

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.09.2017

CORAM:

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

W.P.No.12501 of 2017
and
WMP Nos.13293 & 13294 of 2017

1.P.Balakrishnan
2.P.Periyasamy
3.S.Mohammed Rafi ... Petitioners

Vs.

1.The Managing Director,
M/s.Gold King Tex India Pvt. Ltd.,
No.67, Koundapalayam Village,
Rayarpalayam Post,
Thiruchengodu,
Namakkal - 637 211

2.The Authorised Officer (SBI of Erode Branch),
Stressed Assets Management Branch,
Raja Plaza, First Floor,
Coimbatore - 641 037.

3.State Bank of India,
Commercial Branch,
Erode.

4.The Labour Officer,
No.414, 4th Floor,
Office of the District Collector,
Salem. ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Mandamus, directing the second respondent to pay the workers pending wages and other dues out of the sale price of machineries and instruments of the first respondent company.

For Petitioners : M/s.D.Geetha

For Respondents 2 & 3 : Mr.M.L.Ganesh

ORDER

(Order of the Court was delivered by S.MANIKUMAR, J)

Claiming themselves, to be the workers of M/s.Gold King Tex India Private Limited, Koundapalayam Village, Rayarpalayam Post, Namakkal and their wages, have not been paid, for a considerable period, from 2013, and being aggrieved by the action taken by the Authorised Officer, State Bank of India, Erode, Stressed Assets Management Branch, Coimbatore, the 2nd respondent, bringing both immovable and movable properties of M/s.Gold King Tex India Private Limited, the 1st respondent/borrower, for auction, placing reliance on Section 529(A) of the Companies Act, 1956, and also inviting the attention of this Court to the attachment order under Section 8 of the Employees Provident Fund Act, 1952 dated 02.12.2015, against the 1st respondent Company, the petitioners/workers have sought for a writ of mandamus, directing the Authorised Officer, State Bank of India, Erode, Stressed Assets Management Branch, Coimbatore, the 2nd respondent, to pay the pending wages and other dues, out of the sale proceeds of machineries and instruments of the M/s.Gold King Tex India Private Limited, 1st respondent. Petitioners have relied on a decision of the Hon'ble Supreme Court in Workers of M/s.Rohtas Industries Ltd. Vs. M/s.Rohtas Industries Ltd., reported in 1987 SCR (2) 1216.

2. Opposing the prayer sought for, Authorised Officer & Assistant General Manager, Stressed Assets Management Branch, Coimbatore, in his counter affidavit has submitted that the writ petition is not maintainable, in law and on facts. According to the Authorised Officer, the 1st respondent Company is not in liquidation and Section 13(9) of the SARFAESI Act, can be invoked, if only the company is in liquidation and under the control of the Official Liquidator and in such circumstances, sale proceeds shall be distributed in accordance with the provisions of Section 529 A of the Companies Act, 1956 (1/1956).

3. The Authorised Officer, has further submitted that there is no privity of contract between the petitioners and the bank, and therefore, the petitioners, as workers, cannot prevent the secured creditor from initiating action, under the SARFAESI Act, 2002, to recover a huge outstanding loan amount of Rs.38,35,00,000/- from the 1st respondent company. Reliance has also been made on the decision of this Court, in a batch of writ petitions viz., W.P.Nos.8693 of 2009 etc., batch dated 07.08.2009, wherein, this Court held that when there is no provision under the Industrial Disputes Act or under the Tamil Nadu Revenue Recovery Act, which makes the dues of a workmen, as first charge on the property.

4. The Authorised Officer, has stated submitted that the decision in M/s.Rohtas Industries Ltd. Vs. M/s.Rohtas

Industries Ltd., reported in 1987 SCR (2) 1216, has been subsequently over ruled by a decision reported in Central Bank of India v. Siriguppa Sugars & Chemicals Ltd., reported in 2007 (8) SCC 353.

