

(2023) 03 MP CK 0093

In the Madhya Pradesh High Court

Case No : Company Petition No. 26 Of 2002

In Ref: M/S Beta Nephthol Ltd.

APPELLANT

Vs

Ref.Has Been Recd. From Bifr New Delhi

RESPONDENT

Date of Decision : 14-03-2023

Acts Referred:

Companies Act, 1956 — Section 529(1)(c), 529A, 530, 530(1), 530(1)(a), 530(5)
Income Tax Act, 1961 — Section 178, 178(2), 178(6)
Central Sales Tax Act, 1956 — Section 17
Insolvency And Bankruptcy Code, 2016 — Section 30(2)

Citation : (2023) 03 MP CK 0093

Hon'ble Judges : Subodh Abhyankar, J

Bench : Single Bench

Advocate : Nikhil Pandey, Gaurav Chhabra

Final Decision : Dismissed

Judgement

Subodh Abhyankar, J

1] Heard on OLR No.40/2017.

2] This OLR has been filed by the Official Liquidator seeking the following reliefs:-

"i) Report of the Official Liquidator may kindly be perused and taken on record.

ii) In view of submission made in Para-4 above, permission may kindly be given to remit a sum of Rs.2,26,940/- to Income Tax Department towards Income Tax payable for the Assessment Year 2010-11, out of funds available in the accounts of the Company (In-Liqn.).

iii) In view of submission made in Para-5 above, Official Liquidator humbly seeks leave of this Hon'ble Court to withdraw OLR no.19/2017 dated 03/03/2017 to avoid future complications.

iv) In view of submission made in Para-7 above, Official Liquidator is humbly opinion that, appropriate orders may kindly be passed by this Hon'ble Court to

waive of the Income Tax liability of Rs.16,81,220/-, Rs.21,58,480/- & Rs.15,63,570/- in respect of Assessment Year 2012-13, 2013-14 & 2014-15 respectively.

Or

if this Hon'ble High Court is not inclined to the aforesaid humbly proposal of the Official Liquidator, the Secured Creditors – Kotak Mahindra Bank Ltd, UTI Asset Management Co. Ltd., IFCI Ltd & Assets Stabilization Fund, may be directed to remit back proportionate share to the Official Liquidator as per table given in para 7 above, so as to enable the Official Liquidator to remit Income Tax amount of Rs.16,81,220/-, Rs.21,58,480/- & Rs.15,63,570/- in respect of Assessment Year 2012-13, 2013-14 & 2014-15 respectively.

And

Such other order(s) as this Hon'ble Court deem fit and proper may kindly be passed in the circumstances of the case."

3] The case of the Official Liquidator is that there are income tax dues and as per the return filed by the company in liquidation, the demand of Income Tax Department comes to Rs.92,82,230/-excluding the penalty and interest for the year 2010-11 to 2014-15 with tax demand after completion of assessment. Reliance is also placed by Shri Mehta on Section 529-A of Companies Act, 1956 (hereinafter referred to as the Companies Act) which provides for overriding preferential payment, as also Section 530 of the same, which refers to preferential payments and it is submitted that since the amount realized from the sale of the assets of the company has already been paid to the secured creditors, and as of now, the company has in its account Rs.20,14,136/- only, the major portion of which is again liable to be set off against the secured creditors' dues. In such circumstances, the aforesaid reliefs have been sought by the OL.

4] Shri Gaurav Chhabra, learned counsel appearing for the Kotak Mahindra Bank has opposed the prayer and it is submitted that the alternative relief sought in the OLR cannot be allowed in any manner as the Bank is a secured creditor and its rights are also saved under Section 529-A of the Companies Act. Counsel has relied upon the decision rendered by the Supreme Court in the case of Stock Exchange, Bombay Vs. V.S. Kandalgaonkar and others reported as AIR 2015 SC 193. He has also relied upon the decision rendered by the Bombay High Court in Company Petition No.910 of 1987 on 28/08/1998 in the case of Starit India Ltd. (In Liquidation), In re. Relevant paras viz., 11 and 12 of the same read as under:-

"11. The scheme and purpose, therefore, which emerges is that the liquidator is bound to make provision for payment determined under Sub-section (2). Once he makes the provision, the bar of Section 178 goes. In other words, once the amount is set aside, as assessed for tax the liquidator is not precluded from disposing of the assets or properties of the company. Sub-sections (1), (2) and (3) therefore read in harmony do not mean that transactions that take place

after the compliance by the liquidator with Sub-clause (b) of Sub-section

(3), are prohibited. The very proviso to subsection (3) treats tax, secured creditors and costs and expenses of winding up on the same footing. Section 178(1) and (2), therefore, do not place transactions of sale of assets subsequent to the order of the Assessing Officer as a preferential payment over other secured creditors. Therefore, the judgment of the apex court is referable only to the "amount" assessed under Section 178(2) of the Income-tax Act. So read and in order to be in conformity with the "amount" assessed, if no money is available for payment of the amount assessed, the assets/properties in the first instance will have to be sold for meeting the liability under Section 178(2) notwithstanding the proviso to Sub-section (3).

