(2011) 09 CAL CK 0116

In the Calcutta High Court

Case No : C.O. No. 2433 of 2011

Prem Narayan Garg — APPELLANT

Vs

Indian Bank and Others — RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Companies Act, 1956 — Section 125
Constitution of India, 1950 — Article 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Transfer of Property Act, 1882 — Section 58

Citation : (2012) 2 CHN 466

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Abhrajit Mitra, Jishnu Chowdhury, Rajesh Upadhyay and Chayan Gupta, for the Appellant;M.R. Sarbadhikari, for Opposite Party No. 1, P.C. Sen D.K. Ghosh, J. Ghorai and D. Chottopadhayay for Opposite Party No. 6, for the Respondent

Judgement

Dipankar Datta, J.—The Petitioner in this revisional application under Article 227 of the Constitution has impugned the judgment and order dated June 23, 2011 passed by the Chairman, Debts Recovery Appellate Tribunal at Calcutta (hereafter the appellate tribunal) dismissing Appeal No. 45 of 2008/689 filed by it, thereby confirming the judgment and order under appeal dated May 19, 2005 passed by the Presiding Officer, Debts Recovery Tribunal - 1, Kolkata (hereafter the tribunal) in T.A./Appeal No. 1 of 2005. The tribunal had set aside an auction sale conducted in respect of the structure, i.e. a bungalow, on premises No. 2, Jubilee Road, Jamshedpur in the state of Jharkhand (hereafter the said bungalow).

2. The opposite party No. 1 (hereafter the bank) had initiated proceedings u/s 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 against the opposite party No. 2, M/s. SCIL (India) Ltd. (in liquidation) (hereafter SCIL), registered as O.A. No. 186 of 1999. By an interim order of the tribunal,

the properties of SCIL including the said bungalow were to be sold for realization of the dues of the bank. The tribunal appointed a Special Officer for such purpose. An order dated January 7, 2004 rejected valuation of the said bungalow made by the bank and the same was ordered to be valued afresh. The bank made a fresh valuation of the said bungalow. It was valued at Rs. 21,43,125/-. The tribunal by its order dated January 14, 2004 directed the bank to issue sale notice by affixing it on a conspicuous part of the property as well as on the notice board of the tribunal for public notice, and fixed January 19, 2004 at 4 P.M. for conducting auction. At this stage, on January 19, 2004, the opposite party No. 6 i.e. Tata Iron and Steel Company (hereafter TISCO) filed an application praying, inter alia, that right, title and interest in respect of the said bungalow be determined first and the sale be postponed, alternatively for leave to participate in the proceedings for sale of the said bungalow without prejudice. On January 19, 2004 itself, the tribunal deferred the auction till January 20, 2004 at 4 P.M. A recovery inspector attached to the tribunal was appointed as Special Officer by an order dated January 20, 2004 to conduct sale of the properties of SCIL including the said bungalow. The submission of the bank that sale of the said bungalow ought to be postponed was not accepted on twin grounds, - (i) no ground was stated therefore and (ii) the intending purchasers were coming to participate in the sale for the last couple of days and notice of sale had been published in terms of its order. Insofar as the application filed by TISCO is concerned, the tribunal declined the prayer expressing the view that in terms of its earlier order dated January 14, 2004, the money that sale of the said bungalow would fetch shall be kept in a separate deposit and further, would be subject to final order as to the rights of the parties to the same. While disposing of the said application, permission was granted to TISCO to participate in the sale. Thereafter, on the same date, the sale was conducted wherein eight bidders participated but only two of them deposited earnest money. The Petitioner emerged as the highest bidder with a bid of Rs. 21,50,000/-. After perusal of the report of the Special Officer, the sale of the said bungalow was confirmed in his favour subject to deposit of balance purchase money on or before the 15th day from the date of sale thereof. The Petitioner deposited more than 25% of the purchase money i.e. Rs. 10,00,000/- immediately after declaration of result. On or about January 29, 2004, the bank filed an application praying for setting aside the sale in respect of the said bungalow and for fresh sale after paper publication and fixing of reserve price in accordance with law. The grounds for such prayer, inter alia, were that the observations made by the tribunal in course of hearing on January 19, 2004 to the effect that the successful purchaser would only be entitled to dismantle the said bungalow and the resultant debris were not recorded in its order passed on that date. Simultaneously, the Petitioner also filed an application. He prayed for issuance of sale certificate and for delivery of possession of the said bungalow in his favour. By an order dated February 26, 2004, the tribunal disposed of the latter application by appointing a Special Officer with a direction that possession of the said bungalow be handed over to the Petitioner. The application for modification filed by the bank, however, was adjourned till March 1, 2004. The order of February 26, 2004 of the tribunal was subjected to challenge in an appeal by the bank before the appellate tribunal. The appellate tribunal in its order dated January 18, 2005 observed that the tribunal had misconducted itself by disposing of the application filed by the Petitioner and keeping the application of the bank pending. While setting aside the order under appeal, it directed the tribunal to consider the application filed by the bank and the Petitioner afresh. The Petitioner challenged the order of the appellate tribunal before this Court in its revisional jurisdiction. A learned single Judge of this Court by an order dated March 22, 2005 disposed of the application with the observation that the tribunal shall consider and dispose of the said applications within two months from date of communication thereof independently and without being influenced by any observation of the appellate tribunal. The parties were directed to maintain status quo in respect of the said bungalow till the disposal of the applications by the tribunal. The tribunal heard the applications afresh and the sale was set aside by an order dated May 19, 2005; consequently, the application of the Petitioner for confirmation of sale stood dismissed and the Registrar of the tribunal was directed to refund the purchase money deposited by the Petitioner in respect of sale of the said bungalow to him within 15 days. The Petitioner preferred an appeal before the appellate tribunal challenging the order dated May 19, 2005. By judgment dated November 27, 2009, the appellate tribunal expressed the view that auction sale of the said bungalow and confirmation thereof in favour of the Petitioner could not be sustained and, accordingly, dismissed the appeal. A further revisional application followed before this Court at the instance of the Petitioner. The revisional application was allowed by an order dated July 1, 2010. The judgment and order of the appellate tribunal was set aside for the reasons mentioned therein and the appellate tribunal was directed to rehear the matter. It was pursuant to this direction of this Court that the appellate tribunal reheard the parties and delivered the impugned judgment and order.

