
(2013) 12 KL CK 0033

In the High Court Of Kerala

Case No : Co. A. No. 14 of 2013 in C.P. No. 29 of 1998

Assistant Commissioner (Assessment), Kollam and Others

APPELLANT

Vs

Official Liquidator, High Court of Kerala and Another

RESPONDENT

Date of Decision : 18-12-2013

Acts Referred:

Citation : (2014) 1 ILR (Ker) 609 : (2014) 1 KHC 233 : (2014) 1 KLT 325

Hon'ble Judges : K.M. Joseph, J;A. Hariprasad, J

Bench : Division Bench

Advocate : Sebastian Champappilly, Special Government Pleader, for the Appellant; K. Moni and Anil K. Narendran, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Joseph, J.—The Assistant Commissioner (Assessment), Special Circle, Kollam and other officers of the State challenge the order passed by the learned Company Judge by which appellants 3 to 5 have been directed to delete from the Thandaper Account No. 12262, revenue recovery files insofar as they relate to the recovery of sales tax dues of the company in liquidation. The Company Petition seeking winding up of the company was filed on 16/07/1998. The company was ordered to be wound up on 12/01/2000. The assets of the company was sold by the Company Court on 9/11/2004 for a sum of Rs. 41,07,927/-. The sale was confirmed on 4/01/2005. The sale was free of all encumbrances. The sale deed was executed on 16/11/2006 and the nominee of the auction purchaser (hereinafter called "the nominee") was put in possession on the same day. It appears that assessment proceedings under the Kerala General Sales Tax Act, 1963, (herein after referred to as "the Sales Tax Act") was taken against the company in liquidation for the assessment year 1994 - 95. An order of attachment was passed under the Kerala Revenue Recovery Act on 12/12/1997. The Company Application was filed by the nominee to direct deletion of the entry regarding the revenue recovery proceedings. The learned Judge allowed the said application. Against the same, the appeal has been filed.

2. We have heard Sri. Dr. Sebastian Champappilly learned Special Government Pleader for Taxes on behalf of the appellants, Sri. Anil Narendran, learned counsel on behalf of the nominee and Sri. K. Moni on behalf of the Official Liquidator.

3. The learned Single Judge allowed the application taking note of the position that as per Section 530 of the Companies Act, 1956 (hereinafter referred to as "the Act"), payment of taxes inter alia is subject to the provisions of Section 529A and that distribution of assets is to be made in accordance with the provisions contained in the said section. The learned Single Judge also relied on the unreported judgment of the Apex Court in Civil Appeal Nos. 6257-6259 of 2004. It is also held that once the company is ordered to be wound up, the State will have to realise its assets, debts in terms of the aforesaid provisions. Provisions of Section 26A or 26B of the Sales Tax Act could not be enforced. It is on this reasoning, the Company Court struck off the recovery proceedings from the Thandaper account.

4. The learned Special Government Pleader would draw our attention to Section 537 of the Act, which reads as follows:

537. Avoidance of certain attachments, executions, etc. in winding up by Tribunal.--(1) Where any company is being wound up by Tribunal--

(a) any attachment, distress or execution put in force, without leave of the Tribunal against the estate or effect of the company, after the commencement of the winding up; or

(b) any sale held, without leave of the Tribunal of any of the properties or effects of the company after such commencement shall be void.

(2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government.

The Government Pleader would also draw our attention to Section 446(2) of the Act. He would also submit that the decision of the Apex Court in Central Bank of India Vs. State of Kerala and Others, does not deal with the rights arising u/s 26B of the Sales Tax Act and the provisions under the Act.

5. Per contra, the learned counsel appearing on behalf of the 2nd respondent would support the order of the Company Judge and would submit that, having regard to the scheme of the Companies Act, sale proceeds of the assets of the company in liquidation proceedings are to be distributed in accordance with the provisions mentioned in Section 529A. Under the scheme it is only after satisfying the claim of the secured creditors and the workmen, which is to be done pari passu, the claim of even the State in regard to amounts due by way of tax need be satisfied. He submits that the decision in Central Bank of India v. State of Kerala and Others (supra) squarely covers the issue. He would draw support from that judgment. He draws our attention to the judgment of the Bombay High Court in State of Kerala Vs. Official Liquidator of Poysha Industrial

Co. Ltd.,

6. Section 26B of the Sales Tax Act reads as follows:

26B. Tax payable to be first charge on the property.-- Notwithstanding anything to the contrary contained in any other law for the time being in force, any amount of tax, penalty, interest and any other amount, if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or such person.

