

(2016) 07 DEL CK 0095

In the Delhi High Court

Case No : Writ Petition (Civil) 3430 of 2016 and CM No. 14665 of 2016

Suresh Kumar Goyal

APPELLANT

Vs

Chief Commissioner Income Tax-2

RESPONDENT

Date of Decision : 13-07-2016

Acts Referred:

Income Tax Act, 1961 — Section 281
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 35

Citation : (2017) 2 ADDelhi 650 : (2016) 289 CurTR 541 : (2016) 235 DLT 199

Hon'ble Judges : Dr. S. Muralidhar and Najmi Waziri, JJ.

Bench : Division Bench

Advocate : Mr. Prasouk Jain, Advocate, for the Petitioner; Mr. Ashok K. Manchanda, Senior Standing Counsel with Lakshmi Gurung, Advocate, for the Respondent No. 1; Mr. Sanjay Bhatt and Mr. Abhishek Anand, Advocates, for the Respondent No. 2/IDBI; Mr. Satyakam, Addit

Final Decision : Disposed Off

Judgement

Dr. S. Muralidhar, J.—The principal challenge in this writ petition, filed by Mr. Suresh Kumar Goyal, is to an order dated 25th November 2013 passed by Tax Recovery Officer ("TRO"), Respondent No. 4 to the extent it attaches the ground floor of the property at Plot No. 84, Ground Floor, HU Block, Pitampura, New Delhi - 110088 measuring 207 square meters ("the property in question"). The other prayer is for a direction to the Sub-Registrar VI-A ("Sub-Registrar"), Government of National Capital Territory of Delhi (Respondent No. 3) to register the sale deed executed by the IDBI Bank Ltd. ("IDBI") (Respondent No. 2) in favour of the Petitioner transferring title of the ground floor of the property in question. In the alternative, the Petitioner has prayed for a direction to IDBI to refund the entire amount paid by the Petitioner as consideration for the ground floor of the property in question.

2. The background to the present petition is that one Mr. Shiv Sareen purchased the property in question on 25th January 2008. On 2nd March 2009, Mr. Sareen,

through his proprietary concern M/s Krishna Designers, mortgaged the ground floor of the property in question to IDBI and sought a cash credit limit of Rs. 4.95 crores. Further on 28th May 2010, a credit limit enhancement was sought by additionally mortgaging the basement of the property in question, thereby taking the total loan exposure to Rs. 7.5 crores.

3. On the default of loan payments by M/s Krishna Designers, IDBI issued a notice dated 24th May 2012 to Mr. Sareen under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act").

4. On 25th November 2013, the TRO issued the impugned order attaching the property in question in respect of arrears of income tax dues owed by Mr. Sareen. Consequently, the TRO also wrote a letter dated 3rd December 2013 intimating the Sub-Registrar about the attachment. The Sub-Registrar was asked to not undertake any transaction qua the property in question.

5. On 30th May 2014, IDBI took possession of the property in question for initiation of recovery proceedings under the SARFAESI Act. On receiving information about the attachment of the property by the Income Tax authorities from Mr. Sareen, IDBI wrote a letter dated 10th September 2014 to the TRO seeking authentication of the impugned order. IDBI also apprised the TRO about the mortgage, the pending proceedings under the SARFESI Act and the fact of IDBI having taken possession of the property in question. IDBI sent further reminder letters dated 15th October 2014, 3rd January 2015 to the TRO.

6. On 24th January 2015 the IDBI issued an advertisement in the newspaper offering for sale by public auction, both the ground floor and the entire basement of the property in question. While the reserve price for the ground floor was fixed at Rs. 1.50 crores, the reserve price for the entire basement was at Rs. 61 lakhs. A bidder had to deposit 10% of the bid amount together with the bid. The last date for submission of the bids was 25th February 2015.

7. Meanwhile, a further reminder was sent by the IDBI to the TRO, CIT-VII on 11th February 2015 pointing out that despite several reminders no response regarding the authenticity of the attachment order dated 25th November 2013 was received.

8. On 25th February 2015 the Petitioner submitted his bid for the ground floor of the property in question in the sum of Rs. 1.54 crores. He simultaneously deposited earnest money in the sum of Rs. 15.40 lakhs, i.e. 10% of the bid amount offered by him. On 26th February 2015 the Petitioner was declared as the successful bidder.

9. On 3rd March 2015 the IDBI wrote to the TRO, CIT-VII intimating them about the ground floor of the property in question having been sold to the Petitioner on 26th February 2015 by way of public auction. On the same date the Petitioner paid an additional 15% of the bid amount, i.e., Rs. 23.10 lakhs by demand draft.

