
(2008) 08 MP CK 0015

In the Madhya Pradesh High Court

Case No : Writ Petition No. 248 of 2002

Mahaveer Enterprises

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 19-08-2008

Acts Referred:

Madhya Pradesh Land Revenue Code, 1959 — Section 146
State Financial Corporations Act, 1951 — Section 29

Citation : (2008) 4 MPLJ 278

Hon'ble Judges : Viney Mittal, J

Bench : Single Bench

Advocate : G.M. Chaphekar, with Ms. Vandana Kasrekar, for the Appellant;
Anand Pathak, Dy. Government Advocate for Respondent Nos. 1 and 2 and
Shekhar Bhargava with Ms. Ritu Bhargava, for the Respondent

Final Decision : Allowed

Judgement

Viney Mittal, J.

The petitioner-M/s Mahaveer Enterprises is a proprietorship concern and has approached this Court challenging a notice dated January 30, 2002 issued u/s 146 of the M.P. Land Revenue Code whereby the property purchased by the petitioner from M. P. Financial Corporation has been attached and sealed.

The facts leading to the controversy may be noticed as follows.

M/s Prominent Cement Limited (hereinafter referred to as borrower-company), a Company incorporated under the Companies Act, engaged in the manufacture of cement, had obtained financial assistance from M.P. Financial Corporation-respondent No. 3. The property of borrower-company was mortgaged as security for the repayment of the loan. The borrower-company never repaid the loan and became a defaulter and was ultimately registered under the Sick Industrial Companies Act, 1985 with Board for Industrial and Financial Reconstruction (BIFR) on March 11, 1998.

It appears that the aforesaid borrower-company was also defaulter in payment of the Commercial Tax to the State Government. It further appears from the record that on account of the default for repayment of the loan amount by the borrower-company, the M.P. Financial Corporation took over the said industrial unit in exercise of its powers u/s 29 of the State Financial Corporation Act (hereinafter referred to as Act). Ultimately, the industrial Unit was put for sale. An offer was received from one M/s Pappu Iron Stores who offered to purchase the plant and machinery for an amount of Rs. 41,30,000/-. The said offer appears to have been accepted by M.P. Financial Corporation vide a communication dated October 20, 2001. It also appears that later on M/s Pappu Iron Stores withdrew the aforesaid offer in favour of the petitioner and informed the said fact to M.P. Financial Corporation vide a communication dated November 8, 2001 and accordingly, requested for transfer of the offer in the name of M/s Mahaveer Enterprises. M.P. Financial Corporation agreed with the proposal offered on behalf of the petitioner and accordingly, petitioner deposited an amount of Rs. 41,30,000/- and the actual physical possession of plant and machinery etc. was handed over to the petitioner-Firm on December 10, 2001.

It further appears from the record that earlier on May 12, 1988 an order had been passed by the Commercial Tax Officer attaching the property of the erstwhile borrower-company on the ground that the aforesaid borrower-company was defaulter of the commercial tax. On the aforesaid attachment order, an objection was raised by M.P. Financial Corporation through a communication dated January 18, 2002, bringing the detailed facts to the notice of the Tax Department and maintaining that since the property in question of the borrower-company was already mortgaged and the matter was before BIFR, therefore the attachment of the property of the said borrower-company could not be effected. On the objection raised by MPFC, the Commercial Tax Department did not take any further steps.

The petitioner has averred that after it had purchased the property and wanted to shift the machinery from the Industrial Unit to its other Unit at Indore, it was served with a notice dated January 30, 2002 whereby it was informed of the attachment and the property in question was also ordered to be sealed.

It is in these circumstances that the petitioner is before this Court.

Two separate replies have been filed in the petition by the respondents. A reply has been filed by the M.P. Financial Corporation, whereby the facts as claimed by the petitioner, have not been contested, but further details have been given that the property of the original borrower-company was taken over by the Corporation u/s 29 of the Act and in terms of section 29 of the Act, the property of the borrower-company had been sold in favour of the petitioner-company and the petitioner-company had acquired a title free from all encumbrances. M.P. Financial Corporation has also maintained that the attachment which has been claimed to have been ordered had been effected without any legal authority and in any case the loan of the borrower-Company was much prior to the default

committed by it towards the Commercial Tax Department.

A separate reply has been filed by the Commercial Tax Department. In the aforesaid reply a contest has been offered. It has been maintained that the tax dues against the borrower company were to be treated as first charge on its property and therefore the recovery proceedings initiated against the erstwhile property of the Company were as per section 146 of the M.P. Land Revenue Code.

The Commercial Tax Department has also maintained that M.P. Financial Corporation had entered into an agreement with M/s Pappu Iron Stores only and at no stage had any agreement with the present petitioner-Firm and therefore the petitioner-Firm could not be treated to be protected u/s 29 of the Act. It has also been maintained that the sale in favour of a purchaser by the Corporation was to be subjected to tax liability towards of borrower-company in preference over outstanding dues towards the MPFC.

