

Debt Recovery Appellate Tribunal - Delhi

T.R.S. Goel (Huf) vs Union Bank Of India And Anr. on 6 May, 2004

Equivalent citations: I (2005) BC 63

Bench: K Kumaran

JUDGMENT K.S. Kumaran, J. (Chairperson)

1. In pursuance of the Final Order/Recovery Certificate issued in O.A. 414/95 by the Debts Recovery Tribunal Delhi (thereinafter referred to as 'the DRT') in favour of the 1st respondent-Union Bank of India (hereinafter referred to as the Respondent-Bank') against M/s. Logic Systems Pvt. Ltd. and Others, including Mr. T.R.S. Goel, the Recovery Officer attached and proclaimed for sale the property-Door No. 104, Defence Colony, New Delhi (with which we are concerned in this appeal) and another property.

2. Aggrieved, the appellant- T.R.S. Goel (HUF) (hereinafter referred to as 'the Appellant/Objector') filed its objections before the Recovery Officer, DRT-II, Delhi, urging that the Hindu Undivided Family-T.R.S. Goel consists of Mr. T.R.S. Goel, his wife-Mrs. Shiromani Goel, his sons- Mr. Shantanu Goel and Mr. Himanshu Goel, and that the appellant/objector received the notice for attachment and sale proclamation, dated 16th August, 2001, pasted on the front side of the property in question. According to the appellant/objector, the recovery proceedings against its property cannot be initiated for the claims against M/s. Logic Systems Pvt. Ltd. simply because the Karta of the Hindu Undivided Family- Mr. T.R.S. Goel is a Director. The appellant/objector claims that it is the absolute owner of the property bearing No. D-104, Defence Colony, New Delhi, which was purchased under the registered sale deed dated 18th February, 1984 from out of the funds of the Hindu Undivided Family. According to the appellant/objector, it is the sole residence of Mr. T.R.S. Goel and the other members of the appellant/objector, Mr. T.R.S. Goel, (HUF) and that it has not so far been partitioned. The appellant/objector, therefore, claims exemption from attachment and the sale of the residential house of the Hindu Undivided Family. The appellant/objector further claims that no efforts were made to realise the money from the company by selling its assets, before attaching and proclaiming for sale the property in question. The appellant/objector has also urged that valuable assets of the company are available.

3. The respondent-Bank filed a reply before the Recovery Officer wherein it urged that the attachment order dated 11th July, 2001 was issued in the recovery proceedings for a sum of Rs. 4 crores and odd, which is due from and outstanding against the certificate debtors to the respondent-Bank. The respondent-Bank denied the details of the Mr. T.R.S. Goel (HUF) for want of knowledge, but urged that it is entitled to proceed against the attached property for the recovery of its dues on the basis of personal guarantee deed executed by Mr. T.R.S. Goel in favour of the respondent-Bank.

4. The respondent-Bank also urged that at the time of the disbursement of the loan to the Company, Mr. T.R.S Goel had himself stated that he is a resident of another property, namely, No. D-30, Defence Colony, New Delhi.

5. The Recovery Officer, by his order dated 23rd April, 2002, disposed of this objection of the objector (in R.C. 77/2000) in terms of the order passed in R.C. 80/99 observing that the same objections have been taken in R.C. 80/99 in O.A. 102/97, and that in both the cases the certificate debtors are same and common as also the property.

6. The learned Recovery Officer also ordered that a copy of the order in R.C. 80/99 passed on 22nd April, 2002 be also made part and parcel of the order passed in the present case.

7. In the said order dated 22nd April, 2002 passed in R.C. 80/99 the Recovery Officer observed that the objector has not submitted the details of the HUF funds used for the purchase of the property, copy of the HUF Income-tax Returns and documentary proof of the existence of HUF. He also observed that the property in question was purchased by Mr. T.R.S. Goel (HUF) when his father Mr. Anup Goel was alive, who is also one of the certificate debtors. He held that in such circumstances the provisions of Section 60(1) (CCC) of the Code of Civil Procedure are not applicable to the facts of the case. He also observed that a creditor, who had obtained a decree against a father, has a right to attach and sell even the interests of the sons in the joint family property, since, the sons have a pious obligation to discharge the debts of the father. Ultimately, the Recovery Officer dismissed the objections filed by the appellant/objector.

8. Aggrieved, the appellant/objector filed Appeal 31/2002 before the DRT-II, Delhi. But, the learned Presiding Officer of the DRT observed that when Mr. T.R.S. Goel gave the guarantee, he did not mention whether he was giving the guarantee in his individual capacity or as Karta of HUF, and that the appellant/objector cannot escape the liability by urging that the property in question is owned by the HUF, of which Mr. T.R.S. Goel is the Karta. Therefore, the learned Presiding Officer of the DRT dismissed the appeal in limine.

