

(2001) 07 KL CK 0045

In the High Court Of Kerala

Case No : C.A. No. 36 of 2001 in M.C.A. 6 of 2001 in C.P. 15 and 19 of 94

Joseph

APPELLANT

Vs

Official Liquidator

RESPONDENT

Date of Decision : 13-07-2001

Acts Referred:

Companies Act, 1956 — Section 530
Companies Act, 1965 — Section 11, 14B, 15(2), 17(6), 529
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17, 2
Presidency Towns Insolvency Act, 1909 — Section 49
Provincial Insolvency Act, 1920 — Section 61

Citation : (2002) 108 CompCas 268 : (2001) 90 FLR 1141 : (2001) 3 ILR (Ker) 209 : (2001) 2 LLJ 1217

Hon'ble Judges : J.B. Koshy, J

Bench : Single Bench

Advocate : George Kutty Mathew, for the Appellant; K. Moni, N.N. Sugunapalan, M. Pathrose and Rajesh Nair, for the Respondent

Judgement

J.B. Koshy, J.—The claim of the applicant in this case is that provident fund amount payable was admitted by the Liquidator only under S. 529A of the companies Act. It is the contention of the applicant that in view of S. 11 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (in short "EPF Act") first charge should be given to the provident fund dues and, therefore, dividend cannot be apportioned in pari passu with the secured creditors as S. 11 will prevail over the provisions of S. 529A. It is also contended that the Industrial Tribunal has awarded that workers are entitled to salary during lay off period. Even though salary for lay off period as directed by the Tribunal was admitted by the Official Liquidator, the provident fund dues on the salary paid during the lay off period was not admitted by him.

2. The first question to be considered is whether the stand of the Official Liquidator is correct in not admitting the claim for provident fund contribution on salary awarded by the Industrial Tribunal as Tribunal's awarded was subsequent

to the winding up order and salary became due after winding up payment. According to the Industrial Tribunal, lay off was illegal and workers are entitled to salary. With regard to the contention that provident fund ought to have been deducted from the salary payable, I am of the view that it has got considerable force. It is true that winding up order was passed subsequent to the period of lay off and award of the Tribunal was subsequent to the winding up order. The lay off which was held to be illegal was before winding up. Salary ordered to be paid by the Tribunal is therefore "wages" as defined in S. 2(b) of the EPF Act and it was emolument "payable" during the period of lay off. The remuneration payable during lay off period is not excluded in the definition. Here Tribunal held that lay off was illegal. Therefore, what was directed to be paid is salary itself. S. 2(b) of the Employees' Provident Fund Act says as follows:

"(b) "basic wages" means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include....."

In the above circumstances, Tribunal awarded salary during lay off period as lay off was illegal and it ought to have been paid during the respective periods prior to the period of winding up. therefore, provident fund contributions ought to have been paid for the benefit of employees and Official Liquidator is directed to include that also as admitted claim of the employees.

3. S. 529A of the Companies Act reads as follows:

"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-s. (1) of S. 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-s. (a) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions".

S. 530 again details preferential payments. S. 11 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 reads as follows:

"11. Priority of payment of contributions over other debts:

(1) Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due

(a) from the employer in relation to an establishment to which any Scheme or

the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under S. 14B, accumulations required to be transferred under sub-s. (2) of S. 15 or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or

(b) from the employer in relation to an exempted establishment in respect of any contribution to the provident fund or any insurance fund in so far as it relates to exempted employees, under the rules of the provident fund or any insurance fund any contribution payable by him towards the Pension Fund under sub-s. (6) of S. 17, damages recoverable under S. 14B or any charges payable to him to the appropriate Government under any provision of this Act under any of the conditions specified under S. 17, shall where the liability therefore has accrued before the order of adjudication or winding up is made, be deemed to be included among the debts which under S. 49 of the Presidency Towns Insolvency Act, 1909, or under S. 61 of the Provincial Insolvency Act, 1920, or under S. 530 of the Companies Act, 1956, are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

Explanation: In this sub-section in S. 17, "insurance fund" means any fund established by an employer under any Scheme for providing benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of any separate contribution or premium in that behalf.

(2) Without prejudice to the provisions of sub-s. (1), if any amount is due from an employer, whether in respect of the employees contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts."

4. The present provisions of S. 11 of EPF Act was enacted on 1.11.1973. S. 529 of the Companies Act was enacted only in 1985. S. 529A(1) specifically states that "Notwithstanding anything contained in any other provision of this Act or any other law for the time being.....". Therefore, I am of the opinion that the applicant's claim will come only under S. 529A and S. 11 of the Employees' Provident Funds Act will not override the provisions of S. 529A. The Official Liquidator had already included the workers' claim for provident fund also under S. 529A along with secured creditors and it cannot be contended that only after clearing all provident fund dues secured creditors claim can be considered.

5. The learned counsel cited the decision in A.P. State Financial Corporation v. Official Liquidator ((2001) 7 SCC 291) wherein it was clearly held that provisions under S. 529A will protect the interest of workmen and it will override the other statutes. Therefore, it can be seen that provident fund dues will come under S.

529A. Merely because there is an amendment including certain payments also in S. 11 of EPF Act the overriding effect of S. 529A will not be curtailed. Hence the contention that over and above S. 529A provident fund claim should be given prior charge than secured creditors cannot be considered and it can be considered only in pari passu along with claim of secured creditors under S. 529A.

6. The contention raised by the counsel for the secured creditor bank that provident dues payable to the Employees Provident Fund cannot be claimed as workmen's dues under S. 529A also cannot be accepted. According to the counsel, since no provident fund is maintained by the company it is not workmen's dues. S. 529(3)(b) details "workmen's dues". S. 529(3)(b)(iv) states as follows:

"(iv) all sums due to 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.

Such a technical interpretation is not possible when S. 529(3)(b) is read as a whole. A beneficial interpretation considering the purpose of the section has to be adopted. When salary was payable during respective wage period, contribution also should have been remitted and contribution payable to Employees' Provident Fund Act also is a workmen's due as defined under S. 529(3)(b) and is entitled to be claimed as preferential claim under S. 529A in pari passu with secured creditors. Official Liquidator has correctly included provident fund claims on behalf of the workers also correctly under S. 529A as workmen's due.

The C.A. is disposed of accordingly.