(2008) 10 BOM CK 0046

In the Bombay High Court

Case No : Writ Petition No. 238 of 2002

Lazarus D''Souza APPELLANT

Vs

National Small Scale Industries Co-operation Ltd. and Others RESPONDENT

Date of Decision : 06-10-2008

Acts Referred:

Goa, Daman and Diu Public Moneys (Recovery of Dues) Act, 1986 — Section 2, 3, 3(1), 3(2), 3(3)

Citation : (2009) 2 BomCR 452

Hon'ble Judges : Deshpande A.P., J;Britto N.A., J

Bench : Division Bench

Advocate : Valmiki Menezes, for the Appellant; Ajit R. Kantak, R. Kantak and W. Coutinho, Government Advocate, for the Respondent

Judgement

Deshpande A.P.

1. The petitioner questions the legality and validity of an order dated 25/2/2002 passed by the respondent No. 3, the Deputy Collector and District Recovery Officer whereunder a sum of Rs. 2,97,859/- is directed to be recovered from the present petitioner on account of he having furnished personal guarantee for higher purchase loan sanctioned to the respondent No. 2. The second respondent is a proprietary concern of which one Mr. Marshall D''Souza is the proprietor. Mr. Marshall D''Souza is the brother of the petitioner and is the principal borrower. The respondent No. 1 is a Corporation which had advanced higher purchase loan to the respondent No. 2 borrower.

2. The proceedings in question are governed and regulated by a special statute called the Goa, Daman and Diu Public Moneys (Recovery of Dues) Act, 1986. Section 2(c) defines "Corporation" so as to mean the Financial Corporation established or functioning in this Union territory and includes any other Corporation owned or controlled by the Central or the State Government specified by the State Government by a Notification in the Official Gazette. It is undisputed and is an admitted position that the respondent No. 1 is a

Corporation within the meaning of Section 2(c) of the Act.

3. Section 3 of the Act provides for recovery of dues as arrears of land revenue from a person who fulfills the character envisaged in Sub-Section (1). The Act provides for a scheme for the speedy recovery of certain classes of dues payable to the State Government, Financial Corporations and other Corporations owned or controlled by the State Government, Government Companies and nationalised and other Banks. With the said object in mind the statute prescribes an expeditious mode for recovery of the dues. Section 3 reads thus:

Recovery of dues as arrears of land revenue-

(1) Where any person is a party-

(a) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire purchase of goods sold to him by the State Government, the Corporation or as the case may be; the Government Company by way of financial assistance; or

(b) to any agreement relating to a loan, advance or grant given to him relating to credit in respect of, or relating to hire purchase of goods sold to him by a Bank or Government Company, as the case may be under Government sponsored scheme; or

(c) to any agreement relating to a guarantee given by the State Government or the Corporation in respect of a loan raised by an industrial concern; or

(d) to any agreement providing that any money payable thereunder to the State Government or the Corporation shall be recoverable as arrears of land revenue under the provisions of the Goa, Daman & Diu Land Revenue Code, 1968 (Act 9 of 1969) and such person.

(i) makes any default in payment of the loan or advance of any installment thereof; or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any installment thereof, or

(iii) otherwise fails to comply with the terms of the agreement then, in the case of the State Government such Officer as may be authorised in that behalf by the State Government by Notification in the Official Gazette, in die case of a Corporation or a Government Company, the Managing Director thereof or where there is no Managing Director, the Chairman thereof, by whatever name called and in the case of a Bank, the local agent thereof by whatever name called, may send to the Collector a certificate as early as possible in the prescribed form mentioning the sum due from such person and requesting that such sum may be recovered as if it were an arrear of land revenue under die provisions of the Goa, Daman and Diu Land Revenue Code, 1968 (Act 9 of 1969).

(2) The Collector on receiving the certificate shall after making such enquiries (including giving hearing to the party affected) as he deems fit proceed to recover the amount stated therein as aforesaid as arrears of land revenue under the provisions of the Goa, Daman and Diu Land Revenue Code, 1968 (Act 9 of 1969).

(3) On recovery of any amount under Sub-section (2), the same shall be paid over to the State Government, Corporation, Government Company or as the case may be, bank after deducting, except in the case of amount to be paid to the State Government, such portion of the amount realised, as cost of collection, as the Collector, may deem to be reasonable.

