
(2007) 09 DEL CK 0149
In the Delhi High Court
Case No : WP (C) No. 6575 of 2006

Mr. A.K. Jain

APPELLANT

Vs

Canara Bank and Others

RESPONDENT

Date of Decision : 14-09-2007

Acts Referred:

Companies Act, 1956 — Section 422, 446, 529, 529A, 537

Constitution of India, 1950 — Article 226

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 19(19), 25, 30

Citation : (2007) 09 DEL CK 0149

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : V.P. Singh, V.K. Jhanji, Rajesh Jain, S.C. Ladi, Akash Aggarwal and Mandakini, for the Appellant; Atul Kumar and Atul Kumar for Respondent No. 1, Deepak Khadaria and Sangeeta Chandra for DDA, Rajiv Mehra and Sumehar Bajaj for Respondent Nos. 4 and 5, S.K. Luthra, for the old and H.K. Chaturvedi, for the Workmen, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—Firstly, facts in brief:

2. Respondent No. 2, M/s. Wings Wear (P) Ltd., was allotted property bearing No. B II/18, Mohan Co-operative Industrial Estate, Badarpur, Delhi, by the DDA on leasehold basis. Such a property cannot be transferred without permission of the DDA and while according such a permission, the DDA is entitled to charge 50% of the unearned increase. Said M/s. Wings Wear (P) Ltd. (hereinafter referred to as the "judgment debtor") needed certain financial assistance for which it approached the respondent No. 1, Canara Bank (hereinafter referred to as the "Bank"). Loans were sanctioned against which the aforesaid property was mortgaged with the bank after taking permission of the DDA. Since the judgment debtor did not make the payment, the bank filed the application before the Debt Recovery Tribunal (in short the "DRT") for payment of its dues, which was

allowed and vide order dated 21.2.2004, the judgment debtor was directed to pay the bank a sum of Rs. 55,47,819.91P. along with pendente lite and future interest at the rate of 21.75% per annum with quarterly rests as well as costs. The judgment debtor failed to make the payment and thus, recovery certificate was drawn in favor of the bank on 30.4.2002. The Recovery Officer took up the execution proceedings. In the meantime, the judgment debtor had gone into liquidation as winding up orders were passed against it by the Company Judge of this Court and the Official Liquidator was also appointed. The Recovery Officer initiated the move to sell the mortgaged property. The reserved price of Rs. 77.60 lakhs was fixed and other terms of sale were settled. Sale proclamation was issued on 19.4.2004 fixing the date of auction as 28.5.2004. The petitioner herein also participated in the said auction and his bid of Rs. 78 lakhs being the highest was accepted and he was declared as the successful bidder. This sale was confirmed on 22.7.2004

3. The petitioner filed application on 1.6.2004 seeking a direction against the bank to pay the unearned increase payable to the DDA, the ground rent and the composition fee. It may be mentioned that since the mortgaged property was governed by the terms and covenants contained in the lease deed dated 18.4.1980 and on the sale of the property, as mentioned above, 50% unearned increase was payable to the DDA, the question had arisen as to who would pay the said unearned increase as well as the ground rent and the composition fee. The SDM, Model Town, has also attached this property on account of certain dues payable to the workmen. The petitioner, Therefore, in the said application dated 1.6.2004 also prayed for withdrawing of the said attachment. The Recovery Officer passed an order dated 22.7.2004 confirming the sale but rejecting the other prayers of the petitioner herein, namely, direction to the bank to pay the aforesaid amounts. The petitioner challenged this order u/s 30 of the Recovery of Debts due to Banks and Financial Institutions before the DRT. The DRT accepted the contention of the petitioner and ordered that the aforesaid dues shall be paid by the bank from the sale proceeds. The bank challenged that order by filing appeal before the Debt Recovery Appellate Tribunal (in short the "DRAT"). The DRAT has passed the impugned order dated 4.4.2006. The case set up by the bank was that since the property in question was sold on "as is where is basis", all the encumbrances with regard to the property had to be borne by the auction purchaser.

4. The petitioner herein, on the other hand, contended that he was not informed of any such dues or liabilities and he could not be made to suffer due to lack of proper and clear indication in the auction notice issued by the Recovery Officer about the encumbrances on the property.