12. If this construction is not followed it will be impossible to construct Section 178 of the Income-tax Act and Sections 529A and 530 of the Companies Act harmoniously. Section 178 of the Income-tax Act was introduced in 1961, whereas Section 529A and the amendment to Section 530 of the Companies Act have been brought by an amendment in the year 1985. Section 529A has been given overriding effect over other dues including the dues under Section 530(1) (a) and also any other law for the time being in force. A proper reading of these two sections of the Companies Act read with Section 178 of the Income-tax Act as interpreted by the apex court must clearly therefore lead to the conclusion that after the requirement of Section 178(2) has been complied with the subsequent tax dues are subject to Sections 529A and 530 of the Companies Act. Dues under Section 529A thus will have precedence over dues under Section 530(1)(a). In my view, therefore, the capital gains tax or subsequent tax dues on account of the sale of the properties by the liquidator do not have preferential rights over the dues of workers and other secured creditors and these rights must have precedence over the tax dues of the Department under Section 530(1) (a). Section 178 of the Income-tax Act will have precedence only over tax assessed under Section 178(2)."

(emphasis supplied)

5] Shri Raunak Choukse, learned counsel appearing for IFCI Bank has also submitted that the IFCI Bank is also a secured creditor and huge liability of the Company (in liquidation) is still pending and there is no question of any amount being remitted to the Official Liquidator for payment of tax as s.529-A protects such secured creditors. Similarly, Shri Nikhil Pandey, learned counsel appearing for SASF has also opposed the prayer of the OL. He has also referred to Section 529-A of the Companies Act. He has also relied upon the decision rendered by the Patna High Court in the case of State of Bihar Vs. Official Liquidator, and others MANU/BH/1080/2015 dated 06/11/2015, para 20, 22 and 23 of the same read as under:-

"20. As a matter of fact, a reliance placed on the judgment of the Apex Court in the case of Imperial Chit Funds (P) Ltd. (supra) is wholly misplaced, inasmuch

as, in that case, the issue was not with regard to the rights of the secured creditors vis-à-vis payment of tax payable to the Government as envisaged under Section 529A of the Company Act rather the issue before the Apex Court was qua section 530(1)(a) with other unsecured creditors and it was in that context that the Apex Court, considering the provisions of Section 178 of the Income Tax Act, had gone to hold that if an order was passed under Section 178 of the Income Tax Act and considering the equality amongst the creditors as set out in Section 530(5) of the Company Act, an order under Section 178 for Income Tax dues would have preference over other unsecured creditors set out in Section 530(1) of the Act.

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22. Thus, it has to be essentially held that the whole purpose of Section 529A of the Company Act is to ensure that workmen and secured creditors should not be deprived of their legitimate claim in course of the liquidation of the company. As a matter of fact, the legislature has secured the workmen's dues and dues of secured creditors which rank *pari passu* should be paid in priority to all other debts. There is no statutory provision overriding the claim of secured creditor except Section 529A of the Company Act and, thus, the submission of the learned counsel for the appellant that the dues of Central Sales Tax Act must be paid with cost of winding in priority to the claim of secured creditor cannot be accepted much less allowed.

23. As noted above, the Official Liquidator has already allowed the claim of the appellant but, the grievance that such claim should have been allowed in preference to the dues of the workmen and secured creditors is not acceptable. This Court, however, must clarify that when the Official Liquidator in the impugned order has used the claim of the appellant being "ordinary" he had actually meant that such claim of the appellant is payable in terms of Section 530(1) of the Act which again makes it very clear that the same is subject to the payment of provision of preferential payments to be made under Section 529A of the Act."

