

CASE NO.:
Appeal (civil) 4333 of 2006

PETITIONER:
Kerala State Financial Enterprises Ltd.

RESPONDENT:
Official Liquidator, High Court of Kerala

DATE OF JUDGMENT: 29/09/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
JUDGMENT

S.B. SINHA. J.

Leave granted.

Appellant herein is a Government company. It is engaged in conduct of chitties. M/s Concert Capital Limited together with its sister concern M/s Concert Securities Limited took loan from it. They failed to repay the said loan. A recovery proceeding was initiated against the defaulting company under the Kerala Revenue Recovery Act, 1968. A notification was issued in that behalf in terms of Section 71 thereof.

The properties belonging to the defaulting company were attached. In the meanwhile, the Company went for voluntary liquidation. A provisional liquidator was appointed. Appellant was informed thereabout.

In the pending company proceeding being C.A. No. 165 of 2001, Appellant filed an application seeking leave to proceed with the sale of the properties, which was objected to, inter alia, on the premise that the charge in respect of the alleged debt was not registered with the Registrar of Companies and, thus, it was an unsecured creditor. A Counter Affidavit thereto was filed by Respondent. A prayer was also made by the Official liquidator for a direction upon Appellant to surrender the original documents. The application for leave to proceed with the revenue recovery proceeding was rejected by a learned Single Judge of the High Court by its order dated 28.11.2003.

An appeal thereagainst being Company Appeal No. 14 of 2004 preferred by Appellant was dismissed by a Division Bench of the High Court. Appellant is, thus, before us.

The contentions raised in support of the appeal are :

(i) In view of the fact that an order of attachment was passed by the Revenue Recovery Officer, the provisions of Section 125 of the Companies Act, 1956 were not attracted;

(ii) The provisions of the Kerala Revenue Recovery Act being a special statute, the same shall prevail over the Companies Act;

(iii) The order of attachment passed in favour of Appellant was saved under sub-section (1) of Section 537 of the Companies Act;

(iv) In any event, the dues of Appellant shall get precedence in terms of sub-section (2) of Section 537 of the Companies Act.

The Official Liquidator, on the other hand, contended that no charge is

created by reason of an order of attachment and as upon liquidation all the properties vest in the Official Liquidator being an unsecured creditor, the provisions of the Companies Act shall prevail.

Appellant is a Government company. Its dues are not Government dues. The provisions of the Kerala Revenue Recovery Act might have been made applicable, but only by reason thereof, dues of a Government company would not become the dues of the Government within the meaning of subsection (2) of Section 537 of the Companies Act.

Ordinarily a charge should be registered in terms of Section 125 of the Act. If the charges are not registered, the same would be void against the liquidator or creditors. The question which arises for consideration is as to whether if the properties are attached by a Revenue Recovery Court, Section 125 of the Act would be applicable? An attachment itself does not create any charge in the property. By reason of attachment, no decree is passed.

The expression 'attachment' has no definite connotation. An order of attachment is passed for achieving a limited purpose. It is subject to further orders as also provisions of other statute.

The word 'attachment' would only mean 'taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it. It is used for two purposes : (i) to compel the appearance of a defendant; and (ii) to seize and hold his property for the payment of the debt. It may also mean prohibition of transfer, conversion, disposition or movement of property by an order issued by the court.

In *Sardar Govindrao Mahadik and Anr. v. Devi Sahai and Ors.*, AIR (1982) SC 989 : [1982] 1 SCC 237, this Court held :

"What is the effect of attachment before judgment? Attachment before judgment is levied where the court on an application of the plaintiff is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. The provision in Section 64 of the Code of Civil Procedure provides that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is claimed enforceable is the claim for which the decree is made...."

Save and except certain special statutes in relation to recovery of debts from the properties of a company which has been directed to be wound up, the provisions of the Companies Act shall apply. An order of attachment made prior to passing of an order of winding up may not be void, but then the execution proceedings must be allowed to continue with the leave of the court in terms of Section 446 of the Companies Act. [See *Ovation International (India) P. Ltd., Re* (1969) 39 Com. Cases 595 (Bom)].

There, indisputably, exists a distinction between attachment before judgment in terms of Order XXXVIII of the Code of Civil Procedure and attachment for execution of a decree under Order XXI thereof. An order of attachment before judgment passed under Order XXXVIII seeks to safeguard

the interests of plaintiff so that in the event a decree is passed, the same stands satisfied. On the other hand, the essential parties of Order XXI is to see that the process of court is not defeated once execution starts, but the same would not mean that the provisions of the Companies Act become wholly inapplicable.

[See Faqir Chand Gupta v. Tanwar Finance P. Ltd., (1981) 51 Com. Cases 60].

The matter may, however, be different where the proceeding itself commenced with the leave of the court. We have noticed hereinbefore that sub-section (2) of Section 537 will have no application in the instant case, inasmuch the recovery proceeding initiated by Appellant cannot be said to be a proceeding for recovery of any tax or impost or any dues payable to the Government.

