

industrial Development Bank of Vs. Export Import Bank of India and

industrial Development Bank of Vs. Export Import Bank of India and

SooperKanoon Citation : sooperkanoon.com/56332

Court : DRAT Mumbai

Decided On : Mar-10-2004

Reported in : II(2005)BC198

Judge : P Upasani

Appellant : industrial Development Bank of

Respondent : Export Import Bank of India and

Advocate for Def. : Mr. Kevic Setalwad

Advocate for Pet/Ap. : Mr. Sunil Shukla

Judgement :

1. This misc. Appeal is filed by the appellants/original defendant No.3 Industrial Development Bank of India (for a sake of brevity hereinafter to be referred to as IDBI) being aggrieved by the order dated 15.1.2004 passed by the learned Presiding Officer of Debts Recovery Tribunal-I, Mumbai in Appeal No. 11 of 2003 in Recovery Proceedings of 29 of 2001 in Original Application No. 2268 of 2000. By the impugned order, the learned Presiding Officer dismissed the appeal filed by the appellants. The said appeal had been filed by the appellants being aggrieved by the order passed by the Recovery Officer of the said Tribunal below Exhibit No. 92 in Recovery Proceedings No.29 of 2001 rejecting appellant's contention that the plant and machinery in question were movables and, therefore, the appellants had pari passu charge on the said plant and machinery and they were entitled to

share the net sale proceeds thereof.

2. Few facts, which are required to be stated and for which there is no dispute, are as follows: The appellants IDBI has filed Original Application No. 2632 of 2000 before the Debts Recovery Tribunal-II, Mumbai against the respondent No. 2 Eastern Overseas Limited (for the sake of brevity hereinafter to be referred to as the Company) wherein the respondent No. 1 Export Import Bank of India (for the sake of brevity hereinafter to be referred to as Exim Bank) were defendant No. 4. The Exim Bank had also filed Original Application No. 2268 of 2000 against the very same respondent No. 2 i.e. the Company before the said Tribunal and both these original applications namely one filed by the IDBI as well as one filed by Exim Bank against the said respondent No. 2, the company came to be decreed.

Immovable properties of the respondent No. 2, the company, were mortgaged with the respondent No. 1 Exim Bank exclusively, whereas the IDBI and Exim Bank had pari passu charge on the movables of the respondent No. 2, the company.

After the recovery certificate was issued in favour of the Exim Bank, recovery proceedings bearing R.P. No. 29 of 2001 came to be initiated, in which the immovable properties along with plant and machinery were put to sale as a one lot and movables were sold as a different lot.

When the process of sale was going on, IDBI had filed an application before the Recovery Officer to sell the plant and machinery as different lot contending inter alia that it was movable property, over which they had pari passu charge and therefore they were entitled to share the sale proceeds of the same. Somehow or the other the said application was not prosecuted by the IDBI. In the meanwhile, after making four different efforts, the sale was concluded in which the plant and machinery were sold as one lot and rest of the movables were sold as different lot.

It was thereafter that the IDBI moved application before the Recovery Officer that they were entitled to share sale proceeds of the plant and machinery. The said application was opposed by the Exim Bank on the ground that the application given by the IDBI to treat the plant and machinery as a different lot was never prosecuted by them, that the said plant and machinery was sold along with the

land building treating it as immovable property, that all this was done within the knowledge of the IDBI and that the IDBI did not press for selling the plant and machinery as different lot, despite giving such application because even the IDBI was aware that it was part and parcel of the immovable property and could not have been sold separately. It was also denied that the plant and machinery was movable property and could have been sold separately. It was reiterated that it was very much an immovable property which was mortgaged with them and that IDBI has no share in the same.

3. The Recovery Officer after hearing both the sides upheld both the contentions of the Exim Bank and rejected the application of the IDBI. Grievance of the IDBI therefore was that they were denied opportunity to share sale proceeds of the plant and machinery, which was a movable property over which they had pari passu charge along with Exim Bank and hence, they filed appeal against the said order to the learned Presiding Officer of Debts Recovery Tribunal-I, Mumbai, under Section 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter to be referred to as 'RDB Act'). The learned Presiding Officer after hearing both the sides upheld the finding given by the Recovery Officer and dismissed the appeal of the appellants IDBI. Hence, appeal to this Appellate Forum.

