(1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force,—
>
> (a) in the case of goods entered for home consumption under Section 46, on the date on which a bill of entry in respect of such goods is presented under that section;
>
> (b) in the case of goods cleared from a warehouse under Section 68, on the date on which a bill of entry

30 (1967) 3 SCR 855.

for home consumption in respect of such goods is presented under that section;

(c) in the case of any other goods, on the date of payment of duty:

Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft or the vehicle by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.

(2) The provisions of this section shall not apply to baggage and goods imported by post."

In the present case, upon import of the goods, the Company had entered the goods for home consumption under Section 46 of the Customs Act, which reads as under:

"**46. Entry of goods on importation.—**(1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically on the customs automated system, allow an entry to be presented in any other manner:

Provided further that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof : (a) to examine the goods in the presence of an officer of customs, or (b)

to deposit the goods in a public warehouse appointed under Section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) The importer shall present the bill of entry under sub-section (1) before the end of the day (including holidays) preceding the day on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing:

Provided that the Board may, in such cases as it may deem fit, prescribe different time limits for presentation of the bill of entry, which shall not be later than the end of the day of such arrival:

Provided further that] a bill of entry may be presented at any time not exceeding thirty days prior to the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

Provided also that where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed.

(4-A) The importer who presents a bill of entry shall ensure the following, namely—

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa."

However, the goods were stored in a private bonded warehouse, in the terms of Section 68 of the Customs Act, which reads as follows:

"**68. Clearance of warehoused goods for home consumption.—**Any warehoused goods may be cleared from the warehouse for home consumption, if —

(a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty, interest, fine and penalties payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for home consumption has been made by the proper officer:

Provided that the order referred to in clause (c) may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

Provided further that the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods

> upon payment of penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon:
>
> Provided also that the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force."

The goods were not released on non-payment of customs duty etc. and, thereupon, show cause notices dated 17th February 2000 and 10th April 2000 were issued and two adjudication orders dated 15th September 2000 and 10th October 2000 were passed.

23. In a similar factual matrix, a three judges' bench of this Court in ***Commissioner of Customs, Calcutta and Another*** v. ***Biecco Lawrie Ltd.***[31] had examined the provisions of Section 15 of the Customs Act, as they then existed, and have opined that clause (b) to Section 15(1) of the Customs Act will cease to apply when the requirements under Section 68 of the Customs Act stand fulfilled and the imported goods are cleared for home consumption. In the context of the present case, we must hold that the debt had become 'due' in terms of the two adjudication orders dated 15th September 2000 and 10th October 2000 and 'payable' immediately. Thus, the customs duty became 'due and payable' prior to twelve months next to the 'relevant date'; the 'relevant

31 (2008) 3 SCC 264.

date' being the date of winding up of the Company on 1st December 2003. The amount 'due and payable' in terms of the two adjudication orders dated 15th September 2000 and 10th October 2000 would, therefore, not fall in the category of preferential payments under clause (a) to Section 530(1) of the Companies Act.

24. We have also examined Sections 61, 72 and 142 of the Customs Act[32] to consider the question of whether the Customs Act confers and creates statutory first charge on the customs dues, and are of the opinion that the sections do not incorporate a statutory first charge to override the general law, as per the *dictum* in ***Dena Bank*** (supra). The provisions of the land revenue enactment applicable in the present case have not been relied upon by the respondents, in which event, a legal issue relating to conflict of laws would have arisen and required an answer. The provisions in the Customs Act do not, in any manner, negate or override the statutory preference in terms of Section 529A of the Companies Act, which treats the secured creditors and the workmen's dues[33] as overriding preferential creditors; and the government dues limited to debts 'due and payable' in the twelve months next before the relevant date, which are to be treated as preferential

32 These provisions, though relevant, are not being reproduced for the sake of brevity.
33 As defined and payable in terms of Section 529(3)(b) of the Companies Act.

payments under Section 530 of the Companies Act, but are ranked below overriding preferential payments and have to be paid after the payment has been made in terms of Section 529 and 529A of the Companies Act. Therefore, the prior secured creditors are entitled to enforce their charge, notwithstanding the government dues payable under the Customs Act.

25. The view and the ratio we have expressed is in consonance with the decision of this Court in ***Punjab National Bank*** v. ***Union of India and Others***[34]. A similar view has also been expressed by a three judges' bench of this Court in ***Sundaresh Bhatt, Liquidator of ABG Shipyard*** v. ***Central Board of Indirect Taxes and Customs***[35], with references to the provisions of the Insolvency and Bankruptcy Code, 2016[36] and the Customs Act. In this context, the three judges' bench in ***Sundaresh Bhatt, Liquidator of ABG Shipyard*** (supra) has referred to Section 238 of the IBC to observe that Section 238 of the IBC clearly overrides any provision of law which is inconsistent with the IBC. This judgment has also made reference to Section 142A of the Customs Act, which reads thus:

> "**142A. Liability under Act to be first charge.—** Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty,

34 (2022) 7 SCC 260.
35 (2023) 1 SCC 472.
36 For short, 'IBC'.