5. The learned DRAT in these circumstances opined that neither the petitioner nor the bank could be blamed since the property was sold on "as is where is basis", normally such a liability would be on the petitioner. But as there was no proper and clear indication in the notice, he could not be fastened with such a

liability. On the other hand, the bank, which had given substantial loan to the judgment debtor and was legally entitled to recover more than Rs. 3 crores and, Therefore, it was not justifiable to call upon the bank to part with another Rs. 2.90 crores towards liability on the property in the form of unearned increase, ground rent and composition fee etc. The learned DRAT, in these circumstances, though that the appropriate course was to set aside the sale itself and gave the following directions:

In this scenario, having regard to the facts and circumstances of the case, the only course appears to be set aside the sale and direct the Recovery Officer to hold fresh auction giving details of encumbrances on the property in the sale notification and sale proclamation so as to enable the willing purchaser to know about the correct position with regard to the property. The Recovery Officer shall be entitled to seek such other information from all concerned. The petitioner-bank shall also render necessary assistance which is required for the auctioning of the property. Accordingly, the sale held on 28.05.2004 in favor of the 4th respondent herein is set aside paving way for fresh steps to be taken by the Recovery Officer, as indicated above.

6. This order is impugned in the present writ petition filed by the petitioner under Article 226 of the Constitution. The submission of the learned Counsel for the petitioner is that the DRAT exceeded the jurisdiction inasmuch as, the only prayer in the appeal filed by the bank was to fasten the liability of payment of the aforesaid dues and the bank's case was that it was the liability of the petitioner, whereas the petitioner was contending that it was the bank which was under obligation to pay the dues. The DRAT, Therefore, could have only decided this issue and could not have set aside the sale itself. His submission was that once the auction has been confirmed by the DRT, there was no question of setting aside such a sale by the DRAT, more so when this was not even the prayer of the respondent bank in its appeal against the order of the DRT. He also referred to the judgment of the Supreme Court in the case of Allahabad Bank Vs. Canara Bank and Another, to contend that the Recovery of Debts Due to Banks and Financial Institutions Act (hereinafter referred to as the "Recovery of Debts Act") was a special enactment and even if the Companies Act is also to be treated as a special Act, the proceedings before the DRT will have overriding effect and the machinery provided under the Recovery of Debts Act for recovery of money due to bank by sale of mortgaged property will prevail over the winding up proceedings under the Companies Act. He referred to the following passages from the said judgment laying down this principle of law:

50. For the aforesaid reasons, we hold that at the stage of adjudication u/s 17 and execution of the certificate u/s 25 etc., the provisions of the RDB Act, 1993 confer exclusive jurisdiction in the Tribunal and the Recovery Officer in respect of debts payable to Banks and Financial Institutions and there can be no interference by the Company Court u/s 422 read with Section 537 or u/s 446 of the Companies Act, 1956. In respect of the monies realised under the ROB Act,

the question of priorities among the Banks and Financial Institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above extent inconsistent with the provisions of the Companies Act, 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding up petition against the debtor-company and also after a winding up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceedings under the RDB Act, 1993. Points 2 and 3 are decided accordingly in favor of the appellant and against the respondents.

Points 4 and 5:

51. We have already held that the adjudication, execution and distribution of the sale-proceeds and working out priorities as between Banking and Financial Institutions and other creditors of the defendant company-so far as the monies realised under the RDB Act are concerned-has to be done only by the Tribunal and not by the Company Court. The next question is as to the manner of distribution of these monies between the Banks or Financial Institutions on the one hand and the other creditors, secured or unsecured of the company under winding up. This question depends upon the effect of Section 19(19) of the RDB Act as introduced by Ordinance 1/2000.

7. Without prejudice to this contention, he submitted that the petitioner was still ready to bear the liability of DDA qua unearned increase and composition charges and was also ready to pay the ground rent, but not the dues of labour, which had to be paid out of the sale proceeds by the Recovery Officer to the bank as well as workers having regard to the provisions of Section 529(a) of the Companies Act.

8. Thus, he submitted that instead of canceling the auction, the DRAT should have given the petitioner opportunity to meet the said liability. He further submitted that since in the auction notice there was no clear stipulation in this behalf, after ascertaining the liability for which the petitioner be given right to contest the exact amount payable as unearned increase etc., choice be given to the petitioner to decide as to whether the petitioner wants to purchase this property or not.

