

(2013) 03 KAR CK 0085

In the Karnataka High Court

Case No : Writ Petition No. 46786 of 2012 (T-IT)

Karnataka State Industrial Investment Development
Corporation Ltd.

APPELLANT

Vs

Commissioner of Income Tax and Tax Recovery Officer,
Mangalore Range

RESPONDENT

Date of Decision : 13-03-2013

Acts Referred:

Income Tax Act, 1961 — Section 281, 281B

State Financial Corporations Act, 1951 — Section 29

Citation : AIR 2013 Kar 104 : (2013) 2 AKR 699 : (2013) 4 BC 265 : (2013) 259
CTR 485 : (2013) ILR (Kar) 3781 : (2013) 77 KarLJ 424 : (2013) 2 KCCR 1562

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : B.R. Jayatheertha, for the Appellant; Thirumalesh, for the
Respondent

Judgement

Ram Mohan Reddy, J.—Petitioner, a State owned Corporation and a Financial Institution governed by The State Financial Corporations Act, 1951 (for short, the SFC Act") sanctioned a term loan of Rs. 1,25,00,000/- to M/s. Veekay Developers Pvt. Ltd. to establish a Luxury Hotel at Sy. No. 32-2A, Bangra Kulur Village, Mangalore City, on 13.09.1995, which term loan was transferred to V.K. Clubs and Homes Pvt. Ltd. By way of security, the borrower - M/s. V.K. Clubs and Homes Pvt. Ltd., created an equitable mortgage by deposit of title deeds, the portions of land and building i.e., measuring about 4390 Sq. feet on the ground floor; 2100 Sq. feet on the first floor; 3515 Sq. feet and 1020 Sq. feet on the third floor; about 18,435 Sq. feet on the 4th, 5th and 6th floors of the Commercial building, together with common facilities thereof, situate at Sy. No. 32/2A of Bangra Kulur Village, Mangalore. By way of further security, the said borrower created equitable mortgage over free hold rights in three shops measuring about, 325 Sq. feet; 115 Sq. feet and; 535 Sq. feet, respectively, in all, measuring 975 Sq. feet, with common facilities, in the building on land

bearing Sy. No. 32/2A, Bangra Kulur Village, Mangalore. The additional loan of Rs. 86,00,000/- when sanctioned, Rs. 76.33 lakhs was released during the year 1998, for which, the building measuring 2110 Sq. feet on the first floor of the building on Sy. No. 32/2A of Bangra Kulur Village, was offered as security by way of equitable mortgage by deposit of title, under the agreement dated 28.04.1998. The borrower, having failed to repay the amount due together with interest led the petitioner to invoke Section 29 of the SFC Act and took over possession of the properties, mortgaged and furnished as security. Though the petitioner took possession of the mortgaged properties, nevertheless, the borrower committed default in the payment of the amounts due.

2. On 05.12.2000, the Tax Recovery Officer, Mangalore Range - second respondent passed an order attaching the immovable properties, including, properties mortgaged of the petitioner invoking Rule 48 of II Schedule to the Income Tax Act, 1961 (for short, "the Act"), to recover Rs. 80,03,276/- towards income tax dues, from Sri Vivian Kamath D'Souza, M/s. Veekay Developers Pvt. Ltd., M/s. Shalimar Constructions and M/s. Canara Builders. Following that order, the second respondent on 23.12.2000, issued a public notice in Udayavani news paper informing about the attachment of the immovable properties calling upon anybody who had any claim or right to the said properties, to furnish necessary documents in support of the claim.

3. On 05.01.2001, petitioner brought to the notice of the second respondent the sanction of the loan on 13.09.1995 and 20.03.1998; the mortgage of the immovable properties, as also taking possession of the said properties on 30.12.1998 and 25.02.1999, invoking Section 29 of the "SFC Act". This was followed by notice dated 06.05.2005 to the second respondent, in response to which, a letter dated 27.01.2006 Annexure "F" was addressed by the Tax Recovery Officer informing the petitioner to proceed with the sale of the immovable properties as it had the first charge and to treat the income tax department as a second mortgagee and after appropriation of the sale proceeds, the remainder if any, to hand over the same for appropriation towards income tax dues.

4. Petitioner instituted Misc. Case No. 42/2008 on 16.07.2008 against the borrowers before the III Addl. District and Sessions Judge, D.K., Mangalore, which was allowed by judgment and decree dated 17.04.2009 permitting the petitioner to enforce the liability u/s 31(1)(a) and (aa) of the SFC Act for recovery of Rs. 8,79,82,220/- together with interest at 22.5% per annum from 16.09.2007 until realization and further sum of Rs. 4,62,75,763/- together with interest at 21% per annum from 16.09.2007 until realization.