3. It appears on perusal of the impugned judgment and order that the appellate tribunal concurred with the tribunal and dismissed the appeal on, inter alia, the following grounds:

i) There was no publication of the sale notice in Hindi though the said bungalow is situated in the Hindi belt of the State of Jharkhand;

ii) There had been no fresh valuation of the said bungalow;

iii) The sale had been conducted after Court hours;

iv) TISCO had a preferential right to purchase the said bungalow but was not given proper opportunity.

v) The said bungalow could not have been put up for auction sale at all.

4. At this stage, the claim of TISCO may be noticed. On a reading of the documents annexed to the revisional application, it appears that the then

Government of Bihar had leased out vast stretches of land in Jamshedpur in favour of TISCO for a period of 50 years expiring in 1995. TISCO had granted sub-lease in favour of SCIL on an application made by it in respect of a piece and parcel of land measuring 0.59 acre, more or less (hereafter the demised land), in the town of Jamshedpur butted and bounded by the properties mentioned in the schedule to the lease deed executed on March 23, 1968 for a period of 10 years with effect from December 1, 1963. In respect of the demised land, no Municipal holding ward or circle number had been allotted. Certain terms of the lease deed being relevant are quoted hereunder:

NOW THIS INDENTURE WITNESSETH AS FOLLOWS:

2. and the Lessee for itself and its successors and assigns respectively to the intent that the obligations may continue throughout the term hereby created hereby covenants with the Company as follows:

(f). Not to transfer charge or create any interest in by way of sale mortgage assignment sub-lease or otherwise or part with possession of the demised premises or any part thereof or any interest therein or the right of enjoyment thereof without the consent in writing of the Company previously obtained which consent the Company shall in its absolute discretion be entitled to give or refuse. In giving such consent the Company shall be entitled to impose such conditions as it shall think fit for binding any transferee assignee or sub-lessee of the whole or part of the demised promises to pay rent and other monies to observe and perform the terms and conditions of these presents and on the part of the Lessee to be paid observed and performed without however affecting the obligations of the Lessee in respect of the payment of such rent and other monies and the observance and performance of such terms and conditions.

