

(2002) 06 KL CK 0037
In the High Court Of Kerala
Case No : W.A. No. 906 of 1994

Recovery Officer and Assistant Provident Fund Commissioner	APPELLANT
Vs	
Kerala Financial Corporation	RESPONDENT

Date of Decision : 12-06-2002

Acts Referred:

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

Citation : (2002) 95 FLR 1024 : (2002) 3 ILR (Ker) 4 : (2002) 3 LLJ 643

Hon'ble Judges : B.N. Srikrishna, C.J;G. Sivarajan, J

Bench : Division Bench

Advocate : N.N. Sugunapalan, for the Appellant; V.B. Unniraj, for the Respondent

Final Decision : Allowed

Judgement

B.N. Srikrishna, C.J.—This appeal impugns the judgment of the learned single Judge dated 22nd June, 1994 allowing the Original Petition and quashing recovery notices issued by the Recovery Officer and Assistant Provident Fund Commissioner to the first respondent Corporation.

2. The appellant before us is the "Recovery Officer" within the meaning of Section 2(kb) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "E.P.F. & M.P. Act"), who is also empowered to recover Provident Fund dues by reason of Section 8G of the Act. The first respondent is a Corporation established under the State Financial Corporations Act, 1951. The second respondent is a scheduled bank carrying on business at Trivandrum in the State of Kerala.

3. A company by name "M/s. Darpan Electronics (Private) Limited" (hereinafter referred to as "the company") was running an industrial concern engaging employees and was covered by the provisions of the E.P.F. & M.P. Act, 1952. The Company had obtained loans from the first respondent Corporation for the purpose of setting up its business. On 21.2.1997, it executed a loan agreement

securing by mortgage certain immovable property belonging to it and by a deed of hypothecation certain movable properties. During the period March 1990 and December 1990 the Company committed default in payment of the contributions to the Employees Provident Fund under the E.P.F. & M.P. Act. It also committed default in repayment of the loan which it had taken from the first respondent Corporation. The first respondent initiated proceedings u/s 29 of the State Financial Corporations Act, 1951 (hereinafter referred to as "S.F.C. Act") and took over all the movable and immovable assets of the Company on 18th November, 1991. On 20.12.1993, the movable assets were sold towards realisation of the debts due to the first respondent Corporation. A sum of Rs. 89,083/- is lying in the account of the said company with the second respondent Bank. A sum of Rs. 37,150/- is said to be due from the company toward the employer's contribution to the Provident Fund.

4. The appellant, who is also the Recovery Officer as defined in Section 2(kb) of the E.P.F. & MR Act, exercising powers of a tax recovery officer under Schedule II of the Income Tax Act, 1961, which is made applicable to recovery of Provident Fund contribution by reason of Section 8G of the said Act, issued demand notices to the company demanding payment of the amount fund due towards the employer's contribution. In exercise of his powers, he also attached 37 cents of land from Sy. Nos. 1763 and 1784 of Palkulangara Village which had already been mortgaged to the first respondent Corporation. He issued a notice dated 16.12.1993 vide Ext. R1(g), calling upon the first respondent as to why the amount due should not be recovered from it. By another order dated 6.1.1994, the appellant also prohibited second respondent bank from transferring the amount of Rs. 89,083/- lying in the amount of the company.

5. The first respondent Corporation moved this Court by its Original Petition No. 1164 of 1994 and challenged all notices of attachment and prohibitory orders issued by the appellant. This O.P. was allowed and the learned single Judge was pleased to quash all the notices and the orders issued by the appellant. Hence, this appeal.

6. In order to appreciate the controversy, it is necessary to notice certain statutory provisions. The S.F.C. Act, 1951 was enacted to provide for establishing of Financial Corporations which could help in the establishment and development of industries in States. Though the Act is of the year 1951, by an amendment made by Act 56 of 1956, Section 46-B was introduced to give extra-ordinary powers to the Corporation set up under this Act. Section 46-B of the S.F.C. Act reads as under:

"46-B. Effect of the Act on other laws.- The provisions of this Act and of any rules or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in

derogation of, any other law for the time being applicable to an industrial concern."

