

(2015) 10 AHC CK 0131
In the Allahabad High Court
Case No : Writ - C No. 45585 of 2015

Kotak Mahindra Bank Ltd. and Others	Vs	APPELLANT
U.O.I. and Others		RESPONDENT

Date of Decision : 16-10-2015

Acts Referred:

Constitution of India, 1950 — Article 38, 43
Employees Provident Funds Family Pension Fund And Deposit-linked Insurance Fund Act, 1952 — Section 11, 11(1), 11(2), 13, 13(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13
State Financial Corporations Act, 1951 — Section 29
Transfer of Property Act, 1882 — Section 100, 69, 69A, 69-A

Citation : (2015) 10 ADJ 122

Hon'ble Judges : Suneet Kumar, J.

Bench : Single Bench

Advocate : Manish Trivedi, for the Appellant; Amit Negi, D.K. Mishra, S.K. Srivastava and Sachindra Upadhyay, for the Respondent

Final Decision : Dismissed

Judgement

Suneet Kumar, J.—The petition is being decided on the request of the learned counsel for the parties at the admission stage without issuing notice to the fifth respondent and without calling for counter affidavit.

2. ING Vyasya Bank Limited which subsequently amalgamated with Kotak Mahindra Bank Ltd.1 sanctioned and disbursed credit facility to the fifth respondent, M/s. Y.A. Fidelity Engineering Pvt. Ltd2. The borrower company defaulted, consequently the debt were classified non-performing asset (N.P.A.) on 4 February 2006 as per guidelines of the Reserve Bank of India. The Bank proceeded in terms of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 20023 and recovered a sum of Rs. 50 lacs by selling the mortgaged immovable property, hypothecated stock, plant and machinery on 30 March 2009 and 22 May 2009

respectively.

3. The third respondent, Recovery Officer, Employees Provident Fund Organization, Kanpur attached the unit of the borrower company for realizing the dues towards employees provident fund under the Employees' Provident Funds and Miscellaneous Provisions Act 1952. Upon failure to deposit the provident fund by the Bank, the Recovery Officer by the impugned order dated 15 July 2015 attached two third salary of the second petitioner, Zonal Recovery Manager, Kotak Mahindra Bank Ltd. The petitioners are assailing the order in writ jurisdiction.

4. Sri Manish Trivedi, learned counsel appearing for the petitioners would submit that the action on the part of the Provident Fund Commissioner in attaching the salary is wholly illegal and arbitrary, the bank is having first charge on the security of the borrower company, therefore, the Bank has recovered all the outstanding dues by sale of the security in 2009, which cannot be claimed under Section 11 of the EPF Act by the respondents. The respondents could recover the employees' dues by sale of other assets of the borrower company.

5. Sri Amit Negi, learned counsel appearing for the respondents would submit that the dues payable by an employer under section 11 of E.P.F. Act, would have priority over other debts and is not subject to the provisions of section 13 of the SARFAESI Act.

6. The rival submissions fall for consideration.

7. The question which arises for consideration is as to whether the priority given to the dues payable by an employer under section 11 of E.P.F. Act is subject to section 13 of SARFAESI Act.

8. The EPF Act was amended by Act 40 of 1973, Act 19 of 1976 and Act 33 of 1988. By Act 40 of 1973, Section 11 was renumbered as Section 11(1) and a new sub-section was added as Section 11(2) and it was declared that any amount due from an employer in respect of the employees' contribution shall be deemed to be first charge on the assets of the establishment and shall be paid in priority to all other debts. The scope of Section 11(2) was enlarged by Act 33 of 1988 by including the employer's contribution.

9. The background in which Amendment Act 33 of 1988 was passed is discernible from the Statement of Objects and Reasons appended to the Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 1988.

10. Section 11, as it stands after the amendment of 1988, reads as under:

"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 section 14B , accumulations required to be transferred under sub-section (2) of section 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 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-section (6) of section 17 , damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act, or under any of the conditions specified under section 17 .

11. An analysis of Section 11 of the EPF Act shows that it gives statutory priority to the amount payable to the employees over other debts. Section 11(1) relates to an employer who is adjudged insolvent or being a company against whom an order of winding up is made. It lays down that the amount due from the employer in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under Section 14B , accumulations required to be transferred under Section 15(2) or any charges payable under any other provision of the Act or the Scheme or the Insurance Scheme shall 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.

12. Section 11(2) contains a non obstante clause and lays down that if any amount is due from an employer whether in respect of the employee's contribution deducted from the wages of the employees or the employer's contribution, the same 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. To put it differently, sub-section (2) of Section 11 not only declares that the amount due from an employer towards contribution payable under the EPF Act shall be treated as first charge on the assets of the establishment, but also lays down that notwithstanding anything contained in any other law, such dues shall be paid in priority to all other debts.

