(2020) 10 DRT CK 0026

In the Debts Recovery Tribunal

Case No : Appeal No. 01 Of 2012

Reshmi Gupta And Anr. APPELLANT

Vs

Bank of India And Ors. RESPONDENT

Date of Decision : 05-10-2020

Acts Referred:

Recovery of Debts Due to Banks and Financial Institution Act, 1993 — Section 13(8), 30(1)Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 16

Citation : (2020) 10 DRT CK 0026

Hon'ble Judges : A. K. Chaturvedi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Instant appeal has been preferred by the appellants no. l and 2 u/s 30(1) of the RDDBFI Act, 1993 with the prayer to set aside the order dated 10.01.2012 passed by the learned Recovery Officer in R.P. Case No. 44 of 2012 and to restrain respondent no.1 bank from taking physical possession of premises no. 23/lA, Barrackpore Trunk Road, P.S. Chitpur, Kolkata - 700002, which was mortgaged in favour of respondent bank till disposal of the appeal. Instant appellants no. l and 2 are wife of original borrowers respondent no.2 and 3 herein as well as guarantors of the housing loan availed bysaid respondent no.2 and 3.

2. The backdrop of the case which led to preferring this appeal is that respondent no. 2 and 3 had availed housing loan from respondent no.1 bank and said loan account became NPA. Respondent bank had filed O.A. No. 13 of 2006 claiming recovery of Rs.12,07,421/-. Aforesaid 0.A. was allowed exparte and recovery certificate was issued accordingly. Recovery proceeding was initiated being R.C. No. 44 of 2009 by the Recovery officer. Valuation of the property was obtained at Rs.12,65,000/-. Reserved price was fixed accordingly. However, the mortgaged property was sold at Rs.23.61 lakhs. Auction purchaser added as party respondent. They filed I.A. No. 1025 of 2019 by virtue of appellate order passed

on 12.05.2017 seeking relief to decide aforesaid appeal afresh and sale made on 27.10.2012 be finalized.

3. Instant appeal was first decided by this Tribunal on 10.07.2012 with the direction that auction purchaser shall pay Rs. 9,39,000/- with related poundage fee and in case of default the sale would stand set aside and certificate debtor become entitled to redeem the property by paying certificate amount and order dated 10.01.2012 passed by the Recovery Officer was quashed. Auction purchaser had preferred an appeal against aforesaid judgement and order passed by this Tribunal being no. 121 of 2012 and cross appeal had preferred by appellant no. 1 and 2 being no. 111 of 2012 which were decided by the Appellate Tribunal on 28.04.2014 with following observations :

"The learned counsel for the appellants in Appeal No. 121 of 2012 would pray for merely setting aside the impugned order and leave as such the matter so that the sale in his favour would automatically become final and permanent and his client also need not pay the additional sum of Rs.9.39 lakhs. In my considered opinion to the risk of repetition and pleonasm but without being tautologous, I would like to point out that once the P.O. had noted certain defects in the sale, then it is ineluctable that it has to be gone into fully and parties should go the whole hog in that connection and they cannot shun it. Hence, in view of the matter, the impugned order is remitted back to the DRT- 3 with the aforesaid mandates to decide the points within a time of three months from the date of receipt of a copy of this order till then status shall continue. Accordingly, the two appeals are disposed of."

Instant appeal was further heard afresh by this Tribunal and disposed of by an order dated 08.12.2014 with the following order:

"In view of the above, I pass following order :

(1) The sale held by the Recovery officer is set aside. Sale Certificate and other connected papers confirming the sale are quashed.

(2) Appellants and other CDs are granted liberty and directed to redeem the property by making payment of Rs.23,61,000/-along with 5% interest.

(3) In case of default after 30 days bank is directed to refund the said amount along with interest to respondent no.5 within 30 days.

(4) Auction purchaser is directed to vacate the mortgage property.

(5) Bank is entitled to put the property on sale afresh. Appeal stands disposed of."

Aforesaid order passed by this Tribunal was again challenged by preferring appeal before the Appellate Tribunal by the Bank being no. 72 of 2017 and by the auction purchaser being no. 36 of 20015. Both the appeal was decided by a common order on 12.05.2017 with the following observations :

"I have considered the rival submission and perused the record. The only submission raised by the counsel for the parties relates to the valuation of the impugned order and whether the sale of the said impugned property was on a fair market value and if the sale was not made on a fair market value it was not valid.