9. Aggrieved, the appellant/objector has come forward with this appeal. The respondent-Bank has filed a suitable reply opposing the appeal.

10. I have heard Counsel for both the sides, and perused the records.

11. The respondent-Bank filed Suit No. 945/90 before the Hon'ble High Court of Delhi against (1) Logic Systems Pvt. Ltd. (2) Mr. Tej Raj Singh Goel and, (3) Dr. (Mrs.) Swarn Lata Aggarwal for the recovery of Rs. 1,17,90,025.86 with interest and costs. The respondent-Bank prayed for a joint and several decree for the said sum against the defendants, an order of injunction restraining the defendants from dealing with, alienating or parting with the possession of the hypothecated goods and other assets of the defendants, and for leave under Order II, Rule 2 CPC to institute suit or such other proceedings in appropriate Court/ Forum having jurisdiction over the mortgaged property, viz., Flat No. 3, Dutta Apartments, Khar, Bombay, and other claims of the respondent-Bank against the defendants. In para 2 of the plaint it has been mentioned that the 1st defendant is a company while defendant Nos. 2 and 3 are Directors of the same, who have personally guaranteed the repayment of the suit amount. The respondent-Bank has further urged that the above said property was equitably mortgaged by the 1st defendant with the respondent-Bank by deposit of title deeds with the intent to create a security for the dues.

12. The Hon'ble High Court of Delhi, by order dated 31st May, 1991, granted leave to the respondent-Bank to institute a separate suit for which leave was sought for, and to omit from this suit the relief based on the mortgage property.

13. When, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as 'the Act') came into force, Suit 945/95 was transferred to DRT, and the DRT took the suit on its file as O.A. 414/95. Ultimately, the DRT passed ex parte final order as follows ;

"Defendants are ordered:

(1) to pay a sum of Rs. 1,17,90,025.86 ps. together with pendente lite and future interest @ 18.5% per annum from the date of filing the suit till its realisation in full in favour of the applicant Bank.

(2) Defendants shall also pay the cost of the suit.

(3) Defendants shall be jointly and severally liable to pay the said amount within four weeks from the date of receipt of this order.

In the event of failure on the part of the defendants to pay the said amount within the stipulated period, the applicant Bank shall be entitled to recover the said amount from the sale of the mortgaged property i.e. Flat No. 3 Dutta Apartments, Khar, Bombay and sale of the hypothecated goods if at all available. If on sale of the mortgaged property and sale of the hypothecated goods, the entire amount is not recovered, balance shall be recovered from the defendants jointly and severally.

Certificate be issued in terms of the order."

14. In pursuance of the Recovery Certificate issued in this O.A. recovery proceedings started before the Recovery Officer (in R.C. 77/2000). By order dated 10th July, 2001 the Recovery Officer ordered attachment of the property bearing No. D-104, Defence Colony, New Delhi. The appellant/objector then filed its objections to the attachment of this property mainly urging that this property is the property of the appellant/objector, i.e. T.R.S. Goel (HUF), which is the sole residence of Mr. T.R.S. Goel and the other members of the said HUF, and is exempt from attachment and sale in view of Section 60, Code of Civil Procedure. According to the appellant/objector, the property was purchased by it under the Sale Deed dated 18th February, 1984 with the funds of the HUF. The appellant/objector also urged that Mr. T.R.S. Goel is one of the directors of the 1st defendant-Company, and that before attaching this property in question, which belongs to Mr. T.R.S. Goel (HUF), no efforts were made to realise the amount due from the company by selling the assets of the company. The appellant/objector also urged that the property of Mr. T.R.S. Goel (HUF) cannot be made liable for the dues of the 1st defendant-Company as the HUF has no share in the 1st defendant-Company. The appellant/objector also urged that this property is being used for residential purposes, and has not been partitioned so far.

But, as pointed out already, the learned Recovery Officer dismissed the objections by his order dated 23rd April, 2002 in the same terms of the order passed in R.C. 80/99 observing that the same

objections have been raised in R.C. 80/99 (in O.A. 102/97), that in both the cases the certificate debtors are same, and the property is also same. The learned Recovery Officer also observed in his order passed in R.C. 80/99 that the appellant/objector has not produced the details of the HUF funds used for the purchase of this property, and that the copy of the Income-tax Returns of the HUF, documentary proof for the substantial existence of the HUF in the year 1984 have not been filed. He also observed that the property had been purchased when Mr. Anup Goel (who is also Certificate Debtor No. 4), the father of Mr. T.R.S. Goel, was alive, and, therefore, the provisions of Section 60(1)(ccc) CPC are not applicable to this case as the certificate debtors are in such a position that they can purchase more than one house. The learned Recovery Officer also held that for the liability of the father, the creditor can also proceed against the share of the sons also in the joint family properties in view of the pious obligation of the sons to discharge the debts, which are not avyavaharika.

