IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 05.01.2015
Pronounced on: 27.11.2015

\+ **W.P.(C) 6327/2011**

PUNJAB AND SIND BANK ……Petitioner

Through: Sh. Pallav Saxena, Advocate.

Versus

MMTC LIMITED AND ORS. …….Respondents

Through: Sh. Rohit Puri, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT

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1. In this writ petition, the Punjab and Sind Bank (hereafter "PSB") is aggrieved by an order of the Debt Recovery Appellate Tribunal ("the Appellate Tribunal") dated 23.03.2011 accepting the First Respondent's (the Minerals and Metals Trading Corporation or "MMTC" hereafter) plea that the mortgage inuring in its favour had to prevail over the PSB's claim in execution of a money decree and directing that proceeds from the sale of a property by the Recovery Officer be used first to satisfy MMTC's claim.

2. The brief facts are that on 21.05.1993, MMTC extended credit facilities to the Second Respondent, M/s Himanshu Jewellers (hereafter "Himanshu") a partnership firm acting through one of its partners, the third respondent ("Jagdish Kumar"), for jewellery export, in terms of its

prevailing policies. The loan was encapsulated in a written agreement and Himanshu was given packing credit facilities for the sum of ₹29,05,485/-. This agreement contained an arbitration clause. The arrangement entailed co-ordination between MMTC and manufacturing units such as Himanshu; it involved MMTC securing credit from its banker and then passing it on to the unit, which was then to export jewellery in terms of the prevailing import-export policy. The amounts availed of by the units were to be repaid with agreed interest. Claiming that Himanshu had defaulted inasmuch as the full payment of the amounts with interest at agreed rates had not been made, MMTC invoked the arbitration clause on 19.06.1996. A three member Arbitral Tribunal was constituted before which MMTC claimed about ₹29 lacs with interest and costs.

3. Himanshu contested the proceedings before the Arbitral Tribunal and denied its liability to MMTC. After considering the terms of the agreement, the invoices in question and the payments made by Himanshu, the Arbitral Tribunal by a plurality of opinions dated 21.12.2002 upheld MMTC's claim to the tune of ₹ 14,73,973/-. Each arbitrator (Mr. Justice S. Ranganathan (Retd.), Mr. Justice P.N. Khanna (Retd) and Mr. K.T.S. Tulsi, Senior Advocate) rendered separate findings. Mr. Justice Ranganathan held that Himanshu was liable to pay MMTC ₹14,73,973/-; Mr. Justice Khanna concurred with that award. Mr. Tulsi, on the other hand, held that Himanshu was not liable. In the result, by the award dated 21.12.2002, Himanshu was held liable to pay ₹ 14,73,973/- plus interest and costs.

4. Meanwhile, unbeknown to MMTC and independent of Himanshu's agreement with it, the latter had approached PSB for credit facilities, in 1994. PSB granted Packing credit facility to the extent of ₹20 lakhs, Foreign Bill Purchase facility to the tune of ₹40 lakhs and Bank guarantee to the

extent of ₹ 60 lakhs. PSB alleges that the borrower, i.e. Himanshu failed to maintain financial discipline in regard to repayment of dues. These defaults constrained PSB to move the Debt Recovery Tribunal ("DRT") claiming ₹1,39,91,244/- with overdue interest at 25% p.a. with quarterly rests and future interest, as overdue payments, against Himanshu in an application (O.A. 330/1997) dated 23.05.1997. This application was allowed by final order dated 11.12.1998 (hereafter "the DRT decree").

5. Since the arbitral award in favour of MMTC had the force of a decree by virtue of provisions of the Arbitration and Conciliation Act, 1996, it applied for execution of such decree before the competent civil court by way of Ex. No. 347/06. On 18.11.2006, the civil court directed auction of property No. 2778/2779, Gali No. 20, First Floor, Beadon Pura, Karol Bagh (hereafter "the disputed property"). PSB, in the meanwhile had independently moved the Recovery Officer in terms of provisions of Section 25 (a) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereafter "the Recovery Act"). The Recovery Officer, DRT-II, Delhi, who has jurisdiction over such proceedings, on 04.04.2007 directed the second and third respondents to disclose details of the loan given to the former (as part of the credit facilities of Himanshu) and the mortgage created by the latter, i.e. the third respondent in favor of MMTC (to secure the credit facilities). An affidavit was accordingly filed refuting PSB's contention that its rights to proceed against the disputed property prevailed; rather MMTC argued that it had pre-existing rights as a secured creditor, by virtue of the deposit of title deeds to the said property by its owner, Shri. Jagdish Kumar, the third respondent.

