

(2010) 04 GUJ CK 0067

In the Gujarat High Court

Case No : Letters Patent Appeal No. 1303 of 2009 in Special Civil Application No. 1424 of 2009 and Civil Application No. 6451 of 2009 in Letters Patent Appeal No. 1303 of 2009

Bank of Baroda

APPELLANT

Vs

Balbir Kumar Paul and Others

RESPONDENT

Date of Decision : 28-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 39, 39(1), 39(4)
Income Tax Act, 1961 — Section 30
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(20), 19(22), 19(23), 19(25), 25

Citation : AIR 2010 Guj 124 : (2010) 2 GLH 790

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; Akil Kureshi, J

Bench : Division Bench

Advocate : Nalini S. Lodha, No. 1 in LPA No. 1303/2009 and Nalini S. Lodha, No. 1 in CA No. 6451/2009, for the Appellant; Bharat T. Rao, for Respondent No. 1, Sandip Bhatt, for Respondent Nos. 10 - 12 in LPA No. 1303/2009, Bharat T. Rao, for Respondent No. 1, J.S. Yadav and Manan Shah, for Respondent Nos. 10 - 12 in CA No. 6451/2009, for the Respondent

Final Decision : Allowed

Judgement

Akil Kureshi, J.—The appellant was original respondent No. 1 in Special Civil Application No. 1424/2009. In this appeal, the appellant has challenged a judgement and order dated 6.5.2009 passed by the Learned Single Judge in the petition filed by respondent No. 1 herein.

2. Brief facts leading to the appeal are as follows:

2.1 Respondent No. 1 was one of the Directors of M/s. R.K. Taneja Fashion Fabrics Pvt. Ltd., a company incorporated under the provisions of the Companies Act 1956. Said company had availed of loan for cash credit facility from the present appellant-Bank of Baroda by mortgaging besides other properties, property of the original petitioner being immovable property situated at Buland

Shahar, Uttar Pradesh(here-in-after referred to as "the suit property").

2.2 Since the loan availed of by the company was not repaid, the appellant bank filed Original Application No. 31/1996 before the Debt Recovery Tribunal, Ahmedabad on 25.1.1996 seeking recovery of Rs. 1,37,83,441/- with interest.

2.3 Debt Recovery Tribunal, Ahmedabad passed a decree on 18.4.2006 in favour of appellant bank. In the petition, original petitioner i.e. present respondent No. 1 has stated that he was not aware whether his brother who was residing at Ahmedabad had defended the matter or not or any steps were taken or not. He had further stated that from the record it is clear that case was not properly presented and his advocate did not remain present. Be that as it may, it is not the case of the original petitioner that he was not served with the notice of the said proceedings by Debts Recovery Tribunal.

2.4 It is not in dispute that petitioner has not challenged the said decree. In terms of the decree, a Recovery Certificate came to be issued on 11.5.2006 bearing Certificate No. 149/2006. Same was forwarded for execution to the Recovery Officer on or around 13.7.2007.

2.5 In the recovery proceedings, the original petitioner appeared before the Recovery Officer and filed his objections vide exh.T/19. It is the case of the petitioner that despite his objections, Recovery Officer permitted further auction of his immovable property at Buland Shahar. However, in auction proposed on 5.12.2008, no offer was received. The auction was therefore, declared unsuccessful. One Shri Ravindra Goyal, made an offer for purchasing the suit property for a sum of Rs. 36 lakhs. Recovery Officer thereupon held an auction in the chamber on 27.1.2009 and issued a sale proclamation notice in which it was stated that if no offer is received, then offer of the third party will be accepted.

2.6 Before the Recovery Officer on behalf of the petitioner, written objections came to be filed on 27.1.2009 contending inter-alia that the authority has no territorial jurisdiction to dispose of the property situated at Buland Shahar. It was therefore, prayed that auction may be deferred till the appeal which he has filed before the tribunal is disposed of.

2.7 On 27.1.2009 itself the recovery officer passed two separate orders in the said proceedings. Objections raised by the petitioner came to be rejected by first order on 27.1.2009. After passing this order, proceedings were adjourned for public auction in the second session.

2.8 In the second session on 27.1.2009, the Recovery Officer passed further order accepting the offer of Shri Ravindra Goyal for purchase of property of the petitioner for a sum of Rs. 36.36 lakhs. The offerer had already deposited Rs. 9 lakhs previously. He was given one day to deposit the shortfall of 25% of the final bid amount. He was given further 15 days for paying up the rest of the amount. It is not in dispute that such amounts have been duly deposited. From the affidavit in reply filed by the bank before the Learned Single Judge, it

becomes clear that though the auction has been completed, sale has not yet been confirmed in favour of the auction purchaser. These orders dated 27.1.2009 passed by the Recovery Officer came to be challenged by the original petitioner before the Learned Single Judge mainly on the ground that the Recovery Officer at Ahmedabad had no territorial jurisdiction to execute the decree qua the property which was situated in Buland Shahar in Uttar Pradesh.