15. The learned Counsel for the appellant/objector points out the Sale Deed dated 18th February, 1984 in favour of Mr. Tej Raj Singh Goel (HUF), and contends that when this property has specifically been purchased by Mr. T.R.S. Goel (HUF), it cannot now be stated that this property is not the joint family property. The learned Counsel for the appellant/ objector also points out that, with regard to the liability of the 1st defendant-Company, the Income-tax Officer also attached this very same property treating Mr. T.R.S. Goel liable for the liability of the 1st defendant-Company, but, on appeal, the Commissioner of Income-tax by his order dated 27th February, 2001 held that this property belongs to Mr. T.R.S. Goel (HUF), and not to Mr. T.R.S. Goel, the individual, and, therefore, this property cannot be sold. The learned Counsel for the appellant/objector points out that a copy of this order has been filed with this appeal.

16. This apart, the learned Counsel for the appellant/objector also points out that even while the matter was pending before the Hon'ble High Court of Delhi (as Suit No. 945/90) the respondent-Bank itself had treated this property as the property of the HUF only and, therefore, had filed LA. 2525/90 for restraining Mr. T.R.S. Goel from alienating his share in this property in question, namely, D-104, Defence Colony, New Delhi, and accordingly, on 29th March, 1990, an interim order to that effect was also passed. He also points out the averment made in paragraph 2 of this application made by the respondent-Bank that Mr. T.R.S. Goel is the owner of the HUF property, being D-104, Defence Colony, New Delhi, and had undertaken to mortgage the said property in favour of the respondent-Bank to secure its dues. The learned Counsel for the appellant/objector contends that this property was not mortgaged to the respondent-Bank.

17. Pointing out these details, the learned Counsel for the appellant/objector contends that the respondent-Bank had not taken any efforts to sell the property of the 1st defendant-Company, which was mortgaged. According to him, before ever the respondent-Bank proceeds against the guarantor, namely, Mr. T.R.S Goel, by attaching the property in question, the respondent-Bank should have first proceeded against the mortgaged property belonging to the 1st defendant-Company in view of the final order passed by the learned Presiding Officer of the DRT that the respondent-Bank has to proceed against the mortgaged property of the 1st defendant, and if the amount is not realised in full, then, it can proceed against the defendant Nos. 2 and 3 in the O.A. who are jointly and severally liable.

18. The learned Counsel for the appellant/objector points out that in the reply filed by the respondent-Bank to the objections filed by the appellant/objector, the respondent-Bank has merely denied for want of knowledge the details of Mr. T.R.S. Goel (HUF), and that this is no denial at all, but, amounts to an admission as to who are the members of the said HUF. He also points out that in paragraph 4 of the objections the appellant/objector has specifically urged that Mr. T.R.S. Goel (HUF) is the sole and absolute owner of the property bearing No. D-104, Defence Colony, New Delhi, having purchased the same under the registered Sale Deed dated 18th February, 1984 with the funds of the HUF. He further points out that the respondent-Bank in its reply has not specifically denied these averments found in paragraph 4 of the objections, but, has merely stated that since Mr. T.R.S. Goel has executed a personal guarantee, the respondent-Bank is entitled to proceed against the attached property for the recovery of its dues. The learned Counsel for the appellant/objector contends that though the learned Recovery Officer has observed that the appellant/objector has not placed on record the details of the HUF funds used for purchasing the property, he has not referred to the details of sources submitted by the appellant/objector, a copy of which has been filed with this appeal. He also contends that the existence of the HUF during the year 1984 is evident from the Wealth Tax and Income-tax assessment orders submitted for the years 1980-81, 1981-82, 1982-83 and 1983-84, copies of which have been filed with the appeal. The learned Counsel for the appellant/objector contends that these factors have not been taken note of and considered by the Recovery Officer, and the learned Recovery Officer has disposed of the objections filed by the appellant/objector in these proceedings (R.C. 77/2000) in the same terms of the order passed in R.C. 80/1999 wherein also the same property has been attached as the property of Mr. T.R.S. Goel. The learned Counsel for the appellant/objector contends that the parties to R.C. 77/2000 and R.C. 80/1999 are not the same as observed by the learned Recovery Officer.