6. On 25.11.2009, the Recovery Officer held that PSB had an overriding right to proceed against the disputed property. The order, *inter alia,* stated that:

> *"Ld. counsel for the MMTC, the noticee, however submits that the award dated 21.12.2002 is a decree and the MMTC has the first charge over the said property and the CH Bank has no right over the property at 277/2779, Gali No. 20, First Floor, Beadonpura Karol Bagh, New Delhi.*
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> *This forum observes that the award dated 22-12-2002 in the nature of money decree and this award has nothing to do with the mortgage of the property. Further, mortgage of the property by CD-2 with MMTC has not been substantiated. It is further observed that since there exists a financial dispute between CD-2 & MMTC, the alleged rights of noticee, MMTC are only that of recovery under the alleged award. The Section 34 of RDDBFI Act 1993 provides for over riding effect of this Act and section 25 of RDDBFI Act 1993 provides-the powers to the Recovery officer without making distinction between the properties "charged or otherwise". As such the application of MMTC regarding claiming the first right & precedence over the above referred property is hereby rejected."*

7. MMTC felt aggrieved by the above order of the Recovery Officer and appealed to DRT, under Section 30 (1) of the Recovery Act, contending that it had prior rights over the disputed property, since the mortgage by deposit of title deeds was prior in point of time to PSB's transactions with Himanshu and the other respondents. It invoked Section 48 of the Transfer of Property Act, 1882 ("TPA") in support its argument. The DRT accepted the contention of PSB that by virtue of Order 34 Rule 14, CPC, a mortgage suit had to be instituted to enforce a mortgage debt (by sale of the property) and that in its absence the mortgage could not claim overriding rights. In so

concluding, the DRT relied on a judgment of the Supreme Court reported as *M.R. Satwaji Rao v B. Shama Rao*2008 (5) SCC 124 to the effect that

> *"……………..Rule 14 of Order XXXIV CPC which prohibits the mortgagee to bring the mortgaged property to sell otherwise than by instituting a suit for sale in enforcement of the mortgage. Admittedly, the said suit by the mortgagee was not in terms of Rule 14 of Order XXXIV. Therefore, bringing the mortgaged property for sale by the appellants in execution of the decree passed in O.S. No. 120/51-52 and purchasing the same by the appellants in public auction is clearly barred under Order XXXIV Rule 14 CPC."*

8. MMTC appealed to the Appellate Tribunal, which by its impugned order, noticed the above judgement but held that mortgage by deposit of title deeds was a well-known method to create interest in an immovable property and that limitation for initiating a foreclosure suit was 30 years. It held, more importantly that the disputed property was not mortgaged with PSB and that since it was mortgaged with MMTC, the latter had, by virtue of Section 48, TPA a prior claim over it. Consequently, the Appellate Tribunal, by the impugned order directed the Recovery Officer to sell the disputed property with the consent of both MMTC and PSB. Both of them could produce bidders. The proceeds of the sale were to be applied first to satisfy MMTC's claim after which they could be applied to satisfy the recovery certificate arising out of the final decree, in favour of PSB.

Contentions of the Parties

9. PSB is aggrieved by the Appellate Tribunal's impugned order and urges that it failed to notice that the mortgage in favour of MMTC was never proved. Mr. Pallav Saxena, learned counsel for PSB, urged that the Memorandum of deposit of title deeds was undated; besides it did not

pertain to Himanshu. In the absence of the method known to law, i.e. a mortgage suit, in terms of Order XXXIV, Rule 14, Code of Civil Procedure, MMTC could not have rested its claim only on the basis of the arbitral tribunal's award – which resulted in a decree. It was urged here that an arbitration proceeding is neither appropriate nor competent in respect of mortgage transactions, which are to be proceeded with in terms of the only manner known to law i.e. a suit for foreclosure and sale. It is argued in this context that the award at best was a money decree and could under no circumstances be interpreted as to mean a successful mortgage claim.