2.9 Learned Single Judge of this Court by impugned judgement and order dated 6.5.2009 allowed the petition only on the ground that in view of provisions contained in Sub-section 23 of Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act (here-in-after referred to as "the said Act"), the Recovery Officer could not have auctioned the property situated at Uttar Pradesh. Learned Judge observed as under:

5. In the present case, it is not in dispute that the property is situated at Shital Ganj, Buland Shahar, UP. That being so, the tribunal ought to have send the same to the concerned Tribunal similarly the recovery officer ought to have held that the recovery certificate cannot be executed here and the recovery officer had no jurisdiction to pass any order. That being so, the order passed by the recovery officer is hereby quashed and set aside. The Tribunal is expected to send recovery certificate to the concerned tribunal within whose local limits of jurisdiction, the property is situated.

2.10 It is this decision which the bank has challenged before us in the present Letters Patent Appeal.

2. Appearing for the bank, learned advocate Shri Nalini Lodha submitted that Learned Single Judge committed grave error in quashing the orders passed by the Recovery Officer on the ground of lack of jurisdiction.

3.1 She pointed out that decree passed by the Debts Recovery Tribunal and the Recovery Certificate issued thereupon has never been challenged by the original petitioner. There is no dispute that he was the Director of the company which had taken loan from the appellant bank. His immovable property was mortgaged along with other properties for securing the loan. It was therefore, open for the bank to execute the decree by sale of the mortgaged property of the petitioner.

3.2 She pointed out that previously also recovery officer had held the auction of the property. Such auction was never challenged.

3.3 She contended that Sub-section (23) of Section 19 of the said Act does not require that necessarily the decree must be transferred to tribunal within whose jurisdiction the property is situated. She relied on the provisions contained in Rules 60 to 63 of Schedule II of the Income Tax Act.

3.4 She submitted that when alternative remedy was available, Learned Single Judge ought not to have entertained the petition. She relied on the decision in case of Punjab National Bank Vs. O.C. Krishnan and Others, She contended that appeal u/s 30 of the said Act was not filed by the petitioner before approaching

the High Court.

3. On the other hand, learned Counsel Shri B.T. Rao appearing for respondent No. 1 herein i.e. original petitioner opposed the appeal. He contended that Learned Single Judge committed no error in quashing the orders passed by the Recovery Officer. He relied heavily on the provisions contained in Sub-section (23) of Section 19 of the said Act to contend that the Recovery Officer at Ahmedabad had no jurisdiction to auction the property of the petitioner situated at Uttar Pradesh.

4.1 Our attention was drawn to provisions contained in Rule 3 of Order XXI of the Code of Civil Procedure.

4.2 Counsel relied on decision of the Apex Court in case of Mohit Bhargava Vs. Bharat Bhushan Bhargava and Others, in which the Apex Court observed that it is only the Court in whose jurisdiction the property is situate that can execute the decree. The Apex Court observed that Section 39(4) of the CPC as inserted by the Act 22 of 2002 with effect from 1.7.2002 , makes it clear that it is no longer a matter of discretion for the Court which passed the decree to proceed with execution of the decree in such a case.

4. Having thus heard learned advocates for the parties, We find that it is not in dispute that the petitioner was the Director of the Company which had borrowed substantial amounts from the present appellant bank. For securing loan, immovable property of the petitioner along with other immovable properties were mortgaged with the bank. It is equally undisputed that the Company did not repay the loan, the appellant bank had therefore, instituted proceedings before the Debts Recovery Tribunal. Decree in favour of the appellant bank was passed way back in the year 1996. Though respondent No. 1 herein i.e. the original petitioner vaguely stated in the petition that it is not clear whether his brother had defended the matter properly or not and further that decree came to be passed and that his advocate had not remained present before the tribunal, undisputedly the decree has achieved finality, and same was never challenged by the petitioner.

5. On the basis of the decree, bank was also granted Recovery Certificate by the Tribunal that too in May 2006. Recovery Officer thereupon proceeded to execute the decree by holding auction of the property of the petitioner situated at Buland Shahar, State of Uttar Pradesh. In the first attempt of public auction, the petitioner raised no objections. Auction however, failed for want of any offer. When the Recovery Officer was in the process of making fresh attempt for sale of the property, the petitioner intervened and raised objections regarding the territorial jurisdiction of the Recovery Officer. His objections were ignored.

6. It is not in dispute that orders passed by the Recovery officer were appealable u/s 30 of the said Act. Section 30 of the said Act reads as follows:

30. Appeal against the order of Recovery Officer .-(1) Notwithstanding anything

contained in Section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under Sub-section(1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers u/s 25 - 28 (both inclusive).

