(2005) 01 KL CK 0017

In the High Court Of Kerala

Case No : W.A. No. 1713 of 2004

State of Kerala APPELLANT

Vs

Rajmohan Cashew (P) Ltd. RESPONDENT

Date of Decision : 20-01-2005

Acts Referred:

Companies Act, 1956 — Section 4A
Kerala General Sales Tax Act, 1963 — Section 26B
Kerala Revenue Recovery Act, 1968 — Section 17, 3, 5, 6
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 2, 34

Citation : AIR 2005 Ker 141 : (2005) 127 CompCas 744 : (2005) 2 KLT 131 : (2005) 142 STC 283

Hon'ble Judges : M.N. Krishnan, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : Raju Joseph, Spl. Government Pleader, for the Appellant; Chacko George, T.I. Daniel, Dilip Mohan, H. Ramanan, M.M. Vinod Kumar, Alex N. Mathew, K.B. Mohamed Kutty and K.M. Firoz, for the Respondent

Judgement

K.S. Radhakrishnan, J.—Whether the Debt Recovery Tribunal has got the jurisdiction to determine the preferential claim of the Government of Kerala over the properties mortgaged to the Banking Institutions is the question that has come up for consideration in this case.

2. State Government and the Assistant Commissioner of Commercial Taxes have approached this Court seeking writ of certiorari to quash the proceedings initiated by the Recovery Officer of the Debt Recovery Tribunal for sale of the various properties belonging to respondents 1 to 5. On enquiry made by the second petitioner it was noticed that some of the properties of respondents 1 to 5 were attached on behalf of Indian Overseas Bank on the basis of the proceedings initiated by the Debt Recovery Tribunal, Ernakulam. State maintains the stand that it has got first charge over the various properties brought to sale by the Recovery Officer of the Debt Recovery Tribunal. An amount of Rs.

9,73,64,415/- is due from the first respondent towards sales tax arrears for the years 1972-73 to 1995-96. Second petitioner had already issued assessment orders after issuing assessment notice to all the parties and after obtaining reply from the first respondent, assessment orders have already been served on the first respondent. Demand notices were issued for sales tax, surcharge, central sales tax and interest for all those years concerned and after accepting the notice the first respondent refused to comply with the demand. State has already taken steps to recover the amount through the Kerala Revenue Recovery Act, 1968. An amount of Rs. 47,06,670/- is also due to the State by way of sales tax arrears from the second respondent, for the years 1975-76 to 1996-97. Second petitioner however completed the statutory formalities and passed assessment orders and served the same on the second respondent along with the demand notice. Since second respondent did not respond revenue recovery proceedings have been initiated by the State under the Revenue Recovery Act.

3. State also initiated proceedings for recovery of the amount of Rs. 1,36,27,260/- from the third respondent towards sales tax arrears for the years 1970-71 to 1995-96. Assessment orders were served on the third respondent. Since there was no response revenue recovery proceedings have been initiated against third respondent as well. From the fourth respondent an amount of Rs. 5,21,897/- is due towards sales tax arrears for which demand notice has already been issued to him. There was no response from the fourth respondent and hence revenue recovery proceedings have already been initiated. From the fifth respondent an amount of Rs. 8,27,63,201/- is due to the State towards arrears of sales tax for the years 1980-81 to 1994-95. Assessment orders have already been passed and demand notices were issued. Since there was no response, revenue recovery proceedings have been initiated. State has got the first charge over the properties belonging to respondents 1 to 5 over which they have already initiated revenue recovery proceedings. At this juncture they came across Ext.P6 proclamation of sale issued by the recovery officer of the Debt Recovery Tribunal for sale of its properties so as to discharge the liabilities due to Indian Overseas Bank.

4. Learned counsel appearing for the Revenue Sri. Raju Joseph submitted that State has got priority in the matter of recovery of sales tax dues over the equitable mortgage created by the defaulters in favour of the Bank. Reference was made to Section 26B of the Kerala General Sales Tax Act, 1963. Counsel therefore submitted that the Recovery Officer of the D.R.T has no jurisdiction over the properties on which State has got first charge by virtue of the provisions contained in Section 26B of the Kerala General Sales Tax Act, Counsel submitted that the learned Judge is not justified in directing the State to approach the Recovery Officer of the Debt Recovery Tribunal.