13. The EPF Act is a social welfare legislation intended to protect the interest of a weaker section of the society, i.e. the workers employed in factories and other establishments, who have made significant contribution in economic growth of the country. Therefore, a legislation made for their benefit must receive a liberal and purposive interpretation keeping in view the Directive Principles of State Policy contained in Articles 38 and 43 of the Constitution.

14. What is of importance is that section 11 of E.P.F. Act, declares the priority of payment of contributions under the Act over other debts. Sub-section (1) of section 11 of E.P.F. Act deals with the question of priority where an employer is adjudicated insolvent or being a company subjected to an order of winding up.

15. Sub-section (2) of section 11 of the E.P.F. Act has two facets. First, it declares that the amount due from the employer towards contribution under the E.P.F. Act shall be deemed to be a first charge on the assets of the establishment. Second, it also declares that notwithstanding anything contained in any other law for the time being in force, such debt shall be paid in priority to all other debts. Both these provisions bring out the intention of Parliament to ensure the social benefit as contained in the legislation. There are other provisions in the Act rendering the amounts of Provident Fund payable immune from attachment of Civil Court's decree, which also indicate such intention of Parliament.

16. In *Central Bank of India Vs. State of Kerala and Others*, Supreme Court was called upon to consider whether first charge created by taxing statutes enacted by the State Legislatures will prevail over the debts due to secured creditors was answered in affirmative.

112. "Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis-a-vis Section 69 or Section 69-A of the Transfer of Property Act. In terms of that sub-section, a secured creditor can enforce security interest without intervention of the court or tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a Receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest.

113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in Section 13 and gave primacy to the right of secured creditor vis-a-vis other mortgagees who could exercise rights under Sections 69 or 69A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales Tax etc. Sub-section (7) of section 13 which envisages application of the money received by the secured creditor by adopting any of the measures specified under sub-section (4) merely regulates distribution of money received by the secured creditor. It does not create first charge in favour of the secured creditor.

114. By enacting various provisos to sub-section (9) of Section 13, the legislature has ensured that priority given to the claim of workers of a company in liquidation under Section 529A of the Companies Act, 1956 vis-a-vis the secured creditors like banks is duly respected. This is the reason why the first of the five unnumbered provisos to section 13(9) lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act 1956. This and other provisos do not create first charge in favour

of the workers of a company in liquidation for the first time but merely recognise the existing priority of their claim under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up.

115. It is thus clear that the provisos referred to above are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the rights of the workers of a company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof".

17. This and other provisos do not create first charge in favour of the workers of a company in liquidation for the first time but merely recognize the existing priority of their claim under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up.

18. While enacting the Debt Recovery Tribunal Act⁵ and the SARFAESI Act, Parliament was aware of the law laid down by the Supreme Court wherein priority of the EPF dues was recognized. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529-A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the EPF's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies.

19. If the provisions of the DRT Act and the SARFAESI Act are interpreted keeping in view the background and context in which these legislation 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.

20. Un-disputedly, the two enactments do not contain provision similar to the Workmen's Compensation Act or EPF Act. 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 SARFAESI Act on the one hand and Section 11(2) of the EPF Act, on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the EPF Act cannot be invoked for declaring that the first charge created under the other 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.

21. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the EPF Act vis-a-vis SARFAESI Act and similar other legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the EPF Act on the property of the dealer or any other person, liable to pay cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors.

22. In Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, , the Supreme Court considered whether dues payable by the employer under Section 11 of the EPF Act will have priority over debts due to the bank. The appellant bank questioned the legality of the orders passed under the EPF Act on the ground that being a secured creditor, the amount due to it was payable on priority vis-a-vis other dues including the dues payable by the employer under the EPF Act.

23. The Court held that by virtue of the non obstante clause contained in Section 11(2) of the EPF Act, any amount due from an employer shall be deemed to be first charge on the assets of the establishment and is payable in priority to all other debts including the debts due to a bank, which falls in the category of secured creditor.

24. In State Bank of Bikaner and Jaipur Vs. National Iron and Steel Rolling Corporation and Others, , State Bank had given a Cash Credit Facility to a borrower who had created a Deed of Mortgage on his Factory premises. The Bank filed a suit for the recovery of its dues at which stage, the Commercial Tax Officer of the State of Rajasthan got himself impleaded on the ground that the Department had a prior claim for the recovery of Sales tax dues under Section 11AAAA of the Rajasthan Sales Tax Act, 1954. That provision was to the effect that notwithstanding anything contrary contained in any law for the time being in force, any amount of tax, penalty, interest and any other sum payable by a dealer or any other person shall be the first charge on the property. The Supreme Court considered the provisions of Section 11AAAA and its impact on Section 100 of the Transfer of Property Act, 1882. The Court noted that there was a distinction between a mortgage and a charge, one which was noted by the Supreme Court in Dattatreya Shanker Mote and Others Vs. Anand Chintaman

Datar and Others, . The Supreme Court held that the phrase "transfer of property" refers to the transferee of the entire interest in the property and it does not cover the transfer of only an interest in the property by way of a mortgage, since the statute created a first charge, it gave priority to the statutory charge over all other charges on the property including a mortgage since the charge operates on the entire property of dealer including the interest of the mortgagee therein.