7.1 In view of availability of statutory appeal under the Act, we are of the opinion that ordinarily this Court would not entertain a writ petition before the person aggrieved has availed of such alternative remedy.

7. From the decision of Learned Single Judge, no reasons are forthcoming to indicate why the petition was entertained without insisting on the petitioner availing of such statutory appeal. As observed by the Apex Court in case of Punjab National Bank v. O.C. Krishnan and Ors. (supra) when the statutory appeal is available, writ petition would normally not be entertained.

8. We are not inclined to allow the appeal only on this ground. Since the advocates on both the sides have addressed us extensively on the merits of the matter also, we would prefer to decide the issues raised before us.

9. Central issue required to be decided in this appeal is whether in view of Sub-section (23) of the Section 19 of the said Act or any other statutory provisions, can it be stated that Recovery officer, Debts Recovery Tribunal, Ahmedabad, has no territorial jurisdiction to execute the decree in terms of recovery certificate issued by the tribunal by sale of property situated in the State of Uttar Pradesh.

10. Title of Section 19 of the said Act is "Application to the Tribunal". Said section provides not only for procedure for filing the application for recovery before the Tribunal, it also provides for detailed procedure for deciding such applications. Provisions are also made for execution of the decree that may be passed by the tribunal. Sub-section (20) of Section 19 in particular, authorizes the tribunal to pass such interim or final order including the order for payment of interest from the date on or before which the payment of the amount is found due upto the date of realization or actual payment, on the application made before the tribunal as it thinks fit to meet the ends of justice.

Sub-section (22) of Section 19 of the said Act provides for issuance of recovery certificate and reads as follows:

(22) the Presiding Officer shall issue a certificate under his signature on the basis of the order of Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

Sub-section (23) of Section 19 provides inter-alia that where the Tribunal is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals, it may send the copies of the certificate of recovery for

execution to such other Tribunals where the property is situated. Section 19(23) reads as follows:

(23) Where the Tribunal, which has issued a certificate of recovery, is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals, it may send the copies of the certificate of recovery for execution to such other Tribunals where the property is situated.

Sub-section (25) of Section 19 empowers the Tribunal to make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.

11.1 Section 25 of the said Act pertains to modes of recovery of debts through which recovery officer can recover amount of debts specified in the recovery certificate. Such modes include attachment and sale of the movable as well as immovable property, arrest of the defendant and his detention in prison and appointing a receiver for the management of the movable or immovable properties of the defendant.

11.2 Section 29 of the said Act provides that provisions of Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 shall apply with necessary modifications. Section 29 reads as follows:

29. Application of certain provisions of Income Tax Act.- The provisions of the Second and Third Schedules to the Income Tax Act, 1961 (43 of 1961) and the Income Tax (Certificate 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.

11. Before attempting to interpret the above provisions we may notice that in the statement of objectives and reasons, for enactment of the said Act, it has been recorded that:

Banks and financial institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to the banks and financial institutions has blocked a significant portion of their funds in unproductive assets, the value of which deteriorates with the passage of time. The Committee on the Financial System headed by Shri M. Narasimham has considered the setting up of the Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. An urgent need was, therefore, felt to work out a suitable mechanism through which the dues to the banks and financial institutions could be realized without delay. In 1981 a Committee under the Chairmanship of Shri T. Tiwari had

examined the legal and other difficulties faced by banks and financial institutions and suggested remedial measures including changes in law. The Tiwari Committee had also suggested setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The setting up of Special Tribunals will not only fulfill a long-felt need, but also will be an important step in the implementation of the Report of Narasimham Committee. Whereas on 30th September, 1990 more than fifteen lakhs of cases filed by the public sector banks and about 304 cases filed by the financial institutions were pending in various courts, recovery of debts involved more than Rs. 5622 crores in dues of Public Sector Banks and about Rs. 391 crores of dues of the financial institutions. The locking up of such huge amount of public money in litigation prevents proper utilization and recycling of the funds for the development of the country.

12.1 With above objectives in mind, the Legislature enacted the said Act to provide for expeditious adjudication and recovery of debts due to banks and financial institutions and all matters connected therewith or incidental thereto.

12. Sub-section (23) of Section 19 of the said Act, as already noted, provides that where the property (against which recovery certificate is to be executed) is situated within the local limits of jurisdiction of two or more Tribunals, the Tribunal may send copies of this certificate of recovery for execution to such other Tribunals where the property is situated. The word used here is "may" and not "shall". Question is though the Legislature has used word "may" should such a requirement be read as mandatory.

13.1 It is the cardinal principle of interpretation of the statute that ordinarily Courts would apply the provisions upon plain reading of language used therein. To this basic principle, there are certain well recognized exceptions.

