

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.07.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.9568 of 2017
and WMP No.10516 of 2017

P.Sangili ... Petitioner

vs.

1. The Chief Manager,
Union Bank of India,
Union Bank Bhavan,
First Floor, 139,
Broadway, Chennai - 108.

2. The Chief General Manager,
BSNL Head Quarters,
Chennai Telephones,
78, Purasawalkam High Road,
Chennai - 600 010

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a writ of certiorarified mandamus, to call for the records under Reference No.AGM:REC:101:2017 dated 28.02.2017 on the file of the first respondent as arbitrary, unconstitutional against Rule of Law and against the Principles of Natural Justice and direct the first respondent to recover the petitioners property as per the order in DRC No.129 of 2012 in O.A.No.89 of 2011 on the file of the Debts Recovery Tribunal-II, Chennai.

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For Petitioner : Mr.C.Rajan

For Respondents : Mr.Srinath Sridevan (for R1)
Mr.R.Govindaraj (for R2)

O R D E R
(Delivered by S.MANIKUMAR, J.)

A former DGM (COBA), BSNL Chennai Telephones, Chennai, has obtained a loan of Rs.39.50 Lakhs on 12.03.2009 for purchase of a Flat. Value of the flat was fixed as Rs.44 Lakhs. Amount has to be repaid in 96 installments. Each installment was fixed at Rs.61,000/-. The borrower has defaulted in making repayments. Hence, the Bank has initiated proceedings in O.A.No.89 of 2011, before the Debts Recovery Tribunal-II, Chennai, for recovery of Rs.48,42,016.07p. The Tribunal has issued an order of attachment on 02.02.2015 in DRC No.129 of 2012 in O.A.No.89 of 2011. Thereafter, petitioner has sent a letter dated 01.02.2016, to the Manager, Union Bank of India, Chennai, stating that he had already paid a sum of Rs.10 Lakhs and that he is prepared to settle the loan amount. He has sought for waiver of interest.

2. Further, on receipt of a letter dated 08.03.2016 from BSNL-Chennai Telephones, his employer, the petitioner has sent a reply dated 21.03.2016, stating that from the beginning, he intended to pay the bank dues. In the said reply dated 21.03.2016 addressed to the Deputy General Manager (Finance) HQ, O/o.CGM, BSNL Chennai Telephones, Chennai, the petitioner has requested the employer to ensure the following:

- "1. The EMI period be enhanced upto the age of 70 years at such a rate divided by the remaining dues after meet out by at 2 & 3 below.
2. Effecting salary recovery @ Rs.45,000/- PM till my retirement.
3. Utilizing my entire retirement benefit for repayment.
4. Waiver of unnecessary interest plus penal interest for the period from July 2010 to March 2016

Or

5. The property may be taken over by the bank under issue of "No due certificate" to me."

3. Subsequently, the bank issued a notice on 13.11.2016 under Section 13(4) Clause (D) of the SARFAESI Act, 2002 to the Deputy General Manager (CA/CSC), BSNL Limited, Chennai Telephone, Chennai, requesting the latter to pay a sum of Rs.68,05,121/- payable by the employer to the borrower, Mr.Sangli, the writ petitioner herein.

4. Acting on the borrower's letter dated 11.01.2017 and a further letter dated 09.01.2017 of BSNL, Chennai Telephones, Chennai, Deputy General Manager (CA/CSC), BSNL Limited, Chennai Telephones, Chennai, addressed a letter dated 15.02.2017 to the

Assistant General Manager, Union Bank of India, Chennai Main Branch, Chennai stating that repayment of loan of Rs.45,000/- per month from December 2016, has been acknowledged by the bank. The employer has sought for details of the present status of the case from the bank. Union Bank of India vide letter dated 28.02.2017 addressed to the the Deputy General Manager (CA/CSC), BSNL Limited, Chennai Telephones, Chennai, has stated that there was a overdue of Rs.67,45,645/- and as an employer, BSNL has to remit the dues, with the terminal benefits available, otherwise, the bank would be constrained to take appropriate action holding the employer, as liable for violating Section 13(4)(d) of the SARFAESI Act, 2002. The bank has requested BSNL to intimate in advance the terminal benefits of the writ petitioner to appropriate bank's dues and to initiate proceedings for recovery of the balance amount.

