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I. Supreme Court: Identical trademarks can be registered in the same class provided the goods are dissimilar

The Supreme Court in ***Nandhini Deluxe v. Karnataka Co-Operative Milk Producers Federation Limited*** *(decided on July 26, 2018)* held that that registration of similar or identical trademarks (NANDHINI v/s NANDINI) for the same class of goods is permissible so long as the goods per se are not similar or identical.

Facts

Karnataka Co-Operative Milk Producers Federation Limited (**"Respondent"**), which is a cooperative federation of the milk producers of Karnataka, adopted the mark 'NANDINI' in the year 1985 and under this brand name, it had been producing and selling milk and milk products. The Respondent registered the mark 'NANDINI' under Class 29 and Class 30. Nandhini Deluxe (**"Appellant"**), on the other hand, was in the business of running restaurants and it adopted the mark 'NANDHINI' for its restaurants in the year 1989 and applied for registration of the said mark in respect of various food items sold by it in its restaurants. The Respondent opposed such registration and the objections of the Respondent were dismissed by the Deputy Registrar of Trade Marks who allowed the registration of the mark 'NANDHINI' in favour of the Appellant. The Respondent approached the Intellectual Property Appellate Board (**"IPAB"**) with the prayer that the registration given by the Deputy Registrar of Trade Marks in favour of the Appellant be cancelled. These appeals of the Respondent were allowed by the IPAB and subsequently the Appellant filed writ petitions before the Karnataka High Court. The Karnataka High Court confirmed the order of IPAB and ruled in favour of the Respondent. The matter came before the Supreme Court and the issue was framed as below:

Issue

Whether the Appellant is entitled to seek registration of the mark 'NANDHINI' in respect of various food items sold by it in its restaurants?

Arguments

The Appellant argued that IPAB as well as the Karnataka High Court erred in its judgement as no proper weightage and consideration was given to the fact that goods and services of the Appellant were totally different from that of the Respondent and therefore, there was no likelihood of confusion or deception among the public. The Appellant cited ***Vishnudas Trading Company v. Vazir Sultan Tobacco Company Limited [(1997) 4 SCC 201]***, where the Supreme Court observed that the monopoly under trademark only extends to the goods which fall in a particular class and not the entire class of goods and the trade mark which is identical or similar in nature can be registered for the goods which fall within the same class. Giving the monopoly to the entire class of goods and services to the registered proprietor would lead to trafficking in the trademark which is not the object and the purpose of the Trade Marks Act, 1999 (**"Act"**). The Appellant targeted the finding that trademark "NANDINI" adopted by the Respondent was well-known, as such finding was made without any supporting material. It was submitted that for arriving at the conclusion of well-known trademark there were certain defined parameters on which the trademark was required to be tested, however, the Karnataka High Court and IPAB failed to examine the trademark as per those parameters. Further, the trademark could not meet the test of a well-known mark as the mark "NANDINI" was admittedly a common name and name of a deity. The Appellant further argued that since the Respondent was in the business of manufacture and marketing of milk and milk products only and had not expanded its business to any other items in Class 29 or 30, the case of the Respondent at the highest could be qua milk and milk products only. The Appellant was anyway not claiming any registration or trademarks which fell in the category of milk and milk products, therefore, the registration of trademark "NANDHINI" should be allowed in favour of the Appellant.

The Respondent argued that as rightly held by the Karnataka High Court and IPAB, the word NANDINI had acquired a distinctiveness and that there was no doubt that if goods under Class 29 and 30 bearing the Appellant's trademark come out in the market, the average consumer would conclude that it belonged to the Respondent. Even though NANDINI is a hindu name and the name of adeity, it has become associated with the Respondent's products due to their use for nearly two decades. Under Section 11(8) of the Act, if any court or registrar has found that a trademark is well-known in at least one relevant section of the public in India, it shall be a well-known trademark for purposes of the Act. Since the Karnataka High Court and IPAB have made findings to that effect as stated above, the mark "NANDINI" is a well-known trademark. Insofar as the argument of the Appellant that "NANDINI" is the name of a God/ deity and, therefore, cannot be registered as trademark, the Respondent submitted that such an argument was counterproductive and against the Appellant's own interest. The relevant question was whether the Appellant can register a trademark bearing the name "NANDHINI". If it is the Appellant's averment that the name "NANDINI" is the name of a Hindu deity and as a result cannot be registered, then such an argument would not only render futile the very registration the Appellant had applied for, but would also render the present petition infructuous.

