
(2003) 01 KL CK 0108
In the High Court Of Kerala
Case No : O.P. No. 32500 of 2002

Achuthan

APPELLANT

Vs

Recovery Officer

RESPONDENT

Date of Decision : 24-01-2003

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 29, 30

Citation : (2003) 3 BC 565 : (2003) 3 KLT 195

Hon'ble Judges : Pius C. Kuriakose, J

Bench : Single Bench

Advocate : T.G. Rajendran, for the Appellant; Thomas Mathew Nellimoottil, A.C.G.S.E., M. Pathros Mathai and Mariam Mathai, for the Respondent

Final Decision : Dismissed

Judgement

Pius C. Kuriakose, J.—In this O.P. the petitioner-debtor impugns Ext.P1 order passed by the Debts Recovery Tribunal in favour of the 3rd respondent-State Bank of Travancore in T.A. No. 1036 of 1997.

2. Heard Sri. T.G. Rajendran, learned counsel for the petitioner, Sri. M.Pathros Mathai for the 3rd respondent-Bank and also the Central Government Standing Counsel for 1st respondent-Recovery Officer attached to the Debts Recovery Tribunal, Ernakulam and the 2nd respondent-Union of India.

3. A decree by sale.of mortgaged properties and also personally for recovery of a sum of Rs. 7,66,823.36 with future interest at 14% per annum was passed by the Tirur Sub Court against the petitioner and seven others and while the proceedings for execution for recovery of the amount by sale of the mortgaged property were pending, those proceedings were transferred to the Debt Recovery Tribunal by virtue of Section 30 of Act 51 of 1993 and the Tribunal passed Ext.P1 order. I am told that a recovery certificate in terms of Ext.P 1 order has been passed. In fact, the Original Petition itself has been instituted before this Court when the 1st respondent issued the demand notice envisaged by Sections 25 to

29 of the Act read with Rule 2 of Schedule II to the Income Tax Act, 1961. Ext.P2 is the demand notice which is also impugned in this O.P.

4. One of the points raised in the O.P. is that the Transfer Application which has resulted in Ext.P1 order was time-barred and that Ext.P1 order insofar as the same has been passed overlooking the bar of limitation is without jurisdiction and is a nullity. I have no difficulty to hold that the Transfer Application was not barred by limitation and Ext.P1 order can never be a nullity. In fact, Mr. T.G. Rajendran did not address arguments also on this point.

5. The point highlighted by Sri. T.G.Rajendran is that Ext.P2 notice insofar as it threatens with sale of the property belonging to the petitioner in view of Rule 68B of the Second Schedule to the Income Tax Act which provides for the procedure for recovery of tax made applicable to the recovery proceedings under Act 51 of 1993 expressly u/s 29 of the said Act is illegal. In other words, the argument is that in view of the admitted position that the property proposed to be sold has not been attached, there should absolutely be no question of sale. In fact, under Ground No. B a point has also been raised that since the proposed sale is not within three years of attachment, the sale proceedings are barred by limitation. This point was not pressed and the point that was pressed was the one raised in Ground C which is to the effect that if there has been no demand attachment by the Tribunal or the civil court or the Recovery Officer as per Second Schedule to the Income Tax Act, the Recovery Officer has no jurisdiction to sell the property at all.

6. Sri. M. Pathros Mathai, learned counsel for the 3rd respondent-Bank would submit before me that the Original Petition under Article 227 of the Constitution is not maintainable in view of the obvious position that appeal lies under the provisions of the statute not only against the orders passed by the Debts Recovery Tribunal but to the Tribunal itself against orders passed by the Recovery Officer. Though there is some force in this argument, I think it better to consider Mr. Rajendran's arguments on merits.

7. Mr.T.G.Rajendran is right in his submission that going by the Second Schedule to the Income Tax Act, sale of immovable property belonging to the debtor is not possible unless the property has been attached. But Section 29 of Act 51 of 1993 which makes the Second Schedule applicable only says as follows:-

"The provisions of the Second and Third Schedules to the Income Tax Act, 1961 (43 of 1961) and the Income Tax (Certificate of Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the income tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act."

Admittedly, the present proceedings are before the Debts Recovery Tribunal by

way of transfer of proceedings pending before the regular civil court u/s 31 of the Act. The suit before the civil court was one for sale based on an equitable mortgage. The decree passed is one of sale. Upon transfer, the Debts Recovery Tribunal also under Ext.P1 expressly directed sale of the decree schedule properties and adjustment of the sale proceeds towards the amount due. It is agreed before me that going by the recovery certificate which is more or less akin to the decree of a civil court also, the Recovery Officer is authorised to sell the property. It is elementary that when there is a mortgage which itself creates a very valuable interest in the immovable property in favour of the mortgagee, attachment is unnecessary. I have no difficulty to understand that the expression "as far as possible apply with necessary modifications" as one doing away with the necessity to attach the properties specifically ordered to be sold under the order of the Tribunal and the recovery certificate.

The Original Petition fails and the same is dismissed. No costs.