(2004) 10 GUJ CK 0023

In the Gujarat High Court

Case No : Special Civil Application No''s. 1448 and 1462 of 2003

Sameer Engineering Works APPELLANT

Vs

District Collector RESPONDENT

Date of Decision : 14-10-2004

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 178, 179
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 72, Order 21 Rule 90
Constitution of India, 1950 — Article 226, 227

Citation : AIR 2005 Guj 81 : (2005) 1 GLR 215

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

Bench : Single Bench

Advocate : Vimal Patel in Special Civil application Nos. 1448 and 1462 of 2003 and Amrita M. Thakore in Special Civil application No. 1448 of 2003, for the Appellant; H.D. Dave, AGP for Respondent No. 1, A.J. Patel and Roopal R. Patel for Respondent Nos. 2-3 and Utpal M. Panchal, in Special Civil Application No. 1448 of 2003, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—Pursuant to the order passed by this Court on 07.10.2004 in MCA Nos. 1709 and 1728 of 2004 in S.C.A. Nos. 1462 & 1448 of 2003, these two petitions are taken up for hearing today.

2. Earlier, these two petitions were disposed of by this Court vide common judgment and order dated 29.09.2003. The said judgment and order was challenged by the original petitioners before the Division Bench of this Court in L.P.A. Nos. 1378 & 1379 of 2003 and while disposing of the said two appeals on 22.07.2004, the Division Bench has remanded the matter to this Court for the purpose of deciding the issue, namely, whether the respondent No. 4 - Vice Chairman of the Bank can lawfully purchase, directly or indirectly, any property of a member of the society sold for the recovery of his dues to the society under Rule 35 (2) of the Rules.

3. It is worthwhile to mention here that after the judgment and order dated 29.09.2003 was passed, the original petitioners have filed review application being M.C.A. No. 2390 of 2003 wherein it was urged on behalf of the original petitioners that the contention with regard to violation of Rule 35 (2) of the Gujarat Co-operative Societies Rules (hereinafter referred to as the Rules) was raised by the petitioners'' advocate during the course of the argument. However, the said contention was not dealt with. This Court has disposed of the said review application on 24.12.2003 holding that though during the course of arguments the said contention was raised, the said contention was not taken in the petition nor any objection was filed to that effect before the revenue authority. The Court has also negatived the argument that the said contention was not dealt with by this Court and the Court has also clarified that in number of places in the judgment, the Court has observed that the property was purchased by the Vice Chairman of the respondent No. 3 Bank. Not only that, the Court has also recorded the submissions made by Mr. A.J. Patel, learned advocate appearing for respondent No. 2 and even in the concluding para of the judgment, it has been stated that if the petitioners were in a position to procure a buyer of the premises under challenge for worth Rs. 92,70,000/- within a period of three months from the date of the order and if the said buyer was ready and willing to deposit the said amount with the respondent No. 2, the sale confirmed in favour of respondent No. 4 would get cancelled and in that eventuality, the respondent No. 4 would be entitled to get back his amount of Rs. 68 lacs being the sale consideration paid by him for the said transaction.

4. In view of the aforesaid observations made by the Court in the judgment and order dated 29.09.2003, the Court has rejected the review application.

5. Thereafter, the appeals were disposed off by the Division Bench and the aforesaid directions were given by the Division Bench to decide the issue regarding applicability of Rule 35 (2) of the Rules and effect thereof on the transaction in question.

6. Heard Mr. Vimal Patel, learned advocate appearing for the original petitioners. He has invited the attention of the Court to the relevant provisions of the Gujarat Co-operative Societies Act (hereinafter referred to as the Act). First of all, he has invited the attention to the definition of "Officer" as given in Section 2(14) of the Act which reads as under :-

2(14) :-

"officer" means a person elected or appointed by a society to any office of such society according to its bye-laws; and includes a chairman, vice-hairman, president, vice-president, managing director, manager, secretary, treasurer, member of the committee, and any other person elected or appointed under this Act, the rules or the bye-laws, to give directions in regard to the business of such society;"

7. According to him, the Vice-Chairman i.e. the respondent No. 4 is included

within the definition of officer as given in Section 2(14). He has, thereafter, invited the attention of the Court to Section 140 of the Act which deals with the power of the Collector to make recoveries during certain period. Section 145 of the Act prohibits the officer of the Bank from bidding at sales. It reads as under :-

"145. Officers of banks not to bid at sales.

At any sale of movable or immovable property, held under the provisions of this chapter no officer or employee of a [land development bank] except on behalf of the bank of which he is an officer or an employee, and no person having any duty to perform in connection with such sale, shall either directly or indirectly bid for or acquire or attempt to acquire any interest in such property."

