(2004) 09 KL CK 0039

In the High Court Of Kerala

Case No : O.P. No. 3787 of 1999

Kerala State Financial Enterprises Ltd. — APPELLANT

Vs

Meenachil Co-operative Agricultural and Rural Development Bank Ltd. — RESPONDENT

Date of Decision : 13-09-2004

Acts Referred:
Stamp Act, 1899 — Section 2(17)
Transfer of Property Act, 1882 — Section 58

Citation : AIR 2005 Ker 76 : (2004) 3 KLT 369

Hon'ble Judges : M. Ramachandran, J

Bench : Single Bench

Advocate : Antony Dominic, for the Appellant; Viju Abraham and George Kutty Mathew and Thomaskutty, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

M. Ramachandran, J.—By order dated 28.12.1998 (Ext.P8), the Joint Registrar of Co-operative Societies, Kottayam (third respondent herein) had overruled the objections of the petitioner in the matter of confirmation of sale of a landed property, admeasuring 2 acres and 98 cents of land with a building in Sy.No. 341/4 of Thalapalam Village. This was purported to be in exercise of powers u/s 21(3) of the Kerala State Co-operative Agricultural Development Banks Act, 1984 (Act 20 of 1984) (hereinafter referred to as Act 20 of 1984). The application was at the instance of the first respondent -- The Meenachil Co-operative Agricultural and Rural Development Bank Ltd. The objector was the petitioner -- Kerala State Financial Enterprises Ltd., represented by its Branch Manager, who had a claim that the property had been already mortgaged to them prior to the encumbrance created in favour of the first respondent-- Bank. 4th Respondent was the owner of the properties, at the time when the properties had been mortgaged in favour of the petitioner, in the year 1994, by deposit of title deeds, as security in respect of Kuri transactions. Original Petition has been filed inter alia challenging the above order.

2. Respondents 4 and 5 had been subscribers to two Kuries in Chitty No. 2/94 and had been assigned chittal Nos. 30 and 25 respectively. When the Kuries got prized, as required for the release of the prize amount, an equitable mortgage in respect of the property concerned had been created on 4.7.1994 and the title deeds in respect of the above land had been deposited with the petitioner-company. This is no where disputed.

3. There was default in the future remittances. The dues Were quantified as Rs. 4,00,030/- as on 14.2.1997. Being a notified establishment, u/s 71 of the Revenue Recovery Act, a requisition had been made to the District Collector, Kottyam for initiating action for recovering the amounts due from the said respondents. The petitioner refers to the certificates issued by the District Collector dated 22.2.1997 and 24.2.1997. A demand notice prior to attachment had been duly issued on 12.3.1997 by the Special Deputy Tahsildar (RR), Ernakulam, and properties were attached on 27.1.1998.

4. It is stated that while these steps were in progress, a public notice had come to the knowledge of the petitioner, published by the first respondent -- Bank. The 4th respondent was therein shown as a defaulter and the sale notification included properties as aforementioned, as to be sold on 11.2.1998. It is further submitted that in spite of objections, the sale proceedings were carried on and since there were no bidders forthcoming, the first respondent -- Bank themselves had purchased the properties in auction. Such action under the provisions of Act 20 of 1984 required confirmation by the notified authority. Objections were filed before the Joint Registrar, in the above context, by the Kerala State Financial Enterprises. However, he was not prepared to see eye to eye with the claims of the petitioner. The order passed was to the following effect:

"Whereas no application with deposit has been made under Sub-section (1) of Section 21 of the said Act and whereas the Sale Officer has duly applied to make an order confirming the sale, in exercise of powers confirmed to me under Sub-section (3) of Section 21 of the said Act. I am inclined to confirm the sale of property of 2 acres and 98 cents in Survey 341/4(Re-Sy. 238/3) of Thalapalam Village which was sold in public auction by the Sale Officer, Meenachil Co-operative Agricultural and Rural Development Bank, Pala on 11.2.1998, and the sale shall become absolute and the property shall be deemed to have vested in the purchasers, viz. the Meenachil Co-operative Agricultural Development Bank Ltd. No. K.197, Pala from the date and time of sale".