5. Added further, Mr.M.L.Ganesh, learned counsel for the bank submitted that though seven items of immovable properties were brought for auction on 13.02.2017, 24.03.2017, 26.05.2017 and 23.06.2017 respectively, none of them were sold. As regards, movable properties, he submitted that out of five lots, in the auction held on various dates, 06.04.2017, 26.05.2017, 23.06.2017 and 31.07.2013 respectively, three lots of movable properties have been sold for Rs.4.69 crores. He further submitted that still, a sum of Rs.16 Crores and above, is due and payable by the 1st respondent company.

6. Mr.M.L.Ganesh, learned counsel for the bank further submitted that as per the procedure contemplated under the SARFAESI Act, 2002, a fresh auction notice has to be issued. According to him, when such notice is issued, then as per Section 17(1) of the Act, petitioners can always approach the tribunal, for appropriate relief, but in any event, the petitioners cannot stall the action taken by the bank, for recovery of dues.

7. Per contra, Ms.D.Geetha, learned counsel for the writ petitioners submitted that already there is an order of attachment by the Regional Provident Fund Commissioner, Salem, towards the Provident Fund dues, payable by the 1st respondent Company and that the same has been duly intimated to the Manager, Commercial Branch, Salem. She further submitted that three workers have already filed claim petitions, before the labour Court, and that the same are pending. According to the learned counsel for the petitioners, as statutory dues are payable by 1st respondent, the same can be claimed from the 2nd respondent bank, with whom assets have been mortgaged. She prayed for suitable directions.

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

8. Before advertng to the rival contentions, it is worthwhile to extract Section 13(4) of the SARFAESI Act, 2002, which as follows:

"In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

9. Thus, in the light of the above provision, bank is empowered to take any of the measures for recovery. Let us also consider what, sub-Section 9 of Section 13 of the SARFAESI Act, 2002, states. "subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors".

10. The Regional Provident Fund Commissioner-II, Salem, has sent a letter, dated 02.12.2015, to the Bank, intimating the order of attachment, issued under Section 8(f) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, wherein, he has recorded that provident fund deposit linked with the Insurance Fund Contribution and Administrative Charges, for the period from 01.05.2014 to 31.01.2015, to an extent of Rs.2,63,302/-, was due from M/s.Gold King Tex India Pvt. Ltd., the 1st respondent.

11. E-Auction sale notice, dated 02.03.2017, has been issued by the Authorised Officer, State Bank of India, Stressed Assets Management Branch, Coimbatore, 2nd respondent herein, bringing the movable and immovable properties of the 1st respondent herein, for auction.

12. It is the submission of Mr.M.L.Ganesh, learned counsel for the 3rd respondent-Bank that seven items of immovable properties were brought for auction on various dates and none of them were sold. As regards movable properties, though five lots have been brought for auction, three of them have been sold for Rs.4.69 Crores and that the 1st respondent is still due, of more than 16 Crores. Contention has also been made by the learned counsel for the 3rd respondent that the 1st respondent-Company, has not been wound up not action is being taken to wound up and therefore, Section 529A of the Companies Act, cannot be invoked by the petitioners to seek for a Mandamus and reliance is placed on the decision of the Hon'ble Division Bench of this Court in W.P.Nos.8696 of 2009 etc., batch, dated 07.08.2009.

13. As per sub-Section (9) of Section 13 of the SARFAESI Act, subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors. Provisos and the explanation in the said section, as follows:

"PROVIDED that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

PROVIDED FURTHER that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

PROVIDED ALSO that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

PROVIDED ALSO that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

PROVIDED ALSO that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation :

For the purposes of this sub-section,--

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor."

14. In *Central Bank of India v. State of Kerala and others* reported in (2009) 4 SCC 94, the Hon'ble Supreme Court, at Paragraph 114, held as hereunder:

"By enacting various provisos to sub-section (9), the legislature has ensured that priority given to the claim of workers of a company in liquidation under Section 529A of the Companies Act, 1956 vis a vis secured creditors like banks is duly respected. This is the reason why first of the five unnumbered provisos to Section 13(9) lays down that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956. This and other provisos do not create first charge in favour of the worker of a company in liquidation for the first time but merely recognize the existing priority of their claim under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up."