Observations of the Supreme Court

The Supreme Court held that though there was a phonetic similarity between the words NANDHINI and NANDINI, the trademark with logo adopted by the two parties were altogether different. The manner, style and other aesthetics of the mark adopted were different. Further, the Appellant used and added the word 'Deluxe' to its mark and, thus, its trademark was 'NANDHINI DELUXE'. A bare perusal of the two marks would show that there was hardly any similarity between the two marks when seen in totality. Examining its salient features, it would be difficult to sustain that the mark adopted by the Appellant would cause any confusion or deception in the mind of consumers. The Supreme Court found that not only visual appearance of the two marks was different, they even related to different products. Further, considering the manner in which they were traded by the Appellant and Respondent, it was difficult to imagine that an average man of ordinary intelligence would associate the goods of the Appellant as that of the Respondent.

The Supreme Court reiterating its judgement in ***Vishnudas Trading Company v. Vazir Sultan Tobacco Company Limited [(1997) 4 SCC 201],*** observed that the proprietor of a trademark cannot enjoy monopoly over the entire class of goods, particularly, when he is not using the said trademark in respect of certain goods falling under the same class. The Supreme Court referred to Section 11 of the Act which prohibits the registration of the mark in respect of the similar goods or different goods but the provisions of Section 11 do not cover the same class of goods. The Supreme Court also held that all the ingredients laid down in Section 11(2) of the Act, as explained by the Delhi High Court in ***Nestle India Limited v. Mood Hospitality Private Limited [(2010) 42 PTC 514 (Del)],*** were not satisfied by the Respondent, hence NANDINI could not qualify as a well-known mark. Additionally, the Supreme Court held that it was not persuaded to hold, that the Appellant had adopted the trademark to take unfair advantage of the trademark of the Respondent. The Appellant had adopted the trademark in respect of items sold in its restaurants way back in the year 1989 which was soon after the Respondent had started using the trademark 'NANDINI'. There was no document or material produced by the Respondent to show that by the year 1989, the Respondent had acquired distinctiveness in respect of this trademark, that is, within four years of the adoption thereof. It was a case of concurrent use of trademark by the Appellant. Further, the Supreme Court concluded that use of 'NANDHINI' by the Appellant in respect of its different goods would not be detrimental to the distinctive character or repute of the trademark of the Respondent.

Decision of the Supreme Court

The Supreme Court set aside the order of IPAB and Karnataka High Court and upheld the order of Deputy Registrar of Trade Marks granting registration of the mark NANDHINI in favour of the Appellant.

VA View

A trademark which has not qualified the test of a well-known mark, which lays claim to classes as wide as Class 29 (*for meats and processed food items*) and Class 30 *(for auxiliary food and beverage items)* has been seen as an outreach in the realm of trademark law. The Supreme Court deemed that it would not be proper to allow the Respondent to enjoy monopoly over large varieties of goods which are distinct in their use and which are clearly identifiable as separate products and also separately vendible and marketable. The likelihood of confusion test also plays a large role for a similar or identical trademark to be registered in the same class. This means determining whether a person of average intelligence can differentiate between the two trademarks.

