
(2012) 07 MP CK 0101
In the Madhya Pradesh High Court
Case No : Writ Petition No. 20346 of 2011

Savitri Patel

APPELLANT

Vs

Bank of Baroda and others

RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 129

Constitution of India, 1950 — Article 226, 32

Limitation Act, 1963 — Section 5

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 26(1), 29

Citation : AIR 2012 MP 157 : (2013) 1 BC 598

Hon'ble Judges : Sanjay Yadav, J;Ajit Singh, J

Bench : Division Bench

Advocate : Praveen Chaturvedi, for the Appellant; Sanjay Sanyal, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Yadav. J

1. Letter dated 24.11.2011 addressed to the Hon'ble Chief Justice was directed to be treated as petition in view of the provision of Chapter XIII-A Rule 12 of the High Court of Madhya Pradesh Rules, 2008. The petitioner, Smt. Savitri Patel, guarantor in cash credit facility of her late husband in the letter had stated:

2. In order to ascertain the correctness of the statement by the petitioner, the Bank of Baroda was called upon to respond. Learned Counsel who represented the Bank since, informed that the property in question has been auctioned, the auction purchaser was also permitted to respond.

3. On 5.3.2012 it was ordered:

The Learned Counsel for the Bank states that he shall be filing reply in due course of the day. A copy of the reply has been supplied to the Learned Counsel

for petitioner before us.

The Learned Counsel for auction purchaser also undertakes to file vakalatnama on his behalf.

List the case on 12.4.2012.

Interim relief to continue.

4. The parties were thereafter allowed to complete the pleadings. The matter, thereafter came up at different dates. That, on 19.6.2012 during course of hearing it transpired that the matter could be amicably settled. Counsel for auction purchaser, was therefore, granted time to seek instructions. The matter thereafter came up for hearing on 28.6.2012; whereon the auction purchaser who was personally present in the Court agreed for amicable settlement of the dispute. Upon his agreeing for amicable settlement, the Bank was given time to workout entire outstanding amount, they are entitled for.

5. The matter when is taken up today, the Bank has furnished the details of outstanding up to 4.7.2012. It is stated that after adjusting the amount deposited by the petitioner (Rs. 12,03,000/-) and refunding the amount to auction purchaser along with interest (saving account) (Rs. 12,11,000+ Rs. 96,880/-), the outstanding amount remains to be paid to the Bank to the tune of Rs. 2,38,361/- (being the outstanding in the loan account) plus Rs. 96,880/- (being the interest required to be paid to the auction purchaser).

6. The auction purchaser, however, backed away from his undertaking of amicable settlement by filing additional return and taking preliminary objection. It is stated by the auction purchaser that in respect of the suit property the petitioner had entered into an agreement on 30.6.2010 with one Smt. Ashwini Yadav for sale for a consideration of Rs. 10,00,000/- of which Rs. 5,00,000/- was paid at the time of agreement. It is submitted that this amount plus Rs. 4,03,000/- thus total Rs. 9,03,000/- which was deposited by the petitioner with the Bank on 29.6.2010 has since been deposited in the sundry account. It is further contended that the petitioner having lost from all Courts in a recovery suit cannot by virtue of present writ petition seek quashment of auction sale. The Bank also does not dispute these facts.

7. We may make it clear that we are not concerned with the legality of the action taken by the Bank to effect recovery of the outstanding amount. We are only concerned with as to whether the Recovery Officer has been fair in discharging his duties. To ascertain this few facts may first be noted.