7. The E.P.F. & M.P. Act, 1952 is an Act to provide for the institution of Provident Fund, Pension Fund, Deposit Linked Insurance Fund etc. in factories and other establishments, to carry forward the constitutional mandate of rendering social justice to the working class. It is intended to give social security to industrial workers at the end of their careers. The E.P.F. & M.P. Act requires every employer to deduct certain prescribed amounts from the wages payable to employees along with prescribed contribution by the employer and deposit such contributions in the Provident Fund. The Provident Fund is administered by the Central and Regional Provident Fund Commissioners, who are statutory authorities. What is of importance to us is that Section 11 of the E.P.F. & M.P. Act declares the priority of payment of contributions under the Act over other debts. Sub-section (1) of Section 11 of E.P.F. & M.P. Act deals with the question of priority where an employer is adjudicated insolvent or being a company subjected to an order of winding up. Sub-section (2) of Section 11 deals with other types of priorities and reads as under:

"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 in force, be paid in priority to all other debts."

Sub-section (2) of Section 11 of the E.P.F. & M.P. Act has two facets. First, it declares that the amount due from the employer towards contribution under the E.P.F. & M.P. 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.

8. The first respondent Corporation contends that it has a prior mortgage in its favour executed on 21.2.1987 pursuant to which it has already taken possession of the assets of the company on 18.11.1991. Hence, the first respondent contends that it has a priority in the matter of satisfaction of its debts, being a prior secured creditor. The provisions of Section 46-B of the S.F.C. Act are also urged in support of the overriding provision. It is contended that u/s 46-B, there is a non obstante clause, which gives an overriding effect to the provisions of the S.F.C. Act as against the laws in force. It was successfully urged before the learned single Judge that what the first respondent has is a mortgage in its favour while the Provident Fund dues are merely demand to be a charge on the

assets. In a contest between a mortgagee's right and a charge, it is submitted, the provisions of Section 100 of the Transfer of Property Act, 1882, make it clear that, the charge must yield unless the charge is given priority by reason of an express provision of law or the charge is against any property in the hands of a person to whom the property has been transferred for consideration and without notice of charge. It is contended by the first respondent that, since the charge itself came into effect subsequently, the first respondent Corporation is a transferee for valuable consideration and, obviously, without notice of charge. For this reason, it is contended that the first respondent's debts are to be first met out of the assets before the Provident Fund dues can be realised therefrom. These arguments have substantially been accepted by the learned single Judge for coming to the conclusion that the first respondent has a higher priority in the matter of realisation of its debts.

9. With regard to the argument based on Section 100 of the Transfer of Property Act, the matter is no longer *res integra*. In *State Bank of Bikaner and Jaipur Vs. National Iron and Steel Rolling Corporation and Others*, , this question came up specifically for consideration of the Supreme Court and the answer given by the Supreme Court is unmistakably against the first respondent, That was a case where the State Bank of Bikaner claimed priority over Sales Tax arrears due to the State on the ground that it was a secured creditor. Section 11-A of the Rajasthan Sales Tax Act declares that any amount of tax, penalty, interest and any other sum, if any, payable by a dealer, or any other person under the Act, shall be the first charge on the property of the dealer, or such person. On behalf of the State Bank of Bikaner, Section 100 of the Transfer of Property Act was relied upon to contend that, since there was a mortgage in favour of the Bank, the bank would have precedence over the claim of sales tax dues, which was only by way of a charge. After analysis of Section 100 of the Transfer of Property Act, and considering the distinction drawn between a mortgage and charge as discussed in the earlier decision in *Dattatreya Shanker Mote and Others Vs. Anand Chintaman Datar and Others*, , it was held that the expression "transferee of property" used in Section 100 refers to transferee of entire interest in the property and it does not cover the transfer of only an interest in the property by way of a mortgage. It was further held that the charge created u/s 11-A of Rajasthan Sales Tax Act over the property of the dealer or a person liable to pay sales tax or other dues was created in respect of the entire interest in respect of the property, since the section declares the dues of the Sales Tax Department as a first charge, the first charge would operate over the entire title of the property which continues with the mortgagor. Therefore, when a statutory first charge is created on the property of the dealer, the interest of the mortgagee is not excluded from the first charge. The Supreme Court also relied on *Fisher and Lightwood's Law of Mortgage*, 10th Edn. and the judgment of the Appeal Court in *Westminster City Council v. Haymarket Publishing Ltd.*, (1981) 2 All. 555 and finally concluded that since the statute created a first charge, it clearly gave priority to the statutory charge over all other charges on the property including a