19. The learned Counsel for the appellant/objector further contends that the learned Recovery Officer is also not right in observing that the objections in R.C. 77/2000 and 80/1999 are same, and that the certificate/debtors are also same in both the matters. He also contends that the learned Recovery Officer has not held that Mr. T.R.S. Goel (HUF) or Mr. T.R.S. Goel, the individual, has any other residential house anywhere, and there is also no evidence to show the same. He also contends that there is no plea or finding that Mr. T.R.S. Goel resides in USA.

20. The learned Counsel for the appellant/objector, therefore, contends that the points raised by the appellant/objector have not been properly considered and decided either by the Recovery Officer or by the learned Presiding Officer of the DRT, in appeal.

21. So far as the contention of the appellant/objector that the property in question is the property of the HUF is concerned, we find that the specific plea in this regard has been taken in paragraphs 2, 3 and 4 of the objections filed by the appellant/objector before the Recovery Officer. In reply to the averments found in this regard the respondent-Bank has merely stated that it is well within its rights to proceed against the attached property for the recovery of its dues on the basis of the guarantee executed by Mr. T.R.S. Goel in favour of the Bank, but, has not specifically denied that this property in question is the property of the HUF.

22. In order to support its contention that this property is the property belonging to Mr. T.R.S Goel (HUF) the appellant/objector has also produced a copy of the Sale Deed dated 18th February, 1984 executed specifically in favour of Mr. Tej Raj Singh Goel (HUF). The specific plea in paragraph 4 of the objections is that Mr. T.R.S. Goel (HUF) is the sole and absolute owner of the property in question, having purchased the same under Sale Deed dated 18th February, 1984 from the funds of the HUF. In reply to this averment the respondent-Bank has only stated in its reply that in view of the fact that Mr. T.R.S Goel has executed a personal guarantee in favour of the respondent-Bank, and the mala fides on the part of the certificate-debtors, the respondent-Bank is entitled to proceed against this property.

23. Further, the copy of the order of the Commissioner of Income-tax, dated 27th February, 2001 shows that with regard to the liability of the 2nd respondent-Company, namely, M/s. Logic Systems Pvt. Ltd., the very same property, namely, D-104, Defence Colony, New Delhi, was brought for sale by the Assessing Officer treating Mr. T.R.S. Goel is liable for the amount due from the Company-M/s. Logic Systems Pvt. Ltd., but, the same was set aside on the ground that the property is owned by Mr. T.R.S. Goel (HUF).

24. But, the learned Recovery Officer observed that the appellant/objector has not submitted that details of the HUF funds used for the purchase of this property. He has also observed that the copy of the HUF Income-tax Returns, documentary proof for the substantial existence of HUF in the year 1984 have not been filed. The appellant/objector has produced the details of the sources of funds for the acquisition of the said property, as Annexure-III with this appeal. The appellant/objector has also produced the Wealth Tax Assessment Orders for the years 1980-81, 1982-83, 1983-84, and Income-tax Assessment Orders for the years 1980-81, 1981-82, 1982-83, all relating to Mr. T.R.S. Goel (HUF).

25. Further, we find that this property has been purchased in the year 1984 itself in the name of HUF. It has not been stated by the respondent-Bank that there was any reason in 1984 itself for the purchase of the property in the name of Mr. T.R.S Goel (HUF), if really it was purchased by the individual Mr. T.R.S. Goel. There is no such plea by the respondent-Bank.

26. This apart, as pointed out already, the O.A. was originally filed as a suit before the Hon'ble High Court of Delhi, i.e. suit 945/90. In that suit respondent-Bank filed LA. 2525/ 90 for restraining Mr. T.R.S. Goel (the 2nd defendant in the suit) from alienating, transferring or parting with possession of his share in the property in question, namely, D-104, Defence Colony, New Delhi.

27. Therefore, even if we ignore the income-tax and wealth tax assessment orders, it will be clear from what I have pointed out above that the property in question, namely, D-104, Defence Colony, New Delhi, is the property of Mr. T.R.S. Goel (HUF), and not the property of Mr. T.R.S Goel in his individual capacity.

28. The next question is whether this property can be proceeded against for the liability of Mr. T.R.S. Goel in his individual capacity. The specific plea of the appellant/objector in the objection is that the property in question is the property of the HUF, and has not been partitioned. There is no

evidence to show that this property has been partitioned. Of course, the undivided share of Mr. T.R.S. Goel in this property can be proceeded against in execution.

29. Even the shares of the other members of the joint family can also be proceeded against execution of the Recovery Certificate issued against the Karta of the HUF, namely, Mr. T.R.S, Goel, if it is for family necessity or benefit. The sons of Mr. T.R.S. Goel are also under a pious obligation to discharge this debt, since there is nothing to show that this debt is tainted with illegality or immorality. But the learned Counsel for the appellant/objector contends that the respondent-Bank itself wanted only to proceed against the share of Mr. T.R.S Goel in this property as is evident from the averments in I.A. 2525/90 and, therefore, the respondent-Bank is estopped by its own conduct from proceeding against the share of the other members of the HUF.

