(2009) 04 GUJ CK 0050

In the Gujarat High Court

Case No : Letters Patent Appeal No. 1258 of 2008 in Miscellaneous Civil Application No. 3135 of 2007 in Special Civil Application No. 17941 of 2007 with Special Civil Application No. 17941 of 2007

UCO Bank APPELLANT

Vs

THE Union of India (UOI) and Another RESPONDENT

Date of Decision : 13-04-2009

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 38C
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 144, 156, 226(3), 281B
Income Tax Rules, 1962 — Rule 16, 2, 48
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(1), 13(2)
Transfer of Property Act, 1882 — Section 69 , 69A

Citation : (2009) 226 CTR 165 : (2009) 182 TAXMAN 26

Hon'ble Judges : K.S. Radhakrishnan, C.J;Akil Kureshi, J

Bench : Division Bench

Advocate : M.D. Rana, for the Appellant; K.M. Parikh, for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, C.J.—The Special Civil Application No. 17941 of 2007 was preferred by the UCO Bank against the Income Come Tax Department, Union of India seeking a writ of certiorari to quash and set aside notice dated 05.07.2007 issued by the Tax Recovery Officer-5, Range-5, Baroda to the bank directing it to deposit amount of Rs. 14.60 lacs the value realized by sale of property which was under the attachment with the Income Tax Department. When the matter came up for admission before a learned Judge, learned Single Judge without issuing notice to the Income Tax Department disposed of the Special Civil Application on 08.08.2007 holding that the remedy open to the Bank is to approach the High Power Committee since the dispute is between two departments. Reference was made to few decisions of the Apex Court viz. [1]

1992 (61) ELT 3 (SC) , [2] 1992 (61) ELT 3 (SC) [3] Chief Conservator of Forests, Govt. of A.P. Vs. The Collector and Others, Later, UCO bank filed Misc. Civil Application to recall the earlier order dated 08.08.2007 in view of the Government of India Memorandum dated 22.01.2004 and sought a decision on merits. Learned Single Judge rejected the said application by his order dated 17.12.2007. Aggrieved by the same, the Letters Patent Appeal has been preferred by the UCO Bank. When the matter came up for admission, we issued notice to the Income Tax Department.

2. Learned Counsel appearing for the UCO Bank submitted that the learned Single Judge was not justified in referring the matter to the High Power Committee relying on the decisions of the Apex Court. Learned Counsel for the UCO Bank submitted that the dispute between the Bank and the Income Come Tax Department is not an issue to be resolved by the Committee as per the principles laid down by the Apex Court in the above mentioned cases. We also fully agree with the Counsel for the Bank. After hearing learned Counsel on either side, we thought we may examine the legality of the impugned notice issued by the Income Tax Department to the UCO Bank, for which it is necessary to examine the facts.

3. Avinash Govind Sharma, the 2nd respondent, assessee, filed his return of income with the Assessing Officer, Income Tax Ward V, Vadodara for the year 2002-03. Return of income was completed u/s 144 of the Income Tax Act, 1961 on 31.03.2005 determined the total income of Rs. 45,54,254/- as against the returned income of Rs. 1,12,047/-. Copy of the assessment order dated 31.3.2005 passed by the Assessing Officer has been produced by the Income Tax Department. Second respondent failed to make payment of outstanding tax dues to the respondent No. 1 and therefore, notice of demand u/s 156 of the Income Tax Act dated 31.03.2005 was issued by the Income Tax Department demanding tax amounting to Rs. 18,18,400/-. Notice of demand was served on the assessee - second respondent on 31.03.2005. Income Tax Department has also passed order of provisional attachment dated 30.03.2005 u/s 281B of the Income Tax Act, and attached the immovable properties of second respondent situated at A-1, Shilp Apartment, 14-15, Haribhakti Society, Race Course Circle, Baroda along with movable property being Motor Car - Palio belonging to second respondent and the same was served on the second respondent on 31.03.2005. Copy of the provisional attachment order passed by the Income Tax Department was also sent to Sub Registrar Office, Baroda, the City Survey Superintendent No. 1, Kothi, Baroda and the District Collector, Baroda etc. Income Tax Department issued notice of demand to the defaulter assessee vide order dated 26.07.2005 under Rule 2 of the Second Schedule to the Income Tax Act, calling upon the respondent No. 2 to make the payment of amount mentioned in the said notice. Inspite of service of notice of demand, assessee - second respondent failed to discharge that tax liability. Income Tax Department, therefore, passed an order of attachment of the properties, movable and immovable belonging the second respondent - assessee on 14.09.2005 invoking Rule 48 of the Second

Schedule of the Income Tax Act and issued order of attachment in Form No. I.T.C.P.-16. Order of attachment was duly served upon the assessee. Income Tax Department also drawn Panchnama of immovable property of the second respondent and carried out inventary in the presence of the witnesses.

