

(1994) 06 KL CK 0030
In the High Court Of Kerala
Case No : O.P. No. 1164 of 1994

Kerala Financial Corporation

APPELLANT

Vs

Recovery Officer

RESPONDENT

Date of Decision : 22-06-1994

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11(2)
Kerala State Financial Corporations Act, 1951 — Section 29, 46B

Citation : (1998) 3 LLJ 1095

Hon'ble Judges : G.H. Guttal, J

Bench : Single Bench

Advocate : M. Pathrose Mathai, for the Appellant; N.N. Sugunapalan, for the Respondent

Final Decision : Allowed

Judgement

G.H. Guttal, J.—M/s. Darpan Electronics (Private) Limited owes Rs. 37,150/- towards its contribution to the Employees' Provident Fund and Rs. 15,95,693/- to the Kerala State Financial Corporation (the Corporation for short). The question for consideration in this petition under Article 226 of the Constitution of India is, whether, by virtue of Sections 29 and 46-B of the State Financial Corporations Act, 1951 ("the Act" for brevity), the Corporation has the overriding right to recover its debts from the assets of Darpan Electronics, notwithstanding the fact that u/s 11(2) of the Employees' Provident Funds and Miscellaneous Provisions Act ("The Provident Fund Act" for the sake of brevity), the amount of provident fund dues is a first charge on the assets of the employer. The facts giving rise to this question are in paragraph No. 2 below.

2. On February 20, 1987 Darpan Electronics (Private) Ltd. borrowed Rs. 10.89 lakhs from the Corporation created under the State Financial Corporation Act a Central Act. Darpan Electronics (Pvt.) Ltd. mortgaged its immovable properties and hypothecated the movables with the Corporation on February 23, 1987. On October 10, 1991 a sum of Rs. 15,95,693 was due and payable by Darpan

Electronics. The Corporation initiated proceedings u/s 29 of the Act and on November 18, 1991 all the property of Darpan Electronics were taken over by the Corporation. On December 20, 1993 movables were sold for realisation of the debt due to the Corporation. A sum of Rs. 89,083/- is playing in its account with the South Indian Bank Ltd., the Respondent No. 2.

A sum of Rs. 37,150/- is due from Durpan Electronics towards the employer's contribution to the provident fund. The Respondent No. 1 is the Recovery Officer as defined in Clause (kb) of Section 2 of the Provident Fund Act. On February 3, 1992 the Recovery Officer issued a demand notice in respect of this sum. Eventually on March 6, 1992, the Recovery Officer attached 37 cents of land from Sy. Nos. 1763 and 1784 of Palkulangara Village in Trivandrum District which was mortgaged with the Corporation, by Darpan Electronics.

The Recovery Officer considered that the Corporation, by virtue of its possession of the property of the defaulter was also a defaulter, issued notice dated December 16, 1993 (Ext.R1(g)) calling upon the Corporation as to why the amount should not be recovered from it. By order dated January 6, 1994, the Recovery Officer prohibited the South Indian Bank, Trivandrum from transferring the amount of Rs. 89,083/- lying in the account of the Corporation.

3. The nature of the rights claimed by the Corporation and the Recovery Officer may be considered in the light of the relevant provisions of law. The right of the Corporation to take over the assets of its debtor is created by Section 29 of (he Act. The Corporation shall have the right to :

(i) take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and

(ii) realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

The Legislature, aware that there may be provisions in other laws which may affect the Corporations right to take over and sell the assets of its debtors, enacted Section 46-B which gives overriding effect to the provisions of the Act. The provisions of the Act, the rules and orders made under it "shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.....".

4. The Provident Fund Act was enacted in 1952 a year later than the Act. u/s 8-G of the Provident Fund Act the provisions of the Second and Third Schedules to the Income Tax Act and Income tax (Certificate Proceedings) Rules, 1962 shall apply as if the said provisions and the rules, referred to the arrears of the amount of provident fund contributions instead of to the income tax. The Respondent No. 1 derives his power to recover the arrears of contribution from Darpan Electronics from Section 8-G and Section 11(2) of the Provident Fund Act read with the rules in the Second Schedule to the Income Tax Act.

5. It is urged on behalf of the Coproation that Section 46-B which makes Section

29 applicable notwithstanding anything inconsistent therewith contained in any other law, creates absolute right in the Corporation to the property of Darpan Electronics to the exclusion of the Recovery Officer.

The Recover Officer claims that the employer's contribution is, under Sub-section (2) of Section 11 of the Provident Fund Act, recoverable in priority to the Corporation's debts and relies upon Sub-section (2) of Section 11 which makes two provisions :

(i) the amount of contribution to the provident fund by the employer - in this case Darpan Electronics - is the first charge on the assets of the Darpan Electronics and

(ii) the amount of contribution due from the employer - Darpan Electronics - shall be "paid in priority to all other debts".

6. The priority granted to the payment and recovery of the amounts due under the Provident Fund Act, and its operation, notwithstanding other laws, is a measure of the legislative urge to ensure that no other authority or law prevents recovery of such dues. But the Corporation too claims under Sections 29 and 46-B of the Act, the right to take over and sell the property which forms the security for the debts. These conflicting claims can be resolved if the nature of the debts of the two creditors are examined.

