
(2008) 02 BOM CK 0100
In the Bombay High Court
Case No : Writ Petition No. 156 of 2008

SICOM Limited

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 16-02-2008

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11(2), 8B, 8G
Law of Property Act, 1925 — Section 205
Transfer of Property Act, 1882 — Section 58

Citation : (2008) 5 BomCR 815

Hon'ble Judges : R.S. Mohite, J; F.I. Rebello, J

Bench : Division Bench

Advocate : V.R. Dhond and Usha Srivastav, instructed by Consulta Juris, for the Appellant; M.S. Bharadwaj, N.R. Prajapati and R.C. Master for Respondent No. 1, Sureshkumar, for Respondent Nos. 2 to 4 and Rashmi M. Vaity, instructed by M.P. Rege and Co., for the Respondent

Final Decision : Dismissed

Judgement

F.I. Rebello, J.—Rule. Heard forthwith.

2. Kusum Ispat and Wire Products Limited for the loan advanced to them by the petitioner and Respondent No. 5 had been secured by a mortgage. The aforesaid Company defaulted in paying the amounts. The petitioner and respondent No. 5 as secured creditors took possession of the mortgaged property and sold it and realised a net sum of Rs. 2,05,00,000/-. The said amounts were appropriated by the petitioner and respondent No. 5 in partial discharge of their debts. According to the petitioner even after appropriation of the said amount, monies are still due and payable.

3. The Company Kusum Ispat and Wire Products Limited it appears were also in default of dues under the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, hereinafter referred to as the EPF Act. The

respondent No. 4 by show cause notice dated 25th April, 2006 informed the petitioner that the petitioner has failed to remit the statutory P.F. dues of the aforesaid company to respondent No. 4. The Respondent No. 1 directed the petitioner to pay an amount of Rs. 3,51,150/- with simple interest at the rate of 12% per annum within 7 days from the said notice, failing which the petitioner would be declared as deemed defaulter as per the provisions of the EPF Act and further legal action was contemplated u/s 8B and 8G of the EPF Act. The petitioner by letter dated 26th May, 2006 replied to the said show cause notice and inter alia stated that the petitioner and respondent No. 5 were secured creditors in respect of the mortgaged property and held paramount and superior rights/charge over the mortgaged property. It was further stated that the claim of the petitioner was as a secured creditor and that the respondent No. 4 has erroneously proceeded on the assumption that the petitioner are the successor to the business of the said industrial concern. It was stated that a Financial Corporation who enforces its security by bringing the security to sale for recovery of its dues pursuant to its statutory rights does not become the successor and as such were not liable or responsible to pay the P.F. arrears of the company. The petitioners were informed by respondent No. 4 that P.F. dues are first charge over all other dues. on the assets of the concern. Further correspondence took place between the respondent No. 4 and the petitioner. Respondent No. 4 issued show cause notice dated 22nd December, 2006 and corrigendum dated 15th January, 2007 informing the petitioners that the petitioners had failed to remit the statutory P.F. dues and called on the petitioners to pay the dues along with interest failing which the petitioner would be declared as deemed defaulter as per the provisions of E.P.F. Act. The petitioner thereafter filed a Writ Petition before this Court being Writ Petition No. 1153 of 2007 for quashing the said show cause notice. By order dated 18th September, 2007 the petitioners were called upon to file their additional reply if any to the show cause notice within two weeks. The respondent No. 4 thereafter by order dated 26th October, 2007 has ordered the petitioners to pay the amounts as set out in the order. Aggrieved by that action the present petition.

4. The submission on behalf of the petitioners are that:

1. The petitioners and respondent No. 5 being secured creditors it was open to the under the provisions of the State Financial Corporation Act to recover their dues by sale of the securities. Considering the exercise of power u/s 39 of the State Financial Corporation Act the dues of the petitioner and Respondent No. 5 have higher priority over the dues of the respondent No. 4.

2. It is further submitted that in the instant case what the Company had created in favour of the petitioner and respondent No. 5 was an English Mortgage. An English Mortgage it is submitted transfers title in favour of the petitioner with only liberty of redemption in favour of the mortgagor. At the time the demand was made by the respondent No. 4 on the petitioner, as the mortgage was created on 9th August, 1985, the mortgaged property ceased to be the asset of

the company and consequently the respondent No. 4 could not have made a demand for the dues of the company on the petitioner herein.

4. The respondent No. 4 has not filed any reply, but the learned Counsel has relied on several judgments, including judgments of this Court, to contend that the issue is no longer open and that the dues under the EPF Act have priority of claim over all other dues.

5. For the sake of considering the above contention we may reproduce Section 11(2) of the E.P.F. Act, 1952 which 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 employees contribution (deducted from the wages of the employee) or the employers 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.