4. Income Tax Department later on came to know that the assessee - second respondent had created registered equitable mortgage on 20.12.2005 in favour of the UCO Bank and thereby created Security Interest in favour of the Bank so as to secure term loan granted by the appellant Bank under the UCO Mortgage Scheme. Further, it was also noticed that the Bank had taken measures u/s 13(2) of the Securitisation Act, 2002 and issued demand notice to the second respondent - assessee since he was found to be a defaulter. Appellant Bank also issued sale notice dated 28.12.2006 published in ''Indian Express'' Baroda edition dated 29.12.2006 inviting offers in sealed covers from the interested bidders for purchase of the immovable properties of the second respondent. Public auction was scheduled to be conducted on 29.01.2007. Income Tax Department vide their letter dated 29.12.2006 informed to the authorized Officer of the appellant Bank about the prior attachment dated 14.09.2005 made by the Income Tax Department and requested to refrain the Bank from further attachment or further proceedings for recovery of the alleged dues in accordance with the Securitisation Act. Income Tax Department also forwarded notice of demand dated 26.07.2005 and copy of attachment order dated 14.09.2005 to the authorized Officer of the appellant Bank. Appellant Bank vide their letter dated 23.01.2007 urged its claim which was refuted by the Income Tax Department vide their letter dated 20.06.2007. Later on, Income Tax Department issued notice u/s 226(3) of the Income Tax Act on 05.07.2007 calling upon the Chief Manager of the Bank to pay sale value of the properties amounting to Rs. 14.60 lacs to the Income Tax Department towards recovery of outstanding dues of Rs. 21,03,049/- due and payable to the Income Tax Department by the assessee. Garnishee notice was also issued which was received by the bank on 05.07.2007. Income Tax Department also sent a letter dated 05.07.2007 calling upon the Chief Manager of the appellant Bank to make payment of the realized sale proceeds within seven days and also forwarded a copy of the prohibitory order passed u/s 226(3) of the Income Tax Act. Under such circumstances, the appellant Bank has approached this Court seeking a writ of certiorari to quash the notice dated 05.07.2007 directing the Bank to deposit the auction proceeds and also for other consequential relief.

5. We are of the view that the learned Single Judge was not justified in taking the view that a High Power Committee has to be constituted on the basis of the principles laid down by the Apex Court in various decisions referred hereinbefore to resolve the disputes between the UCO Bank and the Income Tax Department. Looking to the facts of this case and the nature of disputes, we are of the view that it is not a matter for the High Power Committee to decide. We have already dealt with the facts which originate in this case. Appellant bank has invoked the jurisdiction of this Court under Article 226 of the Constitution of India to examine

the legality of the notice dated 05.07.2007 sent by the Tax Recovery Officer enclosing prohibitory orders u/s 226(3) of the Income Tax Act, 1961. We find that the Bank has invoked provisions of Sub-section (2) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest, 2002 (for short ''Securitisation Act'') only on 31.08.2006. Income Tax Department had already issued demand notice on 31.03.2005 which was duly served on the assessee on 31.03.2005. Assessee had created equitable mortgage with the Bank on 20.12.2005 while property was already under attachment with the Income Tax Department. Rule 16 of Second Schedule of the Income Tax Act states that where a notice has been served on a defaulter under Rule 2, defaulter or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the Tax Recovery Officer. Further, Income Tax Department had also passed order of attachment of immovable property of assessee on 14.09.2005 by invoking provisions of Rule 48 of the Second Schedule of the Income Tax Act. Attachment being prior in point of time, in our view, notice under Sub-section (2) of Section 13 of the Securitisation Act has no overriding effect.

6. We may, in this connection, refer to the latest decision of the Apex Court in Central Bank of India Vs. State of Kerala and Others, wherein the Apex Court has examined the scope of various provisions of ''Securitisation Act'' as well as `DRT Act'' and the `Bombay Sales Tax Act, 1959'' and ''Kerala General Sales Tax Act, 1963''. Apex Court has noticed that Securitisation Act has made provision for registration and regulation of securitisation/reconstruction companies, securitisation of financial assets of banks and financial institutions and other related provisions. However, what is most significant to be noted is that there is no provision either in the DRT Act or the Securitisation Act by which first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower. Apex Court observed that u/s 13(1) of the Securitisation Act, limited primacy has been given to the right of the secured creditors vis-a-vis Section 69 or 69-A of the Transfer of Property Act. Hon''ble Apex Court also noticed that primacy has not been extended to other provisions like Section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax etc.

7. We are of the view applying the same analogy in absence of any specific provisions under the Securitisation Act creating any first charge on the bank, Section 281B of the Income Tax Act read with Rule 16 of the Second Schedule of the Income Tax Act will have over-riding effect on S ub-section (2) of Section 13 of the Securitisation Act. Even otherwise, so far this case is concerned, on facts, property was provisionally attached by the Income Tax Department vide order u/ s 281B of the Income Tax Act, 1961 before security interest was created in favour of the Bank. Income Tax authority by final attachment order on 14.09.2005 invoked provisions of Rule 48 of Second Schedule to the Income Tax

Act, 1961 and the Second respondent has created equitable mortgage only on 20.12.2005 in favour of the Bank much after the property was attached by the Income Tax Department. The Bank also invoked sub-section (2) of Section 13 of the Securitisation Act only on 31.08.2006. That being factual situation, we find no illegality in the notice dated 05.07.2007 issued by the Tax Recovery Officer to the UCO Bank demanding the sale proceeds in respect of the property over which the Income Tax Department has got charge.

8. Letters Patent Appeal, therefore, lacks merits, the same is dismissed, so also the Special Civil Application No. 17941 of 2007.