mortgage. The expression "first charge" was explained to mean that, it would cover within its ambit a mortgage also. Consequently, when a first charge is created by statute, that charge will have precedence over an existing mortgage.

10. The contention of the first respondent based on the overriding effect of Section 46-B of the S.F.C. Act has no substance in our judgment. Undoubtedly, the intention of Parliament in enacting Section 46-B in the year, 1956 was to ensure that a State Financial Corporation could quickly and effectively recover the amounts due by taking possession of the property of the defaulter instead of having resort to the cumbersome method of recovery through a court of law. While this was the law, Parliament amended Section 11 of the E.P.F. & M.P. Act by specifically enacting Sub-section (2) thereof, declaring that the amount due as contribution to the Employees Provident Fund has first charge on the assets of the establishment and that, notwithstanding anything contained in any other law for the time being in force, it shall be paid in priority against all other debts. In fact, the second facet of Section 11(2) of the E.P.F. & M.P. Act goes one step further than what is provided in Section 46-B of S.F.C. Act. The reason for this is obvious. While the State Financial Corporation would have to be helped to recover the debts due to it from a defaulting debtor, the Provident Fund payable to workers is of greater moment, since it is a matter of terminal social security benefit made available by statute to the working class. Taking into consideration that E.P.F. & M.P. Act is a social benefit legislation, and the evil consequences of Provident Fund dues being defeated by prior claims of secured or unsecured creditors, the Legislature took care to declare that irrespective of when a debt is created, the dues under the E.P.F. & M.P. Act would always remain first charge and shall be paid first out of the assets of the establishment. We are also not impressed by the contention of the first respondent that upon usage of non obstante clause in Section 46-B of the S.F.C. Act. Sub-section (2) of Section 11 of the E.P.F. Act is of subsequent date. No doubt, both Section 46-B of the S.F.C. Act and Section 11(2) of the E.P.F. & M.P. Act declare their intent by usage of the non obstante clause. But, since Section 11(2) of the E.P.F. & M.P. Act has been enacted later, we must ascribe to the Parliament the intention to override the earlier legislation also. It is, therefore, clear that Section 11(2) of the E.P.F. & M.P. Act overrides all provisions of other enactments including Section 46-B of the S.F.C. Act.

11. We are supported in our conclusion by the judgment of the Supreme Court in A.P. State Financial Corporation Vs. Official Liquidator, . This was also a case arising under the S.F.C. Act, 1951. The Corporation therein had exercised its powers u/s 29 of the Act in respect of a debtor company which was under liquidation. The Corporation claiming to be a secured creditor filed two applications u/s 446(1) of the Companies Act read with Section 29 and 46 of the S.F.C. Act for staying outside the liquidation proceedings. The learned Company Judge allowed these applications on the specific condition that the Corporation should undertake to discharge its liability due to the workers u/s 529-A of the Companies Act and also inform the Official Liquidator by advance notice about