On the basis of the Provisions contained in Section 2(14) read with Section 145 of the Act, Mr. Patel has submitted that since the respondent No. 4 being the Vice-chairman of the respondent No. 3 Bank has purchased the property of the petitioners, the same is violative of the express provisions contained in the Act and hence, the same should be held as invalid.

8. Mr. Patel has further invited the attention of the Court to Rule 35 (2) of the Gujarat Co-operative Societies Rules, 1965 which reads as under :-

"(2) No officer or servant of a society shall purchase, directly or indirectly, any property of a member of the society sold for the recovery of his dues to the society."

9. On the basis of this rule, Mr. Patel has submitted that the sale effected in favour of respondent No. 4 who is the vice-chairman of the respondent No. 3 Bank is in violation of the expressed provisions contained in Rule 35 (2) of the Rules and hence, the said sale should be declared null and void and the prayer made by the original petitioners in the main petition with regard to handing over the possession of the property in question should be granted to the petitioners.

10. Mr. A.J. Patel, learned advocate appearing for the respondent No. 3 Bank has raised preliminary objection to the effect that the petitioners have not made any prayer in the main petition nor any averments were made to that effect and hence, the petitioners should not be allowed to agitate this issue before this Court. Apart from this preliminary objection, Mr. Patel has relied on the provisions contained in the Bombay Land Revenue Code (hereinafter referred to as the Code). First of all, he has pointed out Section 178 of the Code which deals with an application to set aside the sale. As per this provision, an aggrieved party can make an application to the competent authority within 30 days from the date of sale of immovable property for setting aside the sale on the ground of some material irregularity, or mistake, or fraud, in publishing or conducting it. He has submitted that no such application was moved by the petitioners before the competent authority. Section 178 further states that no sale can be set aside on the ground of any such irregularity or mistake, unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason

thereof. The petitioners have never produced any evidence or material before the Collector or before this Court so as to prove that as a result of the alleged irregularity, the petitioners have sustained a substantial injury. Mr. Patel has further invited the attention of the Court to the provision of Section 179 which deals with order confirming or setting aside sale. As per this section, if no application is moved, then the competent authority will have to confirm the sale. Even Proviso to Section 179 empowers the competent authority to suomotu initiate proceedings for setting aside the sale if he is of the view that such order is required to be passed and for that purpose, he is supposed to record reasons. The Authorities have not thought it fit to initiate such proceedings.

11. On the basis of above statutory provisions, Mr. Patel has submitted that neither any application was moved nor sale was set aside and it was ultimately confirmed. Once the sale is confirmed, it cannot be set aside and for that purpose, he relied on the decision of this Court in the case of PATEL DWARKADAS K. AND ORS. V. STATE OF GUJARAT AND ORS., 2001 (42) 3 G.L.R. 2488wherein the objection was received subsequent to the confirmation of sale and in that context, the Court has held that there is no provision provided for entertaining any objection subsequent to the confirmation of sale. The Court has, therefore, taken the view that the Deputy Collector was not required, authorised or competent to consider the objection of the objector, after a passage of 30 days from the date of sale and after the confirmation of the sale in question.

12. Mr. Patel has further submitted that the petitioners have not made out any case for setting aside the sale and assuming that even if such a case is made out on the basis of alleged violation of Rule 35 (2), looking to the conduct shown by the petitioners, it is not just and proper for this Court to exercise the discretion in favour of the petitioners. In this connection, he relied on the decision of the Hon''ble Supreme Court in the case of A.M. Allison Vs. B.L. Sen, : AIR 1957 S.C. 227 wherein the Hon''ble Supreme Court has held that Proceedings before the High Court were by 226 and the High Court has the power to refuse the writ if it is satisfied that there was no failure of justice, and in appeals which, are directed against the orders of the High Court in applications under Art. 226, the Supreme Court can refuse to interfere unless it is satisfied that the justice of the case requires it. But where it is not so satisfied it will not interfere. In this case, the Hon''ble Supreme Court has further declined to decide the question of jurisdiction on the ground that whether infirmities might possibly have attached to the orders passed by the Deputy Commissioner, on the score of want of jurisdiction, no useful purpose would be served by their interfering at this late stage as the Deputy Commissioner and the High Court both came to the same conclusion and the Supreme Court has also endorsed it. Mr. Patel has further submitted that the said principle has been reiterated by the larger Bench of the Hon''ble Supreme Court in the case of Balvantrai Chimanlal Trivedi, Manager, Raipur Mafg. Co. Ltd., Ahmedabad Vs. M.N. Nagrashna and Others, wherein it is held that though there was some force in the contention regarding jurisdiction of the authority to entertain an application of the employee, there being no failure of justice it would

not interfere with the order of the High Court dismissing the writ petition of the appellant.