The sub-section as it now reads was pursuant to Act 33 of 1988 with effect from 1st August, 1988.

6. With that background we may first consider the issue as to whether the petitioner and respondent No. 5 being secured creditors of the company, their dues rank higher in priority than the dues of the respondent No. 4. The issue of priority of State dues has been considered by us in *Krishna Lifestyle Technologies Limited. v. Union of India and Ors.* Writ Petition No. 4171 of 2007 decided on 5th February, 2008. What emerges from the judgment is as under:

1. Between an ordinary creditor and the State, the State dues would have priority of claim over an ordinary creditor.

2. Between a secured creditor and a State, the dues of the secured creditor would prevail over the dues of the State. 3. It is, however, open to the Competent Legislature by Legislation to make the dues of the State rank higher in and have priority even over the dues of a secured creditor.

In the instant case we are concerned with dues under the E.P.F. Act and the dues of a State Financial Corporation under the provisions of the State Financial Corporation Act.

The issue in our opinion between the dues under the EPF Act and other secured State creditors in so far as this Court is concerned is no longer *res integra*. We may gainfully refer to the several judgments. Firstly, in the case of *Janata Sahakari Bank Ltd. v. Assistant Provident Fund Commissioner and Recovery Officer and Ors.* Writ Petition No. 639 of 2005 decided on 23rd June, 2006.

The issue there was the priority of claim under the provisions of the Securitisation and Reconstruction Act, 2002 (Securitisation Act) and the provisions of Employees Provident Fund and Miscellaneous Provisions Act, 1952. A learned Division Bench, after noting the provisions was pleased to hold that the

Securitisation Act does not have any substantive provision which makes the debts of the banks and financial institutions have a priority over the statutory dues, whereas the EPF Act has a substantive provision to declare the Provident Fund dues would have first charge on the assets of the establishment and would have priority over all other dues. The learned Bench referred to the judgment of the Supreme Court in the case of State Bank of Bikaner and Jaipur Vs. National Iron and Steel Rolling Corporation and Others, , where the issue was priority of claims under the Rajasthan Sales Tax Act and the claims of the secured creditors. Reliance was also placed on the judgment of the Division Bench of the Kerala High Court in Recovery Officer and Assistant Provident Fund Commissioner v. Kerala Financial Corporation 2002 III CLR 191 where the issue was priority of claims between the State Financial Corporation Act and EPF Act. The learned Division Bench of the Kerala High Court held that the P.F. dues would have priority of claim over the dues under the provisions of the State Financial Corporation Act. Another Division Bench of this Court in Indus Agro Products v. Union of India and Ors. 2006 II CLR 582 was considering the rights of the purchaser who had purchased the property pursuant to the sale conducted under the provisions of the State Financial Corporation Act and the dues under the provisions of the E.P.F. Act. The learned Division Bench was pleased on consideration of the law to take a view that the dues under the provisions of the EPF Act would have priority of claim over the sale under the provisions of the State Financial Corporation Act. The purchaser in that case, therefore, was held to be liable.

Considering the law as considered by the two Division Benches of this Court with which we are in respectful agreement and the terminology of Section 11(2) of the EPF Act, we have no manner of doubt that the PF dues would be a first charge on the assets of a company. Respondent No. 4, therefore, considering the amounts realised by the petitioner from the sale of the assets, could have made a demand on the petitioner for recovery of the P.F. and other miscellaneous dues including interest in terms of the Act, Rules and Regulations.

7. Having answered the first question, we may now answer the second question, namely whether on the date of the demand or when the dues became payable the property was not the asset of the company as there was a English mortgage created in favour of the petitioner as far as back as on 9th May, 1985. At this stage we may note that we do not propose to go into the terms of the mortgage deed to find out whether in fact it amounts to English mortgage. We proceed on the assumption that the mortgage is an English Mortgage. Section 58(e) of the Transfer of Property Act reads as under:

58(e) English mortgage. --Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

Relying on this provision the learned Counsel seeks to contend that when an English mortgage is created, the property is transferred in favour of the mortgagee. The only right that the mortgagor retains is for redemption of mortgage. Therefore, on the date when the mortgage was created it will be the mortgagee who is entitled to the title as transferee of the property and consequently it ceases to be the property of the mortgagor. To answer the issue the question that will have to be answered is whether the expression transfer of the mortgaged property absolutely would amount to a conveyance and/or sale in favour of the mortgagee by the mortgagor. The nature of the right created by a mortgage (English Mortgage) had come up for consideration before the Privy Council in AIR 1939 14 (Privy Council) . That was a case of an English Mortgage. The issue was whether Section 58(e) upon its true construction amounts to an absolute transfer of the property. The Privy Council considered the nature of the English Mortgage under the English Law and under Indian Law. We may gainfully refer to the following paragraphs:

18. Bearing these considerations in mind it remains to consider the effect of the wording of Section 58(e) of the Act. That Section speaks of the mortgagor - transferring the "mortgaged property absolutely to the mortgagee." In using those words does it mean that no interest or no legal interest in the property remains in the mortgagor? Their Lordships cannot think so. If the sub-section stopped at the word "mortgagee" it might be necessary put this construction upon it, but it does not stop there: it adds the proviso that the mortgagee "will retransfer" the property; "upon payment of the mortgage money as agreed.