10. On 16th March 2015 a letter was written by the TRO, CIT-12 to the IDBI requiring the latter to send a demand draft (DD) in favour of the TRO for amount of Rs. 1,59,60,770 including interest and Rs. 10,06,080 for the arrears of tax dues of Mr. Sareen for Assessment Years (AYs) 2009-10 and 2010-11 respectively. On 13th April 2015 the balance sale consideration of 75% of the bid amount totalling Rs. 1,13,96,000 was credited by the Petitioner to the account of IDBI by RTGS. IDBI charged interest @ 15.25% amounting to Rs. 1,30,293 on account of the delay in payment.

11. On 21st April 2015 a sale certificate under the SARFAESI Act in respect of the ground floor of the property in question was issued by the IDBI in favour of the Petitioner. Physical possession of the property in question was handed over to the Petitioner on the execution of sale deed. Under the column "List of encumbrances?" appearing in the sale certificate, it was stated: "Nil as per knowledge of the authorised officer". However, by this time the IDBI was aware of the attachment order of the Income Tax Department (ITD) but failed to mention it.

12. On 30th April 2015 the Petitioner was handed over the original chain documents in respect of the ground floor of the property in question by the IDBI. On 22nd May 2015 the Petitioner and a representative of the IDBI approached Respondent No. 3 for registration of the sale document in respect of the ground floor of the property in question. However, Respondent No. 3 declined to register the sale deed on account of the attachment order passed by the TRO. On 8th June 2015 Respondent No. 3 issued a memorandum stating that the sale certificate presented for the ground floor of the property in question was pending registration for want of "no objection certificate" ("NOC") from the TRO, CIT-7. On 23rd June 2015 the IDBI wrote to the TRO, CIT-12 seeking cancellation of the attachment order.

13. The Petitioner states that from 14th July 2015 to 18th August 2015 several letters were written to IDBI to either refund the money paid by him together with interest or get the sale deed registered in the Petitioner's name. On 29th July 2015 a letter was written by TRO, CIT-12 to the IDBI seeking explanation as to how the ground floor and basement of the property in question was sold by IDBI by public auction without following proper procedure. It was stated that no NOC could be issued till the outstanding tax liability was paid by IDBI out of the sale proceeds.

14. On 21st August 2015 IDBI wrote to the Petitioner issuing a corrigendum to the sale certificate issued on 21st April 2015 by amending the particulars under the Column "list of encumbrances" from "Nil" to attachment order dated 25th November 2013 of the Income Tax Department (copy attached) on the said property". On the same day, the IDBI also issued a letter to the Petitioner refusing to refund the money deposited by the Petitioner. On the very next day, i.e., 22nd August 2015 IDBI sent the Petitioner a copy of the attachment order issued by the TRO, CIT-12 which had been inadvertently not enclosed with the

letter dated 21st August 2015.

15. The Petitioner made a representation on 26th August 2015 to the TRO, CIT-VII praying for removal of the attachment. On 26th September 2015 and 30th September 2015 representations were made by the Petitioner to the Finance Minister and to the TROs CIT-VII and CIT-12 respectively requesting for an NOC to be issued. The Petitioner made further representation on 31st December 2015, 19th January 2016, 3rd February 2016, 4th February 2016, 5th February 2016 followed by email/reminders 5th February 2016, 8th February 2016, 15th February, 9th March and 17th March 2016. Another representation was made to the Prime Minister on 26th March 2016. With the numerous representations yielding no result, the Petitioner filed the present writ petition in which notice was issued on 25th April 2016.

16. No counter-affidavit was filed by the ITD despite four weeks' time being granted. At the request of learned counsel for Respondents 1, 4 and 5, a final opportunity was granted on 1st June 2016. A counter affidavit of the ITD was handed over at the time of hearing.

17. This Court has heard the submissions of Mr. Prasouk Jain, learned counsel for the Petitioner, Mr. Ashok K. Manchanda, learned Senior standing counsel for Respondent No. 1, Mr. Sanjay Bhatt, learned counsel for IDBI and Mr. Satyakam, learned Additional standing counsel for Respondent No. 3 respectively.

18. Mr. Prasouk Jain submitted that Section 35 of the SARFAESI Act was a non-obstante provision that would override anything to the contrary in any other law. This included Section 281 (1) of the Income Tax Act, 1961 ("IT Act"). He pointed out that notice under Section 13 (2) of the SARFAESI Act was issued on 24th May 2012 prior to the attachment order issued by the ITD. Relying on the decision in *Transcore v. Union of India* (2008) 1 SCC 125 he submitted that notice under Section 13 (2) of the SARFAESI Act tantamounted to an attachment and would get precedence over the attachment of the property by the ITD. Reliance was also placed on the decision of the Gujarat High Court dated 27th September 2011 in *Special Civil Application No. 2447/2011 (Asset Reconstruction Company (India) Limited v. Commissioner of Income Tax)*. Learned counsel for the Petitioner submitted that since the legal position was explicit, the Petitioner would be pressing only for the first prayer viz., for a direction to the Respondent No. 3 to register sale deed in favour of the Petitioner in respect of the ground floor of the property in question. In other words, the Petitioner was not pressing the alternative prayer for a direction to IDBI to refund the amount deposited by the Petitioner together with interest.