5. Counsel appearing for the sixth respondent Sri. Chacko George on the other hand contended that the procedural provisions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short R.D.B. Act) would override

the procedural provisions of the Kerala General Sales Tax Act and the Kerala Revenue Recovery Act. There is no illegality in the direction of the learned Single Judge in directing the Debt Recovery Tribunal to consider the priority for recovery of sales tax. Counsel submitted that there is no illegality in submitting the claims of all including that of the State to the jurisdiction of the Debt Recovery Tribunal and the Recovery Officer. Counsel made considerable stress on the decision of the Apex Court in Allahabad Bank v. Canara Bank and Anr. AIR 2000 SC 1535 Counsel submitted that the provisions of the Kerala Revenue Recovery Act cannot override the provisions of the R.D.B. Act.

6. 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 recognised 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 & Jaipur v. National Iron & Steel Rolling Corporation and Ors. ((1995) 96 STC 612) Delhi Auto and General Finance Pvt. Ltd. v. Tax Recovery Officer and Ors. ((1999) 114 STC 273) 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 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 33.C 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 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 mortgagee or secured creditors and would get precedence over an existing mortgage right.

7. We may now examine the question that when once the statutory right u/s 26B is conceded whether the State and its officials be subjected to the jurisdiction of the Debt Recovery Tribunal and its Recovery Officer. Once the right of the State in the matter of recovery of sales tax from the defaulters over the. equitable mortgage created by the defaulters in favour of the Banks or Financial Institution is conceded, then the State can invoke their machinery to enforce that charge or

priority over the properties of the defaulters in accordance with Section 26B of the Act read with the provisions of the Kerala Revenue Recovery Act, 1968. Section 26B has employed a non obstante clause stating that notwithstanding anything to the contrary contained in any other law for the time being in force, any amount of tax, penalty, interest and any other amount, if any, payable by a dealer or any other person State will have first charge.

8. The Kerala Revenue Recovery Act, 1968 has been enacted to, consolidate and amend the laws relating to the recovery of arrears of public revenue in the State of Kerala. Defaulter under the Revenue Recovery Act means a person from whom an arrear of public revenue due on land is due. Section 3 states that the public revenue due on any land shall be the first charge on that land, the buildings upon it and on the produce thereof. Section 5 deals with the procedure to be followed for recovery of arrears of public revenue due under the Act. Section 5 states that whenever public revenue due on land is in arrear, such arrear together with interest if any, and cost of process may be recovered by attachment and sale of the defaulter''s movable property and by attachment and sale of the defaulter''s immovable property. Authorities have also got the power for attaching defaulter''s property and for arrest of the defaulter and his detention in prison. Section 6 states that arrears of public revenue due on land shall bear interest at the rate of 2 per cent per annum or at such other rate as may be notified by the Government from time to time in the Gazette. Chapter II of the Act deals with attachment and sale of movable property. Revenue Recovery Act by the nature of the enactment does not operate to cast fresh liability on any person, but intended as a method of recovery of amounts from persons who are otherwise bound to make payments. Once it is established that charge is to be enforced against the property mortgaged by the defaulter, mode of recovery etc. has been provided under the Revenue Recovery Act. If the State is relegated to Debt Recovery Tribunal all the procedures laid down in the Revenue Recovery Act would be of no avail.

