(2008) 11 MAD CK 0193

In the Madras High Court

Case No : Writ Petition No. 20499 of 2007

D. Rani APPELLANT

Vs

Joinus Interiors and Construction Ltd. and Others RESPONDENT

Date of Decision : 19-11-2008

Acts Referred:

Income Tax Rules, 1962 — Rule 60
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 20, 29, 30

Citation : (2008) 11 MAD CK 0193

Hon'ble Judges : V. Dhanapalan, J;S.J. Mukhopadhaya, J

Bench : Division Bench

Advocate : T.V. Badrinarayanan, for the Appellant; Asha, for Sarvabhauman Associates for RR-1 to 5 and Rajamanickam, for R-6, for the Respondent

Judgement

S.J. Mukhopadhaya, J.—This writ petition has been preferred by the auction purchaser against the order dated 26th April, 2007, passed by the Debts Recovery Appellate Tribunal, Chennai (hereinafter referred to as "Appellate Tribunal") in M.A. No. 30/04. By the impugned order, the Appellate Tribunal set aside the ex-parte final order dated 26th Nov., 2002, passed by the Debts Recovery Tribunal ? I, Chennai (hereinafter referred to as "Tribunal") as also the sale of land in question, which was made in favour of the petitioner at the cost of the appellant with interest.

2. The main plea taken by the petitioner is that the sale having made as per order of the Tribunal and having confirmed, in absence of challenge to such sale u/s 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "DRT Act, 1993"), it was not open to the Appellate Tribunal to set aside the sale in appeal preferred by the borrower against an ex-parte decree.

3. Lakshmi Vilas Bank Ltd., (hereinafter referred to as "Bank") filed application u/s 19 of the DRT Act, 1993, against the borrowers, respondents 1 to 5. The ex-

parte decree was passed by the Tribunal on 26th Nov., 2002. The borrower filed M.A. No. 105/03 in the said O.A. No. 128/01 before the Tribunal, challenging the ex-parte proceeding, which was rejected by the Tribunal vide order dated 17th Nov., 2003, giving rise to the appeal preferred by the borrowers u/s 20 in M.A. No. 30/04.

In the meantime, recovery certificate No. 2/03 was issued on 14th Jan., 2003 and order of attachment was issued by recovery officer on 8th May, 2003. The recovery officer, to give effect to the decree, issued auction notice on 25th June, 2003 and the petitioner being the highest bidder, he deposited a sum of Rs. 3,05,000/= on 30th July, 2003. Sale certificate was issued by the Tribunal on 4th Feb., 2004, which was also confirmed.

4. Though the borrowers challenged the ex-parte order dated 26th Nov., 2002, and on rejection of petition to set aside the ex-parte order, preferred appeal u/s 20, but no appeal u/s 30 of the DRT Act, 1993 was filed challenging the auction sale. No allegation was made with regard to the legality and propriety of auction sale, which took place during the pendency of the application before the Appellate Tribunal to recall the ex-parte order. The Appellate Tribunal, by impugned order dated 27th April, 2007, not only allowed the appeal by setting aside the ex-parte decree, but having set aside the sale, as was made in favour of the petitioner, the present petition has been preferred.

5. Learned Counsel appearing on behalf of the petitioner submitted that in absence of any challenge to sale u/s 30 and as the borrowers never deposited the full amount of auction, Appellate Tribunal had no jurisdiction to set aside the sale while deciding the appeal against a final order of the Tribunal.

On the other hand, according to the counsel for the borrowers, ex-parte decree having set aside, it was open to the Appellate Tribunal to set aside the consequential auction sale, which took place pursuant to the said ex-parte order.

Learned Counsel appearing on behalf of the petitioner also assailed the order of Appellate Tribunal dated 26th April, 2007, on merit, and referred to the order that the respondents-borrowers had knowledge of the proceeding, but did not choose to appear before the Tribunal and in absence of a valid explanation, the Appellate Tribunal should not have accepted the appeal to set aside the ex-parte decree.

6. We have heard the learned Counsel for the parties, noticed the rival contentions and perused the records.

From the record it appears that the Tribunal issued summons on the borrowers, but the borrowers failed to enter appearance. The bank alleged that non-appearance of borrowers was wilful and wanton for the reason that they had knowledge of legal notice, suit summons, final order and notice issued by the recovery officer. The Appellate Tribunal noticed that all the notices issued on the borrowers such as legal notice, suit summons, were returned with the postal endorsement "Left", but according to the bank, the notice sent by the recovery officer in the same address having received by the borrowers, it is to be presumed that they had knowledge of the notice.

