(2002) 03 KAR CK 0011

In the Karnataka High Court

Case No : Writ Appeal No''s. 4623 to 4625 and 4697 of 2001

Bharat Beedi Works Limited APPELLANT

Vs

Kunhambu K. and Others RESPONDENT

Date of Decision : 15-03-2002

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Income Tax Rules, 1962 — Rule 60 (1), 61
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 20, 30

Citation : (2003) 115 CompCas 676 : (2002) ILR (Kar) 2289 : (2002) 6 KarLJ 133 : (2002) 2 KCCR 1427

Hon'ble Judges : N.K. Jain, C.J;N. Kumar, J

Bench : Division Bench

Advocate : K.G. Raghavan Dua Associates in W.A. Nos. 4623 to 4625 of 2001 and K.S. Hanumantha Rao, in W.A. No. 4697 of 2001, for the Appellant; K.G. Raghavan Dua Associates for Respondent-5 in W.A. No. 4697 of 2001, P.K. Ponnappa and M.M. Ashok for Caveator-Respondent-1 in W.A. Nos. 4623 to 4625 of 2001 and P.K. Ponnappa, for Caveator-Respondent-1 in W.A. No. 4697 of 2001, for the Respondent

Final Decision : Allowed

Judgement

1. These writ appeals are filed by M/s. Bharat Beedi Works Limited, auction purchaser and the Vijaya Bank respectively against the order dated 5/6-7-2001, passed in the case of K. Kunhambu and Anr. v. Presiding Officer, Debt Recovery Tribunal, Bangalore and Ors., W.P. No. 12994 of 1999 (GM-DRT), DD: 5/6-7-2001 wherein the learned Single Judge has set aside the public auction held on 30-3-1999, quashed the confirmation of sale of the property in question in favour of the auction purchaser made on 4-2-2000 and directed the auction purchaser to deliver the possession of the property back to Mrs. Laxmi Kutty, respondent 2, petitioner 2.

2. The necessary facts in W.A. Nos. 4623 to 4625 of 2001 are that at the instance of the first respondent, the 5th respondent-Vijaya Bank had issued Bank

guarantees to the tune of Rs. 15 lakhs to three different financiers in order to purchase some timber. The said financiers though invoked the said Bank guarantee did not ensure supply of timber, which made the 1st respondent liable to pay the entire amount covered by the Bank guarantees. The 2nd respondent-owner of property No. TS 666/100 R.S. No. 95/100, Mangalore, stood as a guarantor to the said transactions, Since respondent I did not repay the debt, the Bank moved the Court and got a judgment and decree on 22-4-1989. Pursuant to the decree, the Bank filed Execution Petition No. 94 of 1992 before the Additional Civil Judge, Mangalore. Pending execution of the decree, a special enactment called Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short ''the Act'') came into force and by virtue of Section 31 of the said Act, the execution petition stood transferred to the 3rd respondent-Debt Recovery Tribunal. The cumulative liability of respondents 1 and 2 was Rs. 60,70,562/- as per the order of the Tribunal, dated 8-5-1998. The Tribunal issued a certificate to its Recovery Officer to execute the decree. The 4th respondent took steps in terms of Second Schedule to the Income Tax Act, 1961 and recovery proceedings were initiated u/s 29 of the Act to recover the entire amount by sale of property. After completing the various formalities, respondent 4 issued proclamation for sale of the property on 18-2-1999 fixing the date of auction on 30-3-1999, on which date auction was held and M/s. Bharat Beedi Works Limited was declared as the highest bidder. The same was challenged in W.P. No. 12944 of 1999, which was allowed in the aforesaid terms. Against the order of the learned Single Judge, the above two writ appeals are filed.

3. Since the point in issue is common, the two appeals were heard together and a common order is passed.

4. The main grievance of the auction purchaser is that this Court has no jurisdiction to interfere in the writ petition and further the direction issued is uncalled for and is without jurisdiction and is liable to be set aside. Learned Counsel for the appellant relied on the decision in Punjab National Bank Vs. O.C. Krishnan and Others, , and the decision of this Court in State Bank of India v. Prabhu, W.A. No. 7333 of 2001, DD: 5-3-2002 wherein interim stay granted staying the auction has been set aside. He also submits that there is a provision providing for remedy to prefer an appeal against the order of the Recovery Officer to the Tribunal u/s 30 of the Act and further appeal to the Appellate Tribunal u/s 20 of the Act and therefore the order of the learned Single Judge quashing the public auction held on 30-3-1999 and subsequent sale confirmation are illegal and are liable to be set aside.

5. Learned Counsel for the Bank has reiterated the above argument and submitted that respondents 1 and 2 cannot circumvent the remedy which is available and in this way if a proceeding is initiated and any direction issued by this Court it is nothing but to frustrate the aims and objects of the Act and to deprive the bona fide purchaser. Therefore, the order of the learned Single Judge is liable to be set aside.

