(2006) 12 GUJ CK 0006

In the Gujarat High Court

Case No : Special Civil Application No. 9320 of 1994

Gen. Manager/Managing Director and Others APPELLANT

Vs

Secretary (Appeal) and Others RESPONDENT

Date of Decision : 26-12-2006

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 144, 145, 146, 147, 148

Citation : (2006) 12 GUJ CK 0006

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : Lilu K. Bhaya, for Petitioners 1 - 4, for the Appellant; Dipen Desai, AGP for Respondent 1 - 2 and A.M. Parekh for Respondents 3 - 8, for the Respondent

Judgement

Jayant Patel, J.—The short facts of the case are that in the year 1975, as per the petitioner, the loan was taken by Respondent No. 3 from the petitioner Bank and as per the petitioner various parcels of the lands total admeasuring 56 acres and 17 gunthas were mortgaged with the petitioner Bank. As per the petitioner, since the amount remained unpaid, the recovery certificates were issued and thereafter the auction was also scheduled on 21.5.1992 initially. However, as none came forward to purchase the land, the offer was given by the Circle Inspector in capacity as the representative of the State Government for Rs. 2,481/- per acre total Rs. 1,44,000/-. It appears that after the auction was held and before the sale could be confirmed by the recovery officer, Respondent No. 3 preferred Special Civil Application No. 3347 of 1992 before this Court for challenging the action of respondent bank and also the recovery officer. This Court (Coram: M.J. Pandya, J.) on May 20, 1992 when passed the order, negatived the contention for the benefit of policy of Debt Relief up to Rs. 10,000/- to each of the debtor, however, so far as the second contention of the notice, the payment made, etc. are concerned, it was observed by the Court that the petitioner therein - respondent No. 3 herein may make representation to the Bank and if made, the same will be decided by the bank within three weeks from the date of the order and till then the impugned notice - Annexure A was stayed.

2. It appears that thereafter the Special Recovery officer vide order dated 22.6.1992 confirmed the sale based on the auction held by him. The respondent No. 3 and others preferred revision before the State Government against the decision of the Special Recovery Officer u/s 211 of the Bombay Land Revenue Code (hereinafter referred to as the Code). The State Government in revisional jurisdiction found that there is no proper fixation of upset price and also found that there is no proper compliance to the order passed by this Court on 20.5.1992 and also observed that first attempt shall be made to recover the amount from the movable properties and thereafter the immovable properties may be taken for recovery of the amount. Ultimately, the State Government partly allowed the revision by setting aside the order of the Special Recovery Officer for confirmation of the sale and directed that fresh proceedings to be undertaken for recovery of the amount and under the circumstances the present petition.

3. I have heard Ms. Bhaya, learned Counsel for the Petitioner, and Mr. Desai, learned AGP for Respondents No. 1 and 2. Nobody has appeared for Respondents No. 3 to 8.

4. The first aspect, which has been considered by the State Government in the impugned order is for taking steps for recovery of the amount from the crops or from other movable property and not from the immovable property directly and it has been observed by the State Government that the provisions of Sections 144 to 165 are not properly observed.

5. If the land is mortgaged while granting loan and if the amount remains unpaid and the recovery certificate is issued, the mortgagee has right to proceed for realisation of the amount from the property, which is mortgaged with the Bank. Such right of the mortgagee cannot be frustrated upon a contention that the amount could be recovered by disposal of the movable property of the defaulter. As such, in the transaction of loan, once a recovery certificate is issued, the option remains with the judgment creditor in whose favour the recovery certificate is issued to recover the amount from the judgment debtor. It may be that the judgment creditor may opt for recovery of the amount from the movable property of the judgment debtor, but if on account of the transaction of mortgage of the land, the judgment creditor has opted for recovery of the amount from the land which is mortgaged with the creditor, such cannot be said as illegal, nor the action available with the judgment creditor can be read as an obligation on the part of the judgment creditor to first recover the amount from the movable property of the judgment debtor. As such, the choice and the option remains with the judgment creditor for the mode of recovery of the amount by realisation of the property of the judgment debtor and, in any case, judgment debtor cannot validly contend that since the amount is not proposed to be recovered from the movable property, the action of proceeding against the immovable property is unwarranted in the eye of law or the action is illegal. Therefore, it does appear

that the State Government has committed error apparent on the face of record in proceeding on the basis that first the recovery must be effected from the movable property of the judgment debtor, who was the applicant before the State Government and the immovable property could be proceeded thereafter.