5. Letter dated 28.02.2017, issued by Union Bank of India, Chennai, sent to the Deputy General Manager (CA/CSC), BSNL Limited, Chennai Telephone, Chennai, and furnished to the writ petitioner is assailed in this writ petition, on the grounds that bank has no right to seek for attachment of the retiral benefits including leave salary and supporting the prayer sought for, reliance has been made on the decision of a Hon'ble Division Bench of this Court in Sundaram BNP Paribas Home Finance Limited Vs. Mir Ali and another reported in 2012 (2) CTC 209.

6. The Divisional Engineer (Legal), BSNL, Chennai Telephones, in his counter affidavit has stated that employer has not acquired any secured assets from the bank, as specified under Section 13(4) of the SARFAESI Act and therefore, BSNL is not liable to pay any money to the bank. BSNL has further contended that bank cannot maintain any demand, as per Section 13(4) clause (d) of the SARFAESI Act, 2002. BSNL has further contended that the bank has no authority to claim the amount from the employer, which is payable to the writ petitioner by way of Gratuity and other retiral benefits. BSNL has further stated that DCRG, Commutation of pension and GPF have already been paid to the writ petitioner by the department of Telecommunications, which is a separate entity. Leave encashment salary alone has not been paid. For the above said reasons, BSNL, has submitted that bank cannot maintain any claim against the employer.

7. Union Bank of India, in its counter affidavit, submitted that the petitioner has availed a personal loan of Rs.39,50,000/- on 12.03.2009, to be repaid in 96 installments, commencing from 30.04.2009 to 30.04.2007. Out of 96 installments, the writ petitioner paid only eight installments,

for the period from 16.04.2009 to 28.08.2010 and another set of payment between 07.02.2016 to 13.02.2017, totalling Rs.5,66,000/-. According to the bank, the outstanding amount due and payable, as on the date of issuing notice was, Rs.67,45,656/- For the willful and chronic default, bank filed O.A.No.89 of 2011 before the Debts Recovery Tribunal, Chennai. The said original application came to be allowed in 2012. DRC No.129 of 2012 has been issued. Property mortgaged, has been attached. The bank could not take possession, as third parties, objected to the same.

8. The bank, wrote a letter to BSNL, to intimate, the details of the terminal benefits to be paid to the writ petitioner and to appropriate its dues towards the outstanding housing loan. It was not an attempt to attach the retirement benefits. Nevertheless, as per Section 60 of the Code of Civil Procedure, 1908, leave salary encashment, is not prohibited from attachment. On the basis of the decisions of the Hon'ble Supreme Court in Union of India v. Hira Devi and Another reported in 1952 AIR SC 2227 and Union of India v. Jyoti Chit Fund Finance and Others reported in (1976) 3 SCC 607, bank has submitted that once the retirement benefits were received by the employee, they ceased to retain their original character and therefore, capable of being attached.

9. Bank has further contended that though property is under attachment, they are not able to take possession due to the occupation of the same, by third parties. Bank has further contended that recovery of public money has to be done and defaulter should not be given indulgence.

10. By an affidavit dated 11.07.2017, Mr.P.Sangili, writ petitioner, has given an affidavit of undertaking that he has no objection for the property being taken to recover the outstanding dues, payable by the writ petitioner. For brevity, undertaking is as follows.

"6. I submit that I state that I have no objection by the first respondent bank in proceeding against my property to recover their outstanding dues.

I am swearing this affidavit to give my consent for the recovery proceedings to be taken up by the first respondent under due process of law in the interest of justice and thus render justice."

11. Added further, Mr.C.Rajan, learned counsel for the petitioner submitted that all along the petitioner has maintained his honesty and integrity, throughout is career and

that the petitioner has shown his bonafides, by filing the above said affidavit of undertaking.

Heard the learned counsel for the parties and perused the materials available on record.