30. But, the learned Counsel for the appellant/objector further contends that this property is the only residential house of the HUF, and is, therefore, exempt from attachment and sale in view of the provisions contained in Section 60(1)(ccc), of CPC. The averment to this effect is found in para 8 of the objections filed by the appellant/objector before the Recovery Officer. But, in reply to this averment the respondent-Bank while denying the same as wrong, has stated that Mr. T.R.S. Goel himself has stated in the "credit information" supplied to the respondent-Bank at the time of disbursement of the loan to the company, that he is a resident of the property, namely, D-30, Defence Colony, New Delhi. The learned Counsel for the respondent-Bank also contends that Mr. T.R.S. Goel had given such reports under his own signature on 12th February, 1982, 16th February, 1983, 11th April, 1984, and 16th June, 1984, and has given his address as D-30, Defence Colony, New Delhi. Therefore, the learned Counsel for the respondent-Bank contends that the contention of the appellant/ objector that the property bearing D-104, Defence Colony, New Delhi is the sole residential house of the Mr. T.R.S. Goel (HUF), cannot be accepted. The learned Counsel for the respondent-Bank further contends that Mr. T.R.S Goel and the members of his family are not residents of India, but, are residents of a foreign country (USA).

31. But, the learned Counsel for the appellant/objector, on the other hand, contends that Mr. T.R.S. Goel was a resident of D-30, Defence Colony, New Delhi till the house in question was purchased in February 1984, and thereafter shifted to this house, and, therefore, the fact that he had given the address as D-30, Defence Colony, New Delhi will not in any way show that the property D-104, Defence Colony, New Delhi is not the only residential house of the appellant/objector and its members. He further contends that even the learned Recovery Officer has not found that Mr. T.R.S. Goel is a resident of USA, or that he is not residing in this house, but, has only observed that as conceded by the learned Counsel for the 2nd defendant (Mr. T.R.S. Goel), Mr. T.R.S Goel visits USA and comes back. The learned Counsel for the appellant/objector , therefore, contends that in the absence of any evidence to show that Mr. T.R.S. Goel does not reside in this house, the contention put forward by the respondent-Bank cannot be accepted.

32. I have considered the contention put forward by the learned Counsel for the appellant/objector. But, I am not able to accept the contention put forward by the appellant/ objector that the respondent-Bank, by seeking to restrain the 2nd defendant (Mr. T.R.S. Goel) from alienating, selling etc. of the property in question, is estopped by its conduct from proceeding against the shares of the

other members of the family/sons of Mr. T.R.S Goel. The prayer made and the order passed therein are only interlocutory in nature, and it does not mean that while executing the recovery certificate issued in O.A. 414/95, the respondent-Bank will not be entitled to proceed against the HUF properties of the guarantor, namely, Mr. T.R.S. Goel. It is only to safeguard its interest, the respondent-Bank has made such a prayer for restraining the 2nd defendant-Mr. T.R.S. Goel from selling, alienating or transferring his share in the property in question. But, the respondent-Bank has not given up its rights to proceed against the whole of the property. In fact, the respondent-Bank has mentioned in LA. 2525/90 filed before the Hon'ble High Court that the defendants had even offered the said property by way of security, but the same was not mortgaged on some technical grounds. Therefore, in these circumstances, I am of the view that this contention of the appellant/objector cannot be accepted.