15. In W.P.Nos.8697 of 2009, petitioners, numbering 30, employees of the Management Madras Wire Industries Pvt. Ltd., Gummidiipoondi, 2nd respondent therein, have sought for a writ of Certiorarified Mandamus, to call for the records culminating in the order dated 09.04.2009 in I.A.Nos. 89, 90, 91/2008 in M.A.No.49 & 50/2007 in DRC.No.81/2006 in OA.No.209/2002 passed by the DRT-II, Chennai, and to quash the same. They prayed for a direction to the respondents 1 and 3 therein, to refund the amounts realised on the sale of the Assets of the Second Respondent to the credit of OA.No.209 of

2002 and DRC No.82/2006, pending before the DRT-II, Chennai and to pass orders on the rateable distribution of amounts, realised on the sale of the assets of the second respondent, as per sec 19 (19) of the DRT Act 1993.

16. Petitioners in W.P.No.8696 of 2009, have contended that they were employees of the Management Madras Wire Industries Pvt. Ltd., 2nd respondent therein. The 2nd respondent therein, without any notice to them, closed down the company on 04.04.2001. Hence, on 10.04.2002, they moved the Conciliation Board. Since there was no representation on behalf of the 2nd respondent company on 18.07.2002, the Conciliation Board passed a failure report. Thereafter, the petitioners and others, raised an industrial dispute in I.D.No.347 to 379, claiming a closure compensation on the file of Principal Judge, Labour Court, Chennai, which were allowed on 22.08.2002. Thereafter, claim petitions were filed for their legitimate benefits, due from the 2nd respondent therein. At this juncture, the petitioners therein came to know that the 3rd respondent therein, Tamil Nadu Industrial Investment Corporation had sold the properties of the 2nd respondent company under Section of 529(A) of the Companies Act, in respect of an outstanding of loan amount due, by the company. The 2nd respondent-Company therein, had taken a loan from the 3rd respondent-TIIC Ltd., by mortgaging the properties of the company. Since it failed to repay the loan amount, the 3rd respondent had taken over the assets of the company and sold the properties of the 2nd respondent-Company at the market value. The 3rd respondent, after adjusting the amount due to it, had deposited the balance amount of Rs.17,83,636/-, before the Debts Recovery Tribunal-II in O.A.No.209 of 2002, filed by the 1st respondent bank, against the 2nd respondent, in respect of the amount outstanding towards the loan availed by the 2nd respondent-Company. The 3rd respondent-TIIC had issued no objection dated 22.02.1995 to the 1st respondent bank for seeking second charge on the fixed assets of the company. When the petitioners therein, came to know about the deposit of the amount by the 3rd respondent Corporation, before the Debts Recovery Tribunal-II, they filed M.A.49 and 50 of 2007 2008 before the Recovery Officer, Debts Recovery Tribunal-II in O.A.No.209 of 2002, for a prayer to prevent the 1st respondent bank, from withdrawing the amount from the sale proceeds deposited by the 3rd respondent Corporation. The said applications were allowed by the Recovery Officer and the petitioners therein were directed to move the Debts Recovery Tribunal-II, by order dated 04.12.2007, holding that only the Tribunal has powers to deal with the said applications. Thereafter, the petitioners therein filed I.A.89, 90 and 91 of 2008 for (i) impleading the Tamil Nadu Industrial Investment Corporation, as the 4th respondent in D.R.C.No.81 of 2006 in O.A.No.209 of 2002, (ii) to stay of disbursal of the amount of Rs.17,83,636/- to the 1st respondent, deposited by the 3rd respondent, after adjusting their dues, from the sale proceeds of the company assets and (iii) to direct the Tamil Nadu

Investment Industrial Corporation, the 3rd respondent to deposit the entire money realised from the sale of land belonging to the 2nd respondent company, in D.R.C.No.81 of 2006. All the above three applications were filed by the workmen, mainly by contending that distribution of surplus sale proceeds of the company can be made only, in accordance with section 529(A) of the Companies Act by the Tribunal. But the applications were rejected by the Tribunal stating that, as per Section 529(A) of the Companies Act, claim of workmen will be on pari pasu with the secured debtors, that too, only in event of winding up of the company only, and not under ordinary circumstances. Aggrieved by the same, W.P.No.8696 of 2009, has been filed by the workmen stating that the dismissal order passed by the Tribunal, is not legally sustainable, when, under section 19(19) of the Debts Recovery Tribunal Act, amount has to be disbursed in accordance with section 529-A of the Companies Act.

