

(2008) 10 BOM CK 0106

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 2298 of 2008

Aatam Gems, Shailesh H. Kothari, Salil Shailesh Kothari and
Mrs. Pratibha Shailesh Kothari

APPELLANT

Vs

Oriental Bank of Commerce

RESPONDENT

Date of Decision : 16-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, Order 21 Rule 66, Order 21 Rule 92, Order 21 Rule 94, 65

Income Tax Rules, 1962 — Rule 52, 53, 54, 60, 61

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 25, 28, 29, 30

Transfer of Property Act, 1882 — Section 54

Citation : (2008) 6 ALLMR 632 : (2009) 1 BomCR 787 : (2009) 1 MhLj 892

Hon'ble Judges : Swatanter Kumar, C.J.;S.A. Bobde, J

Bench : Division Bench

Advocate : V.R. Dhond and T.N. Tripathi, instructed by T.N. Tripathi and Co, for the Appellant; Vimal Gupta and K.S. Shetty, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, C.J.—In Original Application No. 252 of 2004, the Debt Recovery Tribunal II, Mumbai, passed an order on 28th June 2005 granting a decree in favour of Oriental Bank of Commerce declaring mortgage over Flat No. 41, 4th Floor, Vijaydeep, Ridge Road, Malabar Hill, Walkeshwar, Mumbai 400 006, in furtherance to which, a recovery certificate was issued by the Presiding Officer for a sum of Rs. 6,39,33,830.56 with interest and costs in favour of the said Bank. It further directed that the amount be recovered in mode and manner prescribed under Sections 25 and 28 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as 'the Act') from the Certificate Debtors. The said mortgaged property came to be attached and affidavit of attachment was filed vide Exhibit 6 on 15th March 2007. The reserve price of the property was fixed at Rs. 7 crores and EMD was ordered to be kept at Rs. 70 lakhs in furtherance to the valuation report submitted to that forum on

7th June 2007. The sale of the property attached was scheduled for 25th September 2007. On or about 24th September 2007, the Applicants- Defendants in the main Petition, filed an application praying for deferment/postponement of the scheduled sale on the following grounds:

1. That Defendant No. 3 Anish Kothari had expired on 04.03.2007 and his legal heirs have not been brought on record. As such the execution process including Proclamation of Sale is null and void.

2. That the Reserve Price of property is R.7 crores and EMD is fixed at Rs. 7 lacs in Public Notice dated 22.08.2007 which is against Rule 53 and 54 of Schedule II of I.T. Act 1961 as EMD kept is only 1% and not 10%.

2. Both these grounds were dealt with by the Recovery Officer vide his order dated 27th September 2007 where he held that the Applicants had approached the forum late as the Warrant of Attachment was served on 15th March 2007 and no reason whatsoever had been stated for approaching that forum at that belated stage. According to the Recovery Officer, the demise of Defendant No. 3 and not bringing his legal representatives on record would not invalidate the proceedings in its entirety as the Bank could choose to proceed against other Defendants and it had a right to proceed against Defendant Nos.2 and 5 to whom the property belonged and sell the property in terms of the order of recovery certificate. The Proclamation of Sale issued was also found to be not defective inasmuch as the mistake of EMD amount was due to publication only and was corrected immediately thereafter by publishing a corrigendum on 28th August 2007. This was also clarified at the time of the auction and it recorded a finding of fact that subsequent publication did not cause any prejudice to any person including the Defendants. Consequently, it rejected the objections taken and dismissed the said application.

3. Aggrieved by the order dated 27th September 2007, the Defendants in the Application filed an Appeal, being Appeal No. 71 of 2007, u/s 30 before the Debt Recovery Tribunal II, Mumbai. By a detailed order dated 11th March 2008, the Tribunal also dismissed the Appeal. Still another Appeal, being Appeal No. 46 of 2008, was preferred by M/s. Aatam Gems and others against the order dated 11th March 2008. The Appellate Tribunal, Mumbai, while dismissing the said Appeal, again noticed the objections taken by the Appellants and recorded its finding as follows:

...The public notice was issued for sale of the property on 22/8/2007. On 24/9/2007 the application was filed on behalf of the appellants with the Recovery Officer raising following objections:

Firstly that defendant No. 3 died on 4/3/2007 and his legal heirs were not brought on record. Secondly, E. M. D. price of the property was mentioned as Rs. 7 lacs instead of Rs. 70 lacs in the public notice dated 22/8/2007 and thirdly notice settling proclamation of sale of the property in form No. 17 was not served on the appellants.

