
(2012) 05 SC CK 0027

In the Supreme Court Of India

Case No : Civil Appeal No. 6204 of 2009

Ram Kishun and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 24-05-2012

Acts Referred:

Contract Act, 1872 — Section 128, 146

Citation : AIR 2012 SC 2288 : (2012) AIRSCW 3491 : (2012) 5 ALT 39 : (2012) 4 AWC 4067 : (2012) 4 RCR(Civil) 337 : (2012) 4 RLW 3635 : (2012) 5 SCALE 673 : (2012) 11 SCC 511

Hon'ble Judges : Dipak Misra, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : Dinesh Kumar Garg, B.S. Billowria and Dhanjay Garg, for the Appellant; T.N. Singh, V.K. Singh, Umang Tripathi, Janendra Lal and Company, Vikrant Yadav and Vinay Garg, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—This appeal has been preferred against the judgment and order dated 20.1.2004 in C.M.W.P. No. 22420 of 2001 passed by the High Court of Judicature at Allahabad, by which it has affirmed the judgment and orders passed by the Board of Revenue and other revenue officials in respect of the recovery of bank dues from the Appellants as their predecessor-in-interest was the guarantor of bank loan.

2. Facts and circumstances giving rise to this case are that:

A. One Ganga Prasad had taken an agricultural loan to the tune of Rs. 8,425/- from the Union Bank of India (Banda Branch) on 20.3.1982 and Chuni Lal, father of the Appellants stood guarantor. Ganga Prasad, debtor died in 1985 and Chuni Lal died in 1986. Chuni Lal could not pay the loan during his life time. Therefore, the bank initiated the proceedings for recovery and ultimately sent the matter to the District Collector, Banda for realisation of the loan amount as an arrear of land revenue.

B. The Collector issued citation/recovery certificate on 13.1.1986 for an amount of Rs. 10,574.45 plus 10% collection charges against Ganga Prasad.

C. In order to make the recovery, land measuring 3 bigha 2 biswas belonging to said Ganga Prasad was put to auction and it could fetch only a sum of Rs. 6,000/-. In order to recover the balance amount the proceedings were initiated against the Appellants as their father stood guarantor. It is evident from the record that the Appellants raised objections that instead of putting their property to auction, the loan amount be recovered from legal heirs of Ganga Prasad as he had left movable/immovable properties and livestock and other assets to meet the recovery of the bank loan. Their objections were not accepted and the land of the Appellants measuring 1 bigha and 10 biswas was put to auction on 15.3.1993. Respondent No. 4 purchased the said land for Rs. 25,000/-. In respect of the same, sale was confirmed and sale certificate was issued by the Collector in favour of Respondent No. 4 and he was put in possession.

D. Appellants raised various objections under the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1952 before the Commissioner, Jhansi, but their objections stood rejected vide order dated 27.7.1992 only on the ground of delay as the objections were not filed within limitation and no sufficient cause could be shown for inordinate delay.

E. Aggrieved, the Appellants approached the Board of Revenue, U.P. by filing Revision No. 2 Cell/92-93. However, the same was dismissed vide order dated 20.3.2001 as the Revisional Authority did not accept the explanation for condonation of delay.

F. Aggrieved, the Appellants approached the High Court challenging the said revisional order of the Commissioner by filing Writ Petition No. 22420 of 2001 which has been dismissed vide impugned judgment dated 20.1.2004.

Hence, this appeal.

3. Shri D.K. Garg, Learned Counsel appearing for the Appellants has submitted that no recovery could have been made from the Appellants as Ganga Prasad debtor had left huge movable/immovable properties and other livestock which could satisfy the demand of the bank loan. More so, there were two guarantors and father of the Appellants was not the only guarantor. Thus, the entire liability of the remaining unpaid amount could not have been fastened upon them. The properties of the Appellants were worth rupees two lakhs which had been sold in auction at a throw-away price of Rs. 25,000/- only, that too, without following procedure prescribed by law. For recovery of the balance amount of loan, only a part of the suit land could be sold. The objections filed by the Appellants had been rejected by all the authorities/courts below on the ground of delay without considering the same on merit. Hence, the said orders are liable to be set aside and appeal deserves to be allowed.

4. Per contra, Mr. T.N. Singh, Learned Counsel appearing for Respondent No. 4

has submitted that the grievance of the Appellants that they could not be fastened with the total liability of unpaid loan amount had not been raised before the courts below. The liability of the guarantor is co-extensive with that of debtor. The auction sale has been confirmed and sale certificate has been issued in favour of Respondent No. 4. He had been put in possession more than two decades ago and since then he has made a lot of developments and improved the land. The auction was held fairly and the property had fetched a fair price. Real brother of the Appellant No. 1 himself had participated in the auction and given the bid for Rs. 20,000/-, though Respondent No. 4 had purchased it for Rs. 25,000/-. Thus, it is not permissible that the Appellants should canvass that the auction has not been conducted fairly or Appellants had not been given chance to bring the best buyer or a part of the property could be sold to meet the demand. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by Learned Counsel for the parties and perused the record.