10. Mr. Saxena relied on the judgment of the Supreme Court reported as *Booz Allen & Hamilton Inc. v SBI Home Finance Ltd* 2011 (5) SCC 532, particularly the observations that mortgage suits- unlike arbitration proceedings which are private actions and can be decided by an agreed forum with consent of parties- are actions *in rem* which can also implicate rights of third parties and are, therefore, non-arbitrable. The following observations were especially relied on:

> *"28. A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration."*

11. It is also argued on behalf of PSB that the Appellate Tribunal fell into error in holding that a suit for foreclosure could be initiated after a longer period of 30 years. In this context, it was urged that the time for filing

a suit to enforce the mortgage claim was within three years of the award and that suit had been rendered time barred. Counsel for the PSB lastly urged that the MMTC could not have successfully argued to avoid the consequences of the enforcement of a recovery certificate under the Recovery Act, without preferring an objection in terms of Rule 11 of the Second Schedule to the Income Tax Act, 1963, which refers to the procedure applicable, by virtue of Section 29 of the Recovery Act.

12. Mr. Rohit Puri on behalf of MMTC argued that this Court should not interfere with the impugned order, which is well reasoned and in consonance with a sound understanding of law. He argued that the award, dated 21.12.2002 by the arbitrator is a decree and cannot be questioned by the certificate holder to dispute its contents. It is contended that there is no dispute between MMTC and Himanshu or the third respondent about the factum of the mortgage on the one hand and that there is no subsisting charge or interest in the disputed property inuring in favour of the PSB, which is a mere certificate holder. The proceedings and orders before the Recovery Officer and the two tribunals below record that the PSB was not a mortgagee in respect of the said disputed property, rather a mere unsecured creditor. In the circumstances, the Appellate Tribunal's conclusions with respect to applicability of Section 48 and the primacy of MMTC's claims were sound and justified.

Analysis and Conclusions

13. Chronologically speaking, the following events occurred: In 1993, MMTC advanced a loan to the second Respondent, supposedly backed by a mortgage of title deeds. In 1994, PSB advanced a loan to the second Respondent. PSB obtained in its favour an order against the second

Respondent in 1998 from the Debt Recovery Tribunal. MMTC obtained an arbitral award in its favour against the second Respondent in 2002.

14. The present dispute pertains to immovable property belonging to Jagdish Kumar (the third Respondent), the original debtor in both the cases, being a proprietor of the second Respondent. The original debtor is now out of the picture, and the two lenders are fighting to claim priority over the asset.

15. MMTC initiated execution proceedings of the award before a civil court. The Arbitration and Conciliation Act, 1996 confers the status of a decree to an arbitral award, which can be enforced according to the provisions of the Code of Civil Procedure. PSB commenced recovery proceedings before the DRT. The proceedings before the Recovery Officer are governed by the Recovery Act. The Recovery Officer under the Recovery Act is cloaked with the same powers as the Income Tax Recovery Officer. By Section 29 of the Recovery Act, the Second Schedule to the Income Tax Act, 1961 (entitled “Procedure for Recovery of Tax”) is made applicable.

16. It is useful to extract the provisions of law applicable to the present dispute. Rule 11 of the Second Schedule to the Income Tax Act, 1961 which is applicable in this regard, is as follows:

> ***"Investigation by Tax Recovery Officer.***
> *11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection :*
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> *Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.*

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that

> *(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or*
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> *(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.*

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

17. Section 48 of the Transfer of Property Act reads as follows:

> *"48. Priority of rights created by transfer.—Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.*

18. Order 34 Rule 14, CPC is also relevant; it states that:

> *"14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by institution a suit for sale in enforcement of the mortgage."*

19. Order 34 Rule 14 of the CPC is clear that the enforcement of a mortgage debt by way of sale of the mortgaged property can only be by filing a separate suit, and not by means of execution proceedings of the earlier decree. By virtue of Section 36 of the Arbitration Act, the arbitral award has the force of a decree. Consequently, the property can only be brought to sale by filing a civil suit, and not in execution proceedings. As *M. R. Satwaji Rao v B. Shama Rao* 2008 (5) SCC 124 is clear authority to that effect, the order of the learned executing Civil Court dated 18.11.2006 cannot be said to be good in law.

20. The Recovery Officer and the DRT proceeded on the correct understanding that the enforcement of mortgage debt by sale must be in accordance with a procedure prescribed by law, and the sale ordered by the executing civil court must have no effect. Their conclusion however, is, that the mortgage must be ignored altogether.

21. The learned DRAT below us, in reversing the order of the DRT, on the other hand, proceeds to hold (correctly in the opinion of this court) that if an earlier mortgage existed it would take prior claim by virtue of Section 48 of the Transfer of Property Act. However, the DRAT went on to direct the Recovery Officer to give effect to the prior claim without having evidence before it that the mortgage existed in itself.

