(2010) 04 GUJ CK 0053

In the Gujarat High Court

Case No : Special Civil Application No. 3046 of 2007

Provident Fund Comissioner APPELLANT

Vs

Dena Bank and Others RESPONDENT

Date of Decision : 22-04-2010

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 38C
Companies Act, 1956 — Section 529A
Debts Recovery Tribunal Act, 1993 — Section 34(1)
Employees Provident Fund Organization Act — Section 11(1), 11(2)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11(2)
Estate Duty Act, 1953 — Section 74(1)
Mines and Minerals (Development and Regulation) Act, 1957 — Section 25(2)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 25 , 26, 27, 28
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 35
Workmens Compensation Act, 1923 — Section 14A

Citation : (2010) 04 GUJ CK 0053

Hon'ble Judges : S.J. Mukhopadhaya, C.J;Akil Kureshi, J

Bench : Division Bench

Advocate : N.K. Majmudar, for the Appellant; S.S. Panesar, for Respondent 1 and Zubin F. Bharda, for Respondent 2, for the Respondent

Final Decision : Allowed

Judgement

Akil Kureshi, J.—This petition is filed by the Provident Fund Commissioner challenging orders dated 22.11.2006 and 8.12.2006 passed by the learned Recovery Officer, Debts Recovery Tribunal, Ahmedabad in Recovery Proceedings No.1329 in O.A. No. 268/2001. The said orders are questioned on the ground that same are contrary to provisions of Section 11(2) of the Employees'' Provident Fund Act ("the Act" for short). The petitioner has further prayed for a direction to respondent No. 3 i.e. the Recovery Officer, Debts Recovery Tribunal, Ahmedabad to reconsider the objections lodged by the petitioner and to pass further orders after taking into account such objections.

2. Shortly stated, facts leading to the petition are that there are unpaid Provident Fund dues of respondent No. 2 company. According to the petitioner, such unpaid provident fund dues form first charge over the movable and immovable properties of the respondent company.

2.1 Respondent No. 1 Dena Bank claims to be a secured creditor of respondent No. 2 company. The respondent No. 1 bank had given loans to respondent No. 2 by hypothecating its movable assets as well as by mortgaging its immovable properties. In view of such hypothecation as well as mortgage created by respondent No. 2 in favour of respondent No. 1 bank, as per the bank, it is the bank which has the first charge over the properties.

2.2 The bank had approached the Debts Recovery Tribunal seeking recovery of its unpaid dues in the said proceedings by filing O.A. No. 26/2001. In the said proceedings, Recovery Certificate came to be issued in favour of respondent No.1 bank to the tune of Rs. 3,62,56,297. On an application filed by respondent No. 1 bank, the Recovery Officer permitted the bank to sale the properties of respondent No. 2 company through auction. Provident Fund Department raised its objections contending inter-alia that as on 3.1.2005, the outstanding recovery of Rs.21,99,728/- plus cost and interest towards the Provident fund dues remained unpaid. The Recovery Officer of the Debts Recovery Tribunal rejected said objections by an order dated 22.11.2006 in following terms:

The Employees Provident Fund Organization vide Exh. T/29 and Exh. T/30 had also raised objection and submitted that they have attached the property in question on 3.1.2005 to recover its dues of Rs. 21,88,728/- plus cost and interest. The Employees Provident Fund Organization submitted that his dues having priority over other debts u/s 11(2) of the Employees Provident Fund Organization Act and claimed the amount out of the sale proceeds of the property sold in auction by this Tribunal. The Employees Provident Fund Organization cited before me a judgement of the Debts Recovery Tribunal, Mumbai wherein the Hon''ble Presiding Officer has relied upon the judgement of the Hon''ble Kerala High Court passed in Appeal No. 906/1994 and observed that the Employees Provident Fund Organization shall have first and permanent charge over the above the charge of even secured creditors.

The Certificate Holder bank cited before me the judgement of the Hon''ble Supreme Court in a matter of Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, wherein the Hon''ble Apex Court held that the crown''s preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors and such right does not exists over the mortgage or pledged property of a secured creditors.

I relied upon the aforesaid judgement of the Hon''ble Apex court and found that Employees Provident Fund Organization is under a category of unsecured creditor, hence cannot precedence over the dues of the Certificate Holder Bank who is a secured creditor. Moreover, the judgment of the Hon''ble Supreme Court is prevailing over the judgment of Hon''ble High Court and the Recovery of Debts due to Banks and Financial Institutions Act 1993 is subsequent to Employees Provident Fund Organization and M.M. Act. Hence the provision of later Act will prevail over the previous Act.

In my opinion the Recovery Officer is not suppose to work for recovery of dues of other depts like Central Excise Dept. and Employees Provident Fund Organization. The Recovery Officer is bound to recover the bank dues as per Recovery Certificate under the provisions of Section 25 - 28 of the Recovery of Debts due to Bank and Financial Institute Act 1993. This debt is supposed to do separate action for recovery of the dues as per respective rules.

Therefore, the objections of Central Excise Debt. and Employees Provident Fund Organization are not maintainable hence hereby rejected and the sale proceeds of Rs. 48. lacs towards the sale of hypothecated movable being Plant and Machinery shall be released to the Certificate Holder bank for appropriation against the loan A/c. of the Certificate debtors and file an affidavit appropriately on the next date.