The Court analysed the well-known character of the prior mark NANDINI by examining the conditions laid down in the judgment of ***Nestle India Limited v. Mood Hospitality Private Limited [(2010) 42 PTC 514 (Del)]*** which includes scrutinizing the similarity between the marks; the reputation of the preceding mark; the use of the mark without due cause; and the detriment caused to the distinctive character of the mark and concluded that 'NANDINI' is not a well-known trade mark. In the instant case, the Supreme Court concluded that the logo, design, the preceding and the succeeding words and the trade dress of both the marks were completely different. Apart from the words NANDINI/ NANDHINI, there was no similarity between the two trademarks. This nuanced approach of the Supreme Court is heartening for persons attempting to register trademarks which are similar to existing trademarks in the same class of goods.

II. Supreme Court decides that the clause in an agreement referring the escrow agents as arbitrator/ mediator is not an arbitration clause

The Supreme Court in the matter of ***Shyam Sunder Agarwal v. P. Narotham Rao and Others*** *(decided on July 23, 2018)* had to decide whether a clause in an agreement which provided escrow agents with the power to make certain decisions for successful completion of a transaction was an arbitration clause.

Facts

Shyam Sunder Agarwal (**"Appellant"**) and P. Narotham Rao and Others (**"Respondents"**) being directors of a company, M/s. Mancherial Cement Company Private Limited (**"MCCPL"**), had executed a Memorandum of Understanding/ Agreement dated December 8, 2015 (**"MOU"**) for sale and purchase of shares of MCCPL. Clause 3 of MOU provided that a settlement was reached between the parties for selling certain shares in MCCPL in order to end certain internal disputes within MCCPL.

The Appellant, who was a purchaser of shares, had issued a notice in 2007 under MOU for arbitration construing Clause 12 in MOU (*reproduced below*) as an arbitration clause. The Appellant filed an arbitration petition in the Andhra Pradesh High Court in 2009 under Section 11 (*which empowers court to take certain measures in case of* *appointment and procedure of arbitration*) of the Arbitration and Conciliation Act, 1996. While this arbitration petition was pending, the Appellant filed company petition with the Company Law Board, praying for certain reliefs under MOU. The company petition was withdrawn by the Appellant in 2017 in order to file fresh petition on the same set of facts. The Respondents, in the meanwhile, had also filed company petition and succeeded in obtaining certain reliefs in 2016, which was appealed against by the Appellant. The arbitration petition pending with Andhra Pradesh High Court was decided against the Appellant on July 22, 2011, against which the Appellant filed a Special Leave Petition in the Supreme Court.

Relevant clauses in MOU

Before proceeding to the arguments of the parties and the observations of the Supreme Court in the matter, we reproduce herein certain clauses in MOU which are relevant in this context:

"**6**. *The parties of 1st part hereby handed over 9 cheques favouring Sri P. Narotham Rao as detailed below to Sri K. Sudhakar Rao S/o Late Sri K. Madhava Rao, R/o Plot No. 7, UBI Colony, Road No. 3, Banjara Hills, Hyderabad and Sri Gone Prakash Rao S/o Gone Chalapathi Rao R/o Transport Guest House, Tarnaka, Hyderabad Mediators/Arbitrators.*

[…]

8. *The parties hereinabove declare and confirm that for successful completion of this transaction in order to avoid any further unforeseen litigations, both the parties hereby mutually appointed Sri K. Sudhakar Rao /o Sri Late Sri K. Madhava Rao, R/o Plot No. 7, UBI Colony Road No. 3, Banjara Hills, Hyderabad and Sri Gone Prakash Rao S/o Gone Chalapathi Rao R/o Transport Guest House, Tarnaka, Hyderabad as mediators and arbitrators to whom the above cheques as well as all other following documents are handed over and the same will be under their custody till satisfactory completion of the entire transaction as per the terms and conditions contained herein.*

[…]

11. Till the total transaction is satisfactorily completed and till entire sale consideration is paid and till the personal guarantees of parties of 2nd part are substituted by the personal guarantees of the Associates of parties of First Part with M/s. Andhra Bank, the above named Arbitrators/Mediators shall not hand over the share certificate with duly signed share transfer deeds in respect of the shares of the parties of 2nd part to the parties of 1st part.