8. The Bank of Baroda sanctioned Housing loan vide loan account No. 07170600000215 with a loan limit of Rs. 10 lacs only in favour of the petitioner and her husband. Due to non-repayment the account became NPA (non performance account). Whereon, the Bank initiated the recovery proceedings by filing suit under the Recovery of Debts Due To Banks And Financial Institutions Act, 1993 forming subject matter of O.A. No. 68/2009. The suit was decreed on

5.10.2009 for a sum of Rs. 13,10,390/- together with pendente lite and further interest @12.50% per annum with monthly rests from 26.3.2009 till full realization. The decree was put to execution vide execution case No. OA Ex. 102/2009 where-under the suit property, i.e., house of the petitioner situated over Plot No. 41, Khasra No. 165, 166, 169/1, 169/2, 170-173, 174/2 to 251 NB No. 643 Patwari Halka No. 25/31, Saket Nagar, Panchasheel Colony, Vivekanand Ward was put to auction on 23.2.2010.

9. Petitioner challenged the auction vide W.P. No. 3770/2010. Said writ petition was disposed of on 5.4.2010 in the following term:

In respect of the fact that the property in question has fetched an offer of Rs. 12,03,000/- the petitioners are at liberty to deposit the said amount and prevent the respondent/Bank from finalizing the sale in favour of the person who has made such offer. True it is that, the petitioners who were at liberty to raise objection under relevant rules before the Recovery Officer, have not availed the remedy but they were definitely prevented by just cause as the lawyers are abstaining from appearing before the Tribunal and for that the petitioners cannot be made to suffer. Therefore, in the interest of justice if the petitioners deposit an amount of Rs. 12,00,000/- within a period of 15 days from today out of which at least Rs. 3,00,000/- are deposited on or before 7-4-2010 then the respondent/Bank shall not finalize the sale as resorted to vide auction notice dated 23-02-2010. In case the petitioners deposit the entire amount as ordered hereinabove, the respondent/Bank shall do well to settle the matter. In case of any deviancy shown by the petitioners the respondent/Bank shall be at liberty to proceed with the sale in accordance with law.

10. Writ Appeal No. 296/2010 preferred against the order in Writ Petition No. 3770/2010 was disposed of on 17.5.2010, in following terms:

Conditional order was passed in W.P. No. 3770/2010 on 5.4.2010 directing deposit of Rs. 12 lakhs within a period of 15 days, out of which 3 lakhs was to be deposited on or before 7.4.2010.

Only sum of Rs. 3 lakhs has been deposited and rest Rs. 9 lakhs has not been deposited. So far the order was conditional as such bank is free to proceed ahead.

In view of the aforesaid as stated by appellant's counsel as there is no extension of time prayed by respondents, there is no life in the matter.

In case time is extended by the Court, appellant is at liberty for revival of writ appeal.

11. That, on 23.4.2010, petitioner filed an application seeking extension of time vide M.C.C No. 661/2010. The M.C.C was disposed of on 21.9.2010 in the following terms:

The matter though was posted for consideration of various interlocutory applications; however, it is submitted by Learned Counsel for the respondents

and not disputed by Learned Counsel for the petitioner that present application for extension of time for depositing the amount of Rs. 9 Lacs in pursuance to the direction in W.P. No. 3770/10, has been rendered infructuous because of the order passed by the Division Bench in W.P. No. 7789/10, wherein the petitioner has been relegated to avail the remedy under the Recovery of Debts Due To Bank And Financial Institutions Act, 1993 and the petitioner has been further protected by extending the interim order.

In view of above since no relief as sought in present application is warranted, the application is accordingly rendered infructuous and is hereby dismissed. However no costs.

12. Writ Petition No. 7789/2010 referred to in the order in M.C.C. was for quashment of recovery certificate, for setting aside the Sale conducted on 29.3.2000, for the permission to the petitioner to deposit balance amount of Rs. 9 lacs and for direction to respondents to handover the possession of the property in question.

13. In W.P. No. 7789/2010 following interim order was passed on 28.6.2010:

Learned Counsel for petitioners submitted that the petitioners are ready to deposit an amount Rs. 9,03,000/-, as petitioners are required to make such payment in compliance of the order dated 5.4.2010 passed in W.P. No. 3770/2010. Petitioners shall also abide the conditions, which may be imposed by This Court, while deciding the matter and till the decision of this petition the possession of petitioners may be protected.