Want of deposit of the amounts specified in the proclamation of sale was thus pointed out as a reason for not acting upon the objections.

5. In the present Original Petition, the above order is challenged as also all the proceedings leading thereto. A declaration also has been sought for to the effect that the sale conducted ignoring the mortgage given in favour of the petitioner is illegal and void.

6. Sri. Antony Dominic, on behalf of the petitioner, submits that the first

respondent -- Bank as also the Joint Registrar of Co-operative Societies (3rd respondent) were in error to overrule the objections of the petitioner, whereby valid and legal rights of the petitioner have been practically set at naught. According to him, even if the Bank was proceeding under a special enactment, rejection of the claims of the petitioner could not at all have been justified. Infirmities touching the root of the transaction had weakened the claims of the Bank, to the advantage of the petitioner. The executive powers of the Governmental authorities have been exercised without full application of mind and overlooking the provisions of the statute and objections raised.

7. When the initial sale had been notified, the first respondent--Bank had divulged certain further details to the petitioner, so as to assert the position that always they were in the driver''s seat. According to them, Smt. Rosamma George, Muthupunnackal, Plassanal had taken three loans from the first respondent- Bank as K.MS.E.3/95-96 for Rs. 50,000/-; PLMS E5/95-96 for Rs. 20,000/- and RHE 88/94-95 for Rs. 3,00,000. The properties, referred to in the notice, namely 2 acres and 98 cents in her name and possession, were shown as security, and it was only after executing appropriate Gehans (Nos. G.54/95, G.64/95 and H.39/95) that loans were sanctioned and paid. She had done so along with her husband Sri. M.K. George, who was the transferor and the title was impeccable. Sri. M.K. George is the 4th respondent and Smt. Rosamma George (his wife) is the 6th respondent herein. It has presently come up that some time during 1995 Sri. George had, by a registered document, transferred the properties in favour of his wife, which facilitated her to subject the properties to encumbrance for money received. The loans had been received and the default compelled the first respondent-Bank to resort to coercive proceedings. These were the basic facts, which have to be adverted to, while disposing of this Original Petition.

8. By the counter affidavit filed by the first respondent -- Bank, claims that they had entered into financial transactions with Rosamma George, in the normal course of business, and all precautionary measures had been taken and in view of the insulating provisions for safeguarding the transactions under Act 20 of 1984. Ext.P8 was impeccably valid, and the petitioner could not have agitated any legally sustainable claims. Reference had been made by the learned counsel to Sections 10, 12 and 21 of Act 20 of 1984. Also, it was a case, where notices prescribed u/s 12 of the Act in respect of the transactions had been duly served with the Village Officer, Thalapalam on 7.4.1995, 3.6.1995 and 12.7.1995 (Exts.R1(a) to R1(c)). Therefore, when legal formalities, religiously had been complied with, and when there was default on the side of the loanees, it would have been possible for them to put the properties on sale without intervention of the Court. After the sale, only on deposit of the amounts due, it would have been possible for an objector to get the sale set aside. Since the application filed before the competent authority was defective, no interference could have been permissible. It had been pointed out that when the property was put to sale on 11.2.1998, Bank had bid the property for an amount of Rs. 4,35,000/- and such

sale alone has been confirmed.

9. Sri. Antony Dominic submits that the provisions of Act 20 of 1984 normally would have come to secure the interest of the institutions like the first respondent, but in the present case, the basic defects in the transactions exposed them to risks, as the property was already under equitable mortgage to them. At no point of time, Bank had any valid rights over the properties. Appropriation steps by them as per Ext.P8 were therefore inconsequential and the right of the petitioner was indefeasible. We may examine the issue in the aforesaid background.

