

(2014) 08 AHC CK 0217

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 1669 of 2010

State Bank of India

APPELLANT

Vs

Assistant Commissioner of C.E. and S.T.

RESPONDENT

Date of Decision : 07-08-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11, 31
Customs Act, 1962 — Section 142
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2)
Transfer of Property Act, 1882 — Section 2(2d), 69, 69A

Citation : (2014) 309 ELT 35

Hon'ble Judges : Tarun Agarwala, J; Dr. Satish Chandra, J

Bench : Division Bench

Advocate : Satish Chaturvedi, Counsel, Advocate for the Appellant; Shailendra Jaiswal, Vinod Kant Srivastava and B.C. Rai, Counsels, Advocate for the Respondent

Judgement

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Tarun Agarwala, J.—The facts leading to the filing of the present writ petition is, that respondent No. 1 is a company incorporated under the Companies Act, 1956 and is engaged in the manufacture and sale of steel. The said company availed credit facilities aggregating Rs. 525 lacs from the petitioner's bank. Respondent Nos. 3 to 6, being Directors in the said company, executed various documents for availing the credit facilities. The credit facilities was in relation to stock, cash credit, term loan, etc. For the aforesaid purposes, respondent Nos. 2 to 6 executed agreement for loan dated 2nd August, 2007. An agreement for hypothecation of goods and assets was also executed on 2nd August, 2007. The machineries was also placed in favour of the petitioner bank. Respondent Nos. 3, 4, 5 and 6 also executed deed of guarantee in favour of the petitioner bank. From the documents so executed the land, building, fixed assets have been mortgaged/charged/hypothecated with the petitioner bank for the purpose of

availing credit facilities. Respondent No. 2 company defaulted in the payment of the loan amount and, accordingly, the petitioner initiated recovery proceedings by issuing a demand notice dated 30th May, 2008 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Thereafter, the petitioner filed Original Application No. 50 of 2010 before the Debts Recovery Tribunal, Allahabad for recovery of Rs. 9.26 crores together with pendente lite and future interest, which is pending consideration.

2. It transpires that the Central Excise department initiated proceedings against the respondent No. 2 company for payment of excise duties and, an order imposing a demand of duty along with interest and penalty was issued on 12th March, 2008 against which the respondent No. 2 company filed an appeal. Based on the aforesaid demand, the Central Excise department initiated proceedings under Section 142 of the Customs Act, 1962 and under the Attachment of Property of Defaulters for Recovery of Government Dues Rules, 1995 on 10th November, 2009 and that the property of respondent No. 2 company has been attached under Section 142 of the Customs Act, 1962 on 16th July, 2010. Based on the said attachment order, the Assistant Commissioner, Central Excise, Allahabad by an order dated 20th July, 2010 intimated the petitioner-bank that in view of Section 11 of the Central Excise Act, 1944 empowering the department to recover Government dues, the bank was intimated that the land, plant and machinery and also any property in the name of respondent No. 2 company should not be brought/sold/leased/transferred by the petitioner without the permission of the Assistant Commissioner of Central Excise, Division Allahabad. The petitioner, being aggrieved by this restraint order issued by the Assistant Commissioner, Central Excise, Allahabad dated 20th July, 2010, has filed the present writ petition for its quashing.

3. We have heard Sri Satish Chaturvedi, the learned counsel for the petitioner-bank, Sri Shailendra Jaiswal holding brief of Sri Vinod Kant Srivastava, the learned counsel for the Central Excise department-respondent No. 1 and Sri B.C. Rai, the learned counsel appearing for respondent Nos. 2 to 6.

4. The learned counsel for the petitioner submitted that the petitioner is a secured creditor and has a first preferential claim to recover its dues and that the respondent No. 1 has no authority of law to restrain the petitioner from not recovering its dues. The learned counsel for the petitioner submitted that the petitioner, being the secured creditor, has the first charge over the property and that there is no statutory provision under the Central Excise Act giving priority to the Excise department to recover Government dues over the debts owed to the State Bank of India, namely, the petitioner.