I am of the view that the order of the Id. P.O. is cryptic, mechanical and without application of mind inasmuch as without following the direction given by the DRAT in the Appellate Order referred hereinabove. The appellate authority has set aside the order of the DRT on the issue of valuation and , therefore, the said order does not exist and should not be adopted. The ORT should have examined the material on record relating to the valuation placed by either side and independently adjudicate the issue relating to the valuation, namely, whether the reserve price fixed in the sale notice fixed at Rs.12,65,000/- was reasonably justified and the property sold at Rs.23,84,810/- was the fair price of the property on the basis of materials available on record and pleadings and submissions of the parties. The DRT should also consider the law laid down by the Apex Court in this regard including the decision of the Apex Court in the case of Ram Kishun & Ors. Vs. State of U.P. & Ors. reported in (2012) 11 sec 511.

So far as the direction of the DRAT relating to the redemption is concerned, the same is not sustainable inasmuch as it is not in accordance with law. None of the provisions supports such direction. Ld. counsel for the respondents is not able to support said direction. The said direction is liable to be set aside. However, it is open to the respondents to raise the plea of redemption if it is available to them under any provisions of the Act and if so raised the same may be considered in accordance with law having regard to the findings recorded by the DRAT in its earlier order which has attained finality.

In the result both the appeals are allowed. The Impugned order dated 08.12.2014 is set aside. The matter is relegated to DRT-3 to decide the matter afresh in the light of the observations made above."

4. By virtue of aforesaid order of the Hon'ble Appellate Tribunal, auction purchaser has filed I.A. No. 1025 of 2019 seeking finalization of auction sale held on 27.10.2012 and appointment of receiver for handing over physical possession of the property and collection of rent from the tenants. Appellants have filed written argument against the aforesaid I.A. Both the I.A. and written argument are taken into consideration.

5. In view of the orders passed by the Appellate Tribunal, this Tribunal has taken up the instant appeal for denovo hearing for the purpose of adjudication of the case afresh.

6. It is the case of the appellants that for the first time they came to learn on 12.11.2010 when auction purchaser entered into the mortgaged property and on enquiry it was revealed that Receiver was appointed by the Recovery Officer and Receiver was directed to attach the property. Proclamation of sale was published

on 16.09.2010 fixing sale date on 27.10.2010. Present auction purchaser being highest bidder at Rs.23.61 lakhs had deposited entire sale price and sale was confirmed. Appellants alleged that none of copies of the order was communicated to them violating principle of natural justice as also provisions of Rule 16 of the DRT (Procedure) Rules, 1993. They submitted that valuation was made on the direction of learned Recovery Officer at Rs.12.65 lakhs and property was sold at Rs.23.61 lakhs whereas appellants has obtained market valuation from ARA-II, Kolkata for land and structure at Rs. 1,07,88,713/-. Appellants submitted that same property was valued by the Bank's empanelled valuer at Rs.33.00 lakhs at the time of mortgaging the property in 2003. It is the argument of the appellants that Id. Recovery Officer has not applied his mind while fixing reserve price. According to appellants they have no objection to sale the property at best price, but not at such a low price. Appellants filed First Application before Id. Recover Officer with the prayer to set aside the order 27.10.2010 and subsequent orders dated 29.10.2010, 01.11.2010, 11.11.2010 and 12.11.2010 with alternative prayer for staying confirmation of sale and for fresh valuation of the property. It is their argument that without disposing of First Application ld. Recovery Officer strait way instructed Id. Receiver to direct the appellants to vacate the mortgaged property in terms of order dated 01.02.2011 passed by him. However, upon hearing the appellants on 15.02.2011 Id. Recovery Officer further directed the Receiver not to act further in terms of earlier orders. On 22.02.2011 appellants moved Second Application seeking recalling order dated 07.01.2011, 17.01.2011 and 01.02.2011. Vide order dated 10.01.2012 pleas of the appellants were rejected. According to appellants that order does not speak of disposal of aforesaid two applications submitted by them. It is their specific argument that without disposing of said two applications impugned sale cannot be confirmed. Appellants alleged that auction purchaser in connivance with bank and Receiver want to grab the mortgaged property.