4. I have heard Mr. Rishabh Shah along with Mr. Sunil Shukla appearing for the appellants so also Mr. Kevic Setalwad appearing for the respondent No. 1 Exim Bank. I have also gone through the entire proceedings including the order passed by the Recovery Officer, one passed by the learned Presiding Officer, which is impugned in this appeal and the relevant case law cited by both the parties at the bar and in my view, the impugned order has been correctly passed.

5. It is contended by Mr. Rishabh Shah, the learned Advocate appearing for the appellants that though the plant and machinery is embedded in the earth, it cannot be said that the said plant and machinery can be branded as immovable property. According to Mr. Shah, the said plant and machinery has to be treated as movable property and admittedly they have pari passu charge over the movable property along with the Exim Bank. He argued that as far as immovable property is

concerned, they are not laying their claim upon it because admittedly it was mortgaged only with the Exim Bank, but as far as the plant and machinery is concerned, they are entitled to sale proceeds along with the Exim Bank on pari passu basis. To support his contention that just because the said plant and machinery is embedded to the earth, it cannot be treated as immovable property, Mr. Shah relied upon judgment of the Supreme Court in the case of Sirpur Paper Mills v. Collector of Central Excise, Hyderabad, reported in J.D (December 11, 1997). He also relied upon AIR 1976 Madras 215 (The South India Bank Ltd. v. V. Krishna Chettiar and Bros.). Mr. Shah also submitted that though at the time of sale, the said property namely plant and machinery was included along with immovable property and was sold in one lot and though in the proclamation of sale at the all four instances, the proclamation stated and described the said plant and machinery as immovable property, the appellants never objected to it because they thought it expedient not to object at that point of time and they were confident that when sale will be through they can always lay their claim on the sale proceeds along with the Exim Bank on pari passu basis.

6. Mr. Kevic Setalwad, the learned Advocate appearing for the respondent No. 1 Exim Bank, on the other hand, vehemently denied that in the present case considering the facts and intention of the parties, the said plant and the machinery can be ever treated as movable property on which the appellants can lay their pari passu claim along with Exim Bank. He submitted that at three times auction was held and in every proclamation of sale, there was a schedule of immovable assets as well as movable assets and that in the first lot, which was with respect to immovable assets, along with land and building main plant and machinery and miscellaneous equipments were included and that in the second lot, which was with respect to movable assets, other items like Weighing Scales, Hydraulic Trolley, Sealing Machine, etc. were included. He further argued that the appellants, IDBI never made any grievance about inclusion of plant and machinery in the first lot which was shown as immovable property over which they had no claim and that it was only thereafter as an afterthought this claim is now coming forward.

7. Mr. Setalwad also pointed out that even in the valuation report submitted by Miltec Consultancy Service with respect to asset clarification, besides land and building the said valuer categorized the main plant and machinery viz. Dal, Spice and Besan Mills, under immovable category as the equipments had been either embedded to the earth or supported by platforms attached to the earth and walls at various levels without which the equipment could not be made functional, unlike in the case of movable machinery and there was no grievance made by the appellants.

Mr. Setalwad also pointed out from the pleadings of the original application filed by the IDBI itself against the said company, in which Exim Bank was arraigned as defendant No. 4 (O.A. No. 2631/2000) that in Exhibit-A which is annexed to the plaint, there is description given of immovable property and at Exhibit-B there is description of movable property. Mr. Setalwad further pointed out that in the description of the said immovable property, what is included is as follows: All those piece and parcel of land viz. Plot No. 32, admeasuring 8,305 sq. mtrs. or thereabouts, in the TTC Industrial Area of MIDC, within the Village limits of Mahape and within the limits of Navi Mumbai Municipal Corporation, Taluka and Registration Sub-District Thane, District and Registration District Thane, in the State of Maharashtra and bounded as follows: On or towards the East by -- Central South Road, and On or towards the West by -- Estate Road, together with all hereditaments, buildings, structures, erections and godowns constructed and erected thereon and all plant and machinery attached to the earth or permanently fastened to anything attached to the earth and lying and being therein." Mr. Setalwad, thus, vehemently argued that this is the interpretation and intention of the appellants themselves, which is reflected in this description, in which they accepted plant and machinery as immovable property and therefore they showed it specifically as immovable property. He also submitted that other instance of their having no grievance with respect to inclusion of plant and machinery as immovable property is revealed by their silence with respect to valuation report, so also their conduct of not making any complaint about the plant and machinery described as immovable property and included in the lot along with immovable property at the time of four sale instances. He submitted that the plant and machinery is Dal, Spice and Besan Mills, is huge and embedded to the earth in

