IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.06.2023

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

Writ Petition No.30200 of 2013
and M.P.No.1 of 2013

M/s.Le Meridien
Owned By M/s.Appu Hotels Ltd.
762 Avinashi Road Neelambur
Coimbatore 641 062
Rep. By Its Director - Human Resources. .... Petitioner

-Vs-

1 The Recovery Officer
Employees Provident Funds Organisation
Regional Office Bhavishya Nidhi Bhavan
Dr.Balasundaram Road Coimbatore 641 018

2 M/s.Tourism Finance Corporation
Of India Ltd. 13th Floor IFCI Tower
61 Nehru Place New Delhi 110 019

3 The Recovery Officer
Office Of The Recovery Officer
Debts Recovery Tribunal I, Delhi Sanskriti Bhawan
D B Gupta Road Jhandewalan
New Delhi 110 055

4 M/s.Sohan Singh Hotels Ltd.
Hotel Sohan Regency Plot No.26 Devi
Apartments 31 Krishnaswamy Mudaliar Road
Coimbatore 641 001. .... Respondents

Prayer : Writ Petition under Article 226 of the Constitution of India praying for the issuance of a Writ of to call for the records of the 1st respondent in proceedings No.TN/ RO-CBE/ RECOVERY/ CC-16/ 34334/ 2013 and quash the notice dated 29.10.2013.

For Petitioner	:	Mr.Anand Gopalan for M/s.T.S.Gopalan and Co.,
For Respondents	:	Mrs.R.Meenakshi, Standing Counsel – for R1 Mr.V.Suresh – for R2 R3 – Tribunal R4 – No appearance

ORDER

Here is an interesting case, whereby the original borrower establishment has been left out and the litigation is now continued for the dues of the said establishment.

2. M/s.Sohan Singh Hotels Ltd., was owner of the property in Coimbatore. In order to develop its hotel business, the establishment had taken a loan from M/s.Tourism Finance Corporation Limited, New Delhi. The establishment was not able to run the hotel and therefore it went into financial distress. As a creditor / mortgagee of the assets in Coimbatore, M/s.Tourism Finance Corporation Limited (hereinafter referred to as 'mortgagee') approached the Debts Recovery Tribunal (DRT) in New Delhi for sale of the assets. The proceedings initiated in O.A.No.78 of 2000 ended in favour of the mortgagee. The DRT-I in New Delhi granted a certificate for recovery of a sum of Rs.6,85,62,267/-. Despite the issuance of the

recovery certificate, the establishment did not pay the amount. Therefore, the recovery certificate was put into execution and a sum of Rs.14,70,13,567/- was claimed due as on 15.01.2004. This was as per proceedings in R.C.No.174 of 2002. Had the mortgagee not done anything further, this litigation itself would not have arisen.

3. In its desire to recover the money on the basis of the recovery certificate, the mortgagee brought the property for auction. The mortgagee approached the Recovery Officer, DRT-I, seeking permission for sale under the Second Schedule of the Income Tax Rules, 1961.

4. In response to the publication made by the mortgagee, four institutions objected to the dues (i) Municipal Corporation of Coimbatore to the tune of Rs.6,27,000/- (ii) Tamil Nadu Electricity Board – Rs.4,62,260/- (iii) Employees Provident Fund (EPF) – Rs.20,57,815/-, and (iv) BSNL for Rs.1,39,293/-. None of these authorities had taken steps to file an application as required under Rule 11 of the Income Tax Rules. The mortgagee further muddled the waters by mentioning the name of the creditors, but went on to say that the aforesaid departments had only intimated on dues on the property. The curious turn in the publication is, it specifically states as follows:

"In response to notice issued by the undersigned to various

departments regarding dues on the property proposed to be auctioned, the following departments have intimated dues on property.

(i) Municipal Corporation due Rs.6,27,000/- upto 29.03.2004

(ii) Tamil Nadu Electricity Board dues Rs.4,62,260/- as per letter dated 24.12.2002.

(iii) Employee Provident Funds due Rs.20,57,815/- as per letter dated 26.03.2003.

(iv) Bharat Sanchar Nigam dues of Rs.1,39,293/- upto 01.04.2002.

This fact may be included in the sale proclamation for the knowledge of prospective buyer."

5. Thereafter, the matter came up before the DRT for proclamation of sale as required under Rule 38 and 52(2) of the Second Schedule of the Income Tax Rules read with Debts Recovery Tribunals Act of 1993. In this publication, the DRT had stated " The sale will be of the property of the defendant above named as mentioned in the schedule below and the liabilities and claims attached to the said property **so far as they have been ascertained** are those specified in the Schedule against each lot." It was also published that the sale of the property is on **"**AS IS WHERE IS BASIS".

