

Union of India and Another

Vs

India Fisheries (Private) Ltd.

Civil Appeal No. 211 of 1964

(K. Subha Rao, J. C. Shah, S. M. Sikri JJ)

09.04.1965

JUDGMENT

SIKRI J. –

This appeal pursuant to a certificate of fitness granted by the High Court of Maharashtra at Bombay under article 133(1)(c) of the Constitution is directed against the judgment of the said High Court in a petition under article 226 of the Constitution filed by the respondent.

The India Fisheries (P). Ltd. - hereinafter called the respondent - was a private limited company and was directed to be wound up by an order of the Bombay High Court, dated October 11, 1950, and a court liquidator was appointed as the official liquidator thereof with all powers under section 179 of the Indian Companies Act, 1913 (VII of 1913), to be exercised by him under section 180 without sanction or intervention of the court save and except in case of sales of immovable property belonging to the respondent. For the assessment year 1948-49, the respondent was assessed on December 8, 1950, the tax being assessed at Rs. 8,737-15-0. On or about March 15, 1951, the Income-tax Officer lodged a claim in respect of this tax with the official liquidator. That claim was adjudged and allowed as an ordinary claim and certified as such on April 2, 1952. In August, 1954, the income-tax department a sum of Rs. 5,188-3-0 against the claim made by the Income-tax Officer as an ordinary creditor. Thus a balance of Rs. 3,5

For the year 1955-56, the department made a demand from the respondent on June 22, 1954, for a sum of Rs. 2,565-6-0 as advance tax. This was paid by the official liquidator. On a regular assessment being made for the said year, only Rs. 1,126-12-0 was assessed as payable by the respondent. After adjusting this sum against the advance payment of Rs. 2,565-6-0, Rs. 1,460-1-0 became refundable to the respondent, inclusive of interest. Instead of refunding of the said balance to the respondent, the Income-tax Officer set off the said amount against the balance of Rs. 3,549-12-0 which was still outstanding in respect of the income-tax demand for the year 1948-49. The respondent filed a revision petition to the Commissioner of Income-tax, but the said petition was rejected by the Commissioner on September 21, 1959, holding that the action of the Income-tax Officer was perfectly justified under the provision of section 49E of the Income-tax Act

On November 25, 1959, the respondent filed a petition under article 226 of the Constitution and prayed for a writ, direction or order of the setting aside the orders of the Income-tax Officer and the Income-tax Commissioner. He further prayed for any further writ, direction or order restraining the department from setting off the refund against the tax dues and directing them to hand over the balance to the official liquidator.

The High Court held that the demand of Rs. 8-737-15-0 in respect of the assessment years 1948-49, being adjudged and certified, came to have all the incidents and character of an unsecured debt payable by the official liquidator to the department. The High Court observed that "this claim thereafter was governed by the provision of the company law and could be paid to the creditor only in accordance with the provisions of the company law. No other remedy nor any other method of obtaining satisfaction of this claim was available to the creditor thereafter. It was no longer the amount of tax remaining payable by a person to whom the refund was due within the meaning of section 49E of the Income-tax Act. In our opinion, therefore, the provision of the excess towards the balance of its claim of Rs. 8,737- 15-0 which the department had proved in the insolvency of the company and was being dealt with in the insolvency." The High Court accordingly set aside the orders passed by the department in so far as they set of

The learned Additional Solicitor-General, on behalf of the appellant, contends that section 49E gives statutory power to the Income-tax Officer, inter alia, to set off the amount to be refunded or any part of the amount against the tax remaining payable by the person to whom the refund is due, and this statutory power is not subject to any provision of any other law. He says that the Companies Act does not take away this power, section 49E is in the following terms :

"Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax Officer, Appellate Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount against the tax, interest or penalty, if any, remaining payable by the person to whom the refund is due."

On the facts of this provision, there is no doubt that this section is not subject to any other provision of law. But it will be surprising if this power can be exercised in such a way as to defeat the provisions of the Indian Companies Act. It is not denied by the learned Additional Solicitor-General that the state has no priority in respect of this claim. The question then arises whether section 49E is subject to the insolvency rules contained in the companies Act. Section 228 of the companies Act, 1913, provides :

"228. Debts of all descriptions to be proved. - In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof the against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value."

Section 229 provides :

"229. Application of insolvency rules in winding up of insolvent companies - In the winding up of an insolvent company the same rules and prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are

entitled to by virtue of this section."

The effect if these statutory provisions is, inter alia, that an unsecured creditor, must prove his debts and all unsecured debts are to be paid pari passu. Therefore, once the claim of the department has to be proved and is proved in the liquidation proceedings, the department cannot by exercising the right under section 49E of the Income-tax Act get priority over the other unsecured creditors. If we were to read section 49E in the way suggested by the learned Additional Solicitor-General, it would be defeating the very object underlying sections 228 and 229 of the companies act, 1913. If there is an apparent conflict between two independent provisions of law, the special provision must prevail. Section 49E is a general provision applicable to all assesses and in all circumstances; section 228 and 229 deal with the proof of debts and their payment in liquidation. In our opinion section 49E can be reconciled with sections 228 and 229 by holding that section 49E applies when insolvency rules do not apply. Acc

The learned Additional Solicitor-General also urged that the application under article 226 was misconceived because the Income-tax Officer had jurisdiction. But if we interpret section 49E as we have done, it is a clear case of lack of jurisdiction. At any rate, there is an error apparent on the face of the orders and the High Court was quite right in exercising its jurisdiction under article 226.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

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