Learned Counsel for respondent nos. 1 & 3 though opposed the prayer, but considering the fact that petitioners in compliance of order dated 5.4.2010 in W.P. No. 3770/2010 have deposited Rs. 3,00,000/- in time with the Bank and for remaining amount of Rs. 9,03,000/- petitioners are ready to deposit by tomorrow.

In view of aforesaid, we adjourn hearing of this case till 20.7.2010.

In the meantime, following directions are issued in this case :-

1. Petitioners are permitted to deposit Rs. 9,03,000/- [Rupees nine lacs three thousand only) by 29th June, 2010, which shall be subject to the decision of this petition.

2. If the amount is not accepted by the Bank on being offered by the petitioners, petitioners shall deposit the aforesaid amount in the High Court by tomorrow before 4.00 P.M.

3. On deposit of aforesaid amount the respondents shall not dispossess the petitioners from the house in question.

14. That, in pursuance to order dated 28.6.2010 petitioner deposited an amount of Rs. 9,03,000/- on 29.6.2010.

15. In the said writ petition, i.e., W.P. No. 7789/2010 one Smt. Ashwini Yadav

sought intervention vide I.A. No. 8907/2010, which was rejected on 4.8.2010. It was held:

The contention of Smt. Ashwini Yadav is that she has lend some amount to the petitioners for repayment of loan to the Bank. There was an agreement in this regard between the petitioners and the intervener. As per agreement, the intervener and the petitioners submitted to the Bank for refund of the amount paid by the intervener to the petitioners, but the bank has refused to return the aforesaid amount because of the pendency of this writ petition. On this ground, it is prayed that the intervention on behalf of Smt. Ashwini Yadav may be allowed.

From the perusal of the application, it is apparent that there is dispute between petitioners and Smt. Ashwini Yadav. This case has no concerned with the dispute between petitioners and Smt. Ashwini Yadav. By accepting the aforesaid intervention, we cannot enlarge the scope of this petition for deciding the dispute between petitioners and Smt. Ashwini Yadav. The application seeking intervention on behalf of Smt. Ashwini Yadav is hereby rejected. She may take recourse of law as is permissible to her for the redressal of her grievance.

The said order, we are informed, is not challenged by said Smt. Ashwini Yadav.

16. Writ Petition No. 7789/2010 was finally disposed of on 16.9.2010 with liberty to the petitioner to avail the remedy of appeal against the order passed by the Recovery Officer, who in the meantime finalized the sale on 10.5.2010 and had issued the certificate of confirmation of sale of immovable property.

17. Petitioner besides raising objections in the execution proceedings also preferred an appeal before Debt Recovery Tribunal. The objections in the execution proceedings were negatived on 23.11.2011 by the Recovery Officer holding:

On perusal of application, Reply and material placed on record, I find that on 186-10 Smt. Savitri Beni Patel herself submitted an affidavit stating that she will handover the vacant possession peacefully by 26-6-10. Her prayer was accepted by the Recovery Officer. Thereafter, she preferred a WP No. 7789/2010 before the Hon''ble High Court of MP at Jabalpur. On the said writ petition, the Hon''ble High Court was pleased to direct the petitioners to deposit Rs. 9,03,000/- by 29.6.10, which shall be subject to the decision of the petition. Hon''ble High Court was further pleased to direct that on deposit of aforesaid amount, the respondents shall not dispossess the petitioners from the house in question. Finally vide order dated 16-9-109 the Hon''ble High Court was pleased to dismiss the petition as withdrawn and was further pleased to make clear that the interim protection granted to the petitioners vide order dtd. 28-6-10 shall remain in force for a period of one month from today.

