

(1960) 04 KL CK 0009
In the High Court Of Kerala
Case No : C.R.P. 326 of 1957

State of Kerala

APPELLANT

Vs

E.P. Mathew

RESPONDENT

Date of Decision : 07-04-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 73

Citation : AIR 1961 Ker 18

Hon'ble Judges : S. Velu Pillai, J;M.S. Menon, J

Bench : Division Bench

Advocate : Government Pleader, for the Appellant; M. Abraham, for 1st Respondent, S. Neelakanta Iyer, K.S. Rajamony and T.R. Subramania Iyer, for the Respondent

Final Decision : Allowed

Judgement

M.S. Menon, J.—This petition by the State of Kerala questions the correctness of the order of the District Munsiff of Trivandrum in C. M. P. No, 2215 of 1957 in O. S. No. 477 of 1956. The petition states the facts necessary to appreciate the contention urged before us as follows:

"Respondents 1 to 3 obtained simple money decrees against Respondent No. 4. Respondent No. 1 executed his decree by attaching and selling movables belonging to the debtor. Respondents 2 and 3 claimed rateable distribution. The State has to get Rs. 1225-3-11 from Respondent No. 4 as sales tax under 3 assessments made by the Sales tax Officer, Trivandrum. Before the amounts were disbursed the State made an application objecting to the payment of the amount to respondents 1 to 3 and claiming preferential payment to the State towards the sales tax due from the debtor. The learned District Munsiff dismissed the petition stating that the State's claim was not tenable. This petition is to revise the said order".

2. The State does not claim any charge in respect of the amount due from the

fourth respondent by way of sales tax. The only question for determination is whether when the amounts due to the State and to respondents 1 to 3 are all unsecured, the State is entitled to a Priority or not.

3. The priority claimed has always been considered at any rate since Lord Coke enunciated the rule in *Quick's case* 9 Rep 129b as one of the established prerogatives of the Crown in English Law. In *Rex v. Wells*, (1807) 16 East 278, in a passage oft quoted, Macdonald, C. B., said:

"I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred".

In *New South Wales Taxation Commrs. v. Palmer*, 1907 AC 179, the Privy Council quoted the passage with approval and said:

"Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community",

4. The right of the Crown to priority when debts of equal degree due to it and a subject compete was certainly part of the law of British India. In *MANICKAM CHETTIAR Vs. Income Tax OFFICER, MADURA.*, the Court said:

"It cannot be denied that the Crown had the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognised in India";

and in *Builders Supply Corporation Vs. Union of India (UOI) and Others*, :

"Taken as a question of fact the question whether priority in respect of Crown debts has or has not been a part of the law of India admits of only one answer. There was a fairly exhaustive citation of authority before us from which it clearly appeared that the principle of the priority of Crown debts had been accepted and given effect to by the courts whenever it had been invoked and that instances without number could be found among the decisions of the Calcutta, Bombay, Madras, Allahabad and Rangoon High Courts".

5. In *Bank of India Vs. John Bowman and Others*, it was contended that "the English principle of debts of the Crown having priority is based upon the prerogative of the Crown", that that principle would not apply to India after the Constitution came into force, and that "to uphold the King's prerogative in India after 1950 would be to go counter to the basic structure of our Constitution". The Court said:

"In our opinion, whatever may have been the historical origin of the principle which gives priority to the debts due to the Crown, when the English Courts came to consider this question the principle had become a part of the Common Law of England, and if this principle formed Part of the Common Law of England, then that law has been preserved under Article 372(1) of the Constitution. This

was the law in force in India immediately before the commencement of the Constitution and it must continue in force until altered or repealed or amended by a competent Legislature or other competent authority".

In that case it was also contended that this Part of the Common Law of England was incompatible with Article 14 of the Constitution. The Court said:

"Now, it is not true to say that the State is denying equality before the law to any person by claiming this special privilege. Article 14 would only be offended against if the State made a discrimination between one creditor and another or between one class of creditors and another. The principle of Common Law is that the State has priority over all competing creditors if the debts are of the same quality. Mr. Seervai says that the competition here is between two creditors and one creditor cannot be preferred to another, and if that was done, there would not be equality before the law under Article 14. The answer to that submission is that the State here is not claiming as a creditor. It may be a creditor, but the right which it claims is in its capacity as the State and its contention is that as it is the custodian of public welfare, as moneys which it is claiming belong to the coffers of the State and are, to be used in public interest, it should be given precedence over private creditors who have not to discharge the duties or responsibilities of the State. In our opinion, therefore the Common Law with regard to priority of debts due to the State is not in any, way inconsistent with the fundamental rights embodied in Part III of the Constitution".