7. Respondent bank has contested the case by filing written argument wherein they submitted appellants and respondent no.2 and 3 have failed to repay the dues. They further contended that sufficient opportunity was given to the borrowers as well as appellants to repay the outstanding dues, however, certificate debtor has failed to deposit the amount which they assured to repay. Respondent bank submitted that borrowers had purchased the property at Rs.4.00 lakh along with tenants and now they claimed value of the property more than one crore rupees. It is further submitted that at this belated stage appellants trying to redeem the property, but they failed to pay even Rs.6.00 lakhs, which they themselves assured to pay with the pre-condition of postponement of sale date. The sale date was deferred but they failed to repay after giving numerous opportunity.

8. Ld. counsel for the auction purchaser submitted that all statutory steps have been taken before auctioning the property and the borrowers were all along attended before Recovery Officer and was apprised of the sale process, however, they have not assailed the valuation report or reserve price when the sale notice

was published and now after confirming the sale they come out with the plea of unfair valuation. Auction purchaser submitted that valuation was made by the registered valuer and surveyor of Calcutta High Court and his report contemplates that 80% of the property was tenanted with meager rent of Rs.200/-. It is also submitted that borrowers had requested Recovery Officer to postpone the sale with the assurance to deposit Rs.6.00 lakhs, as such, sale date was deferred to 27.10.2010, however, such payment was not made after giving numerous opportunity. Ld. Recovery Officer compelled to open the bid for sale and highest bidder has deposited entire sale price within stipulated time and thereafter sale was confirmed. Auction purchaser has prayed for finalization of auction sale and its confirmation.

9. I have heard Id. counsel for the parties, perused materials on record and also considered facts and circumstances of the case including case laws cited by the parties.

10. Having heard Id. counsel for the parties, I find that basic issues to be decided in this appeal are whether valuation report is fair and reserve price was fixed after due application of mind and whether Recovery Officer has conducted proceedings in appropriate manner and whether right to redemption is available to the appellants or not. Before adverting to rival contentions urged on behalf of the parties I have kept in perspective the decision of the Hon'ble Supreme Court on the aforesaid issues.

11. In F.C.S. Software Solutions Ltd. Vs. La Medical Devices Ltd., reported in (2008) 10 sec 440 Hon'ble Supreme 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 land and machinery had not been made in a lawful manner before proclamation of sale, nor disclosed at time of sale notice, in such a fact situation the sale was set aside after its confirmation. [underline supplied]

12. In Navalkha & Sons Vs. Sri Ramanya Das, [AIR 1970 SC 2037], Hon'ble Supreme Court has held that there must be a proper valuation report, which should be communicated to the judgement debtor and he should be 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. 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 property is required to be determined fairly and reasonably.

[underlining for emphasis]

13. In Swastik Agency & Ors. Vs. State Bank of India [AIR 2009 ORISSA 147] it has been held that borrowers' right to hold property is constitutional as well as human and he cannot be deprived of his property except in accordance with provisions of statute. In obtaining valuation report and fxing reserve price legal obligation of authority is to secure best price. There must be application of mind by authority concerned while approving report of approved valuer and fixing reserve price, failure to do so may cause substantial injury to borrower and guarantor and that would amount to material irregularity and ultimately vitiate subsequent proceedings. Authority is duty bound to decide as to whether sale of part of property would meet the outstanding demand. Setting aside auction sale after confirmation is permissible, if sale is conducted without adherence to procedure prescribed by statute. [underlining for emphasis]

14. In Ram Kishun & Ors. Vs. State of U.P. & Ors reported in (2012) 11 sec 511 Hon'ble Supreme Court held undoubtedly public money should be recovered and recovery should be made expeditiously, but it does not mean that the financial institution which are concerned only with recovery of their loan may be permitted to behave like property dealers and permitted further to dispose of the security assets in any unreasonable or arbitrary manner in flagrant violation of statutory provisions. Right to hold the property is a constitutional right as well as human right. A person cannot be deprived of his property except in accordance with law. Thus the condition precedent for taking away some ones property or dispose of the secured assets, is when the authority must ensure compliance of the statutory provisions. In view of the above, it is evident that law requires a proper valuation report fixing reserve price accordingly. Acceptance of auction bid taking into account 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. Court cannot interfere unless it is found that that some material irregularity in the conduct of sale has been committed. The Court further held that it should not be forced sale. A valuer's report should be as good as actual offer and valuation 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 sale would not be a proper exercise of judicial discretion.