13.2 The Legislature having used term "may" in Sub-section 23 of Section 19 of the said Act, would ordinarily be understood to have authorized the tribunal concerned to send the copies of the recovery certificate for execution to the tribunal within whose local jurisdiction such property may be situated. Unless we read the said term "may" as "shall" and hold that such requirement is mandatory in nature, the case of the original petitioner must fail.

13. In case of *Sudhir and Others etc. Vs. State of M.P. etc.*, the Apex Court was considering the situation where two criminal cases arising out of same incident, one of which is exclusively triable by the Sessions Court whereas the other one is not. In that context, bearing in mind the salutary practice that when two criminal cases relate to the same incident, they are tried and disposed of by the same Court, the Apex Court interpreting the provisions of Section 228 of the CPC held and observed as under:

16. The employment of the word may at one place and the word shall at another place in the same Sub-section unmistakably indicates that when the offence is not triable exclusively by the Sessions Court it is not mandatory that he should

order transfer of the case to the Chief Judicial Magistrate after framing a charge. In situations where it is advisable for him to try such offence in his court there is no legal obligation to transfer the case to the Chief Judicial Magistrate. One of the instances for not making the transfer is when a case and counter case have been committed to the Sessions Court and one of those cases involves an offence exclusively triable by the Sessions Court and the other does not involve any such offence.

14.1 In case of State of U.P. Vs. Manbodhan Lal Srivastava, the Apex Court observed that the use of word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. It was further observed that:

In that connection, the following quotation from Crawford on "Statutory Construction"-art. 261 at p. 516, is pertinent:

The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other....

14.2 In case of The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, the Apex Court observed that:

the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow there from, and, above all, whether the object of the legislation will be defeated or furthered.

14. Bearing in mind the above principles of statutory interpretation, and also objects for which the said Act was enacted, we find it difficult to hold that the term "may" used in Sub-section (23) of Section 19 should be read as "shall" or that the provision for forwarding the recovery certificate to another tribunal within whose jurisdiction the property may be situated as mandatory and not enabling. Accepting the ordinary language used in the said section does not frustrate the said provision or the object sought to be achieved. On the contrary insisting on treating such a requirement as mandatory would lead to further

delay in execution of a decree which may have been passed by the tribunal long back.

15. In comparison to the said provision contained in Sub-section(23) of Section 19 of the said Act, Section 38 of the CPC provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 39 of the CPC pertains to transfer of a decree. Sub-section (1) of Section 39 of the CPC provides inter-alia that the Court which passed a decree may on the application of the decree holder send it for execution to another Court of competent jurisdiction, if any of the conditions laid down therein is specified. One of the conditions is that if the decree directs the sale or delivery of the immovable property situated outside the local limits of the jurisdiction of the Court which passed it. We are conscious that here also though the word used is "may", however, entire issue has been put beyond any controversy by providing in Sub-section(4) of Section 39 that:

39(4) Nothing in this section shall be deemed to authorize the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.

16. In the said Act there is no such provision as found in Sub-section (4) of Section 39 of the Code of Civil Procedure. In view of this significant difference, reliance on the language in Section 38 and 39 of the CPC or various rules under Order 23 thereof would not further the case of the original petitioner. Decision in case of Mohit Bhargava(supra) was rendered in view of provisions of Code of Civil Procedure. It was in this background that the Apex Court observed that the decree could be executed by the Court which passed the decree so long as it is confined to the assets within its own jurisdiction or as authorized by Order XXI Rule 3 or Order 21 Rule 48 of the Code.

17. It is in this context that we must understand the provisions contained in Rule 3 of Order XXI which provides that where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sale the entire estate or the tenure.

18. On the contrary, provisions contained in the said Act are vitally different with respect to execution of decree. As already noted, Section 29 of the said Act provides that provisions of Second and Third Schedule to the Income Tax Act 1961 would as far as possible, apply with necessary modifications. In particular, Schedule-II of the Income Tax Act pertains to procedure for recovery of tax. Detail provisions have been made for effecting recovery. Part-III to Schedule-II pertains to attachment and sale of immovable property, which includes sale and proclamation of sale of immovable property as also for considering the application to set aside the sale of immovable property under certain circumstances. Thus entire statutory scheme for execution of decree in the said Act is vitally different.

19. In view of the above discussion, we are of the view that recovery officer,

Debts Recovery Tribunal, Ahmedabad did not lack jurisdiction to execute the recovery certificate.

20. Decision of the Learned Single Judge is therefore, required to be and hereby set aside. Appeal stands allowed.

21. As already noted though auction is complete, sale has not yet been confirmed. Nothing stated here-in-above is meant to take away the right of the original petitioner if he has any under the law to object to confirmation of the sale or prejudice his pending appeal before the Debts Recovery Tribunal which shall be decided in accordance with law unmindful of the observations made here-in-above.

22. Appeal stands disposed of accordingly. Civil application also stands disposed of accordingly.