25. In *State of Karnataka and Another Vs. Shreyas Papers Pvt. Ltd. and Others*, , one of the issues which fell for consideration was whether the purchaser of assets of a concern sold by a State Financial Corporation under Section 29 of the SFC Act, 1951 would be liable under the Karnataka Sales Tax Act, 1967 for the arrears of Sales Tax of the concern whose assets had been transferred. The Supreme Court noted that the transferee had in fact, no notice of the arrears of sales tax either actual or constructive. The State Sales Tax Act, therefore, contained a provision subjecting the transferee to the liabilities of the transferor only when the ownership of the business was transferred. Secondly, the State law did not contain any provision exempting the requirement of the notice of a charge to the transferee. In contrast it may be noted that Section 11(2) of the EPF Act, 1952 specifically (i) creates a first charge in respect of any amount being due from the employer on account of employer's or employee's contribution; (ii) provides that the amount shall be liable to be paid in priority to all other debts; and (iii) envisages that this shall be notwithstanding anything contained in any other law for the time being in force. The non obstante provision, therefore, would necessarily override all other provisions of law including the Transfer of Property Act, 1882.

26. The Supreme Court in *Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited*, dealt with the question as to whether "priority given to the dues payable by an employer under Section 11 of E.P.F. Act is subject to section 529-A of the Companies Act 1956", the court observed that "it is also important to bear in mind that 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 [Section 530(1)(f)]. 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's 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) 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 inference that Parliament intended to create first charge in favour of the secured creditors and give priority to the debts due to secured creditors over the amount due from the employer under the EPF Act.

27. The Supreme court in Employees' Provident Fund Commissioners' case considered the authoritative pronouncements on the subject including the judgments referred to herein above and categorically held that the debt due to the secured creditor cannot create first charge or give priority to debt in favour of the secured creditor over statutory dues of the employees.

28. Applying the law to the fact of the present case, it is evident from the material brought on record that the Recovery Officer, Employees' Provident Fund Organisation, Kanpur by letter dated 14 October 2011 addressed to the Zonal Head, ING Vaisya Bank Ltd. had demanded Rs. 12,35,176/- which was due from the borrower M/s. Y.A. Fidelity Engineering Pvt. Ltd. The letter would refer to an earlier prohibitory notice issued on 21 September 2005 under Section 8-B of the E.P.F. Act read with rule 26(1)(i) of the second schedule of Income Tax Act 1961 stating therein that any sale of moveable/immoveable assets of the establishment after that date will be treated as non compliance of the prohibitory order. Similar notices were also sent on 23 November 2009 and 25 March 2010 due to non compliance of the earlier notice.

29. ING Vaisya Bank Ltd. vide letter dated 31 July 2013 informed the Recovery Officer that they have auctioned the assets of the borrower company in 2009 under SARFAESI Act 2002 which were mortgaged to Bank against the credit facility granted. The sale proceeds were appropriated in the concerned loan account and as of now there is no surplus amount with them to remit the EPF dues. It was further stated that the sale proceeds likely to be fetched shortly by UPFC from the sale of the main factory comprising of land, building, plant and machineries belonging to the borrower company which presently are under the physical possession of the UPFC, which is having first charge and the ING Vaisya Bank Ltd. is having second charge. The EPF dues has to be sought from the sale proceeds being undertaken by UPFC.

30. In this background, it is urged on behalf of the petitioner that they have been able to recover Rs. 50 lacs against the due sum of Rs. 3,62,84,073/- as on 30 June 2013, the balance is yet to be recovered from the fifth respondent, therefore, demand of EPF dues is wholly erroneous and untenable and salary of the second petitioner could not have been attached.

31. Having considered the facts and circumstances of the case and having due regard to the law stated herein above, I do not find any illegality or infirmity in the impugned order/letter dated 15 July 2015, issued by the Recovery Officer, Employees' Provident Fund Organization, Kanpur.

32. In the event of petitioner depositing EPF dues with the respondents within

eight weeks from today, the attachment order of the salary of the second petitioner shall be recalled.

33. The writ petition is accordingly dismissed.

34. No order as to costs.

1Bank

2Borrower Company.

3SARFAESI Act.

4EPF Act.

5DRT Act.