7. It appears that against the order by which the Tribunal refused to set aside the ex-parte order, appeals were preferred before the Appellate Tribunal and some relief having granted in favour of the borrower, the bank preferred writ petition, W.P. Nos. 8995 and 16978/04 and this Court, by order dated 4th Dec., 2006, had observed that "when M.A. Nos. 105 and 106 were rejected by the Debts Recovery Tribunal on merits, there was no occasion for the DRT to allow the borrower to deposit 50% of the recovery certificate amount and it was an error and the said error was not noticed by the Appellate Tribunal also". It is only on remand the Appellate Tribunal decided the case on merits by impugned order dated 26th April, 2007. While deciding the case on merits, the Appellate Tribunal, while noticed that the legal notice, suit summons, etc., issued on the borrowers returned with postal endorsement "Left", the Appellate Tribunal held that the Tribunal ought to have provided an opportunity for the appellants to contest the matter on merits. As they were set ex-parte, the Appellate Tribunal further held that reasons being that principle of natural justice should not be denied to persons, the ex-parte order was set aside as the borrowers did not get proper opportunity before the Tribunal. Further, while setting aside the ex-parte order, the order of sale was also set aside.

8. We have already noticed that the borrower has not challenged the sale u/s 30 of the DRT Act, 1993. Under Rule 60 of II Schedule to the Income Tax, which is also applicable in the proceeding pursuant to Section 29 of DRT Act, 1993, while challenging the sale, the applicant is to deposit full amount of the sale price. In the present case, it is not in dispute that the sale consideration amount was not deposited by the borrowers.

9. In the case of Indian Bank v. Stanfroze Agvet Farms W.P. No. 19833 of 2007, it came to the notice of the Division Bench of this Court that the borrower challenged the auction sale made pursuant to order passed by recovery officer, but the appeal u/s 30 of DRT Act, 1993 was not preferred before the Debts Recovery Tribunal and the statutory amount required to be deposited under Rule 60 of the II Schedule to the Income Tax Act, 1961 was not deposited. In the said case, by unreported judgment dated 10th July, 2008 in W.P. Nos. 19833 & 31170 of 2007, the Court held as follows :

13. u/s 30 of the RDB Act, 1993, appeal can be preferred against the order of the Recovery Officer within 30 days'' from the date on which copy of such order is issued. As the borrowers intended to challenge the auction-sale pursuant to the order passed by the Recovery Officer, it was open for them to prefer such appeal u/s 30, but such appeal could have been only before the DRT and not before the DRAT.

14. u/s 29 of the RDB Act, 1993, the provisions of Second and Third Schedule to

the Income Tax Act, 1961 are applicable, as far as possible. Under Rule 60 of the Second Schedule to the Income Tax Act, 1961, it is mandatory to deposit the amount specified in the proclamation of sale as that for the recovery of which sale was ordered with interest thereon, at the rate prescribed under the said Rules for setting aside the sale of immovable property.

15. In the present cases, though the respondents-borrowers challenged the auction-sale made pursuant to the order passed by the Recovery Officer, the appeal u/s 30 of the RDB Act was not preferred before the DRT and the statutory amount required to be determined under Rule 60 of the Second Schedule to the Income Tax Act, 1961, was also not deposited in preference of such appeal.

16. For the reasons aforesaid, we are of the view that the appeal preferred u/s 20 of the RDB Act before the DRAT was not maintainable and the DRAT, for the said reason, has no jurisdiction to entertain the appeal; we have no other option except to set aside the impugned order dated 13.3.2007 passed by the DRAT, Chennai. However, this order shall not stand in the way of the borrowers to negotiate the matter with the Bank.

10. In view of the aforesaid decision of Division Bench of this Court in Indian Bank (supra), we hold that the Appellate Tribunal, while setting aside the ex-parte decree, had no jurisdiction to set aside the sale, which was not under challenge, that too in absence of any petition u/s 30 of DRT Act, 1993, which could have been preferred along with requisite total amount of sale.

So far as setting aside of the ex-parte decree and restoring the case before the Tribunal is concerned, we are not inclined to interfere with such part of the impugned order dated 26th April, 2007, the ex-parte decree having passed without service of appropriate legal notice and suit summons on the borrowers.

11. We, accordingly, set aside the part of the impugned order dated 26th April, 2007, so far as it relates to setting aside of the sale is concerned. The Tribunal is expected to decide the case on merits on an early date. It will also be open to the borrowers to challenge the same by filing a petition u/s 30 of DRT Act, 1993 and on depositing the sale consideration amount along with a petition to condone the delay, having pursued the matter before the Appellate Tribunal and this Court, if otherwise permissible under the law.

The writ petition is allowed in part. But there shall be no order as to costs.