33. I will next deal with the contention of the appellant/objector that the property in question, namely, D-104, Defence Colony, New Delhi is the only residential house of Mr. T.R.S Goel (HUF), and is exempt from being attached and sold in execution. The pleadings in this regard are found in paragraph 8 of the objections filed before the Recovery Officer, wherein the appellant/objector has stated that the said property is the sole residence of Mr. T.R.S. Goel and the members of Mr. T.R.S. Goel (HUF), and that the property is being used for residential purposes only. But, the contention of the learned Counsel for the respondent-Bank is that Mr. T.R.S. Goel had given his address as D-30, Defence Colony, New Delhi, and had stated that he is resident of that house, in the "credit information" supplied by him at the time of disbursement of the loan. He also contends that the appellant/objector has not proved by any satisfactory evidence that Mr. T.R.S. Goel or any other member of the family is resident of the property in question D-104, Defence Colony, New Delhi. But, the learned Counsel for the appellant/objector contends that this property D-104, Defence Colony, New Delhi was purchased on 18th February, 1984 only, and that Mr. T.R.S. Goel had thereafter shifted to the said property. But, I find that Mr. T.R.S. Goel has not filed his own affidavit as to whether he shifted from D-30, Defence Colony, New Delhi, and occupied this property D-104, Defence Colony, New Delhi, and if so, when he did so. Of course, in this appeal, the Power of Attorney agent of Mr. T.R.S. Goel (HUF)-Mr. Syed Salim has filed an affidavit dated 23rd May, 2001 before the Recovery Officer stating that the house D-104, Defence Colony, New Delhi is the only residential property of the appellant/objector in Delhi, and, it does not have any other property in Delhi. He has also stated that the said house is the only dwelling house available in Delhi, and is occupied by the HUF. Of course, the learned Counsel for the respondent-Bank contends that the Power of Attorney deed in favour of Mr. Syed Salim is not a proper one, and cannot be relied upon. I will deal with this contention of the respondent-Bank later. But, in my view, this affidavit of the Power of Attorney agent is not sufficient to come to the conclusion that Mr. T.R.S. Goel (HUF) owns only this property, namely, D-104, Defence Colony, New Delhi, and is occupying it. Under normal circumstances the affidavit filed by a Power of Attorney agent can certainly be acted upon. But, this is a case where the important question is whether Mr. T.R.S. Goel (HUF) is in occupation of this property. The contention of the respondent Bank is that Mr. T.R.S. Goel and the members of his family are residents of USA. The Recovery Officer has observed that the learned Counsel for the 2nd defendant-Mr. T.R.S. Goel conceded that Mr. T.R.S. Goel used to visit USA and come back. In these circumstances, I am of the view that the affidavit should be filed by Mr. T.R.S. Goel himself to show that he or any other member of his family is occupying this property D-104, Defence Colony, New

Delhi as their sole residence, and if so, from what date.

34. Therefore, in my view, the matter has to be remanded back to the Recovery Officer for consideration and decision as to whether this property D-104, Defence Colony, New Delhi is the only residential house of Mr. T.R.S. Goel (HUF), and whether Mr. T.R.S. Goel or any other member of his family is in occupation of the same as such residence, and if so, from what date. This will be necessary to find out and decide whether the appellant/objector is entitled to the protection under Section 60(1)(ccc) of CPC.

35. An objection has also been raised that the ground floor of the property in question has been let out and, therefore, also the protection under Section 60(1) (ccc) of CPC cannot be claimed by the appellant/objector. Firstly, there has to be proof with regard to the fact that any portion of the property has been let out to a tenant. Then it will have to be considered and decided as to what would be the effect of such letting out a portion of the property in question on the right of the appellant/objector to claim the protection of the above said section. These points have also to be considered and decided by the Recovery Officer while deciding the question whether the property is in the occupation of Mr. T.R.S. Goel or any other member of his family, as their only residential house.

36. The Recovery Officer shall take the recovery proceedings back on his file, give opportunity to Mr. T.R.S. Goel himself to file an affidavit accordingly, and also give an opportunity to the respondent-Bank to file an appropriate reply affidavit. After giving opportunity to both the sides to put forward their case in this behalf, the learned Recovery Officer shall decide the questions whether the property D-104, Defence Colony, New Delhi is the only dwelling house of Mr. T.R.S. Goel (HUF); whether the same is in the occupation of Mr. T.R.S. Goel or any other member of his family, whether any portion of this property has been let out to any tenant, and whether the appellant/objector is entitled to the protection of Section 60(1) (ccc) of CPC.

37. As pointed out already, the learned Counsel for the respondent-Bank refers to the copy of the Power of Attorney Deed stated to have been executed by Mr. T.R.S. Goel and Mr. T.R.S, Goel (HUF) in favour of Mr. Syed Salim, and contends that it cannot be relied upon. The learned Counsel for the respondent-Bank contends that the original of this Power of Attorney Deed was not produced, and that this Power of Attorney Deed does not mention the property with reference to which it has been executed and, therefore, it cannot empower Mr. Syed Salim either to file the objections before the Recovery Officer or the appeal before this Tribunal. But, the learned Counsel for the appellant/objector, on the other hand, points out the provisions contained in this Power of Attorney Deed enabling Mr. Syed Salim to appoint a lawyer, represent them in any Court, in the Banking matters before the Bank, Recovery Officer, DRT, DRAT, High Court, Supreme Court and Government and Semi-Government agency. He also points out that it enables Mr. Syed Salim to appear on their behalf in any Court, to plead, file the affidavit and give instructions in any Banking matter in any Court and also to sign on their behalf. Pointing out these provisions, the learned Counsel for the appellant/objector contends that this is a special power of attorney given to Mr. Syed Salim with regard to Banking matters before the Recovery Officer, DRT and DRAT etc, He also points out that this Power of Attorney deed specifically authorises him to give instructions to the