12. It is further agreed that any decision to be taken by said Mediators/Arbitrators during the period of entire transaction in the event of any breaches committed by either of the parties shall be final and binding on all the parties hereinabove."

Observations of the Andhra Pradesh High Court

The Andhra Pradesh High Court had held that, *"A reading of Clauses 8 and 12 indicates that though the above-named two persons have been styled as 'arbitrators', they are only custodians of the cheques and certain other documents, which they have to retain pending successful completion of the transaction. They are not empowered to adjudicate* *any dispute between the parties relatable to the MoU dated 8.12.2005. Even the conduct of the parties of the 1st part to the MoU in approaching the civil Court seeking certain reliefs suggests that parties to the MoU never conferred any adjudicatory role on S/Sri K. Sudhakar Rao and Gone Prakash Rao. There is no material on record to infer that the parties to the MoU intended to resolve their disputes through conciliation or arbitration. When such is the intention of the parties to the MoU, the instant application under sub-sections (5) and (6) of Section 11 seeking appointment of a sole arbitrator is wholly misconceived. Accordingly, the arbitration application is dismissed."*

Issue

The Supreme Court had to decide whether Clause 12 of MOU was an arbitration clause.

Arguments

The Appellant brought the attention of the Supreme Court to the language used in Clause 12 of MOU such as "decision", "Mediators/Arbitrators" and "decision… final and binding on all the parties". The Appellant submitted that the following three essentials of an arbitration clause were met in the instant case:

a. There had to be a dispute between the parties;

b. The dispute had to be adjudicated upon by giving the parties a hearing; and

c. At the end of the hearing, there should be a decision which is final and binding between the parties.

On the other hand, the Respondents pointed out that if MOU was read as a whole, it was clear that terms "Mediators/Arbitrators" was used loosely. The Respondents submitted that Clause 12 had to be read with other clauses of MOU, which inferred that the decision was to be taken by persons referred to as "Mediators/Arbitrators" (*who were actually escrow agents*) with respect to certain matters that arise during the transaction. Mala fide was also alleged against the Appellant by contending that the Appellant on several occasions indicated his interest in pursuing remedy under company law for necessary reliefs over arbitration and had never intended to implement the terms of MOU.

Observations of the Supreme Court

The Supreme Court observed that upon reading of the relevant clauses in MOU, it was clear that the "Arbitrators/Mediators" were actually escrow agents, who were appointed to ensure successful consummation of the contemplated transaction under MOU.

The Supreme Court further observed *"10. [....] when viewed as a whole, it is clear that the two escrow agents are not persons who have to decide disputes that may arise between the parties, whether before or after the transaction is completed, after hearing the parties and observing the principles of natural justice, in order to arrive at their decision. A reading of the MOU as a whole leaves no manner of doubt that the said MOU only invests the two gentlemen named therein with powers as escrow agents to smoothly implement the transaction mentioned in the MOU and not even remotely to decide the disputes between the parties as Arbitrators".*

The Supreme Court also made remarks on the mala fide on the part of the Appellant including delays in pursuing the arbitration remedy (*Section 11 petition filed two and a half years after issuing notice*), recourse to reliefs under company law, etc. The Supreme Court observed that its discretionary jurisdiction under Article 136 (*Special leave to appeal by the Supreme Court*) of the Constitution of India should not be exercised in favour of such a person.

Essentials of a valid arbitration agreement

The Supreme Court referred to its decision in the case of ***P. Dasaratharama Reddy Complex v. Government of Karnataka and Another [(2014) 2 SCC 201]*** which referred to the observations in the case of ***K.K. Modi v. K.N. Modi [(1998) 3 SCC 573]*** listing out pre-requisites for a valid arbitration agreement as under:

a. The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement;

b. The jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration;

c. The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal;

d. The tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides;

e. The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law; and

f. The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

Decision

The Special Leave Petition was decided against the Appellant and the Supreme Court concluded that Clause 12 in MOU was not in the nature of an arbitration agreement between the parties.