Section 26B was inserted on 01/04/1999. Section 530 of the Act clearly provides that amounts due as taxes inter alia is to be distributed subject to the provisions of Section 529A. The argument of the learned Government Pleader is that the principle laid down by the Apex Court in Central Bank of India's case (supra) will not apply to resolve the dispute in this case. In the first place he would point out that Section 26B was actually incorporated with effect from 01/04/1999 while Section 529A was incorporated in the year 1985. In other words, it is after being aware of the provisions contained in Section 529A that the State Legislature has enacted Section 26B, by which the State Legislature intended that notwithstanding anything to the contrary contained in any other law for the time being in force, any amount of tax, penalty interest and any other amount, if any, payable by a dealer or any other person under this Act shall be the first charge on the property of the dealer or such person. Also the Central Bank's case was not between the claims of the State in regard to amounts due as taxes versus a claim u/s 529A. In the Central Bank's case (supra), the question which arose essentially was as follows:

A person borrowed money from the creditor bank mortgaging his property? The bank filed a suit which was decreed by the Tribunal under Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The recovery officer issued notice for sale of the properties of the borrower. It is at that stage the Tahsildar issued a notice to the borrower for recovery of certain amounts due as arrears of land revenue. The Tahsildar claimed protection of Section 26B of the KGST Act and contended that the State Government had got first charge over the attached properties. The Bank filed a writ petition contending that being a Central legislation, the DRT Act would prevail over the Kerala Act. The writ petition and the writ appeal were dismissed. It is thereafter the bank carried the matter before the Apex Court.

This was the facts in one of the appeals. We need not repeat the facts in other cases. The Apex Court inter alia held as follows:

128. If the provisions of the DRT Act and the Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the

procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, and Section 529A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to the Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the non-obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

7. The learned Special Government Pleader for taxes Dr. Sebastian would contend that this is a case where Section 26B of the KGST Act was incorporated after the enactment of Section 529A of the Act. Section 26B was inserted with effect from 01/04/1999, whereas Section 529A was in the Statute book since 1985. He would contend that as far as the State Legislature is concerned, it is exclusively entitled to make laws relating to a subject falling in list II of the Seventh Schedule. Entry 54 of the List II provides for taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List 1. Therefore, the State Legislature was indeed competent to enact Section 26B creating first charge in respect of the amounts due under the Sales Tax Law of the State. It is clearly covered by the field of legislation viz. "Entry 54". Entry 43 of List I reads as follows:

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

Therefore Companies Act has been enacted on the basis of the above entry. The Companies Act has been enacted by Parliament. According to the learned Special Government Pleader unless it is found to be repugnant, the law made by the State must prevail. In order to appreciate this argument, it is necessary to refer to Article 246 of the Constitution which reads as follows:

246. Subject-matter of laws made by Parliament and by the Legislatures of

States.-- (1). Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2). Notwithstanding anything in clause (3). Parliament and, subject to clause (1) the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3). Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4). Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

8. Article 246 opens with a non-obstante clause and provides that notwithstanding anything contained in clauses (2) and (3), Parliament is clothed with exclusive power to make laws in respect of matters enumerated in List I. Still further the opening words of Article 246(3) are to the effect that the power of the State Legislature to make laws in respect of matters enumerated in List II is subject to clauses (1) and (2) of Article 246. The result of the aforesaid constitutional devices is no longer *res Integra*. We need only refer to two decisions of the Apex Court in this regard. The decision in *Sudhir Chandra Nawn Vs. Wealth-tax Officer, Calcutta and Others*, dealt with a case under the Wealth Tax Act. The Court therein *inter alia* held as follows:

Secondly in view of Article 246, exclusive power of the State Legislature has to be exercised subject to Clause (1) i.e. the exclusive power which the Parliament has in respect of the matter enumerated in List I. Assuming that there is a conflict between Entry 86 List I and Entry 49, List II, which is not capable of reconciliation, the power of Parliament to legislate in respect of a matter which is exclusively entrusted to it must supersede *pro tanto* the exercise of power of the State Legislature.