[underlining for emphasis]

In my opinion the ratio of aforesaid judements is squarely applicable in the fact situation of the case in hand and it helps this Tribunal in coming to a lawful conclusion. It is also made clear that I have considered all the case laws cited by the parties to the appeal, however, the ratio of the judgements which are applicable to this case are discussed in the foregoing paragraphs and other case laws, in my considered opinion, are not related to the fact situation of this case, as such, are not discussed to avoid unnecessary burden in disposing of the case.

15. In view of the aforesaid ratio of the judgements and considering the fact situation of the case this Tribunal proceeds to adjudicate the issues enumerated above.

16. So far as acceptance of valuation report and fixation of reserve price followed by auction sale are concerned I find that valuation obtained on the direction of the Recovery Officer was Rs.12.65 lakhs and valuation obtained in 2003 was at Rs.33.00 lakhs when mortgage was created and property was sold at Rs.23.61 lakhs whereas applicant obtained market value of the property from ARA-II at Rs.1.07 crore. Admittedly the property was rented from the time of its purchase and it was mortgaged in the same rented condition. Aforesaid valuations of the property obtained at different time show wide variations. It transpires from valuation report obtained by the Recovery Officer that 80°/o of the building was tenanted at meager Rs.200/-rent. However, the fact remains that mortgage was created in rented condition. It is evident on record that reserve price was fixed on the basis of valuation report at Rs.12.65 lakhs whereas the property was sold at Rs.23.61 lakhs, which is more or less double of the reserve price. Valuation obtained for auction sale was much less than the valuation obtained at the time of mortgage, aforesaid variations should have struck in the mind of the Recovery Officer and he should think twice whether fresh valuation report is necessary or not. Moreover, Id. Recovery Officer did not consider aforesaid variations while passing order accepting valuation report and also did not intimate the valuation to the borrowers when such a largewide variation is forthcoming. Ld. Recovery officer has also not passed any reasoned order reflecting his satisfaction on accepting the valuation report while fixing reserve price, which ought to have been done for the sake of transparency and natural justice. On the contrary he passed a cryptic order without taking into consideration aforesaid aspects of the matter which shows his non-application of mind. In view of aforesaid ratio of the judgement it was incumbent on the part of the Recovery officer to pass a reasoned order reflecting his satisfaction while accepting the valuation report for fixation of reserve price, which has not been done. Admittedly, in this case valuation so obtained is more than half of earlier valuation and property was sold more than double price of the present valuation. Hence, I am of the opinion that Recovery Officer has fixed the reserve price in a very hasty manner without application of mind. He has also not intimated the certificate debtors the quantum of valuation of his property, which was going to be auctioned, before publication of proclamation of sale. Therefore, in my considered opinion the reserve price was not fixed on proper valuation report. Before parting from this issue it is clarified that that in a catena of judgement Hon'ble Supreme Court has held that market value of a property for the purpose of registration is determined by the concerned State for determining quantum of stamp duty and registration

fee, therefore, appellants claim that value of their property is more than one crore as per query obtained from ARA-II in respect of the market value of the property is not justified.

17. Coming to the next issue regarding conduct of recovery proceeding I find that recovery proceeding was conducted by the Recovery Officer in a very hasty and non-transparent manner. I find that First Application was moved on 26.11.2010 before the Recovery Officer with the prayer for setting aside orders dated 27.10.2010; 29.10.2010; 01.11.2010; 11.11.2010 and 12.11.2010 passed in R.P. 44 of 2009 and stay on confirmation of sale and for revaluation of the impugned property. The hearing of said application was adjourned from time to time and finally fixed on 15.02.2011. Curiously, on 14.02.2011 Id. Receiver directed the appellants to vacate the impugned property in terms of an exparte order dated 01.02.2011 passed by the Recovery Officer. However, again on 15.02.2011 when the matter was heard in the presence of the borrowers, ld. Recovery Officer directed Id. Receiver not to take any action on the basis of earlier orders. Appellants thereafter moved Second Application for setting aside exparte orders passed on 7th and 17th January and 1st February 2011 and for hearing of the First Application. Keeping aforesaid two applications pending, impugned order under appeal dated 10.01.2012 was passed by the Recovery Officer, which is extracted below :