6. On the other hand, the learned Counsel for respondents 1 and 2 submits that when the procedure for auction is not provided in the Act, the auction could not have been held and there is material irregularity on account of two publications for the same property. This Court should not interfere with the order of the learned Single Judge on the ground of maintainability, as once the case has been admitted, it should not be dismissed on the ground of maintainability, otherwise also order needs no interference. Therefore, the order of the learned Single Judge does not call for any interference.

7. We have heard the learned Counsels for the appellants and respondents, perused the materials placed on record and the case-laws cited.

8. It is not necessary to go into the merits of the case nor this Court can go into the correctness of the order passed by the Debt Recovery Tribunal and auction held. What is to be seen whether the order of the learned Single Judge needs any interference.

9. No doubt, this Court can invoke Article 226 of the Constitution, if the impugned order is passed without jurisdiction or there is any violation of natural justice, but not otherwise. Nothing has been placed on record to show that the order is without jurisdiction or there is any violation of principles of natural justice. More so as per the facts culled out, in the instant case auction was held on 30-3-1999, which was confirmed on 4-2-2000, possession was given on 15-2-2000 and the impugned order was passed on 5/6-7-2001, which in our view is not sustain able.

10. Admittedly, the matter arises under the Act for recovery of cumulative liability due to Bank as per the order of the Tribunal dated 8-5-1998.

11. As per Rule 60(1) of the Income Tax Rules, the defaulter or any person whose interests are affected by the sale, may within 30 days from the date of sale, apply to the Tax Recovery Officer to set aside the sale after satisfying the conditions prescribed therein. As per Rule 61 of the Rules the defaulter or any person whose interests are affected by the sale, may within 30 days from the date of sale, shall apply to the Tax Recovery Officer to set aside the sale on the ground that notice was not served on the defaulter to pay the arrears as required under Schedule II or on the ground of a material irregularity in publishing or conducting the sale. The jurisdiction of the Civil Court is barred.

A perusal of Rule 60 reveals that an application can be filed to set aside the sale of immovable property on deposit and Rule 61 provides for filing of an application to set aside the sale of immovable property on ground of non-service of notice or irregularity.

As per Section 30 of the Act any person aggrieved by an order of the Recovery Officer may prefer an appeal to the Debt Recovery Tribunal and as per Section 20 any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

12. In the instant case, respondents 1 and 2, petitioners have an alternative remedy as stated above. One can avail the remedy provided under Rule 60(1) by filing an application to set aside sale of immovable property on deposit. Application to set aside sale of immovable property on ground of non-service of notice or irregularity is provided under Rule 61 of the Second Schedule to Income Tax Act. Thereafter, if necessary, one can avail remedy u/s 30 of the Act by filing an appeal against the order of the Recovery Officer before the Tribunal and Section 20 provides for a further appeal against the order of the Tribunal before the Appellate Tribunal.

13. In the facts and circumstances of the case, in our opinion the order of the learned Single Judge is not sustainable and as such any finding or observation made on the merits of the case is of no consequence and uncalled for.

14. A reference can be made to the decision in the case of Punjab National Bank, supra, wherein the decree passed by the Debts Recovery Tribunal, Calcutta, was challenged in a petition under Article 227 of the Constitution. The petition was allowed observing that:

"As the mortgaged property directed to be sold was situate in Chennai, the Debts Recovery Tribunal had no territorial jurisdiction in respect thereto and it could not have directed sale of the mortgaged property".

The Supreme Court set aside the order of the High Court observing that the order of the Tribunal was appealable u/s 20 of the Act and the High Court should not have exercised its jurisdiction under Article 227.

Paras 5 and 6 of the Order of the Supreme Court read:

"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short ''the Act''). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the Banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court

should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act".

15. A Division Bench of this Court in the case of State Bank of India, supra, considering the fact-situation and the decision in the case of Punjab National Bank, supra, has set aside interim order passed by the learned Single Judge staying the proclamation of sale on the ground that alternative remedy of appeal is available u/s 20 of the Act and the respondent-petitioner therein cannot circumvent the remedy by filing a writ or suit which is expressly barred.

16. The argument that once the case is admitted, it should not be dismissed on the ground of maintainability is not tenable in the facts of this case and for the reasons mentioned above.

17. Under the circumstances, even though this Court has wide power, but in the absence of any material placed and as stated, in our considered view and in the facts of the given case it is not proper to invoke extraordinary writ jurisdiction. The order of the learned Single Judge dated 5/6-7-2001, so also the direction that auction purchaser shall deliver the possession of the property back to Mrs. Laxmi Kutty, respondent 2, petitioner 2 are not sustainable and are liable to be set aside.

18. Accordingly, the order dated 5/6-7-2001 of the learned Single Judge is set aside and these writ appeals are allowed. It is always open to the parties to avail the legal remedies available as per law. In the circumstances of the case, costs are made easy.