Their Lordships think that with this addition the sub-section upon its true construction does not declare "an English mortgage: to be an absolute transfer of the property. It declares only that such a mortgage would be absolute were it not for the proviso for retransfer. It does not determine what legal effect follows from the use a particular form of words; it merely prescribes the form of words necessary to constitute what is known in India as an English mortgage. Section 58(e) deals with form, not substance. The substantial rights are dealt with in Ss.58(a) and 60. Whatever form is used nothing more than an interest is transferred and that interest is subject to the right of redemption."

The Privy Council then observed as under:

In their view the mortgage of a lease in any of the six forms referred to above is not an absolute assignment under Indian law and does not create privity of estate between the lessor and the mortgagee.

A Division Bench of this Court noted the settled law in *The Jagadamba Loan Company Limited v. Raja Shiba Prasad Singh* 43 Bom LR 789.

This Court paraphrased the law as under:

It was there held that in India even in the case of an English mortgage a legal interest remains in the mortgagor; hence the interest taken by the mortgagee is

not an absolute interest and is not such as to render him liable for the burdens of the lease by reason of privity of estate.

The issue came up for consideration once again in *Narandas Karsondas Vs. S.A. Kamtam and Another*, . The question for consideration before the Supreme Court was whether the mortgagor can exercise his right of redemption after the mortgagee under an English Mortgage with power to sell the mortgaged property without the intervention of the Court gives notice to the mortgagor to sell the mortgaged property by public auction and sells it by public auction. The position of a mortgage in England was set out thus:

In England, a mortgagee gets an equitable interest in the property. Under the English doctrine a contract of sale transfers an equitable estate to the purchaser. The Court does not assist the mortgagor by granting him a remedy unless there is collusion on the part of the mortgagee.

Thereafter considering the law in India it was observed thus:

In India there is no equity or right in property created in favour of the purchaser by the contract between the mortgagee and the proposed purchaser. In India there is no distinction between legal and equitable estates. The law of India knows nothing of that distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England. Under the Indian law, there can be but one owner that is, the legal owner....

Proceeding further and considering the expression "Transfer" this is what the Court has observed:

In India, the word "transfer" is defined with reference to the word "convey". The word "transfer" in English law in its narrower and more usual sense refers to the transfer of an estate in land. Section 5 of the Law of Property Act in England defines: "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument. The word "conveys" in Section 5 of the Transfer of Property is used in the wider sense of conveying ownership.

Thus the Court noted a distinction between the transfer in English law and conveyance in Indian Law.

8. Considering the law as declared in *Ram Kinkar* (supra) and *Narandas Karsondas* (supra) it would be clear that the expression "transfer" in Section 58(e) of the Transfer of Property Act is not conveyance. The mortgagor continues to have an interest in the property and it is not merely a right of redemption as was sought to be contended on behalf of the petitioners. Once an English mortgage does not create a conveyance in favour of the mortgagee then considering Section 11(2) of the EPF Act there will be a first charge on the said property to the exclusion of all other creditors including secured. The law thus would be that the PF dues under the EPF Act would have the priority of claim irrespective of the provisions of mortgage under the Transfer of Property Act or a

sale under the provisions of the State Financial Corporation Act.

9. By our order dated September 6, 2007 in Writ Petition No. 1153 of 2007 we had directed the petitioners to deposit an amount of Rs. 4.00 lakhs. The said amount has been deposited in this Court. Considering our order of September 18, 2007 in Writ Petition No. 1153 of 2007 the Prothonotary & Senior Master to release the amount deposited with the interest if any in favour of the respondent No. 4. The petitioners to pay the balance dues, if any, on respondent No. 4 issuing a notice to the petitioner for the balance dues and within six weeks of the notice being served by respondent No. 4 on the petitioners.

10. With the above directions Rule discharged. In the circumstances of the case there shall be no order as to costs.

The learned Counsel for the Petitioner seeks stay of the above order for 8 weeks. In our opinion this is not a fit case to grant stay. Hence application for stay is rejected.