(4) No suit for the recovery of any such due as aforesaid shall lie in a Civil Court against any person referred to in Sub-section (1) and no injunction shall be granted by a Civil Court in respect of any action taken or intended to be taken in pursuance of the right conferred by this section.

4. Perusal of the said section brings home the fact that when a person obtains a loan, which includes a transaction of hire purchase, from the State Government or the Corporation who extends financial assistance, the said amount shall be recoverable from such person under the provisions of the said Act as arrears of land revenue. A summary mechanism is provided for to enable such a recovery. Concluding part of Sub-section (1) of Section 3 lays down that in the case of the State Government, such Officer as may be authorised in that behalf by the State Government by issuing Notification in the Official Gazette, in the case of a Corporation or a Government Company, the Managing Director thereof or where there is no Managing Director, the Chairman thereof, by whatever name called and in the case of a Bank, the local agent thereof by whatever name called, may send to the Collector a certificate as early as possible in the prescribed form mentioning the sum due from such person and requesting that such sum may be recovered as if it were an arrear of land revenue. Thus the foundation for making recovery of the amount is the certificate issued by the Authorised Officer specifying the sum due from such person. In the scheme of Section 3, the certificate so issued is by itself executable and assumes the character of a decree. Sub-section (2) then provides that the Collector on receiving certificate shall after making such inquiries (including giving hearing to the party affected) as he deems fit proceed to recover the amount sated therein as aforesaid as arrears of land revenue. Thus the only safeguard for a person against whom a certificate is issued is an inquiry to be conducted by the Collector. This inquiry to be held by the Collector necessarily has to be touching the particulars furnished by the Authorised Officer/Competent Authority and cannot travel beyond the same. Sub-section (3) thereafter lays down that the amount recovered by the Collector shall be paid over to the State Government. In case of Corporation, Government Company or the Bank as the case may be the Collector may deduct from the amount realised, such sum as cost of collection, as the Collector, may deem to be reasonable. Sub-Section (4) of Section 3 bars the jurisdiction of Civil

Court and declares that no suit for recovery of any such

sum due, shall lie in a Civil Court against any person referred to in Sub-section (1) and no injunction shall be granted by a Civil Court in respect of any action taken or intended to be taken in pursuance of the right conferred by this section.

5. Section 4 protects the interest of the State Government, the Corporation, etc. in any property created by any mortgage, charge, pledge, or other encumbrance. Sub-section 1(b) protects the right of the State Government or the Corporation to take up appropriate proceedings against any person other than a person referred to in Section 3, whereas Sub-section 2, inter alia, provides that where the property of any person referred to in Section 3 is subject to any mortgage, charge, pledge, or other encumbrance in favour of the State Government, the Corporation, a Government Company or a Bank then in every case of a pledge of goods, proceedings shall first be taken for sale of the goods pledged, and if the proceeds of such sale are less than the sum due, then proceedings shall be taken for recovery of the balance, as if it were an arrear of land revenue. The proviso to Sub-section 2(a) lays down that where the Collector is of the opinion that it is necessary so to do for safeguarding the recovery of the sum due to the State Government, Corporation, Government Company or Bank, as the case may be, he may, for reasons to be recorded direct proceedings to be taken for the recovery of the sum due as if it were an arrear of land revenue before or at the same time the proceedings are taken for sale of the goods pledged. Section 4(2)(b) provides that in every case of mortgage, charge or other encumbrance of immovable property the said property or as the case may be the interest of the defaulter therein, shall first be sold in proceedings for recovery of the sum due from that person as if it were an arrear of land revenue, and any other proceedings may be taken thereafter only if the Collector certifies that there is no prospect for realisation of the entire sum due through the first mentioned process within reasonable time. Section 6 empowers the State Government to make rules and Section 7 declares that all suits of the nature referred to in Sub-section (4) of Section 3 pending in any Civil Court immediately before the commencement of the Act shall abate upon such commencement. Thus the only provisions which relate to the recovery are contained in Section 3 and Section 4 of the Act. Section 4 is aimed at protecting the interest of the State Government, Corporation, etc. and the only limited protection that is available to the borrower or to the guarantor is comprised in Sub-section (1) and Sub-section (2) of Section 3.