10. Since reliance has been placed by the Bank on Section 12(2) of the Kerala State Co-operative Agricultural Development Bank Act, the provision could be extracted herein below:

"(2) Notwithstanding anything contained in any law for the time being in force, a Gehan created or mortgage or hypothecation executed in favour of the Agricultural Development Bank or a primary bank shall take precedence over any attachment or equitable mortgage over the properties, where, after publication of a notice in the prescribed form, the claim or interest under such attachment or equitable mortgage has not been notified to such bank within the time prescribed in the said notice".

Thus, it is submitted that if at all the petitioner initially had any claims, so long as they did not put up any such claims of equitable mortgage to them, after Exts.R1(a) to R1 (c), the legal effect was that such claims automatically became subordinate to their rights over the property. Therefore, the petitioner had no enforceable legal rights and any claims become subservient to the rights of the Bank.

11. As defined u/s 2(e) of the Act, a Gehan is a special charge on properties in favour of the lending Bank. By a mere declaration in writing by the borrowers for securing payment of money advanced or to be advanced by way of loan, it will have all the characteristics of a valid mortgage. Security of such loan is ensured by the Act. A loan u/s 9(3) of the Act is recoverable by the Bank concerned in case of default of payment in the same manner as if they are arrears of public revenue due on land. Charge on movable or immovable property is ensured by expressly reserving in favour of the Bank a right of sale without intervention of Court, in case of default. (See Section 10(1) of the Act). It is also provided that notwithstanding anything contained in the Registration Act, or any other law for the time being in force, it shall not be necessary to register any Gehan or mortgage or hypothecation created or executed in favour of the Agricultural Development Bank or a primary bank, provided the Agricultural Development Bank or the primary bank, as the case may be, sends a copy of the declaration or instrument, whereby such documents, including Gehan had created to the Registering Officer of the area concerned within stipulated time. The Registering Officer is expected to file a copy thereof in Book No. 1 kept under the

Registration Act and thereupon it is deemed to create an interest in the property. The Bank had complied with these formalities.

12. The argument of the respondent therefore was that in view of Section 12(2) of the Act and the publication of notice, the proceedings for sale became unimpeachable. The further submission was that the sale could have been annulled only as provided u/s 21 of the Act and since there was no deposit coming from the petitioner, which was a precondition, no rights remained to be adjudicated. Act 20 of 1984 was intended to facilitate a more efficient working of Co-operative Agricultural Development Banks in the State, and the special provisions as above were incorporated so as to ensure that the transactions entered into by the institution were fully protected and recovery steps were flawlessly efficient.

13. However, on an examination of the attending circumstances, as highlighted by the petitioner, it is evident that notwithstanding the watertight provisions in the Act, certain basic irregularities have effectively undermined the rights of the Bank of an opportunity to assert the rights as against the claims of the petitioner. Even though in the counter affidavit, the Bank claimed that they were convinced that the applicant for the loan had valid and marketable title over the properties proposed to be mortgaged, and that the same is absolutely encumbered as on 15.3.1995 and that there was no third party interest over the properties, the facts appear to be otherwise. The dates of availing of the three loans respectively were 20th of April 1995, 7th June 1995 and 15th of July 1995. But well before that the 4th respondent had encumbered the property concerned in favour of the petitioner, in the year 1994. The title deed of the properties, as could be seen from the counter affidavit filed by the Bank, is having registration No. 74/95 of the Sub Registrar''s Office, Erattupetta. The loans had been applied for by Smt. Rosamma George (6th respondent), after she got the rights by the said transaction. It is but evident that the 4th respondent--husband after encumbering the properties in favour of the petitioner in the year 1994 had transferred the properties in favour of his wife in the year 1995. Such a transfer, during the subsistence of the encumbrance, could not have validly conferred any rights on the 6th respondent to the detriment of the petitioner. Perhaps the first respondent -- Bank had bona fide intended to enter into transactions, but a lacuna was in fact there. The 6th respondent presented the documents and applied for loan, misrepresenting the bank that she was having ownership and title over the properties, which she never had legally acquired. Therefore, the contention of the Bank that there was proper scrutiny or that there was marketable title enjoyed by the 6th respondent is without basis. This erodes the substratum of their stand.