9. We may now examine the question is whether State and its officers, would succumb to the procedure laid down under the R.D.B. Act, 1993 in preference to the procedure laid down in the Kerala Revenue Recovery Act. Section 17 of the Act deals with jurisdiction, powers and authority of the Tribunals, which states that the Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the Banks and Financial Institutions for recovery of the debts due to such banks and Financial Institutions. Appellate Tribunal shall exercise the jurisdiction powers and authority to entertain appeals against any order made, or deemed to have been made by a Tribunal under the Act. Jurisdiction of the Tribunal is therefore to be invoked by the Banks and other Financial Institutions for recovery of debts due to such Banks and Financial Institutions. There is no provision in the Act enabling the State Government or its officers to invoke the jurisdiction of the Tribunal to recover the amounts due to them. Tribunals are of limited jurisdiction created by the statute. They can function only within the four corners of the statute by

which they are created. Tribunal has therefore got power and authority to entertain and decide application of the Banks and Financial Institutions and not by the State and its machinery. Bank has been defined u/s 2(d) of the Act to mean a banking company, a corresponding new bank, State Bank of India, a subsidiary bank or a Regional Rural Bank. Financial Institution has been defined as a public Financial Institution within the meaning of Section 4A of the Companies Act, 1956. Financial Institution can prefer application before the Debt Recovery Tribunal for recovery of debts due to such Banks and Financial Institutions and the Tribunal has jurisdiction, powers and authority to entertain those applications and decide it.

10. Recovery of debts determined by the Tribunal is dealt with in Chapter V of the R.D.B. Act, 1993. Section 19 of the Act deals with procedure of Tribunals. Recovery Officer under the R.D.B. Act can function only on the direction of the Tribunal. Once it is found that the Tribunal has no jurisdiction to entertain and decide the application preferred by the State Government, the question of subjecting it to the jurisdiction of the Recovery Officer does not arise. The decision of the Apex Court in Allahabad Bank''s case supra (AIR 2000 SC 1535 deals with altogether a different fact situation. Apex Court has dealt with the powers of the Company Court under the Companies Act vis-a-vis the Tribunal under the R.D.B. Act. On a comparison of the provisions of the Companies Act, 1956 and the R.D.B. Act Court came to the conclusion that when there are two special statutes the latter will normally prevail over the former.

11. Section 34 of the R.D.B. Act deals with overriding effect of the said Act which states that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the Act. Once it is held that State has got priority in the matter of recovery of sales tax due over the properties mortgaged to Financial Institutions due to its statutory charge the State is legally entitled to invoke their machinery for enforcing that charge especially when Debt Recovery Tribunal has not been conferred with any jurisdiction under the Act to entertain application either by the State or by its officers. Recovery officer of the Debt Recovery Tribunal once being informed of the State Government''s statutory charge over the mortgaged properties shall not proceed with those properties, till the State Government statutory charge gets exhausted. The Tribunal has also not been conferred with the power to decide as to whether State has got a statutory charge with regard to the mortgaged properties. If there is a genuine dispute between the defaulter and the State Government or between the State Government or the Bank those are disputes not to be resolved by the Debt Recovery Tribunal. We are therefore of the view, direction given by the learned Single Judge subjecting the State and its recovery officers to the jurisdiction of the Tribunal and the Recovery Officer cannot be sustained. We set aside the direction in the judgment of the learned Single Judge and allow this appeal.

12. We hold with regard to the property offered as security. State is entitled to follow the mode of recovery under the Kerala Revenue Recovery Act for realisation of those debts and the Debt Recovery Tribunal or the Recovery Officer have no jurisdiction to proceed with the properties over which State has got jurisdiction. Financial Institutions or the Banks cannot raise any claim over those properties on which State has got charge before the Debt Recovery Tribunal. Even if the Bank or others have any claim over the properties on which the State has got first charge they have to invoke the provisions of the Revenue Recovery Act, to raise their claims before the Recovery Officer under the R.R. Act, rather than State and other officers going after them before the Debt Recovery Tribunal. Counsel for the Bank further submitted that some of the properties over which State claims priority are lying outside the State of Kerala and cannot be proceeded under the Revenue Recovery Act. Revenue Recovery Act lays down procedure to effect recovery even if the properties are situated outside the State. We therefore hold that the Debt Recovery Tribunal has no jurisdiction to deal with the properties over which the State Government have got first charge u/s 26B of the Kerala General Sales Tax Act and the claims of the Banks and Financial Institutions over that properties have to be adjudicated under the provisions of the Revenue Recovery Act. The appeal is therefore allowed and the judgment of the learned Single Judge is set aside.