"On perusal of the affidavits of the CDs, the purchaser and the rebuttal of the CHB, I am of the opinion that sufficient time and opportunity has been given to the CDs to make payment for the debt, but they have not utilized the opportunity and repaid the dues till date. There is no reason to delay the sale process any longer. The plea of the CDs No. 3 and 4 is thus rejected and disposed off.

Ld. Receiver and the CHB is directed to act as per order No.30 dated 07.01.2011, 17.01.2011 and 01.02.2011 and take physical possession of the concerned property, arrange for transfer of ownership, registration of the property in the matter of the successful purchaser and handing over of the title deeds to the successful purchaser through Registry of this office."

(underlining for emphasis)

It is strange that Id. Recovery Officer without disposing of the prayers made in the First and Second Application by a reasoned order straight way directed Id. Receiver to take physical possession with the assistance of police authority. Administration of justice demands disposal of interlocutory applications before taking final decision on the issue. It is a settled law that not only must justice be done, it must also be seen to be done. In aforesaid order Id. Recovery Officer stated that sufficient opportunities were given to square up the dues, as such plea of the CDs are rejected. There is no whisper of disposal of First and Second Application. Therefore, I am of the view that conduct of the recovery proceeding is not fair and transparent and the impugned order under challenge is cryptic and passed without application of mind, as such, it is liable to be set aside.

18. The last issue remains for adjudication is whether right to redemption is available to the appellants. To resolve this issue I should refer to the concerned Section of the Act of 2002 :

"Sec. 13(8) - If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset."

Moreover, Hon'ble Supreme Court has held in several judgements that right to redemption in case of public auction of immovable property is available even after confirmation of sale. Hence, right to redemption is always available to the borrowers or guarantors as per provisions of Sec. 13(8) (supra) and the law settled by Hon'ble Supreme Court. In this case appellants may redeem his property in accordance with law.

19. Before concluding the case it is worthwhile to observe that allegation made by the appellant against the auction purchaser, bank officials and Receiver for connivance and counter allegation made by the respondent bank that appellants and respondents no. 2 and 3 are trying to delay the recovery proceeding are all baseless, as both the parties failed to produce any substantial evidence in favour of their respective allegation, as such, the allegations are rejected.

ORDER

19. In view of the foregoing discussion and having regard to the ratio of the judgements and orders cited above this appeal is deserved to be allowed. Accordingly the appeal is allowed. Order dated 10.01.2012 passed by learned Recovery Officer in R.P. 44 of 2010 is set aside. Learned Recovery Officer is directed to proceed with the recovery proceeding from the stage of obtaining fresh valuation report. He is further directed to obtain a fresh valuation report and intimate the value thereof to the appellants and respondent no. 2 and 3 and fix reserve price accordingly in a transparent manner after applying his mind and pass a reasoned order. He is also directed to allow the appellants and auction purchaser, if they so like, to participate in the public auction to be held and they shall be allowed to participate without depositing EMO as would be fixed for the auction. In case auction purchaser is not willing to participate in the public auction or failed to bid at highest level, the sale price already deposited by them shall be remitted back with current savings bank interest rate within a month from the date of confirmation of sale. The incidental expenses and accrued interest for remitting the sale price to the auction purchaser, if so happen, shall be borne by the appellants and respondent no.2 and 3. Since it is an old case and recovery of public money is involved, Id. Recovery Officer is directed to complete the proceeding within three months from the date of receiving this judgement. Consequently, aforesaid I.A. is also disposed of. No costs.

Copy of the judgement/final order be uploaded in the Tribunal's website. File be consigned to the Record Room.

(Dictated to Stenographer transcribed by him, corrected, signed and pronounced by me in the Virtual open court on this the 05th day of October, 2020)