9. Notice in this petition was issued to the DDA also to ascertain the dues payable to it. DDA has filed the affidavit computing the dues as per which, the amount payable as on 2nd November 2006 was Rs. 2,19,81,344/-. This amount is worked out in the following manner:

1. Plot No. B-11/18 Mohan Cooperative Indl Estate

2. Size of plot as per lease deed (P-6/c) 1937.02. sq. yds. (Market Rate) 1619.58 sq. mtrs.

3. Deviation of rate for Mohan Cooperative Indl. Estate for the year 2003-04 Rs. 26080 P.sq. Mtr.

4. Add 2% on above rate as per practice being followed for industrial plot for year 2004-05 Rs. 26602=00

5. UEI charges $1619.58 \times 26602 = 4,30,84,067-16$

6. Less premium paid (P-6-C) (-) 18578-60 4,30,65,488-56

7. 50% UEI share of DDA on 100% shares 2,15,32,744-28(A)

8. Updating charges @ Rs. 12.5% $2,15,32,744.28 \times 2 \times 12.5$ w.e.f. 29-7-04 100x12

Total amount A + B = 2,19,81,343.12 say Rs. 2,19,81,344.00

10. Learned Counsel for the DDA submitted that if Updating charges are calculated till date, the total amount as on 30.9.2007 works out to Rs. 2,99,49,621/-.

11. Learned Counsel for the bank submitted that the order of the DRAT was proper and justified inasmuch as, the property was under-valued and the petitioner's bid of Rs. 78.05 lakhs is much below the market value. He pointed out that the dues of the bank with up to date interest itself works out to approximately Rs. 5.4 crores. Counsel for the workmen informs that dues of the workmen are approximately Rs. 5 crores, which is on the basis of adjudication by the Labour Court for which recovery certificates have also been issued and the SDM had attached the property in question much before it was to be put to auction.

12. We have considered the respective submissions of the counsel for the parties and have minutely gone through the impugned order dated 4.4.2006 passed by the DRAT. The relevant facts have already been noted above. After the auction, dispute arose as to whether it is the petitioner, who is to pay the aforesaid dues or the liability is that of the respondent bank. We may note that the Recovery Officer while deciding the applications of the petitioner herein vide his order dated 22.7.2004 confirmed the sale also by the same order.

13. The submission of the respondent was that since the property in question was sold on "as is where is basis", all the encumbrances with regard to the property are to be borne by the auction purchaser and the DRT should not have fastened the liability on the respondent bank, who lent the money to M/s. Wings Wear Pvt. Ltd.

14. The submission of the petitioner, on the other hand, was that he was not aware of any such liability at the time when the auction took place. Taking note of these contentions the learned Appellate Tribunal found that in the notice as well as in the sale proclamation, known and unknown liabilities attached to the said properties were not disclosed and had that been done, the petitioner or the respondent bank would not have faced anxious moments. In these

circumstances, the Appellate Tribunal thought that the proper course of action was to cancel the sale itself and take fresh steps for auctioning the property. The exact discussion by the Tribunal runs as follows:

10. In the light of these submissions on considering various orders I am of the view that the appellant as well as the 4th respondent cannot be made to suffer due to lack of proper and clear indication in the auction notice issued by the Recovery Officer about the encumbrance on the property. It was though indicated in the auction notification that other details regarding liabilities is not forthcoming, the Recovery Officer should have categorically mentioned in the notice as well as in the sale proclamation that the property does not have known and unknown liabilities which have to be borne by the auction purchaser. Had that course been taken by the Recovery Officer, in my considered view, the appellant and the auction purchaser perhaps would not have faced anxious moments. The appellant having lent a substantial amount to the 1st respondent-company to set up an industrial unit and as on the date of sale of the property the appellant was legally entitled to recover more than Rs. 3 crores, it will not be justifiable to call upon the appellant to part with another Rs. 2.90 crores towards the liability on the property which was purchased by the 4th respondent. Nor in the absence of a clear-cut indication regarding the liabilities on the property being put to auction, either in the sale notification or in the sale proclamation, the auction purchaser be asked to make good all the encumbrances which go along with the property. It is also noticed that the Presiding Officer of the SRT has recorded that the details of liabilities have not been indicated in the proclamation of sale issued by the Recovery Officer. Apart from the dues of Delhi Development Authority, the Official Liquidator has also come forward with a plea that the salaries of the employees of the 1st respondent-company are also dues and that these dues are also to be recovered from the sale proceeds.

11. In this scenario, having regard to the facts and circumstances of the case, the only course appears to be set aside the sale and direct the Recovery Officer to hold fresh auction giving details of encumbrances of the property in the sale notification and sale proclamation so as to enable the willing purchaser to know about the correct position with regard to the property. The Recovery Officer shall be entitled to seek such other information from all concerned. The appellant-bank shall also render necessary assistance which is required for the auctioning of the property. Accordingly, the sale held on 28.05.2004 in favor of the 4th respondent herein is set aside paving way for fresh steps to be taken by the Recovery Officer, as indicated above.