17. Similarly, on behalf of the workmen of Discostone Indo Ltd., W.P.No.750 of 2007, has been filed, praying for a Mandamus, directing the 5th respondent therein, to retain the amount to the extent of Rs.5,99,83,560/- in the credit of O.A.No.1247 of 1998, and to remit the same, to the District Collector, Kancheepuram, 4th respondent therein, as per G.O. (D) No.545 dated 21.5.2003. The petitioners therein contended that the second respondent company, in the said writ petition, without informing the workmen, by letter dated 15.12.1997, purported to close the company. This was challenged in I.D.No.131 of 1999 and by award dated 12.4.2000, the Industrial Tribunal has declared such closure as illegal. On the aforesaid basis, 457 employees filed their claim petition before the Labour Court and obtained an award for a sum of Rs.5,99,83,560/-. Thereafter, application under Section 33-C (1) of the Industrial Disputes Act was filed for recovery of the amount and accordingly, by G.O.Ms.No.545, dated 21.5.2003, the Government had directed the Collector, Kancheepuram, to recover the amount under the Revenue Recovery Act. In the meantime, Canara Bank, the first respondent in the said writ petition, filed O.A.No.1247 of 1998 before the Debts Recovery Tribunal, for recovery of a sum of Rs.5 Crores with interest. Since the Directors of the Company had abandoned the company, no steps were taken on behalf of the Company, before the Debts Recovery Tribunal, which passed a decree, in favour of the Bank. Thereafter, recovery proceedings were initiated in DRC.No.62 of 2000, for sale of land of 42.60 acres. In the auction held on 18.10.2006, M/s.Best and Crompton Engineering Limited purchased the same, for Rs.17.89 crores, which was subsequently confirmed and sale certificate was issued to the purchaser. The entire amount has been deposited to the credit of O.A.No.1247/1998. Petitioners in W.P.No.750 of 2007, claimed that the award in favour of the workmen should be considered as first priority and, moreover, necessary certificates, having been issued by the Government to collect the amount due to the workmen under the Revenue Recovery Act,

their claim should have priority. The Recovery Officer, however, rejected the claim of the workmen. There were other writ petitions also.

18. On the above pleadings, a Hon'ble Division Bench of this Court, framed two questions for considerations, viz.,

(1) Whether the dues of the workmen as determined by the Industrial Tribunal are required to be paid by applying the principle under Section 529-A of the Companies Act?

(2) Whether the dues of the ESI Corporation can have priority over dues of the secured creditor?

19. After considering various provisions and decisions, in W.P.No.8696 of 2009, etc. batch, dated 07.08.2009, at Paragraphs 28 and 29, a Hon'ble Division Bench, held as follows:

"28. So far as the petitioners in W.P.Nos.8696 of 2009 and 750 of 2007 are concerned, their claim is based on Section 19(19) of the RDB Act. However, section 19(19) itself makes a reference to Section 529-A. It is not in dispute that the company is not in liquidation and even there is no initiation of any winding-up proceedings. From the various decisions referred to earlier, it is apparent that the question of giving priority to the amount payable to the workmen as indicated in Section 529-A of the Companies Act would arise only when the company is in liquidation. Therefore, the claim on the basis of applicability under Section 529-A cannot be sustained.

29. The allied submission to the effect that such dues of the workmen are recoverable as arrear of land revenue under the Tamil Nadu Revenue Recovery Act also does not advance the cause of the petitioners. First of all it cannot be said that merely because the amount is recoverable as arrear of land revenue, it can be equated "Crown debt". Even assuming that such amount can be equated as 'Crown debt', in the absence of any charge created by any statutory provision, such Crown debt cannot have precedence over a secured debt as apparent from several decisions of the Supreme Court noticed hereinbefore. Therefore, the claim of the workmen that they have got a preferential right to be paid or a right to be paid at par as comprehended under Section 529-A with the secured creditor is not acceptable. Their right could arise only after the claim of the secured creditors is satisfied because, at that stage, surplus amount would be refundable to the borrower and obviously they can claim from such surplus amount, if any."