I have heard Shri G.M. Chaphekar, learned senior counsel for the petitioner, Shri Anand Pathak, learned Dy. Government counsel for the respondents No. 1 and 2 and Shri Shekhar Bhargava, learned senior counsel for respondent No. 3-M.P. Financial Corporation and with their assistance have also gone through the record of the case.

The facts which are not in dispute indicate that the M/s Prominent Cement Limited had obtained a loan from M.P. Financial Corporation in the year 1983 and accordingly had mortgaged its land, building, plant and machinery as security towards repayment of the loan. Later on the aforesaid borrower-company had also filed a petition before the BIFR claiming itself to be a sick Company. The said petition was registered in the year 1988. Therefore, it is apparent that not only on account of the property under a prior mortgage with M.P. Financial Corporation, but also on account of the fact that the petition filed by the borrower-company was pending with BIFR, attachment of the property of the said borrower-company by the Commercial Tax Department on May 12, 1988, was of no consequence and was liable to be ignored. In fact an objection in this regard was also taken by MPFC through a communication dated January 18, 2002, and thereafter no steps, whatsoever, were taken by the Commercial Tax Department.

In any case, the rights of M.P. Financial Corporation were concededly prior in time to Commercial Tax Department and therefore, were liable to be discharged at the first instance from the mortgaged property. It also appears from the record that the petition filed by the borrower-company was dismissed by BIFR on January 11, 2000 and therefore, after culmination of the said proceedings, M.P. Financial Corporation initiated proceedings for auction of the property of the borrower-Company. An offer was made by M/s Pappu Iron Stores, New Delhi, but during the negotiation with the said Firm, the aforesaid Firm communicated to M.P. Financial Corporation that the offer made by it be substituted in favour of the petitioner-Firm. The aforesaid request made by M/s Pappu Iron Stores was

accepted by M. P. Financial Corporation and therefore, the aforesaid offer of Rs. 41,30,000/- initially made by M/s Pappu Iron Stores was treated as an offer made by the petitioner-Firm.

Thus, the sale of the property in favour of the petitioner-Firm is nevertheless a sale by the Corporation to the petitioner-Firm u/s 29 of the Act and therefore u/s 29(2) of the said Act, the title acquired by the purchaser is to be treated to be free from all encumbrances. Any liability of M/s Prominent Cement Limited (original borrower company) could not, by any stretch of imagination, be fastened upon the petitioner-Firm. The stand taken by the Commercial Tax Department is absolutely contrary to the provisions of section 29(2) of the Act.

Although a great reliance has been placed by the Commercial Tax Department on the attachment order with regard to property of the defaulter Company, but it is apparent that at the time of the aforesaid attachment, the matter was already pending before the BIFR, therefore in terms of section 22 of Sick Industrial Companies (Special Provisions) Act, 1985, the aforesaid attachment was of no legal consequence and was liable to be ignored.

Before parting with this order, it may be noticed that Shri Anand Pathak, learned Dy. Government counsel has argued that the Tax recovery against a defaulter was treated to be as first charge on the property of the defaulter and therefore, such a recovery for the tax amount was to take precedence over any other recovery. Learned counsel has placed reliance upon a judgment of the Apex Court in the case of Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, .

The facts, as already noticed above, show that M.P. Financial Corporation had already mortgaged the property of the borrower-Company in its favour in the year 1983. After the said property stood mortgaged in favour of M.P. Financial Corporation, the liability of the said Company towards the Commercial Tax could not be fastened upon the property of the said Company in preference over the mortgage liability. As a matter of fact, the said property was not even available for creation of any charge by the Tax Department. Even otherwise, as per section 46B of the Act, the provisions of the said Act shall operate notwithstanding provisions of any other law and therefore shall be deemed to have an overriding effect.

The reliance by the learned counsel for the respondent upon the judgment of Dena Bank (supra) is wholly misplaced. In para 10 of the aforesaid judgment, it has been held by the Apex Court that Crown's preferential right to recovery of the debts over other creditors is confined to ordinary or unsecured creditors but principles of equity and good conscience do not accord the preferential right for recovery of its debt over a mortgagee or pledgee of goods or secured creditor. The aforesaid observations made by the Apex Court may be noticed as follows :

10. However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India)

do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In *Giles vs. Grover* it has been held that the Crown has no precedence over a pledgee of goods. In *Bank of Bihar vs. State of Bihar* the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in *Law of Mortgage* (TLL, 7th Edn., p.386)

It seems a government debt in India is not entitled to precedence over a prior secured debt.

Consequently, I find that the Commercial Tax Department has absolutely no justification or jurisdiction to order the attachment and sealing of the property of the petitioner, which had been purchased by it from M. P.F.C.

The present petition is thus allowed and the notice dated January 30, 2002 issued by the Commercial Tax Department, Annexure P-7 against the petitioner and the seizure memo, Annexure P-8 are hereby quashed.

C.C. as per rules.