19. Mr. Sanjay Bhatt, learned counsel for the IDBI/Respondent No. 2 supported the case of the Petitioner insofar as the main prayer for registering the sale deed in favour of the Petitioner. He submitted that the attachment resulting from notice under Section 13 (2) of the SARFAESI Act issued by the IDBI on 24th May 2012 would have precedence over the impugned attachment order dated 25th

November 2013 issued by the TRO.

20. In the counter-affidavit filed on behalf of the ITD, it is stated that there was ? huge outstanding against the Assessee" and therefore, the TRO, CIT- 12 attached the property in question strictly in accordance with the provisions of the IT Act. The attachment order was issued under Section 222 of the IT Act read with Rule 48 of the Second Schedule of the IT Act. It is submitted that since the Sub Registrar, Respondent No. 3, had informed IDBI about the attachment of the property by the ITD, there was no need for the IDBI to write to the ITD to confirm the authenticity of the said order. It is further submitted that failure on the part of Respondent No. 4 to reply to IDBI's letters "does not deem the attachment to non-authenticated." It is submitted that bidding and auction took place in 2015, i.e., subsequent to the attachment of the property in 2013. IDBI and Respondent No. 3 had full notice of the attachment of the property in question. It is submitted that there was no breach of law. According to the ITD, the contention that SARFAESI Act being a special Act overrides the IT Act "is an issue which is res integra."

21. The short question is whether the notice issued under Section 13 (2) of the SARFAESI Act by IDBI on 24th May 2012 tantamounts to an attachment and would get precedence over the attachment of the property in question by the ITD by its order dated 25th November 2013.

22. Section 13 (2) and Section 35 of the SARFAESI Act read as under:

"13(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-Section (4).

xxxx xxxxx xxxxx

35. The Provisions of this Act to override other laws The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

23. Section 281 of the IT Act reads as under:

281. Certain Transfers to be void:(1) Where, during the pendency of any proceedings under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any Assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the Assessee as a result of the completion

of the said proceeding or otherwise :

Provided that such charge or transfer shall not be void if it is made-

(i) For adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the Assessee; or (ii) With the previous permission of the Assessing Officer.

(2) This section applies to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged or transferred exceed ten thousand rupees in value.

Explanation : In this section, "assets" means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the Assessee.

24.1 The question that arose for consideration before the Gujarat High Court in *Asset Reconstruction Company (India) Limited v. Commissioner of Income Tax* (supra) was similar to the one that arises in the present case. The Petitioner, Asset Reconstruction Company (India) Limited ["ARCIL"] had invoked 13 (2) of the SARFAESI Act and issued a notice dated 24th December 2009 to Mardia Steels Limited ("MSL") upon failure by MSL to repay the loans to the banks and financial institutions which loans were taken over by ARCIL through separate agreements. Following this, in exercise of the power under Section 13 (4) of the SARFAESI Act, read with Rules 8 and 9 of the Security Interest (Enforcement) Rules 2002, ARCIL took possession of the secured assets of MSL and advertised the possession notice in the press on 10th April 2010.

24.2 The ITD by its letter dated 8th November 2010 informed ARCIL that the assets of the MSL was under attachment of the ITD and that ITD had already filed an affidavit of proof of debt before the Official Liquidator ("OL") on 16th September 2009. The ITD claimed that its dues should be exhausted before the assets could be brought to sale by ARCIL. A writ petition was thereafter filed in the Gujarat High Court by ARCIL seeking a declaration that the claim of the ITD for priority of realisation of the income tax dues was contrary to law.

24.3 To begin with, Gujarat High Court referred to an earlier decision of its Division Bench in *Baroda City Cooperative Bank Limited v. State of Gujarat* 2010 (3) GLR 2132 where after analysis of several decisions of the Supreme Court, the legal position was summarised as under:

"16. From the judgments referred to above, it will be evident that ?

(a) The arrears of tax due to the State can claim priority over the unsecured debt.

(b) If first charge by way of priority is not claimed under the statute, the said doctrine is not applicable.

(c) Normally the doctrine of first charge/priority of State will prevail over the private debt which is an unsecured debt.

(d) In normal course, the doctrine of first charge/priority cannot prevail over secured debts, but if first charge of the State is over the secured debts, both debts being equal, the State can claim priority even over the secured debts, and

(e) The secured debts under the Securitization Act or debt under the RDDB Act has no first charge and thereby cannot compete with first charge/priority claim of the State if made under the statute."