6. It appears that the another aspect, which weighed to the Government was that the upset price of the land in question was not fixed before holding the auction and it is also recorded by the State Government that such upset price was required to be mentioned in the sale proclamation.

7. It has been submitted by the learned Counsel appearing for the petitioners that, as recorded in the order dated 22.6.1992 of the Special Recovery Officer, upset price was fixed at Rs. 2,481/- on the basis of sale instances of last five years and, therefore, the finding of the State Government is not correct and since the upset price was already fixed, it cannot be said that the action of the Special Recovery Officer was illegal.

8. It is true that there is reference to the fixation of upset price of the land in question, but the same is just before a few minutes of the auction itself. It is not a case for fixation of upset price prior to publication of the sale proclamation. What is required for the Special Recovery Officer exercising power under the Code is to have the fixation of the upset price before publication of the sale proclamation. Therefore, the State Government has observed that no proper procedure of drawing panchnama was undertaken and the average price as per the index was followed. In a matter of sale of immovable property by public auction, with a view to see that the rights of the parties are balanced namely; of the debtor and the creditor and the land may not be disposed of at a throw-away price, it should be required that there is prior fixation of upset price and such aspects are also incorporated in the sale proclamation so as to put to notice to the prospective buyers about the minimum offer to be submitted for the land which is proposed to be sold. Not only that but while fixing the upset price, it would be expected for the competent officer to examine the aspects for probable minimum market value of the land in question may be on the criteria of the last sale instances, the other government record, if any, of the acquisition of the land, the prevailing price, which may be arrived at on the basis of the panchnama etc. etc. If the upset price is mentioned in the sale proclamation itself, it would make known to the public at large the minimum offer to be submitted of the land in question. It appears that in the present case, it was at the last moment, just before the actual auction, the upset price was fixed and, therefore, it cannot be said that the State Government has committed error in exercising the power of revisional jurisdiction on such ground.

9. However, the aforesaid cannot be read in absolute for exercise of the revisional power when the sale is to be interfered with conducted for recovery of the amount at the public auction. Even if it is considered that the irregularities are there in conducting the sale such irregularities should be not only material irregularities, but it should be to the extent that it would have altered the result

or the outcome of the auction. In the case where the power is to be exercised in revisional jurisdiction by the State Government, normally the approach on the part of the State Government would be to see that the rights of the parties are balanced sufficiently and the proper care is taken to protect the interest of the debtor as well as of the creditor. In the case where the sale is already held and no other buyer has come forward, except the Government Officer, even if the State Government in revisional jurisdiction found that there was no proper fixation of upset price and if the sale is set at naught, the consequence may arise of no buyer coming forward for purchasing the property and the amount may be required to be refunded. Such situation in a matter where the auction is already held would benefit none and would consequently cause loss to the debtor as well as to the creditor, both. Therefore, it appears that while exercising the quasi judicial power, it was required for the State Government to balance the situation in a manner, which sufficiently protected the interest of both the sides. Mere setting side of the sale on the ground of no proper fixation of upset price would not be in the proper exercise of the discretion by the State Government. It was required for the State Government to ensure that the maximum price of the property is realised, thereby causing no resultant loss to the judgment creditor. Had the State Government while exercising the revisional jurisdiction, kept in mind the aforesaid approach, the auction held could not be set at naught unconditionally. If the attempt on the part of the judgment debtor is to see that the maximum price of the land is realised, on entertaining all such attempts, the judgment creditor should not be put to loss for all time to come. Therefore, I find that it was required for the State Government to balance the situation by protecting the rights of the judgment debtor as well as of the judgment creditor, more particularly when there was no other material available on record before the State Government to come to the conclusion that the valuation of the land could have been realised more had there been proper fixation of upset price.

