

CASE NO.:
Appeal (civil) 3636-3637 of 1998

PETITIONER:
Pawan Kumar Jain

RESPONDENT:
The Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Ors.

DATE OF JUDGMENT: 11/08/2004

BENCH:
S. N. Variava & Arijit Pasayat

JUDGMENT:
J U D G M E N T

S. N. VARIAVA, J.

These Appeals are against the Order of the Allahabad High Court dated 01.09.1997 by which Appellant's Writ Petition has been dismissed and the Order dated 06.11.1997 by which the Review Petition has been dismissed.

Briefly stated the facts are as follows.

The 1st Respondent had advanced monies to the 4th Respondent. The Appellant stood guarantor in respect of the said loan as at that time he was a Director of the 4th Respondent-Company. By the Writ Petition, the Appellant challenged the Recovery Notice issued against him under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972. The High Court has dismissed the Writ Petition and the Review Petition.

Mr. Mohta submitted that the Central Government has issued a Notification specifying 1st Respondent-Corporation as a Financial Institution within the meaning of the term as defined in Section 2(h) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the "Debt Recovery Act"). He submitted that such an Institution can only proceed in the manner laid down in the Debt Recovery Act. He submitted that it is not open to give a go-by to the provision of the Debt Recovery Act and use the machinery under the U.P. Public Moneys (Recovery of Dues) Act, 1972 (hereinafter called the "U.P. Act"). For this reason the Notice is bad and requires to be quashed. In support of his submission, he relied upon the case in Unique Butyle Tube Industries (P) Ltd. Vs. U. P. Financial Corporation & Ors. [(2003) 2 SCC 455]. In this case, it has been held that a Financial Institution within the meaning of that term in the Debt Recovery Act cannot proceed under the U. P. Act.

This authority would have been binding upon us. However, in reply Mr. Bhalla pointed out that in respect of the 1st Respondent-Institution the Notification by the Central Government has only been issued on 24.01.2004, whereas the Recovery Certificate is of a much earlier date. He submitted that, therefore, in this case the proceedings under the U. P. Act are not barred. He pointed out that under Section 31 of the Debt Recovery Act, it is only suit or proceeding pending before any Court, which stand transferred to the Tribunal established under that Act. In our view, Mr. Bhalla is right. As the action was initiated prior to the Notification being issued by the Central Government, the action would not be barred and would not stand transferred to the Tribunal.

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.\027(1) Where any person is party\027

(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\027

(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.\027(1) Nothing in section 3, shall \026

(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 \026

(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."

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.

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.

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.

We, however, clarify that it will be open to the 1st Respondent to proceed against the Appellant before the Debt Recovery Tribunal in accordance with principles laid down in Unique Butyle Tube's case (supra).

The Appeals stand disposed of accordingly. There will be no order as to costs.