(emphasis supplied)

6] On the other hand, Ms. Veena Mandlik, learned counsel appearing for the Income Tax Department has vehemently propagated the cause of Income Tax Department and it is submitted that the income tax department has priority over the other claims of the secured or unsecured creditors. She has also referred to Section 178 of the Income Tax Act, 1961. Reliance has also been placed by her on the decision rendered by the Supreme Court in the case of Imperial Chit Funds (P.) Ltd. Vs. Income Tax Officer reported as 498 ITR Vol. 219. Relevant para of the same reads as under:-

"8. During the course of hearing, our attention was drawn to Section 17 of the Central Sales Tax Act, 1956 which is similar to Section 178 of the Income-tax Act, 1961. We are of the view that the interpretation placed by us on Section 178

of the Income-tax Act, should govern cases arising under Section 17 of the Central Sales Tax Act, 1956 as well. But, a situation may arise where the authorities under both the Acts (Income-tax Act as well as Central Sales Tax Act) send similar orders to the Official Liquidator, in which case the question of precedence may arise. In our opinion, in such cases, the priority shall be with respect to the date of receipt of the orders by the Official Liquidator.”

(emphasis supplied)

7] She has also relied upon the decision rendered in the case of State Tax Officer Vs. Rainbow Papers Limited passed by the Supreme Court in Civil Appeal No.1661 of 2020 on 06/09/2022. The relevant para of the same read as under:-

“48. A resolution plan which does not meet the requirements of Sub-Section (2) of Section 30 of the IBC, would be invalid and not binding on the Central Government, any State Government, any statutory or other authority, any financial creditor, or other creditor to whom a debt in respect of dues arising under any law for the time being in force is owed. Such a resolution plan would not bind the State when there are outstanding statutory dues of a Corporate Debtor.

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54. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.

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57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority.”

(emphasis supplied)

8] In rebuttal, learned counsel appearing for the secured creditors are unison in their submissions that Section 529-A of the Companies Act would have the overriding effect if read along with Section 530 of the Companies Act as also Section 178 of the Income Tax Act.

9] Shri Mehta, learned counsel for the OL on the other hand has tried to distinguished the judgement relied upon by Ms. Veena Mandlik and it is submitted that the Income Tax Department cannot claim its dues as a matter of right. He has also submitted that the case of Imperial Chit Funds (P.) Ltd. And Rainbow Papers Limited

(supra) are clearly distinguishable as the same deals with Section 530 of the

Companies Act viz-a-viz Section 178 of Income Tax Act, and there is no reference of Section 529A and thus, the aforesaid decision is of no avail to the respondent/Income Tax Department.

10] Heard learned counsel for the parties, and perused the record.

11] Before I proceed to reflect upon the merits of the case, it would be apt to refer to the relevant provisions of the Companies Act as also the Income Tax Act. The same reads as under:-

"[529-A. 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,¹ [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) to (g) not relevant hence not reproduced...

XXXXXXXXXXXXXXXXXXXXX".....

178. Company in liquidation.— (1) Every person—

(a) who is the liquidator of any company which is being wound up, whether under the orders of a court or otherwise; or

(b) who has been appointed the receiver of any assets of a company, (hereinafter referred to as the liquidator) shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Assessing Officer who is entitled to assess the income of the company.

(2) The Assessing Officer shall, after making such enquiries or calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the Assessing Officer, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by

the company.

(3) The liquidator—

(a) shall not, without the leave of the Chief Commissioner or Commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the Assessing Officer under sub-section (2); and

(b) on being so notified, shall set aside an amount, equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands:

Provided that nothing contained in this sub-section shall debar the liquidator from parting with such assets or properties for the purpose of the payment of the tax payable by the company or for making any payment to secured creditors whose debts are entitled under law to priority of payment over debts due to Government on the date of liquidation or for meeting such costs and expenses of the winding up of the company as are in the opinion of the Chief Commissioner or Commissioner reasonable.

(4) If the liquidator fails to give the notice in accordance with sub-section (1) or fails to set aside the amount as required by sub-section

(3) or parts with any of the assets of the company or the properties in his hands in contravention of the provisions of that sub-section, he shall be personally liable for the payment of the tax which the company would be liable to pay:

Provided that if the amount of any tax payable by the company is notified under sub-section (2), the personal liability of the liquidator under this sub-section shall be to the extent of such amount.

(5) Where there are more liquidators than one, the obligations and liabilities attached to the liquidator under this section shall attach to all the liquidators jointly and severally.

(6) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.”

(emphasis supplied)

12] So far as the reliance placed by the counsel for the rival parties on the various decisions is concerned, the same have already been referred to above and it is apparent that the provisions of s.529A of the Act of 1956 has the overriding effect over all the other laws/Acts.