12. Let us consider the decisions relied on by the learned counsel for the parties.

i) In Union of India v. Smt. Hira Devi and Another reported in 1952 AIR SC 2227, in paragraph 16, the Hon'ble Apex Court, held thus

"(16) This conclusion does not, however, apply to the arrears of salary and allowance due to the judgment-debtor as they stand upon a different legal footing. Salary is not attachable to the extent provided in Section 60 Civil Procedure Code clause (1), but there is no such exemption as regards arrears of salary. The learned Attorney-General conceded that this portion of the amount can be proceeded against in execution."

ii) In Union of India v. Jyoti Chit Fund Finance and Others reported in (1976) 3 SCC 607, in paragraph Nos.10 to 12, the Hon'ble Apex Court, held as follows:

"10. We may formulate what has been indicated—the actual points urged before us by Shri Sanghi and vigorously controverted by Shri Rohtagi. (1) Is it permissible in law for amounts representing provident fund contributions and pensionary benefits to be attached, having due regard to section 3 and 4 of the Provident Funds Act, Section 11 of the Pensions Act and Section 60(1), provisos (g) and (k) of C.P.C.? (2) Is the Union of India entitled to move the Court and request it to investigate the question that the whole or part of the sum in its hands on account of the judgment-debtor as provident fund, compulsory deposits and pensionary benefits and, therefore, not liable to be attached, or is it out of bounds for a third party to the suit, like the Union of India, even if the step be taken pro bono publico by a relevant public authority, to invoke the jurisdiction of the Court in this behalf? (3) Is the Rajya Sabha Secretariat staff so totally separated from the Union of India that the latter cannot urge, in these proceedings, the claims belonging to employees of the said Secretariat in the civil court even if the attachment of the sums involved is contrary to law? We are inclined to hold,, without hesitation that on all the points the appellant is bound to succeed. A bare reading of ss.

3 and 4 of the Provident Funds Act, 1925, read with Section 2(a) of that Act, will convince anyone that attachment of amounts bearing their description are prohibited. It will be a gross violation of legal mandates involving public interest if, in the teeth of such injunction, an attachment should still be ordered by a court.

11. The finer distinction sought to be made by Shri Rohatgi that because the appellant has already retired, therefore, the provident fund and allied amounts have already fallen due and have ceased to possess the complexion of sums 'by way of provident fund under Sections 3 and 4, is fallacious. On first principles and on precedent, we are clear in our minds that these sums, if they are of the character set up by the Union of India, are beyond the reach of the court's power to attach. Section 2(a) of the Provident Funds Act has also to be read in this connection to remove possible doubts because this definitional clause is of wide amplitude. Moreover, Section 60(1), provides (g) and (k), leave no doubt on the point of non-attachability. The matter is so plain that discussion is uncalled for.

12. We may state without fear of contradiction that provident fund amounts, pensions and other compulsory deposits covered by the provisions we have referred to, retain their character until they reach the hands of the employee. The reality of the protection is reduced to illusory formality if we accept the interpretation sought. We take a contrary view which means that attachment is possible and lawful only after such amounts are received by the employee. If doubts may possible be entertained on this question, the decision in Union of India v. Radha Kissen Agarwala & Anr. reported in (1969) 1 SCC 225 erases them. Indeed our case is an afortiori one, on the facts. A bare reading of Radha Kissen makes the proposition fool-proof that so long as the amounts are Provident Fund dues to them, till they are actually paid to the government servant who is entitled to it on retirement or otherwise the nature of the dues is not altered. What is more, that case is also authority for the benignant view that the government is a trustee for those sums and has an interest in maintaining the objection in court to attachment. We follow that ruling and over-rule the contention."

iii) In Sathiyabama and others vs. M.Palanisamy and others reported in 2004 (1) LW 125, a learned single Judge of this court, at paragraph 9 of the judgment held as follows:

"9. It is therefore clear that these amounts which are payable to employees, so that they would not be left resourceless at the time of retirement are exempted for attachment, whether they are payable to the employee or to his legal representatives. The various decisions referred to above also indicate that whether the employee has retired, or has become insolvent or has died the character of these amounts do not change so long as they are in the hands of the employer. The immunity from attachment is complete. The object of the provisions are to see that the employee gets these amounts after his retirement or his heirs get them after the employee's 'death' since the scheme is a beneficial one, the authority viz.: the employer is a trustee for those sums and is bound to object to the attachment. The second respondent has rightly maintained its stand against the attachment. There can be no legal justification for classifying or describing such deposits or amounts differently after the employee's death or retirement, so long as they are with the employees, there is protection from attachments. Provident Fund amounts, pension and other compulsory deposit retain their character until they reach the hands of the employee, any other view cannot be taken considering the conditions in which such exemption provisions operate and the class of persons they were intended to benefit. In one of the decisions, even the pay order had been made out but it had not left the hands of the employer, the plea of the person seeking attachment on the ground that, really nothing further was required, was in vain. It still had not reached the employee and as the learned Judge picturesquely put it, "A miss is as good as a mile."

iv) In Sundaram BNP Paribas Home Finance Limited Vs. Mir Ali and another reported in 2012 (2) CTC 209, in paragraph 15, a Hon'ble Division Bench of this Court, held as follows:

"15. In the light of the principles laid down by the Hon'ble Supreme Court, let us consider the present case. Appellant seeks prohibitory order against the Garnishee/employer of 1st Respondent from making any payment to the 1st Respondent. As pointed out earlier, as security for the loan,

property has been mortgaged to the Appellant. On 23.09.2010, Appellant issued possession notice under Section 13(4) of SARFAESI Act read with Rule 8(1&2) of Security Interest (Enforcement) Rules, 2002 and taken symbolic possession of the said property. Appellant has thus initiated action under Securitization Act to realise the loan amount by proceeding against the security. When the Appellant has proceeded against the mortgaged property offered as security, Appellant is not justified in invoking Section 9 of Arbitration and Conciliation Act. That apart Appellant has sought for pro-order prohibiting the garnishee from making the payment to the tune of Rs.46,83,533/-. If such huge amount of Rs.46,83,533/- is to be attached, virtually, 1st Respondent will be left with no amount for sustenance. As per Section 60(1)(ia) of C.P.C., only one-third of take home salary could be attached. Appellant is not at all justified in seeking pro-order prohibiting from making payment of Rs.46,83,533/-"

13. In the case before us, the bank wanted the employer, BSNL to remit, terminal benefits of the petitioner, and leave salary, towards discharging the loan amount, when the secured asset, has already been attached. Even assuming that taking possession is objected, bank can always resort to Section 14 of the Act, instead wrote a letter to the employer to remit even the leave salary. At this juncture, it is worthwhile to quote the opening sentence of Hon'ble Justice V.R.Krishna Iyer in Union of India's case, "The moral of this case is that a short cut, may often be a wrong cut - in law, as in life. The ratio of this appeal is that technically will not triumph in courts of law and justice, where substantial public policy is involved and it is such public policy which humanistically protects provident fund and pensionary dues of government servants from claims of judgment-creditors to attach in satisfaction of decrees." The Learned Judge further held thus.

" 6. We may make it clear here that the stand taken by Shri Rohatgi, Counsel for the respondent, is twofold. He argues firstly that this amount in the hands of Government is admittedly being held on behalf of the Rajya Sabha Secretariat servant who has just retired and, therefore, has lost the character of provident fund or pension. The inhibition of attachment of provident fund and like amounts, even if valid, cannot apply to this class of sums which have suffered a metamorphosis. Secondly, the Government has no right to move the

court raising objection to the attachment since the judgment-debtor is the only appropriate person who can do so. We disagree.