> penalty, interest or any other sum payable by an assessee or any other person under this Act, shall, save as otherwise provided in Section 529-A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993), the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 and the Insolvency and Bankruptcy Code, 2016 be the first charge on the property of the assessee or the person, as the case may be."

Section 142A of the Customs Act was inserted by Act 8 of 2011 with effect from 8th April 2011. It does not apply to the present litigation. Section 142A of the Customs Act protects and ensures that the dues under the Customs Act do not, in any way, affect the rights of third parties under Section 529A of the Companies Act or rights of the parties as per provisions of the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993[37], the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002[38] and the IBC. Read in this manner, it is clear to us that the provision of Section 142A of the Customs Act, insofar as it protects the rights of overriding preferential creditors governed and covered by Section 529A of the Companies Act, is clarificatory and declaratory in nature, and does not lay down a new *dictum* or confer any new right as far as the present case is concerned. However, the enactment of section 142A of the Customs Act does confer or create a first charge on

37 For short, 'RDDBFI Act'.
38 For short, SARFAESI Act'.

the dues 'payable' under the Customs Act, notwithstanding provisions under any Central Act, but not in cases covered under Section 529A of the Companies Act, RDDBFI Act, SARFAESI Act and the IBC. Section 142A of the Customs Act, post its enactment, would dilute the impact of Section 530 of the Companies Act, which had restricted preferential treatment to government taxes 'due and payable' limited to twelve months prior to the 'relevant date', without preferential right for taxes that had become 'due and payable' in the earlier period.

26. In view of our reasoning, we must hold that the decision of the division bench of the Calcutta High Court in ***Dytron (India) Ltd***. (supra) does not lay down the correct law and is, accordingly, overruled. The decision in ***Dytron (India) Ltd***. (supra) was referred to in ***Sundaresh Bhatt, Liquidator of ABG Shipyard*** (supra), wherein this Court observed that reliance of the National Company Law Appellate Tribunal on ***Dytron (India) Ltd***. (supra) was not appropriate as such interpretation has been legislatively overruled by the inclusion of Section 142A in the Customs Act. We wish to clarify, as held above, that the decision in ***Dytron (India) Ltd***. (supra) does not lay down the correct law, as even earlier, the position in law was that the debt 'due and payable', when it falls within the four corners of clause (a) to Section 530(1) of the

Companies Act, would be treated as preferential payment, but it would not override and be given preference over the payments of overriding preferential creditors covered under Section 529A of the Companies Act.

27. We must also examine the decision of this Court in ***Imperial Chit Funds (P) Ltd.*** v. ***Income Tax Officer, Ernakulam***[39], wherein this Court has interpreted the legal effect of Section 178 of the Income Tax Act, 1961[40], which was enacted pursuant to the report of the Company Law Reforms Committee. On interpretation of Section 178 of the Income Tax Act, it was held that the provision is made applicable for any tax which is '*then or is likely to become payable*', and specifically relates to cases where the company is in liquidation. Consequently, the amount specified and covered by Section 178 of the Income Tax Act is protected in view of the *non-obstante* clause in sub-section (6) to Section 178 and this amount has to be set aside. In terms of Section 178 of the Income Tax Act, the amount set aside will not form a part of the pool of dues to be distributed among ordinary or unsecured creditors or, for that matter, as indicated over the overriding or preferential creditors under Sections 529A and 530 of the Companies Act.

39 (1996) 8 SCC 303.
40 For short, 'Income Tax Act'.

28. In view of the aforesaid discussion and for the reasons stated, the present appeal is allowed and the impugned judgment dated 26th August 2008 in Original Side Appeal No. 1 of 2005 is set aside. Company Application No. 906 of 2004 filed by the Official Liquidator in Company Petition No. 168 of 2002 will be treated as allowed. The sale proceeds deposited in this Court and converted into fixed deposit receipts, along with the interest accrued thereon, will be paid to the Official Liquidator to be distributed in accordance with the provisions of Sections 529A and 530 of the Companies Act. There would be no order as to costs.

.....J.
(SANJIV KHANNA)

.....J.
(SUDHANSHU DHULIA)

NEW DELHI;
AUGUST 18, 2023.