15. The question, Therefore, is as to whether we should confirm the aforesaid order whereby sale is cancelled or give a chance to the petitioner to pay up the dues of DDA and allow the auction to remain in his favor. In order to take a particular view, some important facts, though already taken note of, may be emphasised here. The company M/s. Wings Wear Pvt. Ltd. is already wound up and is in liquidation. The main asset is the property in question. Liability of the

secured creditor, namely, the respondent bank and the workmen is approximately Rs. 9 cores. There may be liabilities of unsecured creditors as well. However, what is important is that the property was valued at Rs. 77 lakhs by the Recovery Officer and the bid of the petitioner was Rs. 78.05 lakhs. The property is located at Mohan Co-operative Industrial Estate and the size of the plot over which the property is constructed is 1937.02 sq. yards (1619.58 sq. mtrs.). As per the calculations given by the DDA for the purpose of calculating unearned increase, the circle rate of the land in question is mentioned at Rs. 26,080/- per sq. mtr. for the year 2003-04. The property was sold in the year 2005 and as per the practice, 2% of the above rate is to be added and in this manner, the rate comes to Rs. 26,602/-. The value of the plot, thus, calculated would come to Rs. 4,30,84,067.16P. It is a matter of common knowledge that the market rates are generally higher than even the circle rates. Thus, the value of the property in question at the time when it was put to auction was in any case Rs. 4.30 crores or even more. How such property was valued at Rs. 77 lakhs and then put to auction is puzzling. It reflects adversely on the manner in which the office of the Recovery Officer attached to the DRT functions. The property is sought to be frittered away at a much lower price by accepting the bid of Rs. 78.05 lakhs of the petitioner. Even if the petitioner is permitted to pay the demands raised by the DDA to the tune of Rs. 2,99,49,621/- as on 30.9.2007, with this amount, the share of the respondent bank as well as the workmen would be negligible as compared to the total dues payable to them. Such a course of auction is clearly not in public interest. We are also amazed to see the conduct of the respondent bank, which did not object to this valuation and allowed the auction to take place and did not object even when the highest bid of the petitioner at a meagre amount of Rs. 78.00 lakhs was accepted. It is not surprising that the petitioner has agreed to pay the aforesaid dues as the property is sought to be given to him for Rs. 78.00 lakhs, worth whereof is manifold.

16. As held by the Supreme Court in *Divya Manufacturing Company (P) Ltd. Vs. Union Bank of India and Others*, and *LICA (P) Ltd. v. Official Liquidator and Anr.* 1995 (4) CLJ 494, the guiding principle in such auctions is to get the most remunerative price and it is the duty of the Court to keep the openness of the auction, so that the intending bidders would feel free to offer the higher value. Needless to mention, this principle has public purpose behind it. The assets being sold are of a company, which has gone into liquidation. There are various creditors-secured and unsecured, lined up in the queue, who are waiting for retrieval of their dues to the maximum extent possible. There are workers also, who are to be paid their wages and their claims rank *pari passu* with that of secured creditors. It, Therefore, necessarily follows that the Court it to ensure that the assets are sold at most remunerative price. No doubt, the aforesaid two judgments were in respect of companies, which were in liquidation and where the auction was held under the supervision of the Company Judge. However, we are of the opinion that this principle shall apply to the auction by the Recovery

Officer attached to the DRT as well. In the present case, not only the company is in liquidation, the sale proceeds have to be distributed between the bank, a secured creditor and the workers. Even otherwise, the property in question is mortgaged with the bank and on the basis of orders passed in the OA filed by the bank, this mortgaged property is put to sale by the Recovery Officer. In that sense, he is the trustee of the property, who is selling the same for the benefit of the mortgagee bank as well as the workers. Therefore, the public purpose, which was seen by the Apex Court while laying down the principle in the aforesaid judgments, should be in the forefront in such sales conducted by the Recovery Officer as well, more particularly when the company has gone into liquidation and the liquidation proceedings are pending before the Company Judge as well.

17. We are in judicial review of the order passed by the Appellate Tribunal and exercising our discretionary jurisdiction under Article 226 of the Constitution of India when we find that such an action was in any case not in public interest, we see no reason to interfere with the order of the Appellate Tribunal cancelling the auction and directing the Recovery Officer to put the property to sale by taking fresh measures. There shall be proper valuation of the property taking into consideration not only the circle rates but also the market rates prevailing in that area.

18. The respondent bank shall also be within its right to get the property auctioned through the Company Judge of this Court before whom winding up proceedings are, pending if so advised.

With these observations, we dismiss the writ petition.