Still further we may refer to the judgment of the Apex Court in *Govt. of Govt. of A.P. and Another Vs. J.B. Educational Society and Another etc.*, Therein the Apex Court held as follows:

8. xxxx xxxx xxxx

The Parliament has exclusive power to legislate with respect to any of the matters enumerated in List 1, notwithstanding anything contained in clauses (2) and (3) of Article 246. The non-obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter

enumerated in List I and a law made by the State Legislature with respect to a matter enumerated in List II of the Seventh Schedule.

9. There is no doubt that both Parliament and the State Legislature are supreme in their respective assigned fields. It is the duty of the Court to interpret the legislations made by the Parliament and the State Legislature in such a manner as to avoid any conflict. However, if the conflict is unavoidable, and the two enactments are irreconcilable, then by the force of the non-obstante clause in Clause (1) of Article 246, the Parliamentary legislation would prevail notwithstanding the exclusive power of the State Legislature to make a law with respect to a matter enumerated in the State List.

10. With respect to matters enumerated in the List III (concurrent List) both the Parliament and the State Legislature have equal competence to legislate. Here again, the Courts are charged with the duty of interpreting the enactments of Parliament and the State Legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict.

11. Thus, the question of repugnancy between the Parliamentary legislation and the State legislation can arise in two ways. First, where the legislations, though enacted with respect to matters in their allotted sphere, overlap and conflict. Second, where the two legislations are with respect to matters in Concurrent List and there is a conflict. In both the situations, Parliamentary legislation will predominate, in the first, by virtue of the non-obstante clause in Article 246(1). In the second, by reason of Article 245(1), Clause (2) of Article 245 deals with a situation where the State legislation having been reserved and having obtained President's assent prevails in that State; this again is subject to the proviso that the Parliament can again bring a legislation to override even such State legislation.

9. The upshot of the aforesaid discussion would appear to be as follows;

10. When a Law is made by the Parliament with reference to the field of legislation carved out exclusively to it under List I and a law is made by the State in exercise of its legislative power under Article 246(3) with regard to the legislative entry in List II of the Seventh Schedule, a question of repugnancy may arise. The first task entrusted to the Court is to ascertain whether there is any repugnancy. The Court must employ the principle of pith and substance. If there is only an incidental encroachment and substantially the law falls within the exclusive domain of the Legislature, the mere incidental encroachment would be ignored. But when the legislations are irreconcilable, the Constitution has accorded supremacy to the parliamentary legislation and parliamentary legislation will reign supreme. When the law is one made with reference to entries in the concurrent list, where both the Parliament and the State Legislature are sovereign powers in the matter of making laws, again in view of Article 254 of the Constitution unless it be a law made by the State, which is

reserved for the assent of the President and the assent is received, the State law, would otherwise if it is repugnant to the law made by the Parliament, must make way whether the parliamentary legislation is before or after the legislation made by the State.

11. In this Constitutional perspective let us examine the effect of Section 26B and whether, in view of the provisions contained in Sections 529A and 530 of the Act, the State can contend that the priority to be observed u/s 529A will not prevail.

Section 529A reads as follows:

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

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to 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.