14. Because, if that be the case, the notices sent to the Village Officer (Exts.R1 (a) to R1(c)), as envisaged by Section 12 of Act 20 of 1984, did not thereby create any further rights than the bank received from the mortgage arrangement. The rights were defective and unenforceable. The notices, though

purported to have been made u/s I2(2) of the Act, were incapable of creating any right because of the inherent defect. Even though the petitioner had overlooked/omitted to make an objection against Exts.R1(a) to R1(c), that did not place them under any special disability, since the 6th respondent''s surrender was in respect of properties over which she had no legal rights. The exhibits produced indicated that Rosamma George was party to a Gehan about which notice was published in the Village Office. The petitioner had no relation or transaction with Rosamma George and were not expected to be alerted because of such notice, even though the property had been described. It became inconsequential as far as the petitioner''s rights were concerned. Resultantly, situation is that the bank had attempted to enforce the Gehan which was unenforceable. The rituals of publication, sale and consequent confirmation was not sufficient enough to clothe them with any specific advantage to the detriment of the petitioner.

15. u/s 11 of the Act, every persons who applies for a loan from a primary bank was expected to make a declaration that the property on which Gehan is created as security in the loan transaction is free from encumbrances. Section 11(3) provides that a person who makes a false declaration shall be punishable with imprisonment, Also it is not as if such a contingency of fraud is overlooked by Act 20 of 1984. Section 11(2) of the Act speaks of the remedy. Notwithstanding anything contained in any law for the time being in force, where a declaration given by a loanee is false or defective, the Bank will have a first charge on all other movable and immovable properties of the applicant, and all such properties shall be deemed to have been included in the Gehan, mortgage or hypothecation created or executed by the applicant as security for the loan granted. Theoretically, at least it may be possible for the Bank to proceed against the 4th respondent or the 6th respondent, at their option, in case they want to enforce their claims.

16. It is beyond dispute that mortgages by deposit of title deeds is a valid procedure, accepted under the Transfer of Property Act, for creating an encumbrance. u/s 58(a) of the Act, a mortgage is a transfer of interest in specific immovable property. This may be for the purpose of securing the payment of money advanced or to be advanced by way of a loan. It includes an existing or future debt over the performance of an engagement which may give right to pecuniary liability. It is undisputable that in respect of a Kuri transaction the petitioner had entered into such an arrangement. The law recognizes a mortgage by deposit of title deeds. When a person delivers to the creditor or the agent, document or title to immovable property with intend to create a security thereon, the transaction is a mortgage by deposit of title deeds (Section 58(f) of the Transfer of Property Act). The petitioner claims that a mortgage deed as envisaged u/s 2(17) of the Indian Stamps Act is in existence. A mortgager therefore is disabled from further encumbering the properties in any case without the junction of mortgagee. It can well be presumed that a liability is automatically attached to the property and it is a burden imposed upon the land

and the interest in the land, by the owner of the land.

17. Advertence may also be made to the dictionary meaning of the term ''mortgage'', see Black''s Law Dictionary, 7th Edition, by Bryan A. Garner. It is described as a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment of performance according to the stipulated terms. It is also "a lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms. Thus, the mortgage presupposes a (notional) conveyance of title as such, though on limited terms and the mortgager may continue the occupation of the property.

18. While dealing with creation of encumbrances, which did not amount to sale, as pointed out by Leonard A. Jones in "A treatise on the Law or Mortgages", the chief distinction between a mortgage and a pledge is that by a mortgage the general title is transferred to the mortgagee, subject to be re-vested by performance of the condition; while by a pledge the pledgor retains the general title in himself, and parts with the possession for a special purpose. It can therefore be stated that by a mortgage, the title is presumed as transferred; by a pledge, the possession alone is parted with. Therefore, if this Court does not step in, that may result in an illegality being perpetuated.

