

A

UNION OF INDIA AND ANR.

v.

B

INDIA FISHERIES (P) LTD.

April 9, 1965

[K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.]

C

Income Tax Act 1922, s. 49E—Department's power to set off refundable amount against tax remaining due—Whether available in respect of tax due from company in liquidation—Whether subject to ss. 228 and 229 of the Companies Act, 1913.

D

The respondent company was directed to be wound-up and an official liquidator appointed by an order of the High Court in October, 1950. In December, 1950, the respondent was assessed to tax amounting to Rs. 8737/- for the year 1948-49. A claim made for this tax on the official liquidator was adjudged and allowed as an ordinary claim and certified as such in April, 1952. The Liquidator declared a dividend of 9½ annas in the Rupee in August, 1954 and paid a sum of Rs. 5188 to the Department, leaving a balance of Rs. 3549.

E

In June, 1954, the Department made a demand from the respondent and was paid Rs. 2565 as advance tax for the year 1955-56. On a regular assessment being made for that year, only Rs. 1126 was assessed as payable, so that a sum of Rs. 1460, inclusive of interest, became refundable to the respondent. However, the Income Tax Officer, purporting to exercise the power available to him under s. 49E of the Income Tax Act, 1922, set off this amount against the balance of Rs. 3549 due for the year 1948-49. A revision petition filed by respondent in respect of this set off was rejected by the Commissioner of Income Tax.

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Thereafter, a petition under Art. 226 filed by the respondent to set aside the orders of the Income Tax Officer and the Commissioner was allowed by the High Court, mainly on the ground that the demand for Rs. 8737 in respect of 1948-49, being adjudged and certified came to have all the incidents and character of an unsecured debt payable by the liquidator to the Department; it was therefore governed by the provisions of Company Law and no other remedy or method to obtain satisfaction of the claim was available to the creditor.

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In the appeal to this Court it was contended on behalf of the appellant that s. 49E gave statutory power to Income-tax Officer to set off a refundable amount against any tax remaining payable and that this power was not subject to any provision of any other law.

H

HELD: The Income Tax Officer was in error in applying s. 49E and setting off the refund due to the respondent. [683C-D]

The effect of ss. 228 and 229 of the Companies Act, 1913, is, *inter alia*, that an unsecured creditor must prove his debts and all unsecured debts are to be paid *pari passu*. Once the claim of the Department has to be proved and is proved in liquidation proceedings, it

cannot, by exercising the right under s. 49E get priority over the other unsecured creditors and thus defeat the very object of ss. 228 and 229 of the Companies Act. Furthermore, 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 assesseees in all circumstances; ss. 228 and 229 deal with proof of debts and their payment in liquidation. Section 49E can be reconciled with ss. 228 and 229 by holding that s. 49E applies when insolvency rules do not apply. [682H-683D]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 211 of 1964.

Appeal from the judgment and order dated February 22, 1961 of the Bombay High Court in Miscellaneous Application No. 352 of 1959.

Niren De, Additional Solicitor General, *R. Ganapathy Iyer* and *R. N. Sachithy*, for the appellants.

A. V. Viswanatha Sastri, *T. A. Ramachandran*, *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, for the respondents.

The Judgment of the Court was delivered by

Sikri, J. This appeal is in pursuant to a certificate of fitness granted by the High Court of Maharashtra at Bombay under Art. 133(1)(c) of the Constitution is directed against the judgment of the said High Court in a petition under Art. 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 s. 179 of the Indian Companies Act, 1913 (VII of 1913) to be exercised by him under s. 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/-. 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 Official Liquidator declared a dividend of 9½ annas in a rupee and paid to the Income Tax Department a sum of Rs. 5,188/3/- against the claim made by the Income Tax Officer as an ordinary creditor. Thus a balance of Rs. 3,549/12/- still remained payable to the Income Tax Department from the assets of the respondent.

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/- as advance tax. This was paid by the Official Liquidator. On a

- A** regular assessment being made for the said year, only Rs. 1,126/12/- was assessed as payable by the respondent. After adjusting this sum against the advance payment of Rs. 2,565/6/-, Rs. 1,460/1/- became refundable to the respondent, inclusive of interest. Instead of refunding the said balance to the respondent, the Income Tax Officer set off the said amount against the balance of Rs. 3,549/12/-
- B** 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 s. 49E of the Income Tax Act.

- C** On November 25, 1959, the respondent filed a petition under art. 226 of the Constitution and prayed for a writ, direction or order for 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
- D** 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. 8,737/12/- in respect of the assessment year 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
- E** High Court observed that "this claim thereafter was governed by the provisions 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
- F** 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 Section 49E was not available to the Department for setting off the amount of the excess towards the balance of its claim of Rs. 8,737/15/- which the department had proved in the insolvency of the company and
- G** 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 off the amount of the refund towards the tax remaining payable, and directed the Income Tax Officer to deal with and dispose of the claim of the present respondent for the refund and pass appropriate orders in respect of the said amount of refund under the provisions
- H** of s. 48 of the Income Tax Act.

The learned Additional Solicitor-General, on behalf of the appellant, contends that s. 49E gives statutory power to the Income Tax Officer, *inter alia*, to set off the amount to be refunded or any part of that 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: A

“Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax Officer, Appellate Assistant 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.” B

On the face 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 s. 49E is subject to the Insolvency Rules contained in the Companies Act. Section 228 of the Companies Act, 1913, provides: C

“228. Debts of all descriptions to be proved.— D

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 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.” E

Section 229 provides: F

“Application of insolvency rules in winding up of insolvent companies.—

In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debate 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 such 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.” G

The effect of these statutory provisions is, *inter alia*, that an unsecured creditor must prove his debts and all unsecured debts H

- A** 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 s. 49E of the Income Tax Act get priority over the other unsecured creditors. If we were to read s. 49E in the way suggested by the learned
- B** Additional Solicitor-General, it would be defeating the very object underlying ss. 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 assesseees and in all circumstances; ss. 228 and 229 deal with the proof of debts and their payment in liquidation. In our opinion, s. 49E can be reconciled with ss. 228 and 229
- C** by holding that s. 49E applies when insolvency rules do not apply. Accordingly, agreeing with the High Court, we hold that the Income Tax Officer was in error in applying s. 49E and setting off the refund due. The Commissioner was equally in error in affirming this order.
- D** The learned Additional Solicitor-General also urged that the application under art. 226 was misconceived because the Income Tax Officer had jurisdiction. But if we interpret s. 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 Art. 226.
- E** The appeal is accordingly dismissed with costs.

Appeal dismissed.