Section 125 of the Companies Act contains a special provision. It may not have any application in a case where a decree has already been passed, as was the case of Indian Bank v. Official Liquidator Chemmeens Exports (P) Ltd. and Ors., [1998] 5 SCC 401, on the ground that in terms of sub-section (2) of Section 446, the Company Court is not empowered to declare a decree passed by a competent court to be void. In that case it was held that the provisions of a special statute would apply subject to the provisions of the Companies Act. Therein a decree was already operative and observations were made only in that context.

Mr. C.N. Sree Kumar, the learned counsel appearing on behalf of Appellant, placed reliance upon a decision of the Kerala High Court in Kerala Financial Corporation, Trivandrum v. CK. Sivasankara Panicker and Ors., (1978) TAX. L.R. 1860, wherein in view of the fact that the State Financial Corporation had already taken recourse to Section 31 of the State Financial Corporations Act.

The question therein was as to whether the order Ext. PI8 has the effect of a decree creating a charge and Sec. 46B of the State Financial Corporations Act has overriding effect over the provisions of Sec. 125 of the Companies Act. It was held :

"...Section 46B, no doubt, provides that the provisions of the State Financial Corporations Act shall have effect notwithstanding anything contained in any other law for the time being in force. An order for realization of the amount due to the Financial Corporation by sale of the assets of the Company amounts to a charged decree. The assets attached and ordered to be sold constitute the security for the amount due to the Corporation. But S. 125 of the Companies Act declares that the charge so created by the company will be invalid as against the Liquidator and any creditor if it is not registered with the Registrar of Companies. This is inconsistent with the provisions of State Financial Corporations Act and therefore under S. 46B of the latter Act which is a special Act the legal effect of the order passed will be binding on the Liquidator of the company also. This is further clear by sub-sec. (10) of S.32 of the State Financial Corporations Act..."

It was further observed :

"...Section 125 applies to every charge created by the company in so far as any security of the company's property is conferred thereby. It cannot be said that a decree by which the company's property is ordered to be sold for realization of the amount due to the creditor is a charge created by the company. It may be that the decree is based on a mortgage created by the company. But, once that mortgage has merged in the decree the relationship of the parties is governed by the terms of the decree and the decree creating a charge is not hit by Section 125 of the Act (See Subrahmanyam v. Muttuswami, AIR (1941) FC 47). If the charge has not matured in a decree, no doubt, S. 125 will apply and the charge will be void against all creditors and the Liquidator. It is not possible to extend

the scope of that Section to cases where there are supervening events which are not covered by the Section. Moreover, in this case in the light of S.46B of the State Financial Corporations Act the charge created by the order of the District Court under section 32 of the said Act will not be affected by S. 125 of the Companies Act inasmuch as the latter section is inconsistent with the right created in favour of the creditor by Section 32 of the Act..."

We may notice that this Court, however, has taken a somewhat different view.

The question as to whether Sections 28, 31 and 46B of the State Financial Corporations Act shall prevail over Section 529 and 529-A of the Companies Act came up for consideration before this Court in *International Coach Builders Ltd. v. Karnataka State Financial Corporation*, [2003] 10 SCC 482, wherein this Court opined :

"We do not really see a conflict between Section 29 of the SFC Act and the Companies Act at all, since the rights under Section 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in *AP. State Financial Corpn. case*. This Court pointed out therein that Section 29 of the SFC Act cannot override the provisions of Sections 529(1) and 529-A of the Companies Act, 1956, inasmuch as SFCs cannot exercise the right under Section 29 ignoring a *pari passu* charge of the workmen..."

The view taken therein was reiterated by a three-Judge Bench of this Court in *Rajasthan State Financial Corporation and Anr. v. Official Liquidator and Anr.*, [2005] 8 SCC 190 wherein it was stated:

"18. In the light of the discussion as above, we think it proper to sum up the legal position thus:

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation."

[See also *ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Ors.*, (2006) 5 SCALE

27].

It may be true that if there exists a statute like SICA, the provisions thereof may prevail over the Companies Act. But in absence of a clear provision, the Companies Act cannot be held to give way to another Act providing for recovery only leaving the rights and liabilities of the parties to be dealt with a general law. [See NGEF Ltd. v. Chandra Developers (P) Ltd, and Anr., [2005] 8 SCC 219 and Jay Engineering Works Ltd. v. Industry Facilitation Council and Anr. - (2006) 9 SCALE 285]

Reliance has also been placed by Mr. Sree Kumar on Maharashtra State Financial Corporation v. Official Liquidator, Sidhu Tyres (P) Ltd., (1988) 64 Com. Cases 641 is also not apposite. Therein the charge was created not by the company, but by its predecessor which was a partnership firm.

For the reasons aforementioned, we do not think that the High Court has committed any error in refusing to exercise its discretionary jurisdiction under Section 446 of the Companies Act. The appeal is dismissed. No costs.