

CASE NO.:
Appeal (civil) 4257 of 2006

PETITIONER:
Ashok Mahajan

RESPONDENT:
State of U.P. & Ors

DATE OF JUDGMENT: 26/09/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (C) No. 21243-245 of 2004)

ARIJIT PASAYAT, J.

Leave granted.

Appellant calls in question legality of the judgment rendered by a Division Bench of the Allahabad High Court dismissing the writ petition filed by the appellant. The said writ petition was filed under Article 226 of the Constitution of India, 1950 (in short 'the Constitution') for quashing the recovery certificate dated 24.4.2002 issued by the respondents 1 and 2.

Background facts as projected by appellant in a nutshell are as follows:

One M/s Denin Leathers Limited (hereinafter referred to as the 'borrower') had taken term loan of Rs.40 lacs from Pradeshia Industrial and Investment Corporation, Uttar Pradesh Limited (in short 'PICUP') and had mortgaged its immovable properties to secure the loan. Initially the borrower had commenced its business as a private limited company in 1979 but subsequently in the year 1995 it was converted to a Public Limited Company. While the borrower becomes a public limited company, appellant's name was included as a Director. On 7.7.1998 a recovery certificate was issued in respect of one Sanjay Mahajan who was one of the guarantors in respect of the loan. According to the appellant due to continued losses the financial condition of the company was bad and added to the financial problems in the year 1999 because of a devastating fire, assets of the company were destroyed. On 2.2.2002 recovery certificate was issued against the guarantors, namely, Keshav Ram Mahajan, Sanjay Mahajan and Smt. Juli Mahajan. On 25.7.2002 the house and household articles of the appellant were attached by the District Authorities by an order to the effect that dues amounted to nearly Rs.1.24 crores plus interest plus 10% collection charges. Appellant made a representation to the authorities stating that he was not a guarantor though coercive steps were taken against him. The appellant was arrested on 24.11.2002. The recovery certificate was issued on 24.4.2002, as the appellant subsequently learnt in the name of the appellant as well as Keshav Mahajan, Ajay

Mahajan and Sanjay Mahajan. Auction proceedings in respect of property took place on 21.4.2003 under the Uttar Pradesh Public Moneys (Recovery of Dues Act) 1972 (in short the 'Act'). The date for fresh auction was fixed on 22.5.2003 under Section 4 of the Act as well as under several other statutes. Appellant filed the writ petition on the ground that under the Act the recovery could not have been made. The High Court with reference to terms of guarantee rejected the stand and held that the Collector was entitled to recover the amount as arrears of land revenue under Section 279(1)(b) of the Uttar Pradesh Zamindari Abolition Act, 1950 (in short the 'Zamindari Act').

Learned counsel for the appellant submitted that even if it is conceded that the appellant had any liability, the properties of the principal borrower had to be dealt with first.

In response, learned counsel for the respondent submitted that as borrower has no property, as is accepted in various documents, therefore, the properties of the appellant have been rightly dealt with. It is submitted that the appellant has been changing his stand. Initially he stated that he was not a guarantor and subsequently says that even if he is a guarantor properties of the borrower have to be dealt with first.

At this juncture it would be appropriate to take note of the following observations of this Court in Pawan Kumar Jain v. Pradeshia Industrial and Investment Corpn. of U.P. Limited (2004 (6) SCC 758).

"5. Mr. Mohta then relied upon Sections 3 and 4 of the U. P. Act, which read as follows:-

3. Recovery of certain dues as arrears of land revenue.--(1) Where any person is party-

(a) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire-purchase of goods sold to him by the State Government or the Corporation, by way of financial assistance; or

(b) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire-purchase of goods sold to him, by a banking company or a Government company, as the case may be, under a State-sponsored scheme; or

(c) to any agreement relating to a guarantee given by the State Government or the Corporation in respect of a loan raised by an industrial concern; or

(d) to any agreement providing that any money payable thereunder to the State Government shall be recoverable as arrears of land revenue; and such person-

(i) makes any default in repayment of the loan or advance or any instalment thereof; or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any instalment thereof; or

(iii) otherwise fails to comply with the terms of the agreement, - then, in the case of State Government, such officer as may be

authorized in that behalf by the State Government by notification in the official Gazette, and in the case of the Corporation or a Government company the Managing Director thereof, and in the case of a banking company, the local agent thereof, by whatever name called, may send a certificate to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrear of land revenue.

(2) The Collector on receiving the certificate shall proceed to recover the amount stated therein as an arrear of land revenue.

(3) No suit for the recovery of any sum due as aforesaid shall lie in the civil court against any person referred to in sub-section (1).

4. Savings. -- (1) Nothing in section 3, shall -

(a) affect any interest of the State Government, the Corporation, a Government company or any banking company, in any property created by any mortgage, charge, pledge or other encumbrance; or

(b) bar a suit or affect any other right or remedy against any person other than a person referred to in that section, in respect of a contract of indemnity or guarantee entered into a relation to an agreement referred to in that section or in respect of any interest referred to in clause (a).

(2) Where the property of any person referred to in Section 3 is subject to any mortgage, charge, pledge or other encumbrance in favour of the State Government, the Corporation, a Government company or banking company, then --

(a) in every case of a pledge of goods, proceedings shall first be taken for sale of the thing pledged, and if the proceeds of such sale are less than the sum due, then proceedings shall be taken for recovery of the balance as if it were an arrear of land revenue :

Provided that where the State Government is of opinion that it is necessary so to do for safeguarding the recovery of the sum due to it or to the Corporation, Government company or banking company, as the case may be, it may for reasons to be recorded, direct proceedings to be taken for recovery of the sum due, as if it were an arrear of land revenue before or at the same time as proceedings are taken for sale of the thing pledged;

(b) in every case of a mortgage, charge or other encumbrance on immovable property, such property or, as the case may be, the interest of the defaulter therein, shall first be sold in proceedings for recovery of the sum due from that person as if it were an arrear of land revenue, and any other proceeding may be taken thereafter only if the Collector certifies that there is no prospect of realization of the entire sum due through the first mentioned process within a reasonable

time."

6. He submitted that by virtue of these provisions, the 1st Respondent cannot proceed against the Appellant/guarantor until the 1st Respondent has first sold the property of the principal-debtor which had been mortgaged in their favour. He points out that on 22nd July, 1996 action under Section 29 of the State Financial Corporation Act, 1951 had been initiated and physical possession taken. He points out that thereafter on 12.02.1996 a One Time Settlement was arrived at by the 1st Respondent with the 4th Respondent. He points out that thereafter the property was handed back to the 1st Respondent. He submits that, therefore, the 1st Respondent is not entitled to proceed against the Appellant.

7. Mr. Bhalla admits the above mentioned facts. He, however, submits that the company committed defaults and, therefore, the One Time Settlement failed. He submitted that earlier attempts to sell the properties of the 4th Respondent Company yielded no result as no offers were received. He submitted that action under Section 29 has again been initiated against the 4th Respondent Company. He submitted that as the 4th Respondent Company has committed defaults and it has not been possible to recovery by sale of property, action has been taken against the guarantor for recovery of the amount.

8. In our view, the above set out provisions of the U.P. Act are very clear. Action against the guarantor cannot be taken until the property of the principal-debtor is first sold off. As the Appellant has not sold the property of the principal-debtor, the action against the Appellant cannot be sustained. We, therefore, set aside the Recovery Notice."

It would be appropriate to direct the High Court to reconsider the matter in the light of the observations quoted above, keeping in view the factual scenario of the present case.

The appeals are allowed to the aforesaid extent without any order as to costs.