(2009) 11 KL CK 0020

In the High Court Of Kerala

Case No : Writ Petition (C) No. 1867 of 2008

Kutaguptan APPELLANT

Vs

Canara Bank RESPONDENT

Date of Decision : 23-11-2009

Acts Referred:

Income Tax (Certificate Proceedings) Rules, 1962 — Rule 68B
Income Tax Act, 1961 — Section 245I
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 19(20), 19(22), 24

Citation : (2010) 2 BC 264 : (2010) 1 ILR (Ker) 464 : (2010) 1 KLT 361

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : Mathew Skaria, for the Appellant; P. Parameswaran Nair, Asst. Solicitor General and P. Gopinath Menon, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—Petitioner being the guarantor for a loan, his property was mortgaged to the creditor bank. That item, which is a schedule to the recovery certificate issued by the Debts Recovery Tribunal in terms of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, for short, the "RDB Act", is sold in enforcement of that certificate. He challenges that sale contending that the final order in the original application was issued by the Tribunal on 27.2.2004 and a period of three years and seven months from the end of the financial year in which that order was/issued, had elapsed before the sale was held on 21.11.2007 and therefore, the said sale is void being violative of Rule 68B of the Second Schedule to the Income Tax Act, 1961, for short, the "IT Act". The argument on his behalf is that Rule 68B of the Second Schedule stipulates an outer time limit of three years, for the sale, from the end of the financial year in which the order giving rise to the demand became final in terms of the provisions of Chap.XX of the I.T. Act or the attachment has become conclusive under the provisions of Section 245-I of the I.T. Act.

2. It is argued on behalf of the creditor bank that the provisions of the Second Schedule to the IT Act would apply only to the extent that they could be applied in terms of Section 29 of the RDB Act and that the interpretation and construction of the aforesaid statutes, as sought to be made on behalf of the petitioner, is unsustainable.

3. Petitioner earlier obtained Ext.P4 judgment which refers to a Writ Petition filed before that by his son-in-law, the co-obligant.

4. The legislative command in Section 19(22) of the RDB Act is that on the Tribunal passing the final order under Sub-section (20) of Section 19, the Presiding Officer shall issue a certificate under his signature to the Recovery Officer, for recovery of the amount of debt specified in the certificate on the basis of the order of the Tribunal. The proceedings before the Recovery Officer would be generated by the communication of the recovery certificate by the Tribunal to the Recovery Officer. This is the operational modality provided for, by Sections 19(22), 25, 28 and 29. No independent application for enforcing the recovery certificate is provided for, or contemplated. Unlike the execution petitions provided for by the Rules in Order XXI of the Code of Civil Procedure, there is no need for an application for "execution" or enforcement of a recovery certificate under the RDB Act. A further legislative clue is also available in this regard. Section 24 of the RDB Act provides that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to an application made to a Tribunal. That the legislature prescribed period of limitation only for an application to the Tribunal and the absence of any provision requiring an application to the Recovery Officer seeking enforcement of the certificate, unequivocally show that the enforcement is merely part of the whole proceedings initiated as per the application to the Tribunal.

5. The Presiding Officers and the Recovery Officers of the Tribunal are exercising quasi judicial functions enforcing recovery by a mode prescribed by the legislation. By virtue of Section 18, there is a clear ouster of jurisdiction of ordinary courts in relation to matters specified in Section 17 of the RDB Act. By such ouster of the jurisdiction, the necessary inference is that the recovery through the machinery under the RDB Act is the mandated substitute. No creditor who comes to a Court or Tribunal seeking relief would stand satiated with a paper certification that he has successfully established his claim. He has to have the relief; the fruit, meaning thereby, the money for which he has sued. If the creditor bank has applied to the Tribunal for relief within the period of limitation in terms of the Limitation Act read with Section 24 of the RDB Act, it is the boundenduty of the Tribunal, including the Presiding Officer and the Recovery Officer, to deliver the fruit of that litigation to the successful party. With no accusation being available against the creditor, even if there is delay in the office of the Recovery Officer, that cannot be used to torpedo the recovery proceedings.

6. Section 25 of the RDB Act provides attachment and sale of immovable property as one of the modes of recovery of debt, in the enforcement of the

recovery certificate. The concept of attachment and sale of immovable property in Clause (a) of Section 25 of the RDB Act does not, necessarily, mean that only a property which is attached, could be sold. Nor does it mean that notwithstanding the quality of any encumbrance created by the debtor in favour of the creditor on an item of property, it has to be, necessarily, attached as a prelude to sale. When security is created by way of mortgage and other transactions which result in encumbrance, no attachment is required, to enforce the liability that is already fastened on such property. The sale of the mortgaged property by the enforcement of the certificate against the mortgaged property is nothing but enforcement of the mortgagee''s right for recovery by sale. The question of attachment does not arise in such cases. Rights under mortgages and the like, as in case in hand; on the strength of which recovery proceedings could be had without any further "attachment", cannot be rapped off in favour of debtors by making reference to Rule 68B of the Second Schedule to the I.T. Act. That will only frustrate the very purpose of the RDB Act.

7. Without prejudice to the modes u/s 25 of the RDB Act, Recovery Officer may take recourse to Section 28, like deduction from salary etc. After providing detailed procedures for recovery under Sections 25 and 28, Section 29 of the RDB Act provides that the provisions of the Second and Third Schedules to the IT Act 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 the RDB Act instead of the I.T. Act. This provision in Section 29 does not result in a wholesale incorporation by reference, of the provisions contained in the Second and Third Schedules of the I.T. Act or of the provisions in the Income Tax (Certificate Proceedings) Rules, 1962, into the RDB Act, but makes those provisions applicable only with necessary modifications as may be required and as far as possible. Those provisions are to be modulated and applied to give effect to the purpose of the RDB Act, that is, to effectuate recovery in accordance with law, and not to stultify it by conceiving bottle-necks.

8. Adverting to Rule 68B of the Second Schedule, it can be seen that the restriction is on sale and the restriction is made referable to the conclusiveness of the demand and the finality of the case. Such conclusiveness is made on the basis of Section 245-I and Chap.XX of the I.T. Act. The provisions in Chap.XX of the I.T. Act are not only not incorporated by reference into the RDB Act, but are not even referred to in Section 29 of the RDB Act as relatable to the proceedings under that Act. Therefore, Rule 68B of the Second Schedule to the I.T. Act which applies to proceedings covered by Section 245-I or Chap. XX of the I.T. Act, does not, in any view of the matter, apply to proceedings under the RDB Act.

9.I may also note that no amount has been paid or remitted in spite of the clear averments in Ground No. 1 of this Writ Petition filed on 15.1.2008 that the petitioner is willing to pay off the entire purchase money within a period of one month.

In the result, this Writ Petition fails. The same is accordingly dismissed. Having regard to the fact that the petitioner is a debtor facing proceedings under the RDB Act, an order of costs, though called for, is not being imposed against him.