13] This court finds that on perusal of s.529A and s.530 of the Act of 1956 makes it abundantly clear that dues of the workmen and that of the secured creditors shall have the overriding preferential treatment in respect of payments of their dues and, all the other dues in respect of tax etc. shall have the right of preferential payment only but not the overriding preferential payment as provided u/s.529-A of the Act of 1956. Apart from that, s.529-A starts with a non

obstante clause, i.e., "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", meaning thereby that it shall have the overriding effect over any other law or any other provision of the Companies Act itself. This court finds itself in agreement with the finding recorded by the Bombay High Court in the case of Starit India Ltd (supra), wherein it has been observed that, " Section 178 of the Income-tax Act was introduced in 1961, whereas Section 529A and the amendment to Section 530 of the Companies Act have been brought by an amendment in the year 1985. Section 529A has been given overriding effect over other dues including the dues under Section 530(1)(a) and also any other law for the time being in force ."

14] So far as the principle governing the two non obstante clauses appearing in two different Acts is concerned, it is no more *res integra* as has been held by the Supreme Court in the case of *KSL and Industries Ltd. v. Arihant Threads Ltd.*, (2008) 9 SCC 763, the relevant paras of the same read as under:-

"89. From the above discussion, in my judgment, the law is fairly well settled. A provision beginning with non obstante clause (notwithstanding anything inconsistent contained therein in any other law for the time being in force) must be enforced and implemented by giving effect to the provisions of the Act and by limiting the provisions of other laws. But, it cannot be gainsaid that sometimes one may come across two or more enactments containing similar non obstante clause operating in the same or similar direction. Obviously, in such cases, the court must attempt to find out the intention of the legislature by examining the nature of controversy, object of the Act, proceedings initiated, relief sought and several other relevant considerations.

90. From the case law referred to above, it is clear that courts have applied several workable tests. They, *inter alia*, include to keep in view whether the Act is "general" or "special", whether the Act is a subsequent legislation, whether there is reference to the former law and the non obstante clause therein. The above tests are merely illustrative and by no means they should be considered as exhaustive. It is for the court when it is called upon to resolve such conflict by harmoniously interpreting the provisions of both the competing statutes and by giving effect to one over the other."

(emphasis supplied)

15] Testing the facts of the case on hand on the anvil of the aforesaid dictum of the Supreme Court, this court finds that firstly, the provisions of s.529A of the Act of 1956 have come into force on 1985 whereas s.170 of the IT Act has come into force in the year 1961, thus, the subsequent provisions of s.529A of the Act of 1956 would have precedence over the IT Act. Secondly, the Act of 1956 is a special Act which govern the law regarding companies only whereas IT Act is a general Act which percolates in just about every sphere of life and is applicable to all the citizen of India when it comes to payment of Income Tax. Thirdly, it is

also found that s.529A and s.530 of the Act of 1956 have already taken into account inter alia the provisions of Income Tax and thus, the harmonious reading of the provisions of the two Acts leads this court to the one and only unescapable conclusion, that s.529A of the Act of 1956 would prevail over the Income Tax Act.

16] So far as the decision relied upon by Ms. Mandlik in the case of Imperial Chit Funds (P.) Ltd. Vs. Income Tax Officer and State Tax Officer Vs. Rainbow Papers Limited (supra) are concerned, the same are clearly distinguishable for the simple reasons that they do not take into account the provisions of s.529-A of the Act of 1956, thus, are of no avail to the Income Tax Department. In the case of Rainbow Papers Limited (supra), the aforesaid decision is not applicable in the facts and circumstances of the case as it was confined only to the provisions IBC and definition of secured creditors under the provisions of IBC which has only been clarified vis-à-vis the provisions of Section 178(6) of the Income Tax Act. Similarly, the Patna High Court in the case of State of Bihar Vs. Official Liquidator (supra) has already discussed and distinguished in detail the decision rendered by the Supreme Court in the case of Imperial Chit Funds (P.) Ltd (spura) and this court concurs with the aforesaid finding recorded by the Patna High Court.

17] Resultantly, the OLR No. 40/2017 is hereby rejected as no such order can be passed to direct the secured creditors to part with the amount which has been given to them out of the proceeds of the properties of the Company (in liquidation) for the purposes of payment of Income Tax liabilities of the Company (In liq.).

18] During the course of the arguments, it has also been informed to this court by the counsel appearing for the Official Liquidator as also the other secured creditors that the their dues exceeds far more than the amounts which have been paid to them until now, thus no further order is required to be passed by this court at this stage.

19] With the aforesaid observations, the OLR No.40/2017 is hereby dismissed.

Let the matter be listed on 28/03/2023 for further orders.