
(2002) 10 MP CK 0053
In the Madhya Pradesh High Court
Case No : First Appeal No. 254/96

State of M.P. and Others

APPELLANT

Vs

Canara Bank and Others

RESPONDENT

Date of Decision : 24-10-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 15 Rule 1, Order 15 Rule 2, 151
Madhya Pradesh General Sales Tax Act, 1958 — Section 33C

Citation : (2002) ILR (MP) 949 : (2002) 5 MPHT 530

Hon'ble Judges : V.K. Agrawal, J

Bench : Single Bench

Advocate : Tanu Tandan, for the Appellant; Rajesh Maindiratta, for the Respondent

Judgement

V.K. Agrawal, J.—This appeal is directed against the judgment and decree dated 9th February, 1996 in Civil Suit No. 62-A/1991 by 9th Additional District Judge, Bhopal decreeing the claim of the plaintiff/respondent No. 1 Canara Bank as against defendant Nos. 1 to 6 / respondent Nos. 2 to 7 herein. The appellants were defendant Nos. 7 to 9 before the Trial Court.

2. The plaintiff/respondent No. 1 filed a suit for recovery of Rs. 10,27,982.03 paise against respondent Nos. 2 to 7. The claim of the plaintiff/ respondent No. 1 was based on the averments that respondent Nos. 2 to 7 had obtained a loan from them as detailed in the plaint which need not be specified here, as the averments in that regard are not material for the disposal of this appeal. It is also admitted position of the case that defendant Nos. 1 to 6/respondent Nos. 2 to 7 mortgaged and hypothecated their properties with the plaintiff/respondent No. 1 towards security of the said loan. The plaintiff respondent No. 1 averred that defendant Nos. 7 to 9 appellants herein, have attached the properties of the respondent Nos. 2 to 7 on 15-1-1977 towards recovery of sales tax dues. It was averred that since the plaintiff/Bank had first charge over the mortgaged properties, to recover the balance of the amount of loan etc., the proceedings of

recovery of sales tax dues by attachment and auction of properties of respondent Nos. 2 to 7 by the appellants, cannot take precedence over the recovery of loan amount from the said properties by the plaintiff/Bank. The plaintiff/respondent No. 1 therefore, also sought a relief of declaration that defendant Nos. 7 to 9 (present appellants) are not entitled to recover the sales tax dues from the properties mortgaged with the plaintiff/respondent No. 1, and the proceedings of attachment and sales of mortgaged property by the defendants Nos. 7 to 9 be declared as incompetent.

3. The defendant Nos. 1 to 6 / respondent Nos. 2 to 7 did not seriously contest the suit and did not deny that they obtained loan from plaintiff/respondent No. 1 or that the said loan was outstanding to the extent claimed by the plaintiff/respondent No. 1. As they remained absent in the later stages of the suit, they were proceeded ex parte.

4. It also appears that an application under Order 15 Rules 1 and 2 read with Section 151, CPC was filed by plaintiff/defendant No. 1 which has also been disposed of in the impugned judgment and decree, alongwith issues Nos. 33 and 34 framed in the suit. It was held by the learned Trial Court that the amount of loan with interest etc. amounting to Rs. 10,27,982.03 paise was outstanding against the respondent Nos. 2 to 7 and the decree for the said sum with interest thereon was accordingly, granted. It was further directed that the plaintiff/appellant was entitled to recover the said amount from the sale of hypothecated and mortgaged properties of the respondent Nos. 2 to 7. Issue Nos. 33 and 34 by which the question as to whether the defendant Nos. 7 to 9 (appellants herein) had first right and charge to attach and sale the hypothecated and mortgaged properties to recover sales tax dues against respondent Nos. 2 to 7, was held by the Trial Court as not proved. Thus the right of the appellants or recovery of the sales tax dues from the said properties as first charge thereon was negated.