5. On the other hand, the learned counsel for the Central Excise department submitted that the dues of the Central Excise department were prior in point of time to the loan granted by the petitioner-bank and since pursuant to the demand raised by them, the property has been attached, consequently, the

Central Excise department had the first right to recover the amount.

6. Insofar as the respondent Nos. 2 to 6 are concerned, the learned counsel on their behalf supported the stand of the petitioner contending that the petitioner-bank has the first charge to recover the amount of loan.

7. Having heard the learned counsel for the parties, the Court finds that the Crown's preferential right to recover its debts over other creditors is confined to ordinary or unsecured creditors and that the Crown's debts does not override the right of a secured creditor unless there is a statute to the contrary. In *Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others*, , the Supreme Court held:

"However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The commons 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 mortgaged or pledged of goods or a secured creditor."

8. Considering the said decision, a Division Bench of this Court in *State Bank of India Vs. State of U.P. and Others*, held that since there was no statutory provision giving priority to the State Government dues over the debts owed to the State Bank, who is a secured creditor, the recovery certificate issued for recovery of sales tax dues were found to be illegal and was quashed. The Court further directed that the bank was entitled to auction and sell the property of the defaulter in order to recover its debts as a secured creditor.

9. In *The Bank of Bihar Vs. The State of Bihar and Others*, the Supreme Court held that the rights of the pawnee, who has parted with money in favour of the pawnor on the security of goods cannot be extinguished even by lawful seizure of goods by the Government and by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied.

10. In *UTI Bank Ltd. Vs. The Dy. Commissioner of Central Excise, Chennai II Division and The Secretary, Ministry of Finance, Government of India*, a Full Bench of the Madras High Court, in relation to recovery of dues of the Central Excise department, held that the UTI Bank, being a secured creditor, was entitled to have a preference over the claim of the Central Excise department. The Full Bench found that there was no provision under the Central Excise Act and the Customs Act, which would gives first preference or the first charge for recovery of the amount. The Full Bench found that the Central Excise Act and Customs Act only envisaged procedures for recovery of the amount and that there was no provision giving first charge to the department for recovery of the amount. On the other hand, the Full Bench found that the *Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* clearly provided a provision for recovery of the amount to a secured creditor, who had the first charge.

11. In *Rana Girders Ltd. Vs. Union of India (UOI) and Others*, ; the Supreme Court held that by virtue of deed of mortgage the U.P. Financial Corporation, being a secured creditor had priority in respect of its dues over the recovery of the dues of the Central Excise department.

12. Before proceeding further, it would be essential to refer certain provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002:

Chapter I of the SARFAESI Act

"2. Definitions:

2(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes -

- (i) debenture trustee appointed by any bank or financial institution; or
- (ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or]
- (iii) any other trustee holding securities on behalf of a bank or financial institution;

in whose favour security interest is created for due repayment by any borrower of any financial assistance;

2(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31;"

Chapter III of the SARFAESI Act

13. Enforcement of security interest. - (1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of this Act.

(2)....

(3)....

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely; -

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b)....

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(5)....

(6)....

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests."

13. From the aforesaid, it is clear that the petitioner, who has granted loan to respondent No. 2 company is a secured creditor under Section 2(2d) of the said Act and that recovery of the loan granted could be recovered as the first charge in preference to recovery of other dues.

14. On the other hand, Section 11 of the Central Excise Act and Section 142 of the Customs Act, 1962 only provides for recovery of sums due to the Government. We do not find that these provisions indicate that the Central Excise department has any preferential charge. The learned counsel for the Central Excise department has failed to show any provision by which Government dues could be recovered as the first charge.

15. In the light of the aforesaid, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, being a special enactment and the petitioner being a secured creditor had the first charge to recover the amount.

16. In the light of the aforesaid, we are of the opinion that respondent No. 1 had no authority of law to restrain the petitioner-bank from proceeding with the recovery of the amount from the assets of respondent No. 2 over which the petitioner had the first charge. Consequently, the impugned order passed by respondent No. 1 cannot be sustained and is quashed. The writ petition is allowed.