...Then submission is made on behalf of the appellants that Rules 60 and 61 come into picture when the sale is challenged. According to the counsel for the appellants the appellants had raised objection one day before the scheduled date for holding of the public auction and therefore, the auction ought not have taken place. The fact is that the appellants had come to know about holding of the public auction and after the auction had taken place the only mode or the Rule under which the appellants could have challenged the auction was by complying with the conditions laid down by Rules 60 and 61 of the Second Schedule of the Income Tax Act. The appellants had not chosen to resort to that remedy by depositing the amount.

As regards the allegation about the irregularity and non-service of notice is concerned, it cannot be forgotten that the property sold was mortgaged property and the respondent bank had obtained decree for mortgage against the appellants and therefore, conditions of service of notice under Rule 54 would not be strictly applicable which was basically meant for sale of the property attached by the tax authorities. It was for this reason that the said rules are made applicable as far as possible u/s 29 of the RDB Act.

The sale had taken place about one year ago on 26/9/2007 and by the application which was filed by the appellants they have been able to stall the process of handing over the possession of the property in question to the purchaser bank though the entire purchase price had been deposited on 11/10/2007.

The learned advocate for the respondent bank stated that even in this Tribunal the appellants have been taking time on the ground that the appellants would pay the entire amount to the respondent bank yet they had not been able to raise funds for deposit of the entire decretal amount due or the amount for which the property is sold. According to the advocate for the respondent bank the bank had paid much higher amount than the price that flat could have fetched at the relevant time.

It is relevant to mention that bidders gave offers of Rs. 7 crore but they were unable to raise their bid amount and therefore, the respondent bank as per the rule had offered an amount of Rs. 9.52 crores which amount was required to be offered by the respondent bank as mortgagee of the said property u/s 72(A) of Code of Civil Procedure. In the aforesaid circumstances, I see no reason to interfere in the impugned order passed by the Presiding Officer, DRT, Mumbai.

4. Correctness and legality of the order dated 11th March 2008 and the findings afore-recorded are challenged by the Petitioners herein in the present Writ petition.

5. The argument raised before us primarily is that there has been violation of Rule 54 of the Rules specified in Second Schedule of Income Tax Act, 1961, relating to procedure for recovery of debts due to Bank as noticed in Form No. 17 was not served upon the judgment debtor and the Bank, as a decree-holder, had

not taken the leave of the Court to participate in the auction. The Petitioners have suffered prejudice as a result of rejection of the objections and they are ready and willing to pay the amount and redeem the mortgage which is their subsisting right.

6. Firstly, we must notice that the Applicants till date have nowhere on the record justified the delay in approaching the forum just a day prior to the date fixed for the auction sale of the mortgaged property. In fact the entire conduct of the Applicants, as demonstrated from the judicial record, shows a careless and negligent attitude which certainly has to be taken into consideration while balancing the equity between the parties in relation to the facts and circumstances of the present case.

7. Before we proceed to discuss the merits of the contentions raised before us, it is of some significance for the Court to notice that publication of notice was made on 25th August 2007. The property was put to sale on the scheduled date i.e. 25th September 2007 and the objections raised by the Petitioners were specifically rejected not only by the Recovery Officer but even by the first and the second appellate authorities under the provisions of the Act. The matter in furtherance to this sale came before the Tribunal on different dates. Vide order dated 26th September 2007, the Debt Recovery Tribunal recorded in the minutes of the order recorded in the roznamachar for that date that the Defendants had raised an objection that in case the CH bank is bidding, then the minimum offer has to be the entire decretal amount as per the provisions of Section 72 of the CPC. Accepting this objection of the Defendants, the Tribunal directed the Bank to pay the entire decretal amount i. e. Rs. 9,51,99,931.56 i. e. Rs. 9.52 crores and not the bid amount. It was also recorded that opportunity was given to all other bidders to raise the offer at the rate of Rs. 25 lakhs, but nobody had shown any interest and in view of the proceedings before the Tribunal, the property was sold for Rs. 9.52 crores to the Bank and was declared successful bidder. It was required to deposit 25% of the offered amount less the EMD by 28th September 2007. Vide order of that date, the matter was adjourned to 11th October 2007 for confirmation of sale. The matter came up for consideration of the Tribunal on 30th October 2007. By that date, the amounts were paid by the Bank in terms of the order of the Tribunal. While recording that the Bank has deposited a sum of Rs. 9.52 crores, the order was passed by the Tribunal in the said roznamachar of the date, the operative part of which reads as under:

In view of the submission made, I find no injury will be caused to the Defendants, if the sale is confirmed today. Besides nothing is placed before me to restrict from following terms and conditions of sale. I therefore confirm the sale. Issue necessary sale certificate in the name of purchaser. Further direction is given to the Defs to handover vacant and peaceful possession to the Purchaser Bank within 15 days. The Defs shall be at liberty to file copy of order on his application, if received any, in the meantime. Adj. For further steps.

8. None of these two orders were assailed in Appeal by any of the parties to the

proceedings. The Bank accepted both the orders and in fact in furtherance to the first order had deposited an extra sum of Rs. 2.52 crores as the reserve price bid accepted was Rs. 7 crores, but vide order dated 26th September 2007 the Debt Recovery Tribunal had directed it to pay Rs. 9.52 crores, the bid which has been accepted before the Tribunal. Compliance of this order and confirmation of sale vide order dated 30th October 2007 definitely vests the Bank with a legal right in the mortgaged property which had been purchased by them in furtherance to the sale conducted by the Tribunal. Not only that, the Petitioners did not challenge any of these two orders in any appropriate proceedings and in fact till date these orders are binding and final between the parties. Thus, it cannot be indirectly set aside in collateral proceedings taken out by the Petitioners at this stage.

9. Another aspect which must lead to adverse inference against the present Petitioners is that in terms of Rule 61 of Schedule II of the Income Tax Act, 1961, the Petitioners have a right to pray before the Recovery Officer for setting aside the sale, but such application is only maintainable in terms of proviso (b) to Rule 61 if they deposit the amount recoverable with the forum where execution of the certificate is pending. Admittedly, the Petitioners have not attempted to deposit the money and stall the property being put to auction or its confirmation in subsequent proceedings before the Recovery Officer and the Tribunal. Thus, the attempts of the defaulter-Petitioners lack bona fide as at no point of time had actually offered the decretal amount to defer and/or raise objections to the conduct and confirmation of sale of mortgaged property. The application of the Petitioners, therefore, was belated, the material and effective orders were not challenged at any point of time including even in the present Petition and the application also lacks bona fide for not taking recourse to the provisions of Rule 61 of the Rules.

10. The arguments with regard to the non compliance of Rule 54 of the Rules as well as non service of From No. 17 upon the Judgment Debtor and participation of the decree holder without the leave of the Court were not the objections raised by the applicants before the Recovery Officer and other authorities as noticed in the impugned orders. We are afraid that the Petitioners cannot be permitted to raise these issues for the first time before this Court and question the correctness of the concurrent orders passed by the Recovery Officer, Presiding Officer, DRT-II and before the DRAT, Mumbai. The defects pointed out in the report of the Commissioner and objection in that regard had been sternly dealt with under the impugned orders. We see no fault in the orders in question in the writ petition. The Petitioners have failed to show any prejudice and thus even if there are some irregularities, the same would not vitiate the proceedings. The non mentioning of correct figure in the notice/proclamation of sale was corrected within a very short time by issuance of a corrigendum and the main objection of the Petitioners for depositing the entire decretal amount was accepted by the concerned authority which order has become final and was duly implemented as the bank had deposited the entire decretal amount. These all proceedings including the orders dated 26th September 2007 and 30th October 2007 were

passed in the presence of the Petitioners and thus they can hardly raise an objection having participated in those proceedings without protest. A proclamation in terms of Rule 52 had been issued and all ingredients of Rule 53 have duly been incorporated as the contents of the proclamation except the typing error in relation to reserve price which was also corrected. The provisions of Rule 54 require that the Proclamation has to be made at some place on or near such property by beat of drum or other customary mode, and has to be affixed on a conspicuous part of the property and will be published in the Official Gazette. There is nothing on record before us to show that these provisions were not complied with. It is interesting to note that in the appeal filed before the Debt Recovery Appellate Tribunal, Mumbai, in the grounds it has been stated that the Recovery Officer permitted the Respondent- Bank to participate in the auction sale and thus committed an error. In face of this argument advanced, the Bank had participated in the auction without leave of the Court falls to the ground. Lastly the other contention of the Petitioners that the sale of the property is also vitiated by the fact that the complete proclamation was published on 28th August 2007 and the sale was conducted on 25th/26th September 2007 prior to expiry of 30 days as contemplated under Rule 54 of the Rules is also without any merit. The public notice/proclamation was issued on 25th August 2007 and corrigendum in relation to correction was published on 28th August 2007. Besides the fact that the period of 30 days would have to be counted from 25th August, 2007 and the sale having been completed on 26th September 2007, both have squarely been in consonance with the said Rules and in any case, nobody has come forward with such a case and even the Petitioners have also failed to show that they suffered any benefit because of two days" delay i.e. 28th August 2007 when the corrigendum was published. Thus, we see no merit in this contention.