There can be no dispute to the settled legal proposition of law that in view of the provisions of Section 128 of the Indian Contract Act, 1872 (hereinafter called the 'Contract Act'), the liability of the guarantor/surety is co-extensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance. (Vide: Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, ; Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam and Another, ; Union Bank of India Vs. Manku Narayana, and State Bank of India Vs. Messrs. Indexport Registered and others,

6. In State Bank of India Vs. Saksaria Sugar Mills Ltd. and Others, this Court while considering the provisions of Section 128 of the Contract Act held that liability of a surety is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor. (See also: Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjunwala, and United Bank of India Vs. Satyawati Tondon and Others,

7. Section 146 of the Contract Act provides that co-sureties are liable to contribute equally. Thus, in case there are more than one surety/guarantor, they have to share the liability equally unless the agreement of contract provides otherwise.

RECOVERY of PUBLIC DUES:

8. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are

concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of statutory provisions.

9. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of statute. (Vide: Lachhman Dass Vs. Jagat Ram and Others, and Narmada Bachao Andolan v. State of Madhya Pradesh and Anr. AIR 2011 SC 1589).

Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance of the statutory provisions.

10. In case the property is disposed of by private treaty without adopting any other mode provided under the statutory rules etc., there may be a possibility of collusion/fraud and even when public auction is held, the possibility of collusion among the bidders cannot be ruled out. In State of Orissa and Others Vs. Harinarayan Jaiswal and Others, this Court held that a highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

11. In Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, this Court considered this aspect and while placing reliance upon its earlier judgment in Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras and another, held that in the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

12. Therefore, it becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price. Thus essential ingredients of such sale remain a correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them, as a moneyed person or a big businessman may not like to involve himself in small sales/deals.

VALUATION & RESERVE PRICE:

13. The word 'value' means intrinsic worth or cost or price for sale of a thing/property. (Vide: Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, and Gurbachan Singh and another Vs. Shivalak Rubber Industries and others,

14. In *State of Uttar Pradesh Vs. Shiv Charan Sharma and Others*, this Court explained the meaning of "reserve price" explaining that the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price, i.e. the minimum bid at auction.

15. In *Anil Kumar Srivastava Vs. State of U.P. and Another*, this Court considered the scope of fixing the reserve price and placing reliance on its earlier judgment in *Duncans Industries Ltd. Vs. State of U.P. and Others*, explained that reserve price limits the authority of the auctioneer. The concept of the reserve price is not synonymous with valuation of the property. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. The valuation is a question of fact, it should be fixed on relevant material. The difference between the 'valuation' and 'reserve price' is that, fixation of an upset price may be an indication of the probable price which the property may fetch from the point of view of intending bidders. Fixation of the reserve price does not preclude the claimant from adducing proof that the land had been sold for a low price.

16. In *Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh*, , this Court held that in an auction sale and in execution of the Civil Court's decree, the Court has to apply its mind to the need for furnishing the relevant material particulars in the sale proclamation and the records must indicate that there has been application of mind and principle of natural justice had been complied with. (See also: *Gajadhar Prasad and Others Vs. Babu Bhakta Ratan and Others*, S.S. *Dayananda Vs. K.S. Nagesh Rao and Others*, ; *D.S. Chohan and Anr. v. State Bank of Patiala*, (1997) 10 SCC 65 and *Gajraj Jain Vs. State of Bihar and Others*,

17. In view of the above, it is evident that there must be an application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as the failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings.

DECISION TO SELL WHOLE OR PART of THE SECURED ASSETS:

18. In *Ambati Narasayya Vs. M. Subba Rao and another*, , this Court dealt with a case where in execution of a money decree for Rs. 2,400/- the land was sold for Rs. 17,000/-. The Court set aside the sale observing that there is a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. (See also: *Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and Others*, and *S. Mariyappa (Dead) by Lrs. and Others Vs. Siddappa and Another*,

19. Thus, in view of the above, it is evident that law requires a proper valuation report, its acceptance by the authority concerned by application of mind and then fixing the reserve price accordingly and acceptance of the auction bid taking into consideration that there was no possibility of collusion of the bidders. The authority is duty bound to decide as to whether sale of part of the property

would meet the outstanding demand. Valuation is a question of fact and valuation of the property is required to be determined fairly and reasonably.