such a way that it cannot be removed and if removed, machinery is not marketable, cannot fetch any price and is worthless and if at all sold, would be sold only as scrap.

He showed photographs showing hugeness of the machinery and nature of installation. He also vehemently argued that right from the beginning the plant and machinery described as immovable property was accepted as such by the IDBI, that no grievance was ever made by the IDBI about inclusion of plant and machinery as immovable property, that all along that was the intention of the parties to treat this as immovable property and that when the plant and machinery is so embedded to the earth, it cannot be taken out and if it is taken out, entire thing becomes useless and is not marketable, then installation has to be treated as immovable property. To support his contention, he relied upon judgment in the case of *Triveni Engineering & Industries Ltd. and Anr. v. Commissioner of Central Excise and Anr.*, IV (2004) BC 6 (DB)=(2000) 7 Supreme Court Cases 29, so also judgment of Rajasthan High Court, Jodhpur Bench, in the case of *Commercial Tax Officer v. Sadulshahar Krai Vikrai Sahakari Samiti*, (2003) 129 Taxman 613 Raj.).

8. I have carefully gone through the case law cited at the Bar by both the sides. All these cases are arising out of Central Excise Act and the question involved in these cases was whether items mentioned therein attracted excise duty or not, because if an article is an immovable property, it cannot be termed as excisable goods for the purpose of the Excise Act. Indeed, there is no definition given of the expression "immovable property" either in Transfer of Property Act or in any taxing statutes. For reference, two definitions in two other statutes can be looked into, one in the Central General Clauses Act and another in the Act of 1882. Definition of immovable property as given in the General Clauses Act defines immovable property as the land and benefits arising out of land and things attached to earth or permanently fastened. A true position is in the explanation given to the parenthesis 'attached to the earth' appearing in Section 3 of the Transfer of Property Act.

(c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached." Thus, from the above meaning given by the Statute to the expression 'attached to the earth', it is clear that such attachment should be for

the permanent beneficial enjoyment of that, to which it is attached.

In *Mittal Engg. Works (P) Ltd. v. CCE*, (1997) 1 SCC 203 the question for consideration was whether mono-vertical crystallizers answer the meaning of "goods". In this case, Mono-vertical crystallizers were used in sugar factories to exhaust molasses of sugar. The component parts of mono-vertical crystallizers were cleared on payment of excise duty from the premises of the appellants therein and they were then assembled, erected and attached to the earth at the site of the customers' sugar factory. The process involved welding and gas-cutting. The Central Excise Customs and Gold (Control) Appellate Tribunal (CEGAT) held that the mono-vertical crystallizer was complete when it left the factory and upheld the demand of excise duty on clearance thereof. The Supreme Court pointed out that the mono-vertical crystallizer had to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory and it was not capable of being sold as it is without anything more. Bharucha, J., (as he then was) speaking of the Court, observed as follows: "The erection and installation of a plant is not excisable. To so hold would, impermissibly, bring into the net of excise duty all manner of plants and installations." Again in *Quality Steel Tubes (P) Ltd. v. CCE*, (1995) 2 SCC 372, the Supreme Court had to consider the question whether the tube mill and welding-head erected and installed by the appellants for the manufacture of tubes and pipes out of duty-paid raw material were assessable to duty under residuary Tariff Item 68 of the Schedule, being excisable goods within the meaning of the Central Excise Act.