5. It is the allegation of the petitioner that efforts to recover its dues by selling the assets and adjusting the proceeds, is thwarted by the income tax department in not issuing a no-objection certificate to the petitioner to go ahead with the sale of the said properties, on the premise, that expert legal opinion suggests that tax payable by the assessee is prior in point of time to the execution of the

mortgage deeds in favour of the petitioner, followed by an order of attachment, the income tax department and hence a priority charge in the matter of recovery of debts as indicated in the letter dated 14th July 2011 Annexure "J".

6. Hence, this petition for the following reliefs:

a) issue a Writ of Mandamus directing the Respondents to lift the attachment in respect of Properties bearing No. 32/2A, Bangra Kulur Village, Mangalore.

b) issue a Writ of Mandamus restraining the Respondents from interfering in sale of the aforesaid properties and appropriate the proceeds towards amounts due to it.

c) issue a Writ of Mandamus restraining the respondents from selling the aforesaid properties and appropriate the proceeds towards arrears of tax due from Sri Vivian Kamath D'Souza, M/s. Veekay Developers Pvt. Ltd., M/s. Shalimar Constructions and M/s. Canara Builders.

d) issue such other writ, order or direction the Court may deem fit in the facts and circumstances of the case.

e) Grant such other relief as the Court may deem fit in the above case and cost in the interest of justice and equity.

7. Having heard the learned counsel for the parties, perused the pleadings and the statutory provisions, the point for consideration is:

Whether realization of income tax dues from the assesses under the Income Tax Act, 1961 will have priority over the secured debt in terms of the State Financial Corporations Act, 1951?

8. The answer to this question need not detain the Court for long in the light of the authoritative pronouncement of the Apex Court in *Union of India (UOI) and Others Vs. SICOM Ltd. and Another*, observing that under Article 372 of the Constitution, as also well settled principles of law statutory provisions will prevail over the Crown debt, coupled with the non-obstante clause in Section 46-B of the SFC Act, not only prevail over contracts but also other laws. In other words, the "SFC Act", having provided for recovery of debt in preference to all other debts under any other law, the Financial Corporation was entitled to appropriate the sale proceeds towards the discharge of debt due to it, at the first instance.

9. Although Sri Thirumalesh, learned counsel for the Revenue places reliance upon the decision of the Apex Court in *Union of India Vs. Somasundram Mills (P) Ltd. and Another*, in support of the submission that general principle of law that debts due to the State are entitled to priority over all other debts, therefore, debts due to income tax department is a prior charge on the immovable properties, mortgaged in favour of the petitioner - Financial Corporation, that it is inapplicable to the facts of this case. That judgment when referred to at paragraph 18 in *SICOM Limited's* case, it was observed that the facts obtaining therein was with conflict of interest between a secured creditor and an unsecured

creditor and not a question that arose for consideration in that petition, which reads thus:

Whether realization of the duty under the Central Excise Act will have priority over the secured debts in terms of the State Financial Corporations Act, 1951 (for short "the SFC Act")?

In that view of the matter the decision in Somasundaram's case has no application, more so since the present case is not one of conflict with secured and unsecured creditor.

10. Learned counsel for the Revenue places reliance upon the decision of the Apex Court in Central Bank of India Vs. State of Kerala and Others, more appropriately, at paragraph 172 onwards. The question that arose for decision making in that case was:

Whether Section 38-C of the Bombay Sales Tax Act, 1959 (the Bombay Act) and Section 26-B of the Kerala General Sales Tax Act, 1963 (the Kerala Act) and similar provisions contained in other State legislations by which a first charge was created on the property of the dealer or such other person, who was liable to pay sales tax, etc. were inconsistent with the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the DRT Act) for recovery of "debt" and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the Securitisation Act) for enforcement of "security interest" and whether by virtue of non-obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act, the two Central legislations had primacy over State legislations?