Advocate, to plead and file affidavit also on behalf of the executants. He contends that the fact that this Power of Attorney Deed does not mention that it is 'Special Power of Attorney Deed', cannot take away its character as a special power of attorney. I agree with the learned Counsel for the appellant/objector in this respect, and find that in view of the recitals pointed out above, found in the Power of Attorney Deed, the Power of Attorney agent- Mr. Syed Salim is entitled to represent Mr. T.R.S. Goel and Mr. T.R.S. Goel (HUF) in the proceedings before the Recovery Officer, DRT and DRAT, and also to plead on their behalf. But, this is, however, subject to what I have stated above with regard to the need for Mr. T.R.S. Goel himself to file an affidavit before the Recovery Officer on the lines mentioned above.

38. The respondent-Bank has also taken the objection that the original Power of Attorney Deed has not been produced. The appellant/objector shall produce the original Power of Attorney Deed before the Recovery Officer for the perusal of the Recovery Officer and the respondent-Bank. If the Recovery Officer feels that it is not necessary to retain the original Power of Attorney Deed, he may order the return of the same to the Power of Attorney agent, retaining the copy thereof.

39. Another contention put forward by the learned Counsel for the appellant/objector is that the final order passed in the O.A. directs the sale of the mortgaged property for the recovery of the amount due to the Bank, and also that if the amount due to the respondent-Bank is not recovered by the sale of the mortgaged property, then it shall be recovered from the defendants jointly and severally. The learned Counsel for the appellant/objector contends that since no appeal has been filed against this order, the same has become final, and, therefore, the respondent-Bank has to first proceed against the mortgaged property to realise the money and, if the entire amount is not recovered, then only proceed against the defendants to enforce their joint and several liability. The learned Counsel for the appellant/ objector contends that the mortgaged property is the property of the 1st defendant-Company at Bombay, and the same is available for being proceeded against in execution.

40. But, the learned Counsel for the respondent-Bank, on the other hand, contends that the final order passed in this O.A. is in the nature of a composite decree, and, therefore, the respondent-Bank has the liberty to proceed against the guarantors and their properties before ever proceeding against the mortgaged property. He contends that it is not necessary that the respondent-Bank should first exhaust its remedies against the mortgaged property, and if the entire amount is not realized, then only proceed against the guarantors and their properties.

41. For appreciating the contentions put forward by both the sides, it is necessary to refer to the operative portion of the final order dated 13th January, 1998 passed by the learned Presiding Officer of the DRT in the O.A. The operative portion reads as follows:

"Defendants are ordered:

- (1) to pay a sum of Rs. 1,17,90,025.86 ps. together with pendente lite and future interest (
- (2) Defendants shall also pay the cost of the suit.

(3) Defendants shall be jointly and severally liable to pay the said amount within four weeks.

In the event of failure on the part of the defendants to pay the said amount within the stipulated time, the said amount shall be payable forthwith.

"Certificate be issued in terms of the order."

42. The above said order of the learned Presiding Officer of the DRT shows that the order passed by him is in the nature of a composite decree. Under normal circumstances, in the case of a composite decree, the decree-holder is entitled to exhaust his remedies in whatever manner he chooses, of course, in accordance with the decree. The learned Counsel for the respondent-Bank contends that it is, therefore, not necessary for the respondent-Bank to first proceed against the mortgaged property, in execution.

43. The decision of the Hon'ble Supreme Court in *State Bank of India v. M/s. Indexport Registered and Ors.*, II (1992) BC 243 (SC)=JT 1992(4) SC 273 cited by the learned Counsel for the appellant/objector himself supports this view. But, the learned Counsel for the appellant/objector contends that if the decree itself puts fetters on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree, then the decree-holder is bound to act accordingly.

44. The relief granted by the Trial Court in the case before the Hon'ble Supreme Court was in the following manner:

"In view of my findings recorded above, the present suit succeeds and decreeing the same, I hereby pass a decree in favour of the plaintiff for recovery of Rs. 33,705.22 p. with costs. The defendants shall pay future interest at the rate of 7% per annum (as agreed in the Setter Ex. PAPW 5/4) from the date of the institution of the suit till its realisation. The plaintiff Bank shall also be entitled to the amount by way of sale of the shop in the case decretal amounts is not paid within a period of three months from today. The decree in question will also be deemed to be a personal decree against all the defendants, but, however, decree will be executable against defendant No. 3 qua the estate inherited by her from Mr. Ajay Kishan Mehta. Decree-sheet be prepared and the file be consigned to the record room."