20. With reference to ESI claim, over the amount payable to the secured creditor, at Paragraph 35, the Hon'ble Division Bench of this Court held as follows:

"35. The above provision merely lays down that distribution of the property of the insolvent or in the distribution of the assets of a Company being wound up, if amount due in respect of any continuation or any amount payable under the Act, the liability wherefor accrued before the date of the order of adjudication of the insolvent or the date of winding up, shall be deemed to be included among the debts which had required to be impleaded as having priority over other debts. Thus it is apparent that aforesaid priority will be available only where the question relates to distribution of the assets of the insolvent or assets of the Company being wound up. Bereft of such insolvency, or winding up, the question of giving priority under Section 94 of the E.S.I. Act would not arise. It is to be noticed that neither in Section 94 nor in Section 45-B or 45-C, it has been laid down that the amount payable under the Act will be the first charge of a property. In the absence of any such provision, the ratio of the Supreme Court decisions already referred to, which is squarely applicable, the dues cannot have priority over the dues payable to the secured creditor in whose favour security has been created prior to the accrual of liability under the E.S.I. Act. The contention that the amount is recoverable as arrear of land revenue is similar to the contention which has been raised by the workmen in the other two writ petitions, viz., W.P.No.8696 of 2009 and W.P.No.750 of 2007 and since the discussion which has been made in connection with the similar contentions raised, is equally applicable, we find even assuming that such amount can be termed as Crown Debt in the absence of any provision making such debt as the first charge on the property, it cannot have any priority."

21. As rightly contended by the respondent-Bank, decision in M/s.Rohtas Industries Ltd. Vs. M/s.Rohtas Industries Ltd., reported in 1987 SCR (2) 1216, has been overruled, subsequently in Central Bank of India v. Siriguppa Sugars & Chemicals Ltd., reported in 2007 (8) SCC 353.

22. Admittedly, the 1st respondent-Company has not been wound up nor any action is taken to wind up. The 1st petitioner and two others are stated to have filed claim petitions before the labour Court. According to the learned counsel for the petitioners, the said claim petitions are pending. Even taking it for granted that there are chances of getting a favourable award, in the light of the decisions, stated supra, the petitioners cannot seek for a direction to

the 2nd respondent herein, to pay the pending wages, and other dues, out of the sale price of machineries and instruments of the first respondent company, unless and until, the borrower-Company been wound up. In the light of the decision of the Hon'ble Division Bench in W.P.No.8696 of 2009, etc. batch, dated 07.08.2009, Sub-Section (9) of Section 13 of the SARFAESI Act, 2002, cannot be invoked, nor the petitioners can seek any relief under Section 529A of the Companies Act. Prayer sought for cannot be granted.

23. Record of proceedings shows that on 29.06.2017, the Hon'ble Division Bench of this Court, while ordering notice to the 2nd respondent-Bank, returnable by 17.02.2017, has ordered as follows:

"Till then, the Bank shall not precipitate the matter. The Bank shall also consider the priority of the charges on the representation submitted by the petitioner relying upon the decision of the Supreme Court in the case of Workers of M/s.Rohtas Industries Ltd. Vs. M/s.Rohtas Industries Ltd., reported in 1987 SCR (2) 1216."

24. In the light of the above decisions and discussion, the writ petition is dismissed. It is open to the writ petitioners to work out their remedy, in the manner known to law. No costs. Consequently, connected Miscellaneous Petition are also closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

skm
To

Sub Assistant Registrar

1.The Authorised Officer (SBI of Erode Branch),
Stressed Assets Management Branch,
Raja Plaza, First Floor,
Coimbatore - 641 037.

2.The State Bank of India,
Commercial Branch, Erode.

3.The Labour Officer,
No.414, 4th Floor,
Office of the District Collector,
Salem.

+1cc to Mr.M.L.Ganesh, Advocate, S.R.No.64260

+1cc to M/s.D.Geetha, Advocate, S.R.No.63990

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and WMP Nos.13293 & 13294 of 2017

VD (CO)
CA (06/10/2017)