24.4. In *Asset Reconstruction Company (India) Limited v. Commissioner of Income Tax (supra)*, the Gujarat High Court also referred to the decision in *Tax Recovery Officer-II, Sadar, Nagpur v. Gangadhar Vishwanath Ranade* AIR 1999 SC 427 where the Supreme Court held that if a property of the Assessee was transferred by him to a third party with intention of defrauding the Revenue, the only remedy available to the ITD was to file a suit under Rule 11 (6) of the Second Schedule to the IT Act to have the transfer declared void under Section 281 of the IT Act. However as far as the case of the ARCIL was concerned, the Gujarat High Court concluded as under:

"It is declared that the claim put-forward by Respondent No. 1 Income Tax Department by way of attachment of assets covered by Section 13 (2) notice for priority over the Petitioner for realisation of the income-tax dues is contrary to the settled position of law and illegal. It will be open for the Petitioner to exercise his right under the SARFAESI Act and the Rules made thereunder and the Income Tax Department shall not in any manner hamper or restrain the Petitioner in proceeding further under the SARFAESI Act, regardless of the attachment orders passed by the Income Tax Department for realisation of income tax dues of Respondent No. 3 company. Rule is made absolute."

25. The Supreme Court in *Bombay Stock Exchange v. V.S. Kandalgaonkar* (2015) 2 SCC 1 was addressing the question whether the ITD could require the Bombay Stock Exchange ("BSE") to deposit the sale proceeds of the membership card of the deceased Assessee towards payment of the income tax dues. The BSE claimed that in terms of Rule 9 of the Bombay Stock Exchange Rules, Bye-laws and Regulations 1957 ("BSE Rules"), on the death or default of a member, his right of nomination ceases and vested in the BSE. Since BSE was the owner of the membership card, no amount of tax arrears of the deceased Assessee was payable by it. Upholding the stand of the BSE, the Supreme Court explained the legal position as under:

"39. The first thing to be noticed is that the Income Tax Act does not provide for any paramountcy of dues by way of income tax. This is why the Court in *Dena Bank v. Bhikhubhai Prabludas Parekh and Co.* (2000) 5 SCC 694 held that Government dues only have priority over unsecured debts and in so holding the Court referred to a judgment in *Giles v. Grover* (1832) 9 Bing 128 in which it has been held that the Crown has no precedence over a pledgee of goods. In the

present case, the common law of England qua crown debts became applicable by virtue of Article 372 of the Constitution which states that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed by a competent legislature or other competent authority. In fact, *Collector v. Central Bank of India* AIR 1967 SC 1831 after referring to various authorities held that the claim of the Government to priority for arrears of income tax dues stems from the English common law doctrine of priority of Crown debts and has been given judicial recognition in British India prior to 1950 and was therefore, "law in force" in the territory of India before the Constitution and was continued by Article 372 of the Constitution (AIR pp. 1835-36, para 7: SCR at pp.861-62)."

26. In the present case, the notice issued by IDBI under Section 13 (2) of the SARFAESI Act was prior to the impugned order dated 25th November 2013 passed by the ITD attaching the property in question. As explained by the Supreme Court in *Transcore v. Union of India* (supra) a notice under Section 13 (2) of the SARFAESI Act "is not merely a show-cause notice." It was held as under:

"In fact, Section 13 (13) indicates that the notice under Section 13 (2) in effect operates as an attachment/injunction restraining the borrower from disposing of the secured assets and therefore, such a notice, which in the present case is dated 6th January 2003, is not a mere show-cause notice but it is an action taken under the provision of the NPA Act."

27. In view of the above legal position, IDBI was entitled, in terms of Section 13 (2) read with Section 35 of the SARFAESI Act, to proceed to bring to sale by way public e-auction the property in question on 25th February 2015 notwithstanding that the ITD had passed the impugned attachment order dated 25th November 2013. In view of the legal position explained in *Bombay Stock Exchange v. V.S. Kandalgaonkar* (supra) the ITD is precluded from relying on the proviso to Section 281 of the IT Act to prevent the registration of the sale deed executed in favour of the Petitioner in respect of the ground floor of the property in question. Its instructions to the contrary to Respondent No. 3 are, therefore, unsustainable in law.

28. Consequently, the attachment order dated 25th November 2013 issued by the ITD insofar as it relates to the ground floor of the property in question is hereby set aside. Respondent No. 3 will, within a period of not later than four weeks from today, proceed to register the sale deed executed by IDBI in favour of the Petitioner in respect of the ground floor of the property in question.

29. The writ petition and application are disposed of in the above terms with no orders as to costs.