

(2005) 07 KL CK 0060
In the High Court Of Kerala
Case No : W.A. No. 2023 of 2004

South Indian Bank Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 06-07-2005

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 26B

Citation : (2006) 1 KLT 65

Hon'ble Judges : Rajeev Gupta, C.J.;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : K. Prabhakaran, for the Appellant; Raju Joseph, Spl. Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—Question that has come up for consideration in this case is whether a decree obtained by a bank before the introduction of Section 26B of the Kerala General Sales Tax Act, 1963 would override the first charge created in favour of the State.

2. The South Indian Bank Ltd. instituted a suit, O.S.720 of 1992 before Sub Court, Trichur for realisation of amounts due to the bank. Loans were secured by equitable mortgage of immovable properties created by deposit of title deeds by respondents 3 to 5. Suit was decreed on 30.1.1995 for an amount of Rs. 3,51,36,073,18 inclusive of costs with future interest at 23.25% from the date of suit till realisation by sale of items 1 to 12 in the plaint A schedule immovable properties and also the movables described in plaint B to F schedule. Bank also filed OA. 1081 of 1998 before the Debts Recovery Tribunal, Ghennai for recovery of the amounts as per the decree by sale of immovable properties mortgaged in favour of the bank. Noticing that the second respondent Tahsildar initiated proceedings for sale of some of the items of properties mortgaged in favour of the bank for recovery of arrears of sales tax due from respondents 3 to 5 bank has approached this Court with the present Writ Petition seeking a declaration

that the bank who is a secured creditor has a first charge over the immovable properties which has been described in Ext.P3 proceedings initiated by the Tahsildar.

3. Counter affidavit was filed in the Writ Petition by the Tahsildar stating that the defaulters are in arrears of sales tax to the tune of Rs. 85,45,276/- excluding the future interest after the revenue recovery certificate. Defaulters had failed to clear the arrears even after the receipt of statutory notice and consequently the property measuring an extent of 16.56 acres in Chalissery Village was attached on 25.06.93. Further it is also stated that the State was not a party in O.S. No. 720/92 of Sub Court, Thrissur and was unaware of the pendency of those proceedings and therefore the decree would not bind the State.

4. Learned single Judge did not examine the question as to whether the State has the first charge over the property in question over the decree obtained by the Bank. Learned single Judge felt that it is open to the Bank to agitate the question before the Civil Court and the mere fact that Ext. P3 is proceeded with will not adversely affect the right of the bank for raising such contentions. Bank is aggrieved by the said judgment and has come up with this appeal.

5. Counsel appearing for the bank Sri. Prabhakaran contended that the amendment made in the Kerala General Sales Tax by the Finance Act, 1999 with effect from 1.4.1999 has no retrospective effect and it does not override or nullify the decree of the Civil Court passed in OS. 720 of 1992 as early as 30.01.1995. Counsel submitted that the equitable mortgage was created by respondents 3 to 5 in favour of the Bank on 12.06.1984 and the bank had filed the suit on 15.05.1992. Suit was decreed on 30.1.1995. Counsel pointed out the second respondent issued Ext.P3 notice on 2.6.1999. Consequently, the bank has got prior charge over the immovable properties proposed to be sold for sales tax arrears by virtue of equitable mortgage created as early as 12.6.1984. Placing considerable reliance on paragraph 21 of the decision of the Supreme Court in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, counsel submitted that when the rights of the bank was crystalised by a decree on 30.1.1995 Section 26B was not introduced. Counsel submitted the said provision cannot have retrospective effect so as to defeat the decree passed prior to the introduction of the said provision.

6. Senior Govt. Pleader for Taxes Sri. Raju Joseph on the other hand, contended that so long as the decree has not been executed the State has got the right to proceed against the properties covered by the decree. Placing reliance on the decision of the Apex Court in Union of India Vs. Somasundram Mills (P) Ltd. and Another, , counsel contended that even if a decree holder brings a judgment - debtor's property to sale and the sale-proceeds are lying in deposit in Court, the State may, even without prior attachment exercise its right to priority by making an application to the executing Court for payment. So far as this case is concerned, counsel submitted, even before passing the decree, the property was attached on 25.6.1993 and therefore the decree passed by the civil court on

30.1.1995 would not affect the right of the State in proceeding against the attached properties.

7. Right of the State to have priority in the matter of recovery of sales tax from the defaulters over the equitable mortgages created by them in favour of Banks and Financial Institutions is no more *res integra*. Dealing with the provisions parallel to Section 26B of the Kerala General Sales Tax Act by the various Sales Tax Laws of other States, Supreme Court has already recognized the statutory first charge in respect of sales tax arrears. Reference may be made to the decisions of the Apex Court in *State Bank of Bikaner and Jaipur Vs. National Iron and Steel Rolling Corporation and Others*, *Delhi Auto and General Finance Private Limited Vs. Tax Recovery Officer, Income Tax and Others*, *Dattatreya Shanker Mote and Others Vs. Anand Chintaman Datar and Others*, *Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others*, and various other decisions. We may refer to the latest decision of the Apex Court in *State of Madhya Pradesh and Another Vs. State Bank of Indore and Others*, wherein the court examined the charge created u/s 33C of the M.P. General Sales Tax Act, 1958 and held that Section 33C creates a statutory first charge that prevails over any charge that may be in existence. The Court held that the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the Bank. Judicial pronouncements settled the law once for all stating that State has got priority in the matter of recovery of debts due and the specific statutory charge created under the Sales Tax Act notwithstanding the equitable mortgages created by the defaulters in favour of the Banks prior to the liability in favour of the State. A Division Bench of this Court in *Sherry Jacob Vs. Canara Bank*, held that revenue recovery authorities shall have the liberty to proceed against the property of the company under the Revenue Recovery Act on the strength of the first charge created over the property by virtue of Section 26B of the Kerala General Sales Tax Act. The Court held that the statutory first charge would prevail over any charge or right in favour of a mortgage or secured creditors and would get precedence over an existing mortgage right.

8. We are in this case concerned with the question as to whether Section 26B of the K.G.S.T. Act would take away the efficacy of a decree passed by the civil court prior to the introduction of said section. We are of the view till the decree is executed through executing court title of the mortgaged property remains with the mortgagor. Decree passed by the civil court is the formal expression of an adjudication which conclusively determines the rights of parties, but unless and until the decree is executed the Bank would not procure the property and the State's overriding rights would have precedence over that of the Bank. When a first charge created by the operation of law over any property, that charge will have precedence over an existing mortgage and the decree obtained by the bank against the mortgagor will not affect the State since State was not a party to the suit. Decree has only conclusively determined the rights between the mortgagor and mortgagee which would not affect the statutory rights of the State. The

expression "rights of parties" used in Section 2(2) means rights of parties to the suit. State which has got a statutory first charge u/s 26B of the K.G.S.T. Act would prevail over the rights created in favour of the Bank by an unexecuted decree. We therefore hold that the decree obtained by the Bank will not have any precedence over the first charge created in favour of the State u/s 26B of the K.G.S.T. Act.

9. Counsel appearing for the Bank submitted that Section 26B has employed a nonobstante clause, which does not exclude a decree or order of the court and therefore decree obtained by the bank is still enforceable de hors Section 26B of the K.G.S.T. Act. Since State is not a party to any decree the contention has no force. Even otherwise in our view by virtue of operation of law State will have prior charge over the properties in question.

Above being the legal position we find no infirmity in the proceedings initiated by the Tahsildar for recovery of the tax due to the State.

Appeal lacks merits and the same would stand dismissed.