22. This Court is of the opinion that the Debt Recovery authorities below are partially correct in the law, but incorrect in their conclusions. Although the Recovery Officer correctly noticed that Order XXXXIV Rule 14 operates, he *applied it* incorrectly. The sequitur, to this conclusion- in the opinion of this Court - is not that the mortgage must not be accounted for at all; rather, simply, the effect in this case is that the enforcement of mortgage claims cannot be in the manner that they were attempted (i.e. by way of execution proceedings in a civil court) and the enforcement of a mortgage debt by sale must instead be by way of a separate suit.

23. If the mortgage does indeed exist, it will create a prior charge over the property, being prior in time (Section 48 of the Transfer of Property Act). The opinion of the Recovery Officer that the Recovery Act, by virtue of the *non-obstante* provision in Section 34, overrides a prior charge is unacceptable. The *non obstante* clause would operate only where there is a conflict, and the Court holds that the applicable rules themselves envision a situation where the Recovery Officer is confronted with a property that is already charged. Rule 11 of the Second Schedule as applied to the Debt Recovery Officer, sets out how the Recovery Officer should investigate such a claim.

24. The fact that the mortgage debt must be enforced by sale through a separate civil suit <u>does not obviate the mortgage itself</u>. So far as the Debt

Recovery Officer is concerned, Rule 11 merely requires him to investigate if evidence of a prior charge on the property exists, and then proceed accordingly. His task is not to finally give effect to the mortgage debt, nor is it to deny its existence in law. Indeed, his determination is not final and is subject to a civil suit that may be filed in that regard (See Rule 11(6) which states, *inter alia* that *"the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."*).

25. In this case, though the MMTC has placed on record a copy of the memo through which the title deeds to the suit property were handed over to it, the Award does not deal with any mortgage based claim. Therefore, the award itself is a simple money decree, to the extent it determines liability of the second and third respondents. In that sense, the position is similar to *M.R. Satwaji Rao* (supra) where it was held that:

> *"We have already referred to Rule 14 of Order XXXIV CPC which prohibits the mortgagee to bring the mortgaged property to sell otherwise than by instituting a suit for sale in enforcement of the mortgage. Admittedly, the said suit by the mortgagee was not in terms of Rule 14 of Order XXXIV. Therefore, bringing the mortgaged property for sale by the appellants in execution of the decree passed in O.S. No. 120/51-52 and purchasing the same by the appellants in public auction is clearly barred under Order XXXIV Rule 14 CPC."*

This Court does not have the benefit of evidence one way or the other to conclude that an enforceable mortgage claim existed. It is also noteworthy that neither of the authorities below us undertook this line of inquiry. Accordingly the Court deems that remand is the most appropriate course of action to take. This conclusion is based primarily on the fact that a blind application of *M.R. Satwaji Rao (supra)* or *Booz Allen (supra)* does not result in the invalidation of the Award, which has attained finality, *inter parties* (as far as MMTC and its borrowers) vis-à-vis the issue of liability of the said borrowers and guarantors are concerned. However, because of Order XXXIV Rule 14, the *route* adopted by MMTC to enforce that award is not correct. At the same time, any observations on the merits of the potential claim of MMTC in a suit for sale ought to be avoided.

26. The next question to be considered is of limitation in the filing of the suit. Here, it would be relevant to notice that having upheld PSB's contention that by reason of Order XXXIV Rule 14 and the decision in *M.R. Satwaji Rao (supra)* as well as *Booz Allen (supra),* the corollary is not that a further action is barred on the ground of limitation. The limitation for such a suit for sale, under Order XXXIV Rule 14 would be an issue that would arise in case it is filed by MMTC. Advisedly this court refrains from pronouncing on that eventuality, because the issue does not arise for consideration. Furthermore, such an issue would involve decision on a question of fact, which should not be adjudicated in writ proceedings.

27. The sale ordered by the executing court is declared a nullity. As this court does not have the benefit of the record before the executing court, it does not express itself on the execution proceedings.

28. The writ petition is accordingly disposed of in the following terms:

a) The matter is remanded back to the Learned Recovery Officer to determine whether there is evidence to show that PSB has some *'interest in, or was possessed of, the property in question'*. Consequent to his findings, the Recovery Officer shall then proceed in accordance with provisions of law.

b) It is open to MMTC to initiate any proceeding it may deem fit, and both parties are at liberty to urge all rights and contentions in such eventuality.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

NOVEMBER 27, 2015