Let the matter be adjourned till 08-12-2006 for further orders due.

3. On 8.12.2006, the said officer permitted the bank to sale the property and authorised the above officer to make proclamation of the sale. These orders dated 22.11.2006 and 8.12.2006 passed by the Recovery Officer, Debts Recovery Tribunal, Ahmedabad in Recovery Proceedings No.1329 in O.A. No. 268/2001 are under challenge in the present petition.

4. Appearing for the petitioner, learned Counsel Shri Majmudar submitted that the provident fund dues of respondent No. 2 would have priority over all other dues being crown debt. He contended that in view of Section 11(2) of the Act, Provident Fund department had the first charge over the properties. Recovery Officer therefore, erred in rejecting the objections of the petitioner and both the impugned orders are therefore, required to be set aside. He relied on decision of the Apex Court in case of Central Bank of India Vs. State of Kerala and Others,

5. On the other hand, learned advocate Shri Panesar for the respondent bank contested the petition contending inter-alia that bank had released the loans in favour of respondent No. 2 company. Large amounts had remained unpaid. The Bank had created charge over the properties. In view of hypothecation and mortgage, bank would have the charge first over the property of the company. He further contended that the petitioner has not given any account of the outstanding provident fund dues of the respondent No. 2 company. The petitioner has in addition to principal sum added exorbitant interest and penalties and thus inflated initial figure of Rs. 21,88,728/-.

6. Having thus heard learned advocates for the parties, we find that Section 11(2) of the Act reads as follows:

11(2) Without prejudice to the provisions of Sub-section(1), if any amount is due from an employer[whether in respect of the employee''s 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 force, be paid in priority to all other debts.

7. In view of the above clear statutory provision, the ratio laid down in decision of the Apex Court Central Bank of India v. State of Kerala and Ors. (supra) would squarely apply in the present case. In the said decision, the Apex Court had examined at length various provisions contained in Legislature such as Bombay Sales Tax Act, Kerala General Sales Tax Act, Workmen''s Compensation Act and Employees'' Provident Fund and Miscellaneous Provisions Act, etc. providing for the priority of the State dues. These provisions were examine in juxtaposition of the provisions contained in Recovery of Debts Due Banks and Financial Institutions Act. The Apex Court in the said decision held that neither in the Recovery of Debts Due Banks and Financial Institutions Act nor in the Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, there is any provision by which first charge has been created in favor of banks, financial institutions or secured creditors qua the property of the borrower. It was held that:

116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38C of the Bombay Act and Section 26B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of State''s charge over other debts, which was recognized by Indian High Courts even before 1950. In other words, these sections and similar provisions contained in other State legislations not only create first charge on the property of the dealer or any other person liable to pay sales tax, etc. but also give them overriding effect over other laws

In the said decision, particularly, with respect to Section 11(2) of the Employees'' Provident Fund and Miscellaneous Provisions Act, it was observed as under:

126. While enacting the DRT Act and Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State 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 529A 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 State''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.

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 (Development and Regulation) 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 Securitisation Act.

130 Undisputedly, the two enactments do not contain provision similar to 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 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.

Above ratio laid down in Central Bank of India v. State of Kerala and Ors. (supra), squarely covers the present case.

8. We are not oblivious to the other line of decisions wherein in absence of any statutory provisions, Courts have held that the crown debt would not have any priority over other secured creditor''s debts. This view was reiterated and expressed by the Apex Court in case of Union of India (UOI) and Others Vs. SICOM Ltd. and Another, the Apex Court held that a debt which is secured or which by reason of the provisions of statue becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the crown debt which is an unsecured one. Said decision was however, rendered in the background of statutory provisions contained in the State Financial Corporations Act by which the borrower had executed mortgage in favor of such Corporation. Later on it was found that borrower also owed a certain sum of money to Central Government in the form of Central Excise dues. It was in this background that the Apex Court noticing the statutory provisions contained in the State Financial Corporations Act as well as under the Central Excise Act came to the above conclusion. This decision in case of Union of India and Ors. v. SICOM Limited and Anr. (supra)has been noticed by the Apex Court in earlier decision in case of Central Bank of India v. State of Kerala and Ors. (supra) and distinguished on account of difference in statutory

provisions with which the Court was concerned in the former decision.

9. In the present case, when we find that statute in clear terms provides for priority of unpaid dues of provident fund of the employees, in view of the decision in case of Central Bank of India v. State of Kerala and Ors. (supra), bank cannot claim first charge despite having created a mortgage over the immovable property.

10. In the result, we find that recovery officer of Debts Recovery Tribunal, Ahmedabad committed a serious error in overruling the objections of the petitioner PF Department. Orders dated 22.11.2006 and 8.12.2006 are quashed. Petition is allowed. It is further declared that provident fund dues would have first charge over the properties in question. In facts of the present case, it is directed that provident fund department shall before effecting recovery of its dues, serve a statement of account of the unpaid provident fund dues with interest and penalty, if any, of the Company on respondent No. 1 bank.

11. Petition is disposed of. Rule made absolute to the above extent.