7. Mortgage is the transfer of interest in immovable property. This is clear from the use of the words "transfer of an interest" used in Section 58 of the Transfer of Property Act. In a charge there is no transfer of interest in the property but the creation of right of payment out of property specified and as such it cannot be enforced against the bonafide purchaser for value without notice. (Please see Mulla on Transfer of Property Act, 7th Edition pages 360 and 605). Mortgage creates a right in rem. Charge does not. While the mortgage is good against subsequent transferees, the charge is good only against transferees with notice of the charge.

8. The Corporation is a secured creditor. It has interest in the property mortgaged or hypothecated to it. The Recovery Officer who represents the authorities under the Provident Fund Act, is not a transferee of any interest of the property of Darpan Electronics. This distinction places the Corporation and the Recovery Officer at different levels of legal rights. It stands to reason therefore, that the Recovery Officer can proceed against the property mortgaged or hypothecated with the Corporation, only if it is shown that, the Corporation had notice of the charge.

9. The mortgage and hypothecation were executed on February 23, 1987. The notice by the Recovery Officer is dated February 21, 1992 (Ext. R1(e)). It was addressed to the District Manager of the Corporation. The material produced in this petition does not show that the District Manager received the notice. The postal acknowledgement (Ext.R3(f)) does not bear the signature of the

addressee. It is blank. Therefore the Corporation had no notice of the charge. Consequently, the Corporation is a transferee for consideration without notice of the charge.

10. A charge can be enforced against transferee for consideration without notice if it is "otherwise expressly provided by any law" (Section 100 of the Transfer of Property Act). The provision of law which permits the enforcement of charge against transferees for consideration without notice, of the charge must be "express". In this case what Sub-section (2) of Section 11 of the Provident Fund Act does is to declare that the amount of provident fund contribution shall "be paid in priority to all other debts". These words do not mean that charge may be enforced against the property held by a transferee for consideration without notice. The legislature was aware of the provision of Sections 29 and 46-B of the Act which invested the Corporation with the right to sell the mortgaged or hypothecated property. If it intended to make the charge enforceable against the property held by the Corporation it would have so provided by express words. What provision of law can be said to be "express" may be understood from the judgment of the Supreme Court in *The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussenhai*, It is not enough to provide for enforceability of the charge against the property. The saving law must also provide that the charge shall be enforced against the property" in the hands of a transferee for consideration without notice of the charge". In my opinion the words "shall be paid in priority to all other debts" employed in Sub-section (2) of Section 11 of the Provident Fund Act do not constitute an express provision that the charge may be enforced against the property held by transferee for consideration without notice of the charge. This Court in *Sundaram Finance Ltd, v. Regional Transport Officer and Ors.* 1979-117 Income Tax Reports 334 and the Allahabad High Court in *Suraj Pramod Gupta and Anr. v. Chartered Bank, Kanpur and Anr.* 1972-83 Income Tax Reports 494 negated the State's claim of priority over the rights of secured creditors.

11. The summary of my conclusion based on the above discussion is as under:

The declaration of priority granted to the payment of employer's contribution of Sub-section (2) of Section 11 of the Provident Fund Act is not a provision of law expressly providing that the charge may be enforced against the property in the hands of a transferee for consideration without notice of the charge. Therefore having regard to the provision of Section 100 of the Transfer of Property Act, the charge created by Sub-section (2) of Section 11 of the Provident Fund Act cannot be enforced against the property mortgaged or hypothecated to the Corporation.

12. Learned counsel for the respondents urged that Sub-section (2) of Section 11 of the Provident Fund Act being an enactment later than the "Act" should be understood to have repealed, by implication, the earlier enactment contained in Section 29 read with Section 46-B of the Act. In the first place, repeal by implication is not favoured by courts. The reason is that the Acts of Parliament are established with such gravity, wisdom and universal consent of the whole

realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated (Maxwell on the Interpretation of Statutes, 12 Edition page 191). Sub-section (2) of Section 11, couched an affirmative language declares that the amount due to the Provident Fund organisation shall be recovered in priority to all debts. There are no negative words suggesting an intention to abrogate the effect of the earlier law. I am unable to read in Sub-section (2) of Section 11 of the Provident Fund Act, an implied repeal of Sections 29 and 46-B of the Act.

13. For the reasons stated in the foregoing paragraphs, I hold that the proceedings of the Respondent No. 1 expressed in the letter No. KR/ 12258/ Recover/Tvm/93 dated December 16, 1993 (Ext. P1, letter No. KR/12258/ Recovery/TVM/93 dated December 27, 1993 (Ext.P3), the prohibitory order No. KR/12258/Recovery/Tvm/93 dated January 6, 1994 (Ext.P4) and the orders No. KR/ 12259/Recovery/92 dated March 6, 1992 (Ext.P5(b)), KR/12258/Recovery/ Tvm/92 dated February 21, 1992 (Ext.P5(a)) and K.R/12258/ Recovery/92 dated March 6, 1992 (Ext. P5(c)) are illegal. I therefore quash them.

14. The Original Petition is allowed. No costs.