(v) To surrender and yield up peaceably and quietly the demised premises (including subject as hereinafter provided all buildings then erected on the said land) to the Company upon the expiration or earlier determination of the said term of ten years in good repair and condition.

4. IT IS HEREBY EXPRESSLY AGREED and DECLARED by and between the respective parties hereto as follows:

(c) If the Lessee commits or allow to be committed any breach of any of the terms conditions and stipulations and covenants on its part herein contained or if the rent hereinbefore reserved or the contribution for municipal services as per Clause 2(d) or any of the bills mentioned in Clause 2(g) or any fees mentioned in Clause 2 (r) shall remain unpaid for twenty one days after the same became due (whether formally demanded or not) or if the Lessee or other the person in whom for the time being the term hereby created is vested shall be adjudicated insolvent or being a Company shall be in liquidation or if the demised land or any part thereof or the right title or interest of the lessee or any part thereof therein shall be sold in execution or any decree of Court (whether being a mortgage decree or money decree or otherwise) and the Company shall not have consented to such then and in any of such cases it shall be lawful for the Company in the name and on behalf of the person or persons then entitled to the immediate reversion expectant on the terms hereby created to enter upon the demised premises or any part thereof in the name of the whole and thereupon the term hereby created shall be determined.

(d) After expiry of the terms of ten years or earlier determination of the lease the Company shall be entitled to retain the building erected by the Lessee and standing on the demised land and pay compensation to the lessee in an amount equal to the aforesaid cost of the building, namely Rs. 1,15,000/- after allowing for deducting depreciation at 2.1/2% per annum from the date of completion of the buildings.

5. It further appears that after expiry of the lease, the same was not renewed and SCIL continued as monthly tenant under TISCO till March 7, 2000 when the Company Court directed it to be wound up.

6. It further appears that a disclaimer application having been filed by TISCO before the Company Court, the same was disposed of on December 6, 2007. TISCO was directed to pay to the Petitioner, who had intervened therein, the amount paid by him for the said bungalow. The official liquidator was granted liberty to seek police help for removal of the Petitioner, if necessary, and for making over possession to TIS Company

7. Mr. Mitra, learned advocate appearing for the Petitioner contended that the appellate tribunal acted illegally and with material irregularity in the exercise of its jurisdiction in confirming the order of the tribunal. According to him, the bank had acted in terms of the order of the tribunal dated January 14, 2004 and issued sale notices and it was unfair on the part of the bank to apply for setting aside the sale nearly nine days after the auction sale was conducted on the ground that there was no wide publicity. Insofar as the observation of the appellate tribunal that there was no fresh valuation is concerned, it was submitted that having regard to the valuation made by the bank on January 7, 2004, the finding of the appellate tribunal is perverse. He further contended that it was only the bank that could have been considered to be an aggrieved party by the auction sale but instead of challenging the order dated January 14, 2004 whereby sale was fixed on January 19, 2004 and the order dated January 19, 2004 whereby sale was fixed on January 20, 2004, it accepted the said orders and acted on it. He imputed mala fides on the part of the bank in not questioning sale of other properties of SCIL situated at Adityapur, Jamshedpur conducted on January 20, 2004 itself in pursuance of the said orders dated January 14 & 19, 2004. Referring to the decision reported in Saheb Khan Vs. Mohd. Yusufuddin and Others, , it was contended that mere irregularity in the procedure for conducting sale would not render it vitiated unless it is demonstrated that a party has suffered substantial injury. In the present case, the bank, which could have been the aggrieved party, did not demonstrate such substantial injury so as to set up a valid claim for setting aside the sale. It was next urged that TISCO

having participated in the sale, it had waived any right that it might have had in respect of the said bungalow in terms of the lease deed and, therefore, cannot complain. Finally, it was contended that the Petitioner being a bona fide purchaser of the said bungalow in terms of sale conducted pursuant to the orders of the tribunal, he ought not to suffer, and in connection therewith, reliance was placed on the decision reported in Ashwin S. Mehta and Another Vs. Custodian and Others, and the decisions referred to therein. The decision reported in AIR 1949 124 (Federal Court) was cited by him in respect of the point that after expiry of the lease, the status of SCIL was that of a monthly tenant and its right to mortgage the said bungalow which it had erected on the demised land had not been lost. The decision reported in S. Berumull Sowcar Vs. P. Velu Gramany, was relied on by him in support of the argument that with the deposit of the original lease deed with the bank by SCIL, the said bungalow could be treated to have been mortgaged by necessary implication and in this connection Section 58(f) of the Transfer of Property Act was also referred to by him. He, accordingly, prayed for relief as claimed in the application.