SETTING ASIDE AUCTION SALE - AFTER CONFIRMATION:

20. In *Navalkha and Sons Vs. Ramanuja Das and Others*, this Court while dealing with the confirmation of sale by Court, held that there must be a proper valuation report, which should be communicated to the judgment debtor and he should file his own valuation report and the sale should be conducted in accordance with law. After confirmation of sale, there should be issuance of sale certificate. Court cannot interfere unless it is found that some material irregularity in the conduct of sale has been committed. The Court further held that it should not be a forced sale. A valuer's report should be as good as the actual offer and the variation should be within limit. Such estimate should be done carefully. The Court further held that unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. (See also: *Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others*, *Union Bank of India Vs. Official Liquidator H.C. of Calcutta and Others*, *B. Arvind Kumar Vs. Government of India and Others*, and *Transcore Vs. Union of India (UOI) and Another*,

21. In *Divya Manufacturing Company (P) Ltd. Vs. Union Bank of India and Others*, , this Court held that a confirmed sale can be set aside on the ground of material irregularity or fraud. The court does not become functus officio after the sale is confirmed. In *Valji Khimji and Company Vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. and Others*, , the Court held that auction sale should be set aside only if there is a fundamental error in the procedure of auction e.g. not giving wide publication or on evidence that property could have fetched more value or there is somebody to offer substantially increased amount and not only a little over the auction price. Involvement of any kind of fraud would vitiate the auction sale.

22. In *FCS Software Solutions Ltd. Vs. LA Medical Devices Ltd. and Others*, this Court considered a case where after confirmation of auction sale it was found that valuation of movable and immovable properties, fixation of reserve price, inventory of Plant and Machineries had not been made in proclamation of sale, nor disclosed at time of sale notice. Therefore, in such a fact-situation, the sale was set aside after its confirmation.

23. In view of the above, the law can be summarised to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is co-extensive with that of principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud.

24. Learned Counsel for the parties are not in a position to point out the specific

rules under which the recovery was to be made. Thus, the aforesaid legal principles have been considered on general principles of law as argued by them.

The instant case is required to be examined in the light of the aforesaid settled legal propositions.

Admittedly, the father of the Appellants stood guarantor when Ganga Prasad took loan from the bank. Though there are some documents to show that there were two guarantors but who was the other guarantor is not evident from the record, nor such a plea had ever been taken by the Appellants before the courts below. As the Appellants had inherited the estate of the guarantor, they are liable to meet the liability of unpaid amount.

The Appellants' land admeasuring 1 bigha and 10 biswas was sold for Rs. 25,000/-. It cannot be held, even by any stretch of imagination, that the land had been sold at a cheaper rate, for the reasons, that the land belonging to Ganga Prasad (principal debtor) measuring 3 bighas and 2 biswas in the same village in a close proximity of time had been sold for a sum of Rs. 6,000/- only. More so, elder brother of the Appellant No. 1 Ram Swaroop had participated in the auction and given the bid of Rs. 20,000/- for the land in dispute. In view of the above, the submission made by Shri Garg that property worth Rs. 2,00,000/- had been sold at a throw away price of Rs. 25,000/- is not worth acceptance.

25. No fundamental procedural error had been pointed out which would vitiate the order of confirmation of sale and issuance of sale certificate.

26. The total amount of loan sanctioned in favour of Ganga Prasad was Rs. 8,425/-. The Collector issued citation for recovery of Rs. 10,574/- on 13.1.1986 and the total amount to be recovered including principal amount, interest, collection charges etc. came to Rs. 14,483.15P. The property of Ganga Prasad had been sold for a sum of Rs. 6,000/-. So, the total amount to be recovered remained about Rs. 8,500/-. The Appellants' land had been sold for Rs. 25,000/- i.e., three times the amount which was to be recovered. In the facts and circumstances of this case, instead of putting this whole land admeasuring 1 bigha and 10 biswas, the sale of 1/3rd of this land could have served the purpose. Therefore, there had been material irregularity in putting the entire property to auction.

27. In case, the auctioning authority had received Rs. 25,000/- from the Respondent No. 4 as a sale consideration after adjusting the outstanding dues of Rs. 8,500/-, the balance amount of Rs. 16,500/- ought to have been paid to the Appellants. There is nothing on record to show that authorities had ever adopted such a course.

28. In view of the above, the auction sale stood vitiated and all the consequential proceedings are liable to be quashed.

However, for the reasons best known to the Appellants, they have neither impleaded the Bank (creditor) nor any of the legal heirs of Ganga Prasad

(principal debtor). In such a fact-situation, it becomes difficult to proceed with the case any further.

29. Be that as it may, the Respondent No. 4 had been put in possession of the land more than two decades ago and he had made improvements.

This Court has consistently held that such a possession should not be disturbed at a belated stage for the reason that such a person would have spent his whole life savings in improving the land and making developments thereon which may include the construction of residences etc. (See: The State of Gujarat Vs. Patil Raghav Natha and Others, and Brij Lal Vs. Board of Revenue and Others,

30. The courts below have rejected the case of the Appellants only on the ground of delay. Nothing had been pointed out before us as to on what basis the aforesaid judgment and orders warrant any interference. In view of the above, the appeal lacks merit and is accordingly dismissed.

However, the Appellants may move an application before the Collector, Banda/ concerned authority, in case the excess amount had not been paid to them, for recovery of the same. If such an application is filed and the authority comes to the conclusion that excess amount had not been paid to them, it shall be refunded within a period of 3 months from the date of making the application with 9% interest.