

(2018) 10 PAT CK 0067

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No.6261 of 2018

Arvind Kumar @APPELLANT@Hash State of Bihar

Date of Decision : 31-10-2018

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 29, 30
Constitution of India, 1950 — Article 226

Citation : (2018) 10 PAT CK 0067

Hon'ble Judges : Nilu Agrawal, J

Bench : Single Bench

Advocate : Arbind Kumar Jha, Ajay Kumar Sinha, Raju Giri

Final Decision : Dismissed

Judgement

1. Heard Mr. Arbind Kumar Jha, learned counsel for the petitioner, Mr. Ajay Kumar Sinha for respondent no. 3, the Central Bank of India(hereinafter

referred to as the Bank), Mr. Raju Giri for respondent nos. 5 and 6, the auction purchaser and learned counsel appearing on behalf of the State.

2. Petitioner in the present writ application has sought quashing of the order dated 31.01.2018, passed by the learned Chairperson, Debts Recovery

Appellate Tribunal, Allahabad (hereinafter referred to as the DRAT) in Appeal No. 309/ 2016 whereby the amendment petition filed by the petitioner

for addition of prayer to declare that on failure to deposit 25% of the purchase price, the fresh sale notice dated 28.10.2016 and the auction sale held

on 14.12.2016, not following the mandatory provisions the sale to the auction purchaser was void in the eye of law.

3. The facts of the case lie in a narrow compass. Petitioner availed term loan from the respondent-Bank for developing a marketing complex in his

commercial plot situated at Main Road in Biharsharif town. A sum of Rs. 69.26 lakhs was sanctioned from the Nalanda College Branch of the Bank

and a sum of Rs. 28.40 lakhs was disbursed to the petitioner. Petitioner having failed to repay the loan, ultimately was declared NPA on 01.01.2009.

Petitioner not having liquidated the loan amount, the Bank filed original application before the Debt Recovery Tribunal, Patna (hereinafter referred to

as the DRT) being OA No. 157/2013, which was disposed of by the learned Presiding Officer, DRT on 22.04.2014 finding that there were laches on

the part of the Bank as recovery was to the tune of Rs. 46 lakhs and odd against the sanctioned term loan of Rs. 28.40 lakhs. However, the account

was settled at Rs. 30 lakhs and by a time schedule entire payment had to be paid by the petitioner within six months. In the event of failure of any of

the installments the Bank and the Recovery Officer of the DRT would proceed for recovery in accordance with law.

However, by order dated 05.05.2014 further time for three months was extended to comply with the earlier order. Simultaneously, SARFAESI

proceedings were initiated and on 08.02.2014 auction sale notice was issued under the SARFAESI Act, which was challenged by the petitioner by

way of an interlocutory application in CWJC No. 11807 of 2013 wherein reserved sale price was fixed as per the earlier evaluation report dated

07.07.2010 and the sale notice was quashed with liberty to the respondent Bank to issue fresh sale notice in accordance with law. Thereafter, the

petitioner filed another writ petition being CWJC No. 18198 of 2015 for further extension of six months time, which was withdrawn vide order dated

10.12.2015 with liberty to the petitioner to approach the DRT, Patna for the said purpose. The respondent-Bank thereafter published a notice in the

daily newspaper "Hindustan" on 03.01.2016 wherein the property of the petitioner was fixed for e-auction on 13.01.2016. Since e-auction could

not be held on the date so fixed, the respondent-Bank further issued notice in daily newspaper on 22.07.2016 for e-auction of the land on 26.08.2016.

The petitioner moved this Court in CWJC No. 12679 of 2016 for quashing of the order dated 08.07.2016, passed by the Recovery Officer, DRT,

Patna in recovery proceedings being RP No. 92/2014 which arose out of OA No. 157/2013 and sale proclamation notice dated 22.07.2016 was also

challenged. CWJC No. 12679 of 2016 was withdrawn on 10.08.2016 with a liberty to the petitioner to approach the appropriate forum. Petitioner,

thereafter, preferred Appeal No. 10/2016 before the Presiding Officer, DRT, Patna for setting aside the entire proceeding from 08.07.2016 till notice

of sale dated 22.07.2016 issued by the learned Presiding Officer in RP No. 92/2014. The appeal of the petitioner was dismissed by order dated

07.10.2016. Petitioner then preferred an appeal before the DRAT, Allahabad being Appeal No. 309/2016. During pendency of the appeal, the learned

Recovery Officer, DRT, Patna in RP No. 92/2014 had fixed the date of re-auction on 14.12.2016 vide order dated 28.10.2016, but since the learned

Chairperson of the DRAT, Allahabad had resigned on 14.12.2016, the petitioner yet again moved this Court in CWJC No. 20315/2016 for the 4th time

for stay of further proceedings in RP No. 92/2014 (Central Bank of India vs. M/s Shiva City & others) in view of the pendency of appeal before the

DRAT, Allahabad, which was disposed of on 26.07.2017 with a direction to DRAT, Delhi to decide the matter on merit within a period of three weeks

from the date of the order.