11. The facts therein were that the borrower, who mortgaged his properties to the creditor Bank failed to repay the dues and therefore, the Bank instituted a suit, which when decreed by the Debts Recovery Tribunal, a recovery certificate issued in favour of the Bank, and the Recovery Officer issued notice for sale of the properties of the borrower. At that stage, the Tahsildar issued a notice to the borrower for recovery of a certain sum as arrears of land revenue stating that the properties had been attached and steps were being taken to sell the same by auction. It is further observed that the Tahsildar claimed that by virtue of Section 26-B of the Kerala Act, the State Government had a first charge over the attached properties, which was opposed by the Bank contending that being a Central legislation, the DRT Act would prevail over the Kerala Act. When writ petitions and writ appeals were dismissed, the matter came up before the Supreme Court. The answer to the question was, that there is no provision in the DRT Act or the Securitisation Act, by which first charge is created in favour of Banks, financial institutions or secured creditors qua the property of the borrower and that Section 13(1) of the Securitisation Act provides for limited primacy to the right of a secured creditor to enforce security interest vis-?-vis Section 69 or 69-A of the Transfer of Property Act. It was further held that the Parliament

incorporated the non-obstante clause in Section 13 of Securitisation Act, 2002 and gave primacy to the right of secured creditor vis-à-vis other mortgagees who could exercise rights under Sections 69 or 69-A of the Transfer of Property Act and that primacy has not been extended to other provisions like Section 38-C of the Bombay Act and Section 26-B of the Kerala Act, by which first charge is created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc. It was further held that if Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, in priority, over the first charge created under State legislations, then it would have incorporated provisions similar to those contained in Section 14-A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act and Section 529A of the Companies Act, 1956 and ensure that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. There being no provision incorporated either in the DRT Act or Securitisation Act, it was held that it was not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act, on the one hand, and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act, on the other, and the non-obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation would not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case might be.

12. As a matter of fact, at paragraph 172 of the judgment in Central Bank of India's case, Apex Court extracted its earlier judgment in State Bank of Bikaner and Jaipur Vs. National Iron and Steel Rolling Corporation and Others, wherein it was observed that the first charge created u/s 11-A of the Rajasthan Sales Tax Act will operate on the property as a whole and not only on the equity of redemption.

13. Regard being had to the provisions of the State Financial Corporations Act, it is clear that a first charge on the property is created clearly giving priority to the dues of the said statutory authority over all other charges on the property, on the basis of the mortgage, since the Income Tax Act, 1961 does not provide for a priority to the statutory charge over all other charges including mortgage under the "SFC Act".

14. Although, learned counsel for the respondent points to Rule 93 of the Second Schedule of the Income Tax Act, 1961, which contemplates that nothing in the said Schedule shall affect any provision of the Act whereunder tax is a first charge upon any asset, is unable to refer to any provision of Income Tax Act,

whereunder income tax due can be treated as a first charge on the assets of the assessee. So also, reference made to Section 281 of the Act too is not in the direction of establishing creation of a prior charge in favour of the Income Tax department over the assets of the assessee. Since what is contemplated under the Section is in relation to certain transactions of transfer being void during the pendency of an assessment proceeding.

15. Learned counsel for the petitioner is correct in his submission that in similar though not identical circumstances, the Division Bench of the High Court of Punjab and Haryana in *Axis Bank Ltd. Vs. Commissioner of income tax, Ludhiana* [2012] 17 taxmann 139 (Punj. & Har.), declined to accept the plea of the Revenue that Rule 93 of the Second Schedule of the Income Tax Act, 1961 creates a prior charge over the assets of the assessee even though there is a provisional attachment order issued u/s 281B of the Act.

16. Interestingly, it must be noticed that the Tax Recovery Officer in the letter dated 27.01.2006 Annexure "F", by way of a reply to the notice dated 06.05.2005 of the petitioner through its learned counsel, conceded to the fact that petitioner had a prior charge over the immovable properties and that the income tax department be treated as the second "mortgagor" (to be read as mortgagee). Though the learned counsel for Revenue submits that the Tax Recovery Officer's opinion would not change the statutory provisions, I am not impressed by that submission in the light of the view supra. Tax Recovery Officer's opinion is valid and not the opinion of the Commissioner of Income Tax in his letter dated 14.07.2011 Annexure "J". In the result, this petition is allowed in part. The order of the Tax Recovery Officer attaching property bearing No. 32/2A of Bangra Kulur Village, Mangalore, mortgaged in favour of the petitioner is quashed and the respondent - income tax authorities are restrained from interfering with the process of sale of immovable properties, subject matter of mortgage, in favour of the petitioner, for recovery of its dues. In the event of the petitioner putting up for sale the immovable properties in question and after appropriation of the sale consideration towards its dues, remainder if any, is directed to be made over to the income tax Department for appropriation against its dues from the assessee, none other than Vivian Kamath D'souza; Veekay Realtors Pvt. Ltd.; Veekay Promoters Pvt. Ltd.; Veekay Developers Pvt. Ltd.; Veekay Home Builders Pvt. Ltd.; Shalimar Construction Pvt. Ltd. and Canara Builders.