8. Mr. Sarbadhikari, learned advocate for the bank and Mr. P.C. Sen, learned senior advocate for TISCO, opposed the application.

9. Mr. Sarbadhikari submitted that both the tribunal and the appellate tribunal were right in setting aside the sale and he urged this Court not to disturb concurrent findings of fact reached by them. According to him, if on a given set of facts two views are possible and a view has been taken by the inferior tribunal, which is not an unreasonable but a plausible view, the revisional Court ought not to substitute its view for the view taken by such inferior tribunal. It was contended that judicial review was available only on the grounds of illegality, irregularity and procedural impropriety, as explained in the decision of the Supreme Court reported in Chairman, All India Railway Rec. Board and Another Vs. K. Shyam Kumar and Others, , and since the judgments and orders of the inferior tribunals do not suffer from any vice, judicial review powers may not be exercised.

10. It was next contended by him that the bank at every stage of the proceedings before the tribunal objected to the said bungalow being put up for sale without adequate publicity and without a reserve price being fixed. The decision directing setting aside of the sale and the decision of the appellate tribunal affirming it being based on proper appreciation of the materials on record, he urged that the same do no merit interference and prayed for dismissal of the revisional application.

11. Mr. Sen, in support of his submission that the revisional application merits outright rejection, raised the following points:

i) It is not a fit and proper case for exercise of discretion under Article 227 of the Constitution;

ii) In view of the restrictive covenants of the lease deed, the said bungalow could not have been mortgaged at all and, in fact, it was never mortgaged to the bank; therefore, no sale thereof could have been conducted;

iii) Even if the said bungalow had been mortgaged by SCIL, it was without the consent of TISCO and the mortgage not having been registered as required by Section 125 of the Companies Act, it is void;

iv) Having regard to the terms of the lease deed, any structure erected on the demised land after expiry of the lease would vest in the lessor and the said bungalow became the property of TISCO; and, therefore, not only the bank but TISCO is also vitally interested in the outcome of the auction sale. TISCO suffered substantial injury because its own property was put up for sale illegally, which the tribunal rightly interdicted since it could not have been put up for sale to recover the dues of bank;

v) TISCO had participated in the sale without prejudice to its rights and contentions and, thus, there was no waiver on its part;

vi) The Petitioner was well and truly aware of the claim raised by TISCO at the time the tribunal ordered the sale and having participated in the auction and emerged as the successful bidder by taking the risk to purchase the said bungalow despite the contesting claims, he is not entitled to any protection; and

vii) The order dated January 14, 2004 of the Tribunal clearly records that the dispute in respect of the said bungalow would be finally decided at a subsequent stage and with the application filed by the TISCO on January 19, 2004, the Petitioner was well and truly aware that TISCO would assert its right, title and interest over the said bungalow and, therefore, the Petitioner cannot claim any equity.

12. In reply Mr. Mitra referred to the Bench decision of the Kerala High Court reported in (1987) 3 Comp LJ 171 (KER) [State Bank of India v. Viswaniryat (P) Ltd. and Anr.] in support of his contention that non-registration of the mortgage u/s 125 of the Companies Act would not render it invalid.

13. Before concluding, he submitted that in the event the Court is inclined not to disturb the judgments of the inferior tribunals and orders re-sale, it may consider directing that the Petitioner be given some preference.

14. I have heard learned advocates for the parties and considered the materials on record.

15. The limits of power that the High Court under Article 227 exercises is well-delineated in a catena of decisions of the Supreme Court. Caution has been sounded that while it is permissible for an appellate Court to re-assess and or re-appreciate the evidence/materials and to reach a conclusion different from the one reached by the trial Court or tribunal, such course of action is not open to the High Court in exercise of revisional jurisdiction. If two views are possible on the evidence/materials before the trial Court and one of the two views has been

taken, which is a plausible view, it is not for the Court exercising revisional jurisdiction to substitute the view taken by the trial Court on the ground that if the matter had been considered by it initially, it could have taken the other view or even a contra view. The exercise of jurisdiction under Article 227 ought to be limited to cases where the subordinate Court or tribunal acts beyond the bounds of its authority or in flagrant abuse of the fundamental principles of law and justice or passes a perverse order or an order of the Wednesbury variety. It is only in such cases that interference could be made even in respect of orders under challenge recording concurrent findings of fact.