7. Processual law is neither petrified nor purblind but has a simple mission - the promotion of justice. The court cannot content itself with playing umpire in a technical game of legal skills but must be activist in the cause of deciding the real issues between the parties. And one guiding principle is not to exaggerate the efficacy of procedural defects where issues of public concern are involved and a public authority vitally interested in the correct principle alerts the attention of the court to the problem. A broadened view of locus standi leads to the futility of technical flaws where larger issues are involved - and that is the trend of modern processual jurisprudence. These general considerations were trite, yet too often ignored, and so need reiteration. Further, the consumers of justice can have scant respect for a procedural policy which is obsessed more with who sparks the plugs of the court system than with what the merits of the rights or wrongs of the relief are. A shift on the emphasis, away from technical legalistics, is overdue if the Judicature is not to aid its gravediggers. We express the view strongly so that hopefuls may be dissuaded from taking up court time by playing up technicalities.

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12. We may state without fear of contradiction that provident fund amounts, pensions and other compulsory deposits covered by the provisions we have referred to, retain their character until they reach the hands of the employee. The reality of the protection is reduced to illusory formality if we accept the interpretation sought. We take a contrary view which means that attachment is possible and lawful only after such amounts are received by the employee. If doubts may possibly be entertained on this question, the decision in Union of India v. Radha Kissen Agarwalla reported in (1969) 1 SCC 225 erases them. Indeed, our case is an a fortiori one, on the facts. A bare reading of Radha Kissen makes the proposition foolproof that so long as the amounts are provident fund dues then, till they are actually paid to the government servant who is entitled to it on retirement or

otherwise the nature of the dues is not altered. What is more, that case is also authority for the benignant view that the government is a trustee for those sums and has an interest in maintaining the objection in court to attachment. We follow that ruling and overrule the contention."

14. Though bank has stated that there was no attempt to attach the retirement benefits of the petitioner, but intended to recover only the leave salary encashment, as there is no exemption under Section 60 of the Code of Civil Procedure, 1908 and further contended that as per Section 13(4)(d) of the SARFAESI Act, 2002, the bank may require at any time by notice in writing, any person who has acquired any of the settled estates from the borrower and from whom any money is due or himself could be due to the borrower, to pay the secured creditor so much of the money as is sanctioned to pay the secured debt, in the case on hand, when the secured property is very much available and when the debtor has also come forward to offer his property to be taken for realisation of the outstanding debts, and when Section 14 of the SARFAESI Act, 2002 enables the secured creditor, to approach the Chief Metropolitan Magistrate, or the District Magistrate, as the case may be, to seek for assistance, for taking possession or sale or transfer by secured creditor under the provisions of the Act, nothing prevented the bank to approach the said authority, for any of the above, instead of directing the employer BSNL/2nd respondent, to remit the retirement benefits, which the petitioner is eligible under the Service Rules.

15. Indisputably, property has been attached by an order dated 02.02.2015 in DRC No.129 in O.A.No.89/2011. The bank has not chosen to initiate any proceeding under Section 14 of the Act. Merely because, there are occupants in the subject property, it is not open to the bank, to direct the employer to remit the retirement benefits to the bank to satisfy the outstanding amount payable by the borrower. From the counter affidavit of the BSNL, Chennai Telephones, it could be seen that all the terminal benefits have been paid to the writ petitioner, except the leave encashment salary.

16. In the light of the undertaking, and in the interest of justice, we are of the view that a person claiming himself to have maintained honesty and integrity while in service, till his retirement, should not have a black mark, by allowing the banker to encash his leave salary, which in the words of Hon'ble Justice V.R.Krishna Iyer, a short cut method. For the foregoing reasons, writ petition is allowed. Order of the first respondent in Reference No.AGM:REC:101:2017 dated 28.02.2017 is set aside.

In view of the undertaking, it is open to the first respondent to recover the petitioners property as per the order in DRC No.129 of 2012 in O.A.No.89 of 2011 on the file of the Debts Recovery Tribunal-II, Chennai. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

ars/asr

To

1. The Chief Manager,
Union Bank of India,
Union Bank Bhavan,
First Floor, 139,
Broadway, Chennai - 108.
2. The Chief General Manager,
BSNL Head Quarters,
Chennai Telephones,
78, Purasawalkam High Road,
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+2cc's to M/s.C.Rajan, Advocate, S.R.No.50768

+1cc to M/s.Srinath sridevan, Advocate, S.R.No.51141

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