13. Mr. Patel has further relied on the decision of the Hon''ble Supreme Court in the case of Hirabai Vs. Hanumanth Krishnaji Bhide and Others, : (1996) 10 S.C.C. 747 wherein the Hon''ble Supreme Court has recorded the finding to the effect that a bare reading of the High Court''s order clearly indicates that opportunity was given to the petitioner to establish whether the sale was vitiated by any material irregularity or fraud in publishing or conducting the proclamation of sale by the decree-holder. The Court has further observed that except repeating the averment and raising a contention in the written arguments, no evidence was adduced to prove them. Under those circumstances, the material conditions required under Order 21, Rule 90 CPC are not proved. The High Court in fact gave the opportunity to pay the amount with interest at the rate of 15 percent on the sale amount but the petitioners have not availed of the opportunity. In the above facts, the Supreme Court has refused to interfere with the decision taken by the High Court and dismissed the Special Leave Petition.

14. Based on the aforesaid judgment of the Hon''ble Supreme Court, Mr. Patel has submitted that in the present case also, adequate opportunity was given by this Court to the petitioners and for that purpose, he has invited the attention of the Court to paragraph 35 of the judgment and order dated 29.09.2003 which reads as under :-

35. While dismissing the aforesaid two petitions, the Court found that looking to the nature of disputes involved in both the petitions, the Court has not thought it fit to exercise its extraordinary and discretionary writ jurisdiction under Article 226 of the Constitution of India. Despite this, the Court is also of the view that the action of the respondents are also not free from blame worthy. The Court, therefore, thinks it fit and proper to observe and direct that if the petitioners are in a position to procure a buyer for the premises under challenge, worth Rs. 92,70,000/- within the period of three months from today and the said buyer is ready and willing to deposit the said amount with the respondent No. 2, the sale confirmed in favour of respondent No. 4 would get cancelled and in that eventuality, the respondent No. 4 would be entitled to get back his amount of Rs. 68,00,000/- being the sale consideration paid by him along with the expenses incurred by him in connection with the said transaction. The Court issues this direction on the basis of the statement made by Mr. A.J. Patel, learned advocate appearing on behalf of respondent No. 4 during the course of his submission. The respondent No. 4 is, therefore, directed to maintain status quo qua the property in question for the period of three months from today.

15. Despite specific opportunity having been given to the petitioners, the petitioners could not procure any buyer or could not make any offer to purchase the said property at the above stated price. He has, therefore, submitted that it is not open for the petitioners to challenge the confirmation of sale made by the competent authority.

16. Mr. Patel has further submitted that even before the Division Bench, during the course of argument, one more opportunity was given to the original petitioners and the same was also not availed of by them. He has, therefore, submitted that it is not just and proper on the part of the petitioners to raise any further grievance with regard to confirmation of sale in favour of respondent No. 4.

17. As far as the applicability of the provisions contained in Section 145 is concerned, Mr. Patel has submitted that the same is not applicable to the respondent No. 3 Bank as the said provision is applicable only to the Land Development Bank. Section 145 of the Act falls in Chapter XI and the title of Chapter XI is "Land Development Banks." This Chapter starts from Section 116 and the last section of this Chapter is Section 145. Section 116 of the Act makes it clear that this Chapter shall apply to Land Development Banks. So far as the provisions contained in Rule 35 (2) of the Rules are concerned, Mr. Patel has submitted that the same has also no application to the facts of the present case as the Bank has not conducted the sale. The sale was conducted by resorting to the Provisions contained in Bombay Land Revenue Code and Special Recovery Officer was appointed who was not answerable to the Bank and was subject to the jurisdiction of the Collector. As per the provisions contained in the Bombay Land Revenue Code, a detailed procedure was prescribed. There is no allegation with regard to fraud or undue influence or malafide exercise of powers by the respondent No. 4. He has, therefore, submitted that the provisions of Rule 35 (2) are not applicable to the present case.