6. As pointed out hereinabove Sub-section 1 obliges the authorised officer to issue a certificate furnishing therein the details required to be so furnished in a form appended to the rules, as the certificate by itself is intended to be put in execution under the scheme of the Act. The Authorised Officer is thus expected to apply his mind while issuing such a certificate. There is only one stage at which the Authorised officer is obliged to apply his mind in regard to the person from whom the amount is to be recovered and the exact sum due to be

recovered from the person named in the certificate. The Collector on receipt of the certificate is invested with a limited power to make an inquiry touching the contents of the certificate. The Collector who is expected to recover the sum due as arrears of land revenue is not empowered to travel beyond the particulars furnished in the certificate.

7. Reverting back to the facts of the present case, in the light of the scheme of the Act, it is required to be stated that the respondent No. 1 had issued a certificate in the name of the respondent No. 2 i.e. M/s. Johan Engineering Industry, Proprietor Mr. Marshall D''Souza and a given sum is mentioned in the certificate as due and recoverable from the said person as arrears of land revenue. It is an admitted position that there is no certificate issued against the present petitioner by the Authorised Officer of respondent No. 1. The application and the certificate accompanying the same issued by respondent No. 1 against respondent No. 2 is extracted herein below.

APPLICATION IN THE COURT OF DY. COLLECTOR/ DISTRICT RECOVERY OFFICER NORTH GOA DISTRICT, PANAJI-GOA.

Case No._______

The National Small Industries

Corporation Ltd., 5, Treeveni Building, Opp. St. Inez Church, St. Inez, Panaji, Goa - 403 001.

.... Applicant.

Vs.

M/s. Johan Engineering Industry, Prop. Mr. Marshall D''Souza, Behind Hotel La Joy, Post Porvorim, Bardez--Goa.

.... Respondent.

MAY IT PLEASE YOUR HONOUR

The Applicant in this case respectfully submits as under:

The applicant has sanctioned a Hire Purchase Term Loan of Rs. 7,03,035.00 to the borrower and the sum of Rs. 7,03,035.00 was disbursed to the borrower as shown in the statement of Accounts annexed to the Recovery Certificate.

However, as per the Terms and conditions annexed hereto the borrower has not paid the total amount of Rs. 2,97,859.00 (as on March 98) is to be recovered from the respondent as on the date of Recovery Certificate.

All efforts were made by our Office to recover the dues from the respondent but the dues could not be realised.

The applicant therefore prays that the Government dues of Rs. 2,97,859.00 may please be recovered from the respondent as if it were arrears of Land Revenue as per the provisions of the Goa, Daman & Diu Public Moneys (Recovery of Dues) Act, 1986 and thereunder and remit it to our office.

Branch Manager Nsic Ltd. Panaji-Goa.

Encl.: 1. Recovery Certificate in Form "A" (See Rule 2).

Certificate under Sub-section (1) of Section 3.

2. A copy of Statement of Accounts.

3. A Copy of Agreement.

CERTIFICATE FORMA

Certificate u/s (1) at Section 3

From: The Branch Manager, The National Small Industries Corp. Ltd., 5, Treeveni Building, Opp. St. Inez Church, Panaji-403 001-Goa.

To, The Collector, District Recovery Cell, Goa.

The sum of Rs. 2,97,859/- is payable by the Party to the NSIC Ltd. 5, Treeveni Building, St. Inez, Panaji, Goa--403 001 and you are hereby requested to recover the said sum as if it were an arrear of land revenue and remit it to my Office after deducting the cost of recovery. Place : Goa Date: 6.4.1998

In the application filed by the respondent No. 1 (herein) no request was made for recovery of the amount from the petitioner. The application mentions that the sum of Rs. 7,03,035/- was disbursed to the borrower as shown in the statement of accounts annexed to the recovery certificate. A sum of Rs. 2,97,859/- (as on March, 1998) was stated to be recoverable from the respondent No. 2 (herein) and a prayer for recovery of the said sum from the respondent No. 2 (herein) was made. Perusal of the certificate reveals that the particulars furnished therein are of the respondent No. 2 alone and no particulars whatsoever in regard to the petitioner/guarantor have been furnished. It is crystal clear that no particulars of the guarantor are furnished and no prayer for recovery of the amount from the petitioner is made in the application filed or in the certificate issued by the respondent No. 1, as the liability of the petitioner/guarantor would arise only on failure to recover the amount from the borrower. This position is further made clear from the terms of the personal guaranty purported to have been executed by the petitioner in favour of the respondent No. 1 on 10/08/1985. The relevant paragraph reads thus;

Now it is hereby agreed and declared as follows:

That in the event of failure by Shri Marshall D''Souza to pay the dues of all denominations to the owners for all losses and damages sustained by the owners....