6. Under the Schedule, the liabilities as aforesaid were merely set forth but there is nothing on record to show that it had been ascertained before the Recovery Officer / RO. When the position remained so, the petitioner, pursuant to the advertisements made in the leading dailies, participated in the auction. In the auction, the property was knocked down in favour of the writ petitioner. The property was sold for a sum of Rs.5,15,50,000/-. The EPF authorities were also casual in their approach. They did not file any claim as required under Rule 11 of the Second Schedule of the Income Tax Rules, 1961. Treating the company as if it had been wound up, the EPF authorities filed an application was filed under Form-66. This has created the entire confusion and has led to this litigation.

7. In its anxiety to take over the entire amount deposited by the auction purchaser, the mortgagee took a stand before the DRT that no proper claim by way of any application was filed by any of the aforesaid parties. The DRT took cognizance of the position of the mortgagee and agreed with it. It passed the following order.

> " *After perusal of all relevant records and hearing argument, it is clear that details of these dues were received in DRT-I in response to notice under Rule 53 through letters.* <u>*No proper claim through any application was filed by any of the parties.*</u>

Concerned authorities never appeared to put forward their views on these issues. These issues are being decided on the basis of record and arguments of CHFI and auction purchaser. It is clear from above discussion that Electricity dues and Bharat Sanchar dues are result of a contract between a service provider and service seeker and these dues are not charge on mortgaged property, so they are neither to be paid by auction purchaser not to be paid from sale proceeds. Claimants may take steps for recovery of their dues against appropriate party at appropriate forums. ***As regards the issue of payment of Employees Provident Fund dues, in the absence of full facts from relevant party contention of CHFI appears to be correct and auction purchaser is not liable to pay these dues."***

CHFI means Certificate Holder Financial Institution, who is referred to in this order as 'mortgagee'.

8. The direction of the DRT was that the mortgagee is responsible only insofar as municipal dues are concerned and that the dues of BSNL, EPF and the Electricity Board, not having been proved, the mortgagee and the writ petitioner are not liable. Feeling aggrieved over the fact that out of the amount which it has received from the auction, it has to share the same with the municipal corporation, the mortgagee filed an appeal before the DRT in Application No.23 of 2005.

9. The DRT came to a further conclusion that it was in agreement with the view of the Recovery Officer and that the order of the Recovery Officer does not suffer from any illegality and therefore, confirmed the appeal. It is pertinent to point out that the appeal was preferred only by the mortgagee, in which the auction purchaser, other bidders as well as the mortgagee were parties.

10. Taking it up further before the Debts Recovery Appellate Tribunal (DRAT) in New Delhi in Application No.50 of 2007, the DRAT reversed the order of the DRT and the Recovery Officer and came to a conclusion that the mortgagee is not responsible for any of the dues including the municipal dues and allowed the appeal. The said order has become final.

11. During the proceedings before the Recovery Officer, DRT or before DRAT, the EPF authorities did not move a little finger to get themselves impleaded and fight for their rights. The curious fact is that Hamlet was played without the Prince of Denmark. The authorities under the Recovery of Debts due to Banks and Financial Institution Act, 1993 did not include EPF. This put both the writ petitioner as well as the mortgagee in a cosier position. The auction purchaser got the property and had started developing the same. The mortgagee got the money and was happy with it. Nothing would have happened, but for the present impugned order.

12. Like Rip Van Winkle, the EPF authorities woke up from their deep slumber and passed the impugned order. They made a claim, which they ought to have made before the DRT, by way of the impugned order. As per the impugned order, they directed payment of dues by the auction purchaser for the dues payable by the mortgagor [M/s.Sohan Singh Hotels Limited] and claimed that the writ petitioner will have to satisfy the same. The writ petitioner has immediately approached this Court and has obtained orders of stay.

13. Irony in this case is that the property was sold sometime in 2005 and despite being aware of the same, EPF authorities brought forth attachment only in the year 2012. It escapes one's understanding as to how a property can be attached, when the establishment due to which the dues came about, was not the owner of the property on the date of attachment.

15. Ms.Meenakshi, learned counsel for the EPF would submit that under Section 11(2) of the EPF Act, the EPF authorities have a first charge. There can be no doubt on this proposition. Amongst the creditors, EPF dues stand first. But, this Court has to interpret the first charge as to mean only the right of EPF over other creditors and not over the properties of the auction purchaser.