Section 529A talks about the overriding according priority to the debts due to the secured creditors and the workers. Section 530 in no uncertain terms makes the payment of taxes inter alia only subject to the priority embodied in Section 529A. If, as contended by the learned Special Government Pleader for taxes, despite the said statutory scheme, the priority is to be accorded to the taxes due to the State of Kerala on the basis of the first charge created u/s 26B of the Sales Tax Act, then we would have to ignore Sections 529A and 530 of the Act. We are of the view that while it was indeed open to the State Legislature to enact Section 26B giving first charge to the amounts due under the State Sales Tax Act, it cannot prevail when it comes into collision with the mandate of Section 529A. It is Section 529A which must prevail. In other words, it is not as if Section 26B is any way void or of no use. Indeed it will have full force otherwise. But put it against the mandate of Section 529A read with Section 530 Section 26B must indeed pale into inefficacy and insignificance. They cannot stand together. If they are allowed to stand together, then necessarily there is irreconcilable conflict and that conflict can only be resolved in favour of the parliamentary legislation. The resultant position is that, as Parliament has declared that in the case of a company which is being wound up, proceeds of its assets must ensure firstly to the secured creditors and workers and it is to be distributed pari passu among them and then, if any proceeds remain, it is to be distributed among others including the State which may be creditors with unsatisfied demands following assessments which have been made under the Sales tax law as in this case.

Giving effect to Section 26B will thwart the Parliamentary law.

12. It is in this regard we must see the judgment of the Apex Court in Central Bank of India's case (supra). It is true that in the Central Bank's case, the Apex Court was dealing with the question as to whether Section 26B of the Sales Tax Act will prevail over the provisions of the Debts Due to Banks and Financial Institution Act, 1993. It is in that context the Apex Court held that there is no provision akin to Section 529A of the Act in the DRT Act. In paragraph 129, it is held that if Parliament intended to give priority to the amounts sought to be realised under the Debt Recovery Tribunal Act, it would have enacted provisions on the lines of Section 529A among other provisions. This is a case of clear indication that when the matter is to be decided between the claim u/s 529A and Section 26B, it is the claim u/s 529A which would prevail in view of the provisions of Section 530 of the Act as in no uncertain terms the claim of the State for payment towards taxes is made subject to Section 529A. This view of ours also finds support from the judgment of the Bombay High Court in State of Kerala Vs. Official Liquidator of Poysha Industrial Co. Ltd.,

13. The learned Special Government Pleader in fact brings to our notice that in the new Companies Act the provisions akin to Sections 529A and 530 respectively are Sections 326 and 327. On the other hand, learned counsel appearing on behalf of the nominee would submit before us that Sections 326 and 327 have not been brought into force.

14. We are also not impressed by the contention of the appellant with reference to Section 537 of the Companies Act. It is true that sub-section (2) of Section 537 provides that nothing in that Section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government. It is true, u/s 537(2), when the company is being wound up the embargo in sub-section (1) of Section 537 is not made applicable for proceedings for recovery of tax payable to the Government. In the facts of this case, we must notice that there is no case for the appellants that recovery proceedings commenced by the State proceeded beyond the stage of attachment. When the company is ordered to be wound up, it will take effect from the date of the petition. Pursuant to the order of winding up, the matter is further proceeded with and the property which is attached is brought to sale before the Company Court. The sale was free from all encumbrances. The sale is made for the benefit of all the creditors. There is no challenge to the sale as such. The appellant before us did not impugn the sale either before the Company Judge or in appeal. The sale deed was executed. The nominee was put in possession. We are of the view that the appellant cannot seek to draw any support from the provisions contained in sub-section (2) of Section 537. No doubt, the nominee relied on the judgment the Full Bench of the Delhi High Court reported in L.I.C. India v. Asia Udyog (P) Ltd. 1984 (55) CC 1873, in which it is held as follows:

The only effect of sub-section (2) of Section 537, therefore, is that the completed transaction whether by way of sale or in execution proceedings do not become

void. But if any further proceedings are to be continued after the winding up order has been passed, Section 446 will have to be complied with.