16. Guided by this principle, I am ad-idem with Mr. Sen and Mr. Sarbadhikari that this is not a fit and proper case for exercise of power of judicial superintendence.

17. The clauses of the lease deed read in its entirety with particular emphasis on the clauses extracted (supra) tend to suggest that the said bungalow, after expiry of the lease, is the property of TISCO, that it could not have been mortgaged by SCIL without the consent of TISCO (if at all there was a valid mortgage), and that for breach of contract committed by SCIL, the said bungalow could not have been put up for sale by auction for recovering the dues of the bank. I find little reason to disagree with Mr. Sen on this aspect.

18. Also, I find that the view taken by the appellate tribunal on the aspect of absence of wide publicity in the Hindi speaking belt of Jharkhand wherein the said bungalow is situate was fatal for the sale, is unexceptionable. The tribunal directed issuance of notice of sale on January 14, 2004, which was effected on January 16, 2004 and the said bungalow was sold on January 20, 2004. There is no material before the Court to hold that the people of the State, in which the said bungalow is situate, were sought to be made aware by any paper publication or otherwise that it was up for sale. The procedure adopted is indefensible and the whole process resulted in substantial injury not only to the bank for it was impossible to fetch the best of offers on such short notice but also the property right of TISCO was infringed seriously.

19. On the evidence/materials before the tribunal, the view taken is indeed a plausible view, notwithstanding Mr. Mitra''s valiant effort to impress the Court that out of the eight bidders who participated, majority of them belonged to the State of Jharkhand and, therefore, the sale could not have been upset on the ground that the people of the State in which the said bungalow is situate did not have proper notice. It cannot be overlooked that only two of the bidders deposited earnest money. The haste with which the sale was conducted did not find favour of the tribunals and I see no reason to hold a view to the contrary.

20. The other contention of Mr. Mitra that TISCO had waived its right is equally without merit. By the application dated January 19, 2004, TISCO sought for permission of the tribunal to participate in the auction sale without prejudice and its prayer was granted on the basis of the said application. Once TISCO was allowed to participate in the sale without prejudice, it did not forfeit its right to

challenge it at a subsequent stage. The appellate tribunal rightly referred to the order of the tribunal dated January 14, 2004, whereby the point as to whether the said bungalow actually belongs to TISCO or SCIL was kept open for a final decision at the time the entire matter is taken up for disposal.

21. It is true, as contended by Mr. Mitra, that the bank did not raise any objection in respect of the properties of SCIL at Adityapur, Jamshedpur on January 20, 2004 in pursuance of the self-same sale notice. However, that is hardly relevant for a decision on this application. One of the letters issued on behalf of SCIL addressed to the bank, produced by Mr. Sarbadhikari in support of his contention that the properties including the said bungalow were mortgaged by way of making over the title deeds, specifically refers to the properties at Adityapur, Jamshedpur. If indeed the same are the properties of SCIL and were mortgaged by SCIL and none else could or did lay any claim in respect thereof, there is no reason as to why steps taken by the bank to sell such property in terms of the order of the tribunal should be viewed as clothing the Petitioner with a right to urge that the subject sale should not have been interfered. The contention appears to me to be unacceptable.

22. The last contention that the Petitioner is a bonafide purchaser and, therefore, ought not to suffer for any procedural irregularity has been urged to be rejected. All along the Petitioner was aware that TISCO was asserting its right in respect of the said bungalow. By the order dated January 14, 2004, the question had been kept open. Even the bank had prayed to defer the sale. In such circumstances, it has to be held that the Petitioner took a calculated risk and cannot now be permitted to turn around and seek the protection of the Court.

23. I find no merit in the revisional application. It stands dismissed without costs.

24. The tribunal shall now proceed to dispose of the matter before it in accordance with law, without being influenced by any observation contained hereinabove or in the impugned judgment of the appellate tribunal.

25. Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.