VA View

The Supreme Court has rightly looked at the clause in the MOU which empowered escrow agents to take certain decisions to ensure smooth implementation of the transaction. The relevant clause in the MOU was not in the nature of an arbitration agreement regardless of usage of certain terms like “Mediators/Arbitrators” and “decision” in the said clause.

Andhra Pradesh High Court had also rightly observed that though the two escrow agents were referred to as “Mediators/Arbitrators” in the MOU, they were mere custodians of cheques and certain other documents pending completion of the transaction. These agents were not empowered to adjudicate any dispute between the parties under the MOU.

In such cases where there is a doubt as to whether a clause in an agreement can be construed as an arbitration clause, the courts examine the intent of the parties whether they intended to resolve their disputes through arbitration. The words and expressions used in the clauses can only be a guiding factor but not a deciding factor in such cases.

III. NCLT holds that an LLP can be amalgamated into an Indian Company

The National Company Law Tribunal (**"NCLT"**), Chennai in the matter of ***M/s. Real Image LLP, M/s. Qube Cinema Technologies Private Limited and their respective partners, shareholders and creditors*** (*decided on June 11, 2018*), sanctioned the Scheme of Amalgamation (**"Scheme"**) for amalgamation of an LLP into an Indian company.

Facts

M/s. Real Image LLP (**"Transferor LLP"**) as well as M/s. Qube Cinema Technologies Private Limited (**"Transferee Company"**) (jointly referred to as **"Petitioners"**) are engaged in the business of establishing and acquiring audio and video laboratories for recording, computer graphics, special effects for video and radio productions, etc. The Petitioners filed a joint company petition under Section 230 to 232 of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and submitted the Scheme by virtue of which the Transferor LLP had proposed to be amalgamated with the Transferee Company as a going concern.

Issue

Whether a limited liability partnership can amalgamate with a private limited company under a scheme of amalgamation filed before the NCLT?

Arguments

The Petitioner submitted that the wordings used in Sections 60 to 62 of the Limited Liability Partnership Act, 2008 (**"LLP Act"**) and Sections 230 to 234 of the Companies Act, 2013 are almost identical and both the legislations empower only the NCLT to sanction the Scheme. Further, prior to enactment of the Companies Act, 2013, under Section 394(4)(b) of the Companies Act, 1956, there was no bar for a transferor in a Scheme of Amalgamation to be a body corporate including an LLP. Moreover, as per Section 234 of the Companies Act, 2013, even a foreign LLP and Indian company can merge with each other. However, such benefit has not been provided under Section 232 of the Companies Act, 2013 for permitting an Indian LLP to merge with an Indian company. Moreover, the proposed Scheme was beneficial for the companies concerned, including their members and creditors. The proposed Scheme would consolidate the business operations of the Petitioners and provide efficient management control and system.

The Regional Director, Southern Region (**"Regional Director"**) submitted that the Scheme provides for the protection of the interest of the employees of the Transferor LLP. The Regional Director further submitted that Petitioners were regular in filing their statutory returns and there was no prosecution filed, no complaint pending and no inspection/ investigation conducted against the Petitioners.

The Official Liquidator submitted that the Transferor LLP had maintained the books of accounts as stipulated under Section 23(4) of the LLP Act and in compliance with accepted accounting principles as required under the law.

Observations of the NCLT

NCLT, Chennai observed that the legislative intent behind enacting both the LLP Act and the Companies Act, 2013 is to facilitate the ease of doing business and create a desirable business atmosphere for the companies and the limited liability partnerships. The aforesaid issue had been categorically dealt with by the Companies Act, 1956 but there is no specific provision in the Companies Act, 2013. Therefore, the present case is a clear case of *casus omissus.* If the intention of the parliament is to permit a foreign LLP to merge with an Indian company, then it would be wrong to presume that the Companies Act, 2013 prohibits a merger of an Indian LLP with an Indian company.