Here the Supreme Court restated two tests, namely, first the article must be goods and secondly that it should be marketable or capable of being brought to market. It was held that the goods which were attached to the earth and thus became immovable did not satisfy the test of being goods within the meaning of the Central Excise Act nor could it be said to be capable of being brought to the market for being sold. In *Quality Steel Tubes (P) Ltd's* case, it was found that both the tests were not satisfied and, therefore, the tube mill and welding head erected by the appellants were not exigible to excise duty. It was held that erection and installation of a plant could not be held to be excisable goods and if such a wide meaning was assigned, it would result in bringing in its ambit structures, erections

and installations which would surely not be in consonance with the accepted meaning of excisable goods and its exigibility to duty.

9. Now what is this test of marketability? Apart from the Supreme Court, the Rajasthan High Court in the case of Commercial Tax Officer v. Sadulshahar Krai Vikrai Sahakari Samiti, (supra) has described this point lucidly as follows: "The plant and machinery to be judged whether it is permanently fastened or attached to the earth is to be seen from the point of utility. If such plant and machinery can be used without being attached to the earth, it can be found to be movable. Heavy machineries are in common used after being fastened to earth.

Because unless that is done, their vibration will not only impair the efficiency but would affect them and therefore, any heavy machinery or plant when put to use, it has to be fastened to earth on some foundation. Unless such fastening is there, the plant and machinery cannot be put to a rational use....." This decision of the Rajasthan High Court is in consonance with the marketability test enunciated by the Supreme Court in Triveni Engg.

case (supra). This is what the Supreme Court has stated as far as marketability test is concerned: "The marketability test requires that the goods as such should be in a position to be taken to the market and sold. In order to take it to the market the turbo alternator has to be separated into its components -- but then it would not remain turbo alternator. Though, there is no finding that without fixing to the platform such turbo alternator would not be functional, it is obvious that when without fixing it does not come into being it can hardly be functional." 10. In the present case at hand, it is the contention of the respondent No. 1 Exim Bank, which is also substantiated by the description and photographs tendered by the respondent No. 1 Exim Bank, that the plant and machinery is so embedded to the earth, that it cannot be separated from it and if it is separated, it would not remain marketable commodity. It is also to be noted that in Triveni Engg, case (supra), the Supreme Court has referred the case of Sirpur Paper Mills Ltd. v.CCE (supra) on which, the appellants IDBI has heavily relied and has observed that while deciding Sirpur Paper Mill's case (supra), decisions of the Supreme Court in the Quality Steel Tubes (P) Ltd's case (supra) so also decision of the Supreme Court in the

Mittal Egg.

Works (P) Ltd's case (supra) were not brought to the notice of the Court.

In the present case at hand, proposition made by the appellant Advocate that whatever is embedded in earth cannot be treated as immovable property, is as such a sound proposition. However, considering intention of the parties, which is revealed from non-action of IDBI i.e. not raising any grievance with respect to inclusion of the plant and machinery in the category immovable property at the time of four sale instances, so also in the valuation report and in their own O.A in which the plant and machinery is also described by them as immovable property, IDBI now cannot say that it was not their intention to treat the plant and machinery as immovable property. The learned Presiding Officer was certainly right when he observed that in his view, it was not proper that IDBI's claim must fail solely on the ground because they did not object to this earlier. However, this is a significant fact which throws light on the intention of the parties. Contention of Mr. Rishabh Shah is that they did not make any complaint on this point because they were confident that they can lay their claim once the sale proceeds are realized, is also to certain extent, correct. But to be on safer side, it would have been proper if they had raised this point at the earliest. They ought to have visualized that if ultimately they cannot lay their claim on plant and machinery, then their acquiescence to the circumstances in which are said plant and machinery was treated as immovable property would come into their way. Indeed, whether the article/goods is movable or immovable depends upon circumstances. In the present case at hand, considering overall circumstances, it has to be concluded that the Recovery Officer, so also the learned Presiding Officer was right in treating and including the said plant and machinery as immovable property. The appeal, therefore, falls. Hence, following order is passed: In view of this, Misc. Application No. 45/04 also does not survive and is disposed of accordingly.

On the request of Mr. Sunil Shukla, operation of today's order is stayed for a period of four weeks from today i.e. till 10.4.2004.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com