Next decision cited by the learned Government Pleader is the decision of the Apex Court in *Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited*, wherein the Apex Court was dealing with the question as to whether priority is to be given to the dues payable by the employer u/s 11 of the Employees' Provident Funds and Miscellaneous Provisions Act (in short the EPF Act) and whether it is subject to Section 529A. Both the EPF Act and the Companies Act have been enacted by the Parliament and it is not a case where the principles contained in Article 246 of the Constitution can be brought into play. In fact what was held *inter alia* is as follows:

Section 529A of Companies Act as inserted by 1985 amendment only expands scope of dues of workmen and place them at par with the debts due to secured creditors and there is no reason to interpret this amendment as giving priority to the debts due to secured creditors over the dues of Provident Fund payable by an employer Company in liquidation. Even before the insertion of proviso to Sections 529(1), 529(3) and Section 529A and amendment of Section 530(1) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund established for welfare of the employees were payable in priority to all other debts in a winding up proceedings. Even the wages, salary and other dues payable to the workers and employees were payable in priority to all other debts. What Parliament has done by these amendments is to define the term "workmen dues" and to place them at par with debts due to secured creditors to the extent such debts rank under Clause (c) of the proviso to Section 529(1). However, these amendments, though subsequent in point of time, cannot be interpreted in a manner which would result in diluting the mandate of Section 11 of the EPF Act sub-section (2) whereof declares that the amount due from an employer shall be the first charge on the assets of the establishment and shall be paid in priority to all other debts. The words "all other debts" used in Section 11(2) of PF Act would necessarily include the debts due to secured creditors like banks, financial institutions etc. the mere ranking of the dues of workers at par with debts due to secured creditors cannot lead to an interference that Parliament intended to create first charge in priority to the debts due to secured creditors over the amount due from the employee under the EPF Act.

We would further notice that the company judge has placed reliance on unreported judgment of the Apex Court on Civil Appeal Nos. 6257-6259/2004, which related to claim under the income tax Act wherein also the Apex Court took the view that claim of the revenue is subject to Section 529A in view of Section 530 of the Act.

15. In this connection there is another aspect of the matter. Actually Section 529A provides for priority to be observed in the matter of payment of debts in the case of winding up. In this case the order that is passed by the learned Company Judge is not an order relating to the priority as such. In fact Section

446(2)(d) provides that it is a company Court which is to decide the question of priority. Section 446(2)(d) of the Act reads as follows:

Section 446. Suits stayed on winding up order:

XXXX XXXX XXXX

2(d). any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or rise in course of the winding up of the company, whether such suit or proceeding has been instituted or is instituted or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

In fact the learned counsel for the Official Liquidator would submit that the appellants have not even submitted claim. But the learned Special Government Pleader would point out that the claims have not been called for. This is rebutted by the learned counsel for the Official Liquidator. The order passed by the learned Company Judge is to strike off the revenue recovery proceedings from the Thandaper Account of the property on the basis of the revenue recovery proceedings resulting in attachment for recovering the sales tax dues. We pose to ourselves the question as to whether in the consideration of such application, the Court could have posed the question that the State of Kerala, which is armed with the first charge u/s 26B, could still proceed against the property. In this connection, we must notice that it is a case where the sale was effected free of all encumbrances. It is brought to our notice by the learned counsel for the respondents that if sale is held not free from encumbrances, it will prejudice the interests of the company shareholders and its creditors including the workers. Such auction may not fetch a proper price. Still we would also think that there is no challenge by the State to the sale held as free of encumbrances. The sale held by the Company Court is for the benefit of all the creditors. The manner in which sale proceeds is to be shared among the various creditors is indicated in the provisions contained in the Companies Act. They include Sections 529A and 530 of the Act. The priority itself is to be decided by the Company Court u/s 446(2) (d). If the State is allowed to proceed against the property, despite the sale held as free of encumbrances, the result would be that the sale would become vulnerable and it would also be against what had been held out to the auction purchaser under the aegis of the Company Court that the sale is being held free of encumbrances. Having regard to the provisions contained in Sections 529A and 530, the intention is clear that the law of land is that the claim of the State must with regard to the amounts due as taxes be subject to the amounts due to the secured creditors and workers. If the sale is held free of encumbrances and if the State is allowed to pursue its claim as against the property, it would naturally bring the sale under a cloud and there would be no end to the litigation which would in the ultimate analysis be not only against the interests of persons whose interests are sought to be secured by the Companies Act on the basis of priority, but against the scheme of the Companies Act. On this reasoning we find that the

impugned order does not suffer from infirmity.

The appeal fails and the same is dismissed.