

(2011) 02 MAD CK 0524

In the Madras High Court

Case No : Writ Petition No. 6571 of 2010 and M.P. No. 1 of 2010

P. Vinmani

APPELLANT

Vs

General Manager, State Bank of India

RESPONDENT

Date of Decision : 14-02-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 20
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17, 18

Citation : AIR 2011 Mad 220 : (2011) 3 BC 62

Hon'ble Judges : S. Nagamuthu, J;D. Murugesan, J

Bench : Division Bench

Advocate : T. Karthikeyan, for the Appellant; K. Sankaran, for the Respondent

Judgement

D. Murugesan, J.—M/s. Kalzar Marketing Agency Private Limited along with five others availed working capital advance of Rs. 75.0 lacs from the Respondent-State Bank of India, Chennai branch in the year 1998. One R.M. Parthasarathy stood as guarantor and he had deposited his sale deed dated 9.10.1968 in respect of the property covered under the registered sale deed No. 3139/1968 dated 9.10.1968 relating to 44 cents comprised in Survey No. 49/26 at Adambakkam revenue village, Saidapet Taluk and created equitable mortgage for the said loan.

2. On the ground that the amount due to the Bank was not repaid, the Respondent-Bank filed a suit in O.A. No. 1285 of 2001 and obtained a decree dated 12.5.2004. It is pertinent to point out that the Defendants in the suit, including the guarantor R.M. Parthasarathy, who was impleaded as sixth Defendant, remained ex-parte. Pursuant to the above decree, the Debt Recovery Certificate was also issued. Under the above circumstances, the Petitioner filed an application before the Debt Recovery Tribunal in M.A. No. 97 of 2008 in the disposed O.A. No. 1285 of 2001 claiming to be the legal representatives of the sixth Defendant in the above O.A. and for a direction to release the sale deed

dated 19.10.1968.

3. That application was filed on the ground that the property was purchased in the year 1968 and the said R.M. Parthasarathy died as early as 19.1.1993. In support of the said claim, a Certificate issued by the Health Officer, Corporation of Madras dated 24.2.1993 was also produced. It was also contended that as the said Parthasarathy was working in the postal department, the pensionary benefits were also extended to the family members. The document in question was missing and therefore, a police complaint dated 25.6.1993 was also given to the Inspector of Police, R-7 K.K. Nagar Police Station.

4. The Tribunal had gone into the question as to the claim of the Petitioner that the said missing document, was used by somebody to create equitable mortgage as a guarantor for the loan availed by M/s. Kalzar Marketing Agency Private Limited and five others. The Tribunal also noticed that on the date of the mortgage viz. 17.9.1998, the said R.M. Parthasarathy was no more since he died as early as on 19.1.1993. The Tribunal, having accepted the contention on behalf of the writ Petitioner, found that the decree passed by the Court, was non-est in law. Nevertheless, the Tribunal had rejected the request of the writ Petitioner for release of the documents on the ground that inasmuch as final order in the O.A. had not been set aside, it had become functus officio.

5. Being aggrieved by that portion of the order, the present writ petition is filed.

6. According to the learned Counsel, once the Tribunal had come to the conclusion that the earlier order of the Tribunal was null and void and non-est in law, it should have recalled the order and consequently should have allowed the relief for return of documents.

7. Learned Counsel for the Respondent-Bank had opposed the writ petition basically on three grounds. Firstly, as against the impugned order of the Debt Recovery Tribunal, the Petitioner has got the remedy of appeal u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and without availing such remedy, the writ petition is not maintainable. In support of the said submission, learned Counsel would rely upon the judgment of the Supreme Court reported in the case of United Bank of India Vs. Satyawati Tondon and Others, .

8. Secondly, the Petitioner, knowing fully well that such an equitable mortgage was created for the loan availed by M/s. Kalzar Marketing Agency Pvt. Ltd. had failed to implead the said Company. When fraud/forgery is pleaded, the said question could, at best, be decided in the presence of persons, who had allegedly created the mortgage. In the absence of the Company, which borrowed the loan and the guarantor, the relief sought for in the application cannot be ordered.

9. Lastly, it is the contention of the Respondent that inasmuch as the order in O.A. had become final, the Tribunal had become functus officio and therefore, so long as that order is not set aside, the relief sought for in this petition cannot be ordered.