In the meantime, it was directed that if the DRAT, Allahabad becomes functional then the case of the petitioner would be decided within three weeks

and the interim order granted in CWJC No. 20315/2016 dated 02.03.2017 that the petitioner would not be evicted from the two rooms if he is residing

would be operative till three weeks from the date of the order dated 26.07.2017.

4. In the backdrop of the factual background, learned counsel for the petitioner Mr. Arbind Kumar Jha contends that the DRAT, Allahabad has erred

in refusing to entertain the prayer for amendment made in the amendment petition by which the orders dated 14.12.2016, 15.12.2016 and 31.12.2016,

passed by the learned Recovery Officer, DRT, Patna in RP No. 92/2014 was also challenged apart from the amendment claimed elucidated as para-2

hereinabove. He submits that the appeal before the DRAT, Allahabad was filed on 21.11.2016 against the order dated 07.10.2016 passed by the

learned Presiding Officer, DRT, Patna in which proceeding from 08.07.2016 till the notice of sale dated 22.07.2016 was passed by the Recovery

Officer, DRT, Patna in RP No. 92/2014 was challenged but by virtue of the order passed by this Court in CWJC No. 20315 of 2016 dated 26.07.2017,

the DRAT, Allahabad was directed to decide the matter on merit and, hence, the subsequent development i.e. the auction of the property held on

14.12.2016 and sale certificate issued on 23.12.2017 would also come within the ambit of adjudication by the Appellate Authority of the DRAT,

Allahabad.

5. Apart from various submissions, the learned counsel for the petitioner submits that the issue of mortgage of the property in question where there was a dispute about ownership which was challenged in appeal has not been decided. Secondly, learned counsel for the petitioner raised the issue of res judicata as the issue raised and not decided cannot be raised. For the said proposition he relies on the judgment of the Supreme Court in the case of *Ishwar Dutt vs. Land Acquisition Collector and another* since reported in (2005) 7 SCC 190 which is only noticed to be rejected as the observation hereinafter would decide this issue.

6. Yet another submission is that after proclamation and settlement of sale under Section 29 of the DRT Act no appeal would lie against such proclamation and settlement of sale, as such, the order passed by the DRAT, Allahabad dated 31.01.2018 that the petitioner has a remedy to challenge the fresh sale notice dated 28.10.2016 scheduling the auction to be held on 14.12.2016 is erroneous as no appeal would lie after proclamation and settlement of sale as provided under Section 30 of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter after referred to as the Act) as processes have already been completed under Section 29 of the said Act. For this proposition he relies on the judgment of the Supreme Court in the case of *P.M. Abubakar vs. State of Karnataka and others* since reported in (2017) 1 SCC 302, particularly paragraph-26.

7. He further submits that the deposit of 25% of the purchased price immediately on the person being declared as a successful purchaser had not been deposited by the respondent auction purchaser, hence, it amounts to no sale on account of non-deposit within the statutory period, hence, no appeal will lie. In this connection, he relies on the judgment of the Supreme Court in the case of *C.N. Paramasivam and another vs. Sunrise Plaza through Partner and others* since reported in (2013) 9 SCC 460, particularly paragraph 28 and in the case of *Rao Mahmood Ahmad Khan through their L.R. vs. Ranbir Singh and others* since reported in 1995 Supp (4) SCC 275.

8. As a last limb, counsel for the petitioner has also alleged fraud upon the DRAT, Allahabad but has not substantiated as to what fraud was committed. The aforesaid contentions of the petitioner are also noticed to be rejected in the backdrop of the order which I propose to pass.

9. Mr. Ajay Kumar Sinha, learned counsel appearing on behalf of the respondent-

Bank submits that the order passed by the DRAT, Allahabad dated 31.01.2018 is in accordance with law. The DRAT did not go beyond the subject matter of appeal and the appeal is still subjudice before the DRAT, Allahabad. The subject matter of challenge before the DRT, Patna in Appeal No. 10/2016 was for setting aside the proceeding from 08.07.2016 till notice of sale dated 22.07.2016, passed by the learned Recovery Officer, DRT, Patna in RP No. 92/2014. The amendment sought by the petitioner before the DRAT, Allahabad was a subsequent notice dated 28.10.2016 scheduling the auction to be held on 14.12.2016 which was challenged by way of amendment before the DRAT, Allahabad. The appeal was preferred against the order dated 07.10.2016 and subsequent action and order would and could not be the subject matter of appeal as the same was never challenged in the original side. He further submits that the DRAT was correct as then the petitioner would lose one opportunity of adjudication before the original court and that the DRAT was also correct as the High Court in CWJC No. 20315/2016 had granted opportunity to the petitioner to raise all points available in accordance with law and was not intended to circumvent or go beyond the jurisdiction of the DRAT.