5. It may be noticed that though the plaintiff/respondent No. 1 claimed specific relief of declaration that defendant Nos. 7 to 9 were not entitled to recover sales tax dues from the hypothecated and mortgaged properties of the respondent Nos. 2 to 7, declaration to that effect was not granted by the impugned judgment and decree. However, it was observed by the Trial Court in the above context that the appellants have failed to establish that they had first charge over the suit property as they did not lead evidence in that regard. It appears that the Trial Court has mis-directed itself in observing so. In fact, it would be clear from Paras 26 and 27 of the plaint that the case of plaintiff/respondent No. 1 itself was that properties hypothecated and mortgaged with the plaintiff was attached by the defendant Nos. 7 to 9/appellants on 15-1-1977 and they propose to recover sales tax dues therefrom. Thus in view of the averments of plaintiff/respondent No. 1 there was no question of any evidence being led by the appellants, in that regard. In fact, the only question that arose for consideration was as to whether the contention of plaintiff Bank was justified, that it had first

charge to recover the dues towards the loan advanced to the respondent Nos. 2 to 7 and their right would take precedence, over the right of the appellants to recover the sales tax dues from the properties of respondent Nos. 2 to 7 mortgaged and hypothecated by them with the plaintiff/respondent No. 1 - Bank.

6. In the above context, learned Counsel for the appellant submitted that u/s 33-C of the M.P. General Sales Tax Act, 1958 (hereinafter referred to as "the Act" for convenience), the appellants had first charge to recover the sales tax dues. Learned Counsel in the above context relied upon the decision of the Apex Court in *Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others*,]. The said case related to the sales tax dues recoverable under the provisions of Karnataka Sales Tax Act which provided that any tax assessed under the said Act, was recoverable as an arrears of land revenue. The Bank in that case also claimed first charge over the property mortgaged with it. It was laid down therein that the claim of the State for recovery of sales tax dues, shall have preference, over the claim of the plaintiff/Bank for recovery of the loan amount from the property mortgaged with it.

7. Learned Counsel for the plaintiff/respondent No. 1 relying upon the decision of Division Bench of this Court in *State Bank of Indore v. Additional Tehsildar-cum-Sales Tax Officer* (1983 MPLJ 130), submitted that since hypothecation and mortgage of the property with the plaintiff/respondent No. 1 was made on 7-9-73, the same cannot be defeated by Section 33-C of the Act which was incorporated by way of amendment by Act No. 20 of 1976 and came into force from 15th of March, 1976. It was thus submitted that the mortgage and hypothecation with the Bank having been made by the respondent Nos. 2 to 7 prior to 15th of March, 1976, i.e., coming into force of Section 33-C of the Act, the charge over the property created by hypothecation and mortgage in favour of the plaintiff/respondent No. 1 Bank shall get precedence over the claim of the appellants for recovery of sales tax dues in pursuance of the provisions of Section 33-C of the Act.

8. However, it may be noticed that in Civil Appeal No. 11528/96, *State of Madhya Pradesh and another v. State Bank of Indore and Ors.*, decided by the Apex Court on 15th of March, 2001, it has been laid down that even if the charge regarding loan taken from the Bank was created earlier than coming into force of Section 33-C of the Act, yet in view of Section 33-C, the charge thereby created in favour of the State in respect of the sales tax dues will prevail over the charge created in favour of the Bank. In view of the above and the ratio laid down in *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and Ors.* (supra), there remains no scope for doubt that the appellants have first charge to recover the sales tax dues against the respondent Nos. 2 to 7 from their property, even if they were hypothecated and mortgaged with the plaintiff/respondent No. 1-Bank, prior to 15th of March, 1976. The contention of learned Counsel for the plaintiff/respondent No. 1, as above, cannot therefore, be accepted. No other question was raised in this appeal.

9. Accordingly, this appeal is partly allowed. The judgment and decree directing recovery of the loan amount from respondent Nos. 2 to 7 to the extent specified therein, remains unaltered. However, the same stands partially modified and it is directed that the recovery of the said amount from the property of respondent Nos. 2 to 7 shall be subject to the recovery of the amount of sales tax dues that may be outstanding to respondent Nos. 2 to 7 by the appellants. To clarify, the claim and recovery of sales tax dues by the appellants, from the properties mortgaged and hypothecated with the plaintiff/respondent No. 1- Bank, shall take precedence over the claim for recovery of the loan amount from the said properties by the plaintiff/respondent No. 1 Bank. The impugned judgment and decree shall stand modified to the above extent. Cost of the appeal, as incurred shall be borne by the parties.