NCLT, Chennai further observed that there is no any express legal bar to allow/ sanction merger of an Indian LLP with an Indian company. The Scheme presented by the Petitioners was fair and reasonable, not contrary to public policy and did not violated any provisions of law. There is no additional requirement for any modification of the Scheme.

Order of the NCLT

The NCLT, Chennai allowed the petition and sanctioned the Scheme to be binding on the partners, shareholders, creditors and employees of the Petitioners. The NCLT, Chennai further held that the Transferor LLP shall be dissolved without winding up from the date of the filing of the certified copy of the order with the Registrar of Companies.

VA View

This order holds a contrary opinion to the order of NCLT, Ahmedabad in the matter of ***Kediya Ceramics*** (*decided on September 22, 2017*), where the NCLT, Ahmedabad disallowed the merger of a registered partnership firm into a company and held that *"in the absence of any specific provision in the Companies Act, 2013, relating to amalgamation, it cannot be said that even a body corporate can participate in the scheme of amalgamation".* However, the present order fails to discuss the aforesaid order of NCLT, Ahmedabad.

The nuance of the said order lies in the intention behind the legislature that has been carefully examined. In order to facilitate the ease of doing business in India and to encourage a desirable business atmosphere, the NCLT, Chennai, even in the absence of specific legal provision for merger/ amalgamation of a limited liability partnership with/ into an Indian company under the Companies Act, 2013, construed the provisions relating to mergers and amalgamations to include the same and sanctioned the Scheme presented by the Petitioners. The present order will certainly act as a precedent for future merger/ amalgamation of limited liability partnerships into companies and facilitate ease of doing business.

IV. Attachment of property for recovery of Income Tax dues cannot disrupt distribution of liquidation assets under the IBC: Telangana and Andhra Pradesh High Court

The Telangana and Andhra Pradesh High Court in the case of ***Leo Edibles and Fats Limited v. The Tax Recovery Officer (Central), Income Tax Department, Hyderabad and Others*** (*decided on July 26, 2018*) held that Income Tax Department is not a secured creditor under provisions of Insolvency and Bankruptcy Code, 2016 for recovery of income tax dues of a company in liquidation.

Facts

The official liquidator was appointed by an Order dated September 21, 2017 of the National Company Law Tribunal, Hyderabad for an auction sale of assets belonging to VNR Infrastructures Limited, a company in liquidation under the provisions of the Insolvency and Bankruptcy Code, 2016 (**"Code")**. Leo Edibles & Fats Limited ("**Petitioner**") in participation thereof was declared to be the highest bidder in respect of a commercial-cum-residential building, along with land, situated at Hyderabad and in pursuance of the same, duly deposited 25% of the bid amount when called upon to do so by the liquidator. Thereafter, the Petitioner was alerted to the subjection of the property to prior attachment under notice dated October 28, 2016 by the Tax Recovery Officer (Central), Income Tax Department, Hyderabad. Furthermore, the Petitioner was met with refusal by the concerned Sub-Registrar to entertain any request for registration in relation to the subject property under directions of the Tax Recovery Officer. Aggrieved, the Petitioner sought relief by filing a writ petition before the High Court of Telangana and Andhra Pradesh (**"Court"**). Upon order passed by the Court in an Interim Application in that regard, the Petitioner deposited the residual amount of sale consideration for the subject property with the liquidator.

Issues

Whether the Income Tax Department (**"Department"**) is to be considered as a secured creditor under the Code and consequently, whether the attachment of property for the recovery of dues under the Income Tax Act, 1961 (**"Act"**) will take priority over the mode of distribution of liquidation assets under the Code.

Relevant Provisions

- *Income Tax Act, 1961*

178. Company in liquidation. – [...]

(6) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force [except the provisions of the Insolvency and Bankruptcy Code, 2016].