18. Mr. M.I. Hawa, learned advocate appearing for respondent No. 4 has more or less adopted the arguments canvassed by Mr. A.J. Patel. He has submitted that since there was no buyer, the property was purchased by him as per the price determined by the Special Recovery Officer and the said sale was confirmed and after confirmation, the document was also executed. Hence, at this belated stage, it is not open for the petitioners to challenge the said sale. In this connection, he relied on the decision of the Hon''ble Supreme Court in the case of Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others, wherein the Hon''ble Supreme Court has held that mere inadequacy of price cannot demolish every Court sale. In the case before the Hon''ble Supreme Court, the Court tried its best, time after time, to raise the price. Well known industrialists in the public and private sectors knew about it and turned up. Offers reached a stationary level. Nor could the Corporation decree-holder be put off indefinitely in recovering its dues on baseless expectations and distant prospects. The judgment-debtor himself has by his litigious exercises, would have contributed to the possible buyers being afraid of hurdles ahead. After all, producing around Rs. 11.5 Lakhs openly to buy an industry was not easy even for apparently affluent businessmen. The sale proceedings had been pending too long and the judgment-debtor could not, even when given the opportunity to produce buyers by private negotiations. Not even a valuer''s report was produced by him. In these circumstances, the Court has held that the executing Court had committed no

material irregularity in the conduct of the sale in accepting the highest offer of the auction purchaser. Relying on the said judgment, Mr. Hawa has submitted that here in the present case also, the respondent No. 4 has purchased the property as there was no other buyer and his offer was the highest one. No objection was raised at any point of time that the sale effected and confirmed was in violation of the provisions contained in Rule 35 (2) of the Rules. Despite the opportunity given to the petitioners, they have neither procured any buyer nor made any offer to purchase the property by themselves. The only intention of the petitioners was to delay the sale proceedings and thereby to deprive of the Bank from recovering its legitimate dues. In such a situation, as observed by the Hon''ble Supreme Court, this Court should not entertain the plea raised by the petitioners and pass any order with regard to restoration of possession of the suit premises to respondent No. 4.

19. Mr. Hawa has further relied on the decision of the Hon''ble Supreme Court in the case of Jaswantlal Natvarlal Thakkar Vs. Sushilaben Manilal Dangarwala and others, wherein while dealing with the contention raised on behalf of the petitioner that the upset price was reduced without giving notice to the judgment debtor, the Hon''ble Supreme Court has held that it is not sufficient for the appellant to contend that there was an illegality or irregularity in the conduct of the sale. He must also prove by adducing sufficient facts that some substantial injury has been caused to the petitioner as a result of the order under O.21 R.72 having been passed without such notice. The Court has, therefore, held that such irregularity was not such as has caused substantial injury to the appellant within the meaning of the rule in the circumstances of the case. Similarly, on the basis of the reasoning given in the said judgment, Mr. Hawa has submitted that assuming that the sale was effected in favour of respondent No. in violation of Rule 35 (2) of the Rules, even in that case, after the said sale was confirmed and documents were executed, the sale is not required to be set aside as the petitioners have failed to adduce any evidence or to show to the concerned authority or to this Court as to whether any substantial injury has been caused to them as a result of the alleged illegality or irregularity. He has, therefore, submitted that the objections raised by the petitioners at such belated stage should not be entertained by this Court and no relief can be granted to the petitioners.

20. After having heard learned advocates appearing for the respective parties and after having gone through their submissions made during the course of hearing as well as the authorities cited before the Court, this Court is of the view that the petitioners are not entitled to the relief prayed for in the petition on the ground of alleged violation of Rule 35 (2) of the Rules.

21. Though during the course of argument, Mr. Vimal Patel, learned advocate appearing for the petitioners has based his argument on violation of the provisions contained in Section 145 of the Act, the said section, however, has application only with regard to Land Development Bank. The same will not apply