19. The inescapable conclusion is that the safeguards taken by the first respondent -- Bank, while advancing the loan to the 4th and 6th respondents, were inadequate. Their bravado by itself fails to bring in dividends, though in the first round they got a technical victory. Though there was appearance on behalf of respondents 4 and 6, they had not chosen to divulge their stand vis-a-vis the transactions. The loan had been obtained by the 6th respondent for investing in the property itself, for a building, and it is not for me to fathom the reasons which prompted them on such an adventure. A fraud apparently has to be ruled out, but I am not certain.

20. I find that while adjudicating the claims of the petitioner, the Joint Registrar had not taken notice of all legal aspects, which should have come within the scope of his enquiry. The notification followed by auction and confirmation, as could be seen from Exts.P1, P3 and P8, in so far as the properties mortgaged to the first respondent -- Bank are declared as invalid and irregular. They have not legally interfered with or unsettled the rights of the petitioner.

21. A contention had been raised by the learned counsel for the first respondent -- Bank that the Original Petition is not maintainable, since the petitioner''s right would have been only an appeal to the Government u/s 83(1)(j) of the Co-operative Societies Act. However, since the matter was pending for long, at this point of time, I do not think it is proper for me to relegate the parties to Such course, as the delay may adversely affect the claims, obligations and rights of two institutions, as well as private parties. Therefore, I am not prepared to accept the objection.

22. During the pendency of these proceedings, by Ext.R1(e) the Deputy Collector (RR) had put the properties concerned for sale on 29.4.2003 in continuation of the proceedings initiated at the request of the petitioner. It will be open for the petitioner to get on with Ext.R1 (e) proceedings. The first respondent too will be entitled to take independent steps for safeguarding their interests.

23. Notwithstanding this judgment, it will be open to the parties to negotiate among themselves and come to agreed settlements. The properties appear to be valuable, and the effort always should be to generate the maximum price, to benefit, if possible the 4th respondent also. I may refer to the observations of the Supreme Court in this regard, made in S.J.S. Business Enterprises (P) Ltd. v. State of Bihar and Ors, 2004 (5) Sup 485 which explicitly lays down the principles, in paragraph 17, as following for guidance:

"17. We are of the view that the sale effected in favour of respondent No. 6 cannot be sustained. It is axiomatic that the statutory powers vested in the State Financial Corporation under the State Financial Corporation Act, must be exercised bona fide. The presumption that public officials will discharge their duties honestly and in accordance with the law may be rebutted by establishing circumstances which reasonably probabilize the abuse of that power. In such event it is for the concerned officer to explain the circumstances which are set up against him. If there is no credible explanation forthcoming the Court can assume that the impugned action was improper (See: Pannalal Binjraj Vs. Union of india (UOI), . Doubtless some of the restrictions placed on State Financial Corporations exercising their powers u/s 29 of the State Financial Corporation Act, as prescribed in Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , are longer in place in view of the subsequent decision in Haryana Financial State Corporation v. Jagdamba Oils Mills. However, in overruling the decision in Mahesh Chandra, this Court has affirmed the view taken in Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras and another, and said that in the matter of sale u/s 29, the State Financial Corporation must act in accordance with the statute and must not act unfairly ie., unreasonably. If they do their action can be called into question under Article 226. Reasonableness is to be tested against the dominant consideration to secure the best price for the property to be sold. "This can only be achieved when there is a maximum participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interesting (interested?) in purchasing the property and generally secures the best price".

24. This equally will be applicable to the petitioner, as any other statutory body, who comes within the purview of State Under Article 12 of the Constitution of India.

The Original Petition will stand allowed. No order as to costs.