10. We have carefully considered the above submissions.

11. As far as the first contention is concerned, it is clear that the Tribunal had specifically found on the given facts and circumstances of the case that the decree passed by the Court is null and void and non est in law. This finding was rendered by taking into consideration the death Certificate of R.M. Parthasarathy dated 23.2.1993 evidencing his death on 19.1.1993 and the records relating to the extending pensionary benefits to the family members from his employer. The Tribunal had also noted the legal heir Certificate issued by the competent Authority during the month of May, 1993 and the police complaint lodged by the son of the deceased R.M. Parthasarathy on 25.6.1993 stating that the document in question was missing. This finding has not been questioned by the Respondent-Bank and therefore, it has become final. An order becomes void, in the event action taken is Ultra Vires of the Statute. In the event the subject matter of adjudication is beyond the competence or the orders passed are such that the Tribunal has no authority to pass, the adjudication is ultra vires and in violation of fundamental principles of judicial procedure and the jurisdiction assumed by wrongly deciding jurisdictional question of law or facts is also illegal. In the event of violation of fundamental provisions of the Act under which the Tribunal functions, the fundamental principles of judicial procedure may also make the order of the Tribunal void. Basically, the above principles are in respect of the jurisdictional issues of the Tribunal. Per contra, there are other areas where the finding of the Tribunal is to the effect that the action of the Authority is totally ultra vires on a given set of facts. When the Tribunal holds that the action of the Authority which leads to an order is non-est, then that order would be considered as no order in the eye of law.

12. This take us to the next contention as to whether the Tribunal would be justified in rejecting the request of the Petitioner on other grounds. Before going into the merits of the case, other contentions on the issue as to whether the writ petition could be entertained as the Petitioner did not avail alternative remedy of appeal, should be decided. It is true that when there is a provision of alternative remedy, which is more effective, the writ petition cannot be entertained unless such a remedy is exhausted. In fact, this law is reiterated by the Apex Court in the judgment reported in the case of United Bank of India Vs. Satyawati Tondon and Others, . Availing alternative remedy is general Rule, but there are exceptions. In case if the order of the Tribunal is questioned on the ground of want of jurisdiction, the provisions of Article 226 of the Constitution can be invoked and more so, when it is pleaded that the order questioned in this writ petition is a nullity and non est in law. In this context, we may also refer that when an order of the Tribunal is a nullity, an appeal there from cannot be of greater validity and in that sense, the question of directing the parties to prefer an appeal against that order, which is a nullity, is of no consequence. In the event when the order is void, non est, relegating a person to avail alternative remedy would result in palpable injustice. In that sense, in the decision reported in the case of Municipal Council, Khurai and Another Vs. Kamal Kumar and

Another, , the Apex Court has held that the High Court could retain the discretion to interfere in proper cases, even in the case when the impugned order is ultra vires.

13. On the facts of this case, it must be seen that the Tribunal has found the decree as null and void and non-est in the eye of law. When such a finding was rendered in favour of the Petitioner which had become final, the Petitioner could maintain writ petition even without availing alternative remedy. In SATYAVATI Tendon's case the Apex Court has emphasized that when there is a provision of appeal under Sections 17 and 18 of the SARFAESI Act, the High Court should not entertain the writ petition. However, that was not the case relating to an order, which is found to be "non-est in law". In our opinion, the ratio of SATYAVATI Tendon's case cannot be made applicable to the facts of the present case. Hence the contention of the learned Counsel that the appellate remedy is available to the Petitioner and without availing that remedy should not have filed the writ petition, requires only to be rejected.

14. As far as the next submission of functus officio is concerned, it has been held that in case the order is null and void or non est in law, it can be withdrawn by the Court. Such a power is available even to the Tribunal as has been held by the Apex Court in the judgment reported in the case of United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, . If that be so, the Tribunal was not justified in rejecting the request of the Petitioner for return of the document after having found that the decree passed by the Court was null and void and non-est in law. When the decision of the Authority suffers from jurisdictional error or such decision is a nullity, that decision can be corrected by the said Authority and therefore, in such cases, the said Authority does not become functus officio after rendering the decision.

15. This takes us to the last consideration as to the order that could be passed in the writ petition. As has been rightly contended by the learned Counsel for the Respondent-Bank, the impugned order was passed without M/s Kalsar Marketing Agency Private Limited and five others being impleaded. That apart, the question of issuing direction to the Respondent-Bank for release of documents cannot be ordered behind the back of the mortgager and therefore, to that extent the matter has to be remitted back to the Tribunal.

16. Accordingly the entire matter is remitted back to the Tribunal for fresh consideration and the Petitioner is directed to take out an application to implead the principal borrower M/s. Kalzar Marketing Agency Private Limited and five others as Respondents and if such an application is filed, the same will not be opposed as this order is passed only on the submission made by the Respondent-Bank that they have not been impleaded as parties before the order was passed. On the company and five others being added as parties, the Tribunal should have a re-look at the entire issue and pass appropriate orders. With these observations, the writ petition is disposed of and the matter is remitted back to the Tribunal for fresh consideration to pass orders within a period of three

months from the date of receipt of a copy of this order. Consequently, the connected M.P. is closed. No costs.