10. Mr. Raju Giri, learned counsel for the auction purchaser adopts the arguments of the respondent-Bank with further submission that it is well settled that where a duty is required to be exercised by a certain authority in a certain way it should be exercised in that manner or not at all and all other modes of performances are necessarily forbidden. He submits that the DRAT had no jurisdiction to pass an order on a subsequent development i.e. fresh sale notice dated 28.10.2016 as it would have been violative of the fundamental principles of natural justice and relies on the judgment of the Supreme Court in the case of *Hukam Chand Shyam Lal vs. Union of India and others* since reported in AIR 1976 SC 789, paragraph 18 and in the case of *Ramchandra Murarilal Bhattad and others vs. State of Maharashtra and others* since reported in (2007)2 SCC 588.

11. Heard the parties. Petitioner has challenged the order dated 31.01.2018 of the DRAT, Allahabad wherein his prayer for amendment incorporated the facts regarding fresh sale notice dated 28.10.2016 and auction held on 14.12.2016 and was rejected by the DRAT, Allahabad in Appeal No. 309/2016 on the ground that the petitioner could avail the remedy of appeal

under Section 30 of the Act before the DRT, Patna as the fresh sale notice dated 28.10.2016 was not under challenge in Appeal No. 10/2016 before the DRT, Patna out of which the present Appeal No. 309/2016 arose.

The submission of the petitioner that the issue of mortgage was not decided in appeal with regard to ownership of the property, the issue of res judicata and that when the auction purchaser failed to deposit 25% as down payment on the date of auction would amount to no sale, hence, no appeal could be preferred, can be agitated by the petitioner before the DRAT, Allahabad where Appeal No. 309/2016 is pending and not under Article 226 of the Constitution of India, as an alternative remedy of appeal has been availed by the petitioner. Since the petitioner had already raised the issue of mortgage before the DRT, Patna in Appeal No. 10/2016 which was dismissed on 07.10.2016 against which the petitioner has preferred an appeal before the DRAT, Allahabad and the matter is subjudice, this Court would not give any opinion on the said issue.

12. So far as the submission of the petitioner that no appeal, as provided under the provisions of the Act, would lie i.e. Section 30 of the DRT Act against the proclamation and settlement of sale which is already complete under Section 29 of the said Act. Section 29 relates to the procedure for recovery of tax and attachment and sale which would not create a bar in preferring appeal by any person aggrieved by an order of the Recovery Officer passed under the Act. The case cited by the petitioner for the said proposition being the case of P.N. Abubakar (*supra*) is on an entirely different facts and would not apply in the present case.

13. The contention of the respondent-Bank and the respondent auction purchaser that the order dated 31.01.2018 passed by the DRAT, Allahabad does not suffer from any error, is the correct proposition, as the DRAT, Allahabad is correct in holding that a subsequent notice dated 28.10.2016 passed by the Recovery Officer, DRT, Patna was not the subject matter of Appeal No. 10/2016 out of which the appeal before the DRAT, Allahabad arose. That was a fresh cause of auction, which was never challenged before the DRT, Patna and straightway has been challenged in appeal before the DRAT, Allahabad by way of amendment. This Court in the earlier writ application being CWJC No. 20315/2016 had merely directed the DRAT, Allahabad to decide the issue on merits within a certain time frame.

14. The DRAT, Allahabad was correct in its finding in the order dated 31.01.2018, passed in Appeal No. 309/2016 as it enjoyed an appellate

jurisdiction for appeals arising out of original order. The original order passed by the DRT, Patna in Appeal No. 10/2016 was for setting aside the

entire proceeding from 08.07.2016 till the notice of sale dated 22.07.2016 passed in RP

No. 92/2014 by the DRT, Patna whereby the appeal of the petitioner was dismissed on 07.10.2016. Appeal before the DRAT, Allahabad being

Appeal No. 309/2016 was preferred against the said order passed by the DRT, Patna. The auction notice dated 28.10.2016 fixing the date of re-

auction on 14.12.2016 was not the subject matter in Appeal No. 10/2016 before the DRT, Patna. Allowing the amendment would amount to passing

an order by the DRAT, Allahabad on a fresh auction sale notice and the subsequent auction held on 14.12.2016 without there being any challenge

against it before the DRT, Patna. Any subsequent event could not be a subject matter of appeal by the Appellate Authority by bypassing the original

court of appeal. Hence, the order dated 31.01.2018, passed in Appeal No. 309/2016 does not suffer from any infirmity.

15. Writ application is, accordingly, dismissed.