The Hon'ble Supreme Court held as follows:

"It is thus clear from the decree that it is a money decree against all the defendants (respondents) and a mortgage decree only against defendant No. 2 (respondent No. 2) so far as the shop is concerned. The decree does not put any fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is

left-entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the property. It will be noticed that there is no preliminary mortgage decree either. It is a final mortgage decree for sale of shop after three months."

The Hon'ble Supreme Court further held as follows :

"In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including the guarantor. It is the right of the decree-holder to proceed with it in a way he likes."

The Hon'ble Supreme Court further held as follows :

"The guarantor in the present suit never took any plea to the effect that his liability is only contingent if remedies against the principal debtors fail to satisfy the dues of the decree-holder. If such a plea had been taken and the Court trying the suit had considered the plea and gave any finding in favour of the guarantor, then it would have been a different position. But in the present case, on the face of the decree, which has become final, the Court cannot construe it otherwise than its tenor. No executing Court can go beyond the decree. All such pleas as to the rights which the guarantor had, had to be taken during trial and not after the decree while execution is being levied."

45. In the present case also we find that the Presiding Officer of the DRT has directed the defendants to pay the amount with the interest and costs, and also directed that the defendants shall be jointly and severally liable to pay the amount within four weeks. He, thereafter, directed that in the event of failure to do so, the respondent-Bank shall be entitled to recover the same by the sale of the mortgaged property, and that if on the sale of the mortgaged property the entire amount is not recovered, the balance shall be recovered from the defendants jointly and severally. The final order passed by the Debts Recovery Tribunals even in cases where the suit amount is secured by a mortgage, is not in the nature of a preliminary decree passed under CPC by a Civil Court. There is no provision in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for passing a preliminary decree or a final decree. The final order referred to above is in the nature of composite decree, and the respondent-Bank is entitled to proceed against the guarantors inasmuch as the first part of the final order specifically provides that the defendants (which includes the guarantors also) shall be liable to pay the amount jointly and severally. It is only in the latter part it has been mentioned that if defendants commit default, the respondent-Bank is entitled to realize the amount by sale, and that if, even then the entire amount is not realized, it shall be recovered from the defendants jointly and severally. The defendants in the O.A. had not put forward any such defence to the O.A., and it is not as if the Presiding Officer of the DRT after considering such a plea had placed fetters on the manner in which the final order should be executed. The defendants had remained *exparte* before the DRT after filing the written statement. The prayer in the suit itself was for a joint and several decree only against the defendants. Therefore, it cannot be stated that the final order puts any fetters on the power of the respondent-Bank to proceed against the guarantors

and their properties.

46. It has also to be remembered that in this case the respondent-Bank had taken leave of the Hon'ble High Court under Order II Rule 2 of the Code of Civil Procedure, 1908 to omit from the suit the relief based on the mortgaged property, and institute a separate suit with regard to the same. Therefore, the DRT had no jurisdiction/power to pass any orders on the basis of the mortgage. Therefore, the appellant/objector cannot take advantage of the mistake committed by the learned Presiding Officer of the DRT when he granted the order for the sale of the mortgaged property itself, which he could not have done in view of the order passed by the Hon'ble High Court of Delhi, because the mortgage and mortgaged property were not subject matter of the suit, at all (which subsequently became the O.A. before the DRT). In these circumstances, I am of the view that this contention put forward by the appellant/objector cannot be accepted.

47. In view of my findings above, the appeal is allowed setting aside the impugned order passed by the learned Presiding Officer of the DRT, dated 11th June, 2002, and consequently, the order passed by the Recovery Officer, dated 23rd April, 2002, in R.C. 77/2000. The matter is remitted back to the Recovery Officer concerned for the purpose of deciding, in accordance with law and in the light of the observations contained in this order, whether the property in question, namely, D-104, Defence Colony, New Delhi is the sole residential house of T.R.S. Goel (HUF); whether Mr. T.R.S. Goel or any other member of his family is in occupation of the same as their dwelling house; whether any portion of the property is in the occupation of any tenant; and if so, as to what would be its effect on the right of the appellant/objector to claim protection under Section 60(1)(ccc) of CPC; and whether the appellant/objector is entitled to the protection under Section 60(1)(ccc) of the Code of Civil Procedure, 1908. The learned Recovery Officer shall take the recovery case back to his file, give opportunity to Mr. T.R.S. Goel to file an affidavit, as indicated in this order, and opportunity to the respondent-Bank to file its reply affidavit. The learned Recovery Officer shall, after giving opportunity to both the sides to put forward their case, decide the recovery case in accordance with law and in the light of the observations contained in this order.

The parties through their Counsel are directed to appear before the Recovery Officer concerned on 6th July, 2004 for taking further directions in this matter.