to the facts of the present case as admittedly, the respondent No. 3 Bank is not a land development Bank. With regard to applicability of Rule 35 (2) of the Rules, it is true that there is an embargo in the said rules on the officers or the servants of the Bank either to directly or indirectly purchase the property of any client of the Bank and since respondent No. 4 being Vice Chairman of the Bank is an officer of the Bank and in the normal circumstances, he cannot be allowed to purchase the property of the Bank. But in the present case, Rule 35 (2) will not have to be looked into isolation. The said Rule will have to be read and interpreted in the context of recovery of the dues of the Bank keeping in mind the procedures laid down in the Gujarat Co-operative Societies Act, The Gujarat Co-operative Societies Rules and The Bombay Land Revenue Code. The recovery of the Bank will have to be effected in three different modes, either by way of execution of a decree or by resorting to the provisions contained in Bombay Land Revenue Code or even by empowering the Registrar to initiate action for such recovery. Here in the present case, a detailed procedure laid down in the Bombay Land Revenue Code has been followed by the Collector. Special Recovery Officer was appointed. He has issued necessary advertisements, fixed the upset price, invited the offers and thereafter, the property was sold to the highest bidder i.e. respondent No. 4. The said sale was also confirmed. The petitioners were aware about all these transactions and yet, they merely remained silent spectators and they have not raised any objection or filed any application within the meaning of Section 178 of the Bombay Land Revenue Code for setting aside the sale nor they have raised this plea in the petitions that the sale effected is illegal on account of it being in violation of the provisions contained in Rule 35 (2) of the Rules. It is for the first time during the course of argument, the said plea was raised. Possibly, it may be the ingenuity of the counsel who has argued the matter before the Court. The Court has also given reasons as to why the said plea was not dealt with and even while disposing of the review application moved by the petitioners, the said reasons have been reiterated. The Court has given a specific opportunity to the petitioners on the basis of the statement made by the learned advocate Mr. A.J. Patel for the respondent No. 3 Bank. If the petitioners were in a position to procure buyer or to offer the abovestated price, the sale was ordered to be cancelled. But this opportunity could not be availed of by the present petitioners. Paragraph 35 of the judgment and order dated 29.09.2003, as referred to hereinabove, extensively dealt with the said aspect of the matter. This Court was also appraised of the fact that even before the Division Bench, one more opportunity was given. Despite the several opportunities having been given, the petitioners could not avail those opportunities. It is not, therefore, just and proper on the part of the petitioners to urge before the Court for setting aside the sale on the ground of alleged violation of Rule 35 (2) of the Rules.

22. It is also equally important to take note of the fact that no allegation of fraud or malafide is made in the entire petition nor even at the time of argument, it is anybody''s case that respondent No. 4 has in any way influenced the sale of the properties in question. Since there was no other buyer and the respondent No. 4

as an ordinary auction - purchaser has participated in the bid and that bid was accepted by an independent authority being Special Recovery Officer, it cannot be said that by virtue of such transaction, any illegality has been committed. It is also equally important to observe here that the present petitioners have not participated in the auction proceedings. Without any participation, it is not just and proper on their part to raise the objection and to delay the proceedings. Moreover, by virtue of sale confirmation, no injustice has been caused to the petitioners as no evidence or material has been produced before the Court or before the authority to point out as to whether by virtue of such alleged illegality or irregularity, any injustice has been caused or any substantial injury has been suffered by the petitioners.

23. In the above view of the matter, the Court is of the view that the authorities cited by Mr. A.J. Patel and Mr. M.I. Hawa, learned advocates appearing for the respective respondents straight way apply to the facts of the case and even if for the sake of argument, the Court accepts the contention of the petitioners that there is a violation of Rule 35 (2) of the Rules, the Court is not inclined to exercise its extraordinary writ jurisdiction under Article 226 & 227 of the Constitution of India in favour of the petitioners who have raised this contention only with a view to delay and thwart the proceedings and without participation in the auction proceedings or that too, without availing of the specific opportunities granted to them.

24. Before parting, to provide strength to its decision, the Court hereby refers to and relies upon the observations made by the Hon''ble Supreme Court in the case of Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, , stating that there is no equity in favour of a defaulting party which may justify interference by the Courts in exercise of its equitable extraordinary jurisdiction under Article 226 of the Constitution of India to assist it in not repaying its debts. The aim of equity is to promote honesty and not to frustrate the legitimate rights of the Corporation which after advancing the loan takes steps to recover its dues from the defaulting parties. A Court of equity, when exercising its equitable constitution must so act to prevent perpetration of a legal fraud and the Courts are obliged to do justice by promotion of good faith, as far as it lies within their power. Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law.

25. In the above view of the matter, this Court is of the view that the sale effected in favour of respondent No. 4 is just and proper and it is not hit by the provisions contained in Rule 35 (2) of the Rules.

26. Since the Division Bench has restored these petitions only for the purpose of deciding the above issue and that issue has been decided in favour of the respondents and against the petitioners, the ultimate conclusion which was drawn by this Court earlier vide its judgment and order dated 29.09.2003 would not call for any change or modification. Hence, both these petitions stand dismissed. The order of status-quo which was granted earlier in the judgment

and order dated 29.09.2003 is hereby vacated.

27. At this juncture, Mr. Vimal Patel, learned advocate appearing for the petitioners has made a request to continue the order of status-quo for some time. However, looking to the facts of the case and since the sale was confirmed much earlier and at the time of earlier disposal of these petitions, vide judgment and order dated 29.09.2003, the status-quo was ordered to be maintained for three months, the said request is rejected.