the proposed sale of the Company's properties and further obtain the Company Court's permission before finalising the tender. This order of the Company Judge was upheld by the Division Bench of the Andhra Pradesh High Court. An appeal was carried there against by the State Financial Corporation to the Supreme Court. The Supreme Court considered the reason for enactment of the S.F.C. Act as against the reason for amendment of Section 529-A of the Companies Act. The Supreme Court pointed out that, though the S.F.C. Act of 1951 was a special Act for grant of financial assistance to industrial concerns with a view to boost industrialisation and to enable recovery of amounts advanced and the Companies Act was also an Act dealing with Companies including winding up such companies, the proviso to Sub-section (1) of the Section 529 and Section 529-A being a subsequent enactment, the non obstante clause in Section 529-A prevails over Section 29 of the S.F.C. Act. Hence, the Supreme Court held that statutory right to sell the property u/s 29 of the S.F.C. Act had to be exercised with the rights of pari passu charge to the workmen specifically created by the proviso to Section 529 of the Companies Act. Under the proviso to Sub-section (1) of the Section 529, the liquidator shall be entitled to represent the workmen to enforce the above pari passu charge. The judgment of the Company Court was upheld. While upholding the judgment of the Company Court, it was pointed out by the Supreme Court that State Financial Corporation could not stay outside the winding up proceedings. It was also held that Section 529A of the Companies Act imposes upon the Company Court the duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with the provisions of the above section. The Legislature amended the Companies Act in 1985 with a social purpose, viz., to protect the dues of the workmen. If conditions are not imposed to protect the right of the workmen, there is every possibility that a secured creditor may frustrate the pari passu right of the workmen under the said provision of law.

12. For the first respondent Corporation, the learned counsel relied on the judgments which were placed before the learned single Judge and which weighed with him. They are Sundaram Finance Ltd. Vs. Regional Transport Officer and Others, and Suraj Prasad Gupta and Another Vs. Chartered Bank and Another, . He contended that inasmuch as Section 8G of the E.P.F. & M.P. Act gives the same powers to the Recovery Officer as given to the Tax Recovery Officer under Schedule II of the Income Tax Act, 1961, the decision under the Income Tax Act has great relevance. He also referred to Rule 6 of Schedule II of the Income Tax Act to contend that title which passes upon sale of property shall be the title of the previous owner subject to any limitation or encumbrance thereupon.

13. We are unable to accept this contention. In the first place, the Income Tax Act contains no provision which declares the priority of Income Tax dues as against the dues of any other secured or unsecured creditor. The provisions of Rule 2 read with Rule 16 of Schedule II of the Income Tax Act merely make it clear that where a notice from the Tax Recovery Officer has been issued, any transfer or alienation made thereafter is void. The presumption, therefore, is, all

such alienation made or interest created prior to the issuance of notice remain untouched. Both the judgments in Sundaram Finance Ltd. (supra) and Suraj Pramod Gupta (supra) proceed upon this very principle, namely the Income Tax Act does not have any substantive provision that tax due has a priority over the dues of other creditors. We have seen that as far as the dues under the Employees' Provident Fund are concerned, Section 11(2) of the E.P.F. & M.P. Act specifically has a substantive provision to declare that provident fund dues shall be made a first charge on the assets of the establishment and shall be paid in priority to all other debts. In view thereof, we do not find that the decisions under the Income Tax Act are of any assistance in answering the question before us.

14. In our view, the reasoning advanced by the Supreme Court in A.P. State Financial Corporation (supra) is equally applicable to the case before us. Firstly, Section 11(2) of the E.P.F. & M.P. Act is subsequent in point of time and, therefore, must be taken to be the latest manifestation of the intendment of the Parliament. Secondly, the social purpose behind the amendment of Section 11(2) is to protect the terminal social security dues of workmen, and therefore, needs to be given higher priority as intended by Parliament.

15. We are, therefore, of the view that the appellant shall be entitled to exercise his powers as a Recovery Officer for recovering the Provident Fund dues. Hence, the notices issued vide Exts. P1 and P3, and the orders at Exts. P4, P5(a), P5(b) and P5(c) were perfectly legal and justified. We are unable to accept the reasoning of the learned single Judge and conclusions arrived at on the inter se contest between the provisions of Section 46-B of the S.F.C. Act and Section 11(2) of the E.P.F. & M.P. Act.

16. In the result, we set aside the judgment of the learned single Judge holding that the dues of the Employees Provident Fund have higher priority as against the assets of the Darpan Electronics (Private) Limited, movable or immovable. Consequently, the appellant as Recovery Officer was entitled to issue the order of prohibition to the second respondent bank not to transfer Rs. 89,083/- standing to the credit of the company in its account. The notice at Exts. P1 and P3 and the orders at Ext. P4, P5(a), P5(b) and P5(c) are hereby revived and shall be disposed of in accordance with law.

The appeal is allowed.