10. In my view it is expected for a quasi judicial authority to exercise the power in a manner which balances the rights of the judgment creditor as well as of the judgment debtor when a complaint is brought before it that the proper price of the land is not realised or that due to material irregularity in exercise of the power by the Special Recovery Officer, an injustice is caused to the judgment debtor. As such in such circumstances, it would be required for the State Government to exercise the jurisdiction by balancing the rights of the judgment creditor too. Setting aside of the sale on a mere ground of procedural irregularity may not be required in all cases and even if the power is to be exercised for such purpose, sufficient care is required to be taken by putting restriction to the ultimate situation so that nobody is permitted to reap undue benefit.

11. It appears that the State Government while exercising the power as quasi judicial authority, has not considered the aforesaid aspects. If the auction is set aside without putting any condition, the consequence may arise to the extent that either no buyer may be available or if available, may be for even less than the amount offered at the auction on behalf of the Government. Therefore, under

such circumstances, the exercise of the judicial discretion demands that even if the auction is to be set aside, it was required for the State Government to impose appropriate condition and the cancellation of the sale unconditionally, considering the facts and circumstances, can be said as error apparent on the face of record.

12. It has come on record that the offer submitted was for Rs. 1,44,000/- and such amount is deposited as back as in the year 1992. Even if the auction proceedings were to be interfered and set aside, it was required for the State Government to put the judgment debtor to the appropriate condition since no such conditions are provided and the auction is set aside, it can also be said that the jurisdictional error is committed by the State Government while exercising the quasi judicial power.

13. Considering the facts and circumstances, it appears that while exercising the revisional jurisdiction and interfering with the sale on the ground of no proper fixation of the upset price, it was required for the State Government to put the revisioning petitioner on condition to deposit the amount with reasonable interest so that situation can be avoided in the event no buyer comes forward for submitting the offer, consequently resulting into loss and seriously prejudicing the rights of the judgment creditors for all times to come since the matter came to be considered at the stage where the auction was held and the sale was confirmed. As such aspects are not included while passing the final order by the State Government and the period of about 13 years has passed after the order passed by the State Government pending the proceedings before this Court, even if respondent Nos. 3 to 8 are desirous to see that out of the fresh auction, more money may be realised of the property in question, they must deposit the amount already deposited by the auction purchaser with reasonable simple interest @ 12% p.a. As the aforesaid aspects is not considered by the State Government while exercising the quasi judicial power, even if this Court is inclined to maintain the order of the State Government for interfering with the auction proceedings, the appropriate condition deserves to be ordered with a view to balance the rights of the Judgment Creditor as well as of the Judgment Debtor and also to ensure that no loss is caused to the auction purchaser who submitted the offer in bonafide.

14. In view of the above, the order passed by the State Government of setting aside of the sale dated 22.06.1992 shall continue on condition that the respondent Nos. 3 to 8 deposits the amount of Rs. 1,44,000/- with interest @ 9% p.a. from 22.06.1992 till the actual deposit within a period of three months from today with the Special Recovery Officer of the petitioner Bank. After the amount is deposited, it would be open to the Special Recovery Officer to undertake fresh auction keeping in view the observations made by the State Government read with the order passed by this Court in the present judgment and in the event the money realised at the auction of the property in question is exceeding the amount already deposited by the respondent Nos. 3 to 13, they

would be entitled to get back the amount to extent of the money realised but not exceeding the amount already deposited.

15. It is clarified that upon failure to deposit the amount by respondent Nos. 3 to 8, the sale already undertaken by the Special Recovery Officer shall remain maintained.

16. The petition is partly allowed to the aforesaid extent. Rule made absolute accordingly. Considering the facts and circumstances, there shall be no order as to costs.