16. Mr.Anand Goplan would submit that Section 17B of the EPF Act cannot be invoked and, last but not the least, he would point out that the hierarchy of Courts viz., Recovery Officer, DRT and DRAT have passed orders in his favour and the EPF cannot ignore the same and pass the impugned order.

17. I am entirely in agreement with Mr.Anand Gopalan that Section 17(b) cannot be invoked in the present case because, there has not been 'transfer of establishment', but there has only been 'transfer of assets'. This issue is no longer *res integra* and I would refer to the judgment of this Court in **Sri Angappa Spinning Mills and Others -vs- Regional Commissioner, Employees Provident Fund, Tamil Nadu and Pondicherry** reported in **(1986) 1 MLJ 386 equivalent to (1987) 1 LLN 586.**

18. Insofar as the argument that the orders of Recovery Officer, DRT and DRAT are in his favour is concerned, a perusal of the orders of the respective authorities show that the submission of Mr.Anand Gopalan is correct. It cannot be controverted by Mr.V.Suresh, representing M/s.Sivakumar and Suresh, learned counsel for the 2nd respondent. In fact it was the morgagee who had successfully convinced the Recovery Officer that EPF dues need not be paid because, EPF authorities had not filed appropriate claim in the appropriate manner. There cannot be any doubt with the proposition laid down by Mr.Anand

Gopalan and Mr.Suresh. It is very clear that the EPF authorities did not file any application or claim under Rule 11 in order to substantiate their case. As already pointed out, they surprisingly took a stand as if M/s.Sohan Singh Hotels Limited has been wound up and ended up filing an application under Form 66 of the Company Court Rules, which is absolutely inapplicable in the case of DRT proceedings. Therefore, it was in those circumstances that the hierarchy of authorities in the previous proceedings came to a conclusion that the EPF claims did not deserve any consideration.

19. Mrs.R.Meenakshi, learned Standing Counsel appearing for the first respondent EPF would submit on the basis of **Maharashtra State Cooperative Bank Limited -Vs- Employees Provident Fund Organization and Others** reported in **(2009) 10 SCC 123**, in particular referring to paragraphs 68 and 69, that the dues of EPF will have priority over a secured creditor viz., Tourism Finance Corporation Limited (mortgagee).

20. The law having been laid down by the Supreme Court, there is no question of any quarrel with the same. However, this argument should have been taken by the EPF authorities at the time the matter was being agitated before the DRT. They cannot arrogate to themselves the power of deciding priority of claims when they had volunteered and submitted to the jurisdiction of

the authorities under the DRT. Having submitted to the jurisdiction of the DRT, they ought to have taken steps and filed the forms under Rule 11. Having failed to do so, they cannot arrogate to themselves the power to ignore the orders passed by the authorities under a duly constituted Parliamentary Statute and try to nullify the same. They had missed the bus in Delhi and cannot attempt to board the same in Coimbatore.

21. Had that been the end of the story, I could have simply allowed the writ petition and could have be done with it. However, I have to take note of the fact that the dues belong to the workmen, who were neither heard nor their claims were considered by the Tribunal under the DRT Act. I cannot at the same time, permit the authority who had submitted to the jurisdiction of the Tribunal created under Debts Recovery Act to ignore the orders and proceed further. It is well settled that any order which voidable has to be set aside in a manner known to law. The order passed by DRT as if it was passed by a Civil Court. Article 261 of the Constitution of India, dealing with Public Acts, Records and Judicial Proceedings provides that full faith and credit shall be given to the judicial proceedings by every authority throughout the territory of India. Therefore, the order passed by the authorities under the DRT Act deserve respect and cannot be ignored by any statutory authority, especially when that statutory authority has submitted to the jurisdiction of the former.

22. On these reasons, I set aside the order passed by the EPF authorities in Proceedings No.TN/RO-CBE/RECOVERY/CC-16/34334/2013 dated 29.10.2013. The writ petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

23. While I allow the writ petition, I grant liberty to the EPF authorities to approach the DRT to take appropriate proceedings, as they may be advised, in order to work out their claims. I should also point out that I am giving liberty to the EPF authorities to approach the DRT to work out their claims not only under Article 261 of the Constitution of India and since they submitted to the jurisdiction of the DRT authorities, but also since their claims seems to have been vascillating as the shifting sands of Sahara; when they issued the notice their claim was Rs.20,57,815/- and when they filed counter before this Court, their claim drastically came down to Rs.9,66,425/-. Reserving the above liberty to EPF authorities, the writ petition is allowed.

20.06.2023

Index : Yes/No
Neutral Citation : Yes/No
Speaking Order / Non-speaking order
KST

To

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V. LAKSHMINARAYANAN, J.

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