- *Insolvency and Bankruptcy Code, 2016*

36. Liquidation estate – [...]

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:--

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

238. Provisions of this Code to override other laws –

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

Arguments

While the final order does not delve into the arguments advanced by the Petitioner, the primary contention of the Department was that the attachment of the subject property was effected far prior to initiation of the liquidation proceedings. In furtherance of its claim, the Department cited the decision in ***Imperial Chit Funds (P.) Limited v. Income Tax Officer [(1996) 219 ITR 498],*** wherein the Supreme Court held that the Department is to be treated as a secured creditor on account of Section 178 of the Act.

Section 178 of the Act provides for assessment and consequent directions to the official liquidator by the assessing officer to set aside the amount due from a company in liquidation prior to any disposal of assets thereof. Insofar as such preference is concerned, sub-section (6) of Section 178 of the Act, which cast an overriding effect upon prevailing laws, was amended with effect from November 1, 2016, to carve out an exception for the provisions of the Code. Assuming that this amendment hampered the preference allotted to recovery of income tax dues, the Department contended that it would be effected without prejudice to alternate modes of recovery available to the Department under Sections 222, 226 and 232 of the Act, which remain unamended by the Code.

Findings

The Court undertook a primary examination of the term "attachment" in order to determine whether such attachment of the subject property by the Department would amount to creation of an interest on behalf of the Department. Relying upon the decision of the Gujarat High Court in ***Ananta Mills Limited (In Liquidation) v. City Deputy Collector, Ahmedabad [(1972) 42 Company Cases 476],*** the Court held that attachment of a property merely obstructed its private alienation but did not create any interest in the property in favour of the attaching creditor.

In refutation of the Department's stance that the notice of attachment was issued prior to initiation of liquidation proceedings under the Code, the Court observed that no further action was taken by the Department for the recovery of dues. In ***Prem Lal Dhar v. Official Assignee [(1897) I.L.R. 25 Cal. 179 (P.C.)],*** the Privy Council concluded that where properties of a company, which was subsequently ordered to be wound up, were attached without any further action being taken, such attachment would bear no consequence to disposal of the assets by the official liquidator. The Court observed that attachment may be considered to be an encumbrance upon the property, which nevertheless would not defeat the disposal thereof under the Code since Section 36(3)(b) of the Code indelibly ushers encumbered assets within the purview of the liquidation estate.

Consequently, such attachment would not amount to an "interest" under Section 52 of the Code which accommodates the priority of a secured creditor for realization of security interest in relation to an asset of the company in liquidation.

In light of the amendment to Section 178(6) of the Act, the Court dismissed the reliance on the decision in Imperial Chit Funds (supra) and found no substance to the Department's claim seeking preferential recovery. Further, in relation to alternate modes of recovery, the Court observed that the relevant sections of the Act did not provide for a non-obstante clause to exclude application of other prevailing laws, as provided under Section 178. Upon a conjoint reading with Section 238 of the Code, the Court found that such alternate recovery would not withstand the authority of the Code.

In conclusion, the Court held that the Department must submit to the action of the liquidator and may file its claim for due settlement at the designated fifth position under Section 53 of the Code. Accordingly, the sale of the subject property was directed to be duly registered in the name of the Petitioner.

VA View

This decision of the High Court of Telangana and Andhra Pradesh reaffirms the supremacy of the Code. Due emphasis has been accorded to the intent of the legislature in its enactment as is evidenced by the Statement of objects and reasons of the Code which reiterates the need to "balance the interests of all the stakeholders including alteration in the priority of payment of government dues."

In line with this motive, the amounts payable by a company in liquidation to the Central or State Government in respect of two years preceding commencement of liquidation proceedings are to be settled under Section 53(1)(e) of the Code at equal rank with debts owed to a secured creditor for amounts remaining unpaid following the enforcement of security interest. Any arrears of the Income Tax Department pending beyond such period will be duly settled one rung lower under the sundry clause for remaining debts and dues under Section 53(1)(f) of the Code.

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