8. Record reveals that during the pendency of the proceedings before the Deputy

Collector/respondent No. 3, notices came to be issued to the proprietor Mr. Marshall D''Souza, but the notice was returned back by the Talathi by stating that Mr. Marshall D''Souza was not residing at the given address. It was also informed that the borrower has now shifted his place of residence to Madhya Pradesh. Para 3 of the impugned order observes that during the course of hearing it was brought to the notice by the applicant (respondent No. 1 herein) that one Lazarous D''Souza (the present petitioner) has executed personal guaranty securing the loan advanced in favour of Marshall D''Souza on 10/08/1985. It was then informed by the applicant that the guarantor is the brother of Marshall D''Souza. In view of this disclosure made by the applicant before the respondent No. 3 notices came to be issued and served on the present petitioner. The petitioner had objected to the proceedings being taken against him for recovery of the arrears of hire purchase loan amount. The impugned order records the reasons for rejection of the petitioner''s objection in paragraph 5 and 12. The reasons are:

(1) That the petitioner is the brother of the borrower,

(2) That the petitioner has failed to provide and furnish details of the movable and/or immovable property of the borrower,

(3) That the petitioner has not co-operated in the proceedings.

For the reasons stated herein above, the respondent No. 3 has held the petitioner liable to pay the amount and directed recovery of the same from the petitioner as arrears of land revenue.

9. In this fact situation, the learned Counsel for the petitioner has submitted that the Collector has no jurisdiction to proceed against any person unless and until a certificate is furnished by the State Government or the Corporation duly signed by the Authorised Officer indicating the name of the person from whom the amount is to be recovered with other details and particulars thereof. It is contended that what is capable of being executed is the recovery certificate issued by the Authorised Officer naming a given person and stipulating the amount to be recovered from such a person. It is also contended that the scope of inquiry contemplated by Sub-section (2) of Section 3 is limited and cannot extend beyond the particulars required to be stated in the certificate. Thus, the submission is that in the absence of a certificate being issued by the Authorised Officer it is impermissible for the Collector and it would be beyond his power and authority to proceed against the petitioner arid hold him liable to pay a given sum of money and direct the recovery of that amount as arrears of land revenue. The submission is well merited. The learned Counsel appearing for respondent No. 1 has tried to contend that even in the absence of the certificate being issued by the Authorised Officer of the State Government or the Corporation it would be open for the Collector to make an inquiry with a view to find out as to who others, in addition to the borrower, are liable for the payment of the amount due and if the Collector pursuant to such an inquiry reaches a conclusion that a given

sum of money is due and recoverable either from the Guarantor or such other person, he can proceed to recover the amount from them as arrears of land revenue. We are afraid we cannot subscribe to this view. In the scheme of the Act, the Collector has been named as a recovery officer with a limited jurisdiction and the jurisdiction to initiate inquiry would be dependent upon the existence of validly issued certificate by an Authorised officer, furnishing the particulars as required under the rules in the form prescribed. In the absence of a certificate being issued against a given person, stipulating a definite sum of amount due, the Collector in the midst of an inquiry against the borrower cannot proceed against third parry which is not named in the certificate and in regard to whom no particulars are furnished to the Collector. Absence of the particulars to be furnished in the certificate would not even enable the Collector to make a proper inquiry. The application of mind by a responsible officer is only at one stage i.e. when a certificate is issued by the authorised officer of the State Government or the Corporation. There are hardly any safeguards for the borrower or the Guarantors in the scheme of the Act. The only safeguard against a drastic power of recovery is application of mind by the Authorised officer while issuing the certificate. If this be the position, we have no hesitation in holding that the requirement for issuing a certificate of recovery by the Authorised Officer is sine qua non for initiation of the inquiry by the Collector u/s 3(2) of the Act. In the absence of a certificate as contemplated by Section 3, Sub-section (1), the Collector would have no jurisdiction to make an inquiry. The respondent No. 3 cannot fasten any liability on the petitioner and direct the recovery of a sum purportedly due from him in the absence of a certificate issued by the Authorised Officer.

10. In the result, in our view, the impugned order passed by the Collector dated 25/02/2002 in Case No. DRO (N)/3(92)/98/NSICPNJ/206 is wholly unsustainable in law being without jurisdiction and thus deserves to be quashed and set aside. The writ petition thus succeeds. Rule made absolute in terms of prayer Clause (a), with no order as to costs.