11. Once the sale is confirmed, a definite right accrues in favour of the auction purchaser. Under Rule 63 where no application is made for setting aside the sale or where such an application is made and just allowed by the Recovery Officer, the Tax Officer shall upon deposit of the amount make an order confirming the sale. Thereupon, the sale shall become absolute. This is not a transaction effected between the parties privately. The entire sale of the property is effected through the process of law i. e. the provisions of the Debt Recovery Act and the Rules specified under Schedule II of the Income Tax Act, 1961. Where the auction purchaser has deposited the entire sale consideration and the objections to the sale have been dealt with and disposed of in accordance with law and the Competent Authority has confirmed the sale, as done in the present case by an order dated 30th October 2007, an absolute right vests in the auction purchaser and he is entitled to issue of such sale certificate. The Bank has deposited higher sum as directed by the Tax Recovery Officer prior to 26th September, 2007 and their claim to the property is fully justified which cannot be frustrated by the Petitioners by making a mere averment across the bar that they are willing to deposit the entire decretal amount. The Supreme Court in the case of Sagar

Mahila Vidyalaya, Sagar Vs. Pandit Sadashiv Rao Harshe and others, , held as under:

the sale of the property in question was perfectly valid and as soon as the sale was confirmed under Order 21 Rule 92 CPC, the judgment debtor had no right or title in the property. Once an order was made under Order 21 Rule 92 confirming the sale, the title of the auction purchaser related back to the date of sale as provided u/s 65 CPC. The title in the property thereafter vests in the auction purchaser and not in the judgment debtor. The issue of sale certificate under Order 21 Rule 94 CPC in favour of the auction purchaser though mandatory but the granting of certificate is a ministerial act and not judicial.

12. A reference can also be made to a judgment of the Supreme Court in the case of Rajender Prashad v. Devi Dayal Ravinder Kumar .

13. The learned Counsel appearing for the Petitioners while relying upon the judgment of the Supreme Court in Narandas Karsondas Vs. S.A. Kamtam and Another, , has argued that he still has a right to redeem the mortgage and as a matter of legal right, the sale could not have been confirmed in favour of the Bank. According to him, till the registered sale deed is executed in favour of the Bank, the Petitioners will have a right to redeem the property. Firstly, on facts, the case of Narandas Karsondas (supra) has no application to the present case. That was a case where sale of the mortgaged property was without intervention of the Court and document of transfer/title had not been registered where the Court, u/s 54 of the Transfer of Property Act, 1882, held that the mortgagor could redeem the mortgage. Here the Petitioners participated in the proceedings at all stages i.e. right from the issuance of proclamation, acceptance of bid, modification of the amount to be deposited by the Bank and finally in the confirmation of the sale. It only filed an application for deferment of the sale and never took any step under Rule 61 of the Rules to pray for setting aside of the same after depositing the requisite amount. The learned Counsel for the Petitioners also relied upon a judgment of the Supreme Court in the case of Mahakal Automobiles and Another Vs. Kishan Swaroop Sharma, , to contend that no notice was given to the Judgment Debtor and thus in terms of Rules 54 and 66 of Order 21, the sale gets vitiated. The principle of law laid down by the Supreme Court in this case can hardly be questioned but again on facts it has no application to the present case. There is no proceedings in the entire execution of the recovery certificate where the Petitioners have not participated effectively. Nothing was done in the absence of the Petitioners and in fact the material objection with regard to deposit of the entire decretal amount and proper declaration to be made was accepted by the Recovery Officer. We are afraid that both these judgments of the Supreme Court are hardly of any help to the case of the Petitioners.

14. We find no merit in the Writ Petition and the same is dismissed, leaving the parties to bear their own costs.