6. Counsel for the respondents submitted that the Common Law of England was never part of the law of Travancore -- this case arises from an area which was part of the Travancore State -- and that Article 372(1) of the Constitution will be of no avail. He drew our attention to an observation of Sankarasubba Iyer, J., in 1943 Trav. LR 16:

"The Common Law of England recognises what may be called the prerogative right of the Crown, in respect of claims. The rule is that when claims of the Crown and claims of persons concur or come into Competition, the Crown is preferred. This doctrine is one peculiar to the Common Law of England and as such there can be no justification for imputing it here, though British Indian High Courts have adopted the same with regard to Presidency Towns".

The question, however, was specifically left undecided in that case. After saying that the ancient Hindu Law seems to have recognised a priority in favour of the King, and quoting Yajnavalkya placitum 278:

"A debtor shall be forced to pay his creditors in the order in which the debts were contracted, after first discharging those of a priest or of the King".

the Judge said:

"It has not been possible to come across any decided cases where the above principle has been adopted. Hence it is better that the question arising in this case be determined, independent of the right of prerogative of the Crown

conceded to it under the Common Law of England, the question whether such a right can be held to exist in this country being left undecided".

7. As far back as *Secy. of State for India v. Bombay Landing and Shipping Co.*, 5 Bom HCR (Q.C.) 23 Westropp, J., said:

That principle is no novelty in India. At an early date we find it promulgated by Hindu jurists" and

"Muhammadan sovereigns were not prone to waive or abandon such royal prerogative as they found existing in India. The British rulers of India have recognised the precedence of the State".

We entertain no doubt that the prerogative should be considered as an essential attribute of the State, as part of general jurisprudence, and that it should be enforced as such.

8. In *Murli Tahilram Vs. T. Asoomal and Co.*, P. B. Mukharji, J., dealt with the origin of the right as follows:

"The origin in jurisprudence recognising priority of debts owing to the State must be sought in the fact of the conception of a State. This claim for priority arose in connection with the revenue claims of the State. A State in order to function had to collect revenue for the purpose of its administration. If the collection of such revenue was to be defeated by private claims as between subjects then it will be embarrassing for the Public Exchequer and will complicate, harass and impede the basic functions of the State. That is the juristic reason based on common sense for the growth of the constitutional doctrine that the revenue claims of the State must have precedence over all other private claims. The peculiar evolution of English law gave it the character of a prerogative of the Crown to collect revenue and therefore Crown debt was given the priority on the basis of the law of prerogative. But the main justification for preserving the revenue claim's priority must remain in every State whether it is under a Crown or under the people or any other form's of Government. Notwithstanding the prerogative ideas of State in the modern age, the State still remains and has to remain by the very nature of its functions a tax collector. The jurisprudence and the law of public finance has, therefore, recognised the necessity of the priority for revenue claims. That is the reason why the republican character of the Constitution of India does not and cannot do away with the necessity of this Constitutional doctrine of priority for State debts. It is a law of necessity and good sense".

9. Counsel for respondents 1 to 3 contended that even if the Crown has a priority, it is still necessary for the Crown to obtain a decree like any other citizen, and that an application u/s 151 of the C. P. C., 1908, will not suffice. He cited *Oudh Commercial Bank Ltd. v. Secy. of State* AIR 1935 Lah 319 (2) wherein the Court after referring to Sub-section (3) of S. 73 of the C. P. C., 1908, --"Nothing in this section affects any right of the Government" -- held that the section does not confer any jurisdiction on the executing Court to entertain a

claim on behalf of the Government in the absence of a decree in support of it, and that

"the sub-section only saves the rights of the Government, independent of the section, such as they might be and merely appears to have reference to the right of priority which can be ordinarily claimed in respect of debts due to the Crown".

We are not prepared to adopt this view.

10. We think that the correct position is as laid down in *MANICKAM CHETTIAR Vs. Income Tax OFFICER, MADURA.*, In that case also it was contended that as a Private person cannot enforce payment without first obtaining a decree, the Crown should also do the same. Leach, C. J., delivering the opinion of the Full Bench, dealt with the contention as follows:-

"The argument is that a private person is governed by the provisions of the Civil P. C. and as there is nothing in the Code which places the Crown in a different position the procedure there contemplated must be followed. I am unable to agree. This argument ignores the special position of the Crown, the special circumstances and the Court's inherent powers. It cannot be denied that the Crown had the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognised in India. If the Crown is entitled as it is, to prior payment over all unsecured creditors the position of secured creditors does not arise. I see no reason why the Crown should not be allowed to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor, without having to file a suit. Of course it must be a debt which is not disputed or is indisputable. In this case the debt represents money due to the Crown under the Income Tax Act and the demand of the Income tax Officer is not open to question"

The judgment then dealt with the inconveniences that would result if the Crown were not able to apply to the Court without obtaining a decree, and said:

"It seems to me that both right and convenience demand that the Court should exercise its inherent power".

11. In the light of what is stated above we must hold that the amount in Court is available for distribution that the claims of the State and of respondents 1 to 3 are equal in degree, and that the State is entitled to a preferential payment. We decide accordingly and allow the petition. In the circumstances of the case, however, there will be no order as to costs.