Considering the facts and submissions of Learned Counsel for the parties I come to the conclusion that the objections raised by the CDs in Para 5 (1) and (2) of application dtd. 16-5-11 cannot be adjudicated by this authority in view of

provisions contained in Sec. 26 (1) of the RDDBFI Act, 1993. So far objections raised in Para 5 (3) is concerned, no application under Rule 60 & 61 of Schedule II of Income Tax Act, 1961 is filed and the Sale Certificate has not been set aside. So far objection No. 5 (4) is concerned, Hon''ble High Court vide order dt. 16-9-10 has been pleased to make clear that the interim protection granted to the petitions vide order dtd. 28-6-10 shall remain in force for a period of one month from 16-9-10.

So far objection No. 5 (5) is concerned, Learned Counsel for CDs has himself submitted that no stay order has been granted in these matters.

Therefore, the application dtd. 16-5-11 raising objection in execution proceedings is dismissed and CD No. 1 and 2 are directed to handover the vacant possession of the property in question to the Auction purchaser peacefully within 03 days failing which Shri S.R. Mohanti, RI is deputed to deliver forceful possession of the property to the Auction Purchaser on 28-11-11 positively. He is also authorized to take police assistance and all other legal steps.

18. Whereas, the appeal was dismissed on 27.2.2012. The Tribunal held the Appeal to be time barred. It held : "There is nothing in the rejoinder lodged by the appellant to substantiate the maintainability of this appeal seeking to set aside the order dtd. 29.3.10 of the recovery Officer by which the property was sold and the order dtd. 10.5.10 by which the sale was confirmed. When the Hon''ble Division Bench of Mumbai High Court has laid down that this Tribunal has no power to condone the delay invoking section 5 of the Limitation Act when the appeal is lodged after the expiry of the period of 30 days specified in the Act, 1993, this Tribunal cannot entertain this appeal since it is barred by limitation."

19. If the appeal was time barred, then, the Tribunal was not required to get into the merit of the matter; however, having gone into the merit the Tribunal was not justified in brushing aside the fact that, in a bipartite order dated 28.6.2010 Division Bench of This Court in W.P. No. 7789/2010 had directed the petitioner to deposit a sum of Rs. 9,03,000/- which was duly deposited on 29.6.2010. Furthermore, the Tribunal ignoring the order dated 4.8.2010 passed in W.P. No. 7789/2010; whereby, one Smt. Ashwini Yadav was prevented from intervening in the matter and was given liberty to take recourse to law, gave unprecedented importance to the version of Smt. Ashwini Yadav. True it is that the petitioner had given an undertaking on 18.6.2006 that she will vacate the premises. The Tribunal, however, overlooked the circumstances under which the petitioner was required to give an undertaking. On the contrary the petitioner having arranged the amount deposited the same with the Bank as per direction in W.P. No. 7789/2010. The Tribunal forgot that a person is entitled to take all such steps which is legally permissible and that is what the petitioner has been pursuing. Tribunal takes the shelter of Rule 63 of Second Schedule of Income Tax Act, 1961 and declined to interfere. Rule 63 stipulates that:

63. Confirmation of sale.- (1) Where no application is made for setting aside the

sale under the foregoing rules or where such an application is made and disallowed by the Tax Recovery Officer, the Tax Recovery Officer shall (if the full amount of the purchase-money has been paid) make an order confirming the sale, and, thereupon, the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application made to set aside the sale on deposit of the amount and penalty and charges, the deposit is made within thirty days from the date of the sale, the Tax Recovery Officer shall make an order setting aside the sale: Provided that no order shall be made unless notice of the application has been given to the person affected thereby.

20. The application referred to are applications under Rule 60, 61 and 62 which respectively provides for:

60. Application to set aside sale of immovable property on deposit.-(1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing-

(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of one and one-fourth per cent. for every month or part of a month calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule. 61. Application to set aside sale of immovable property on the ground of non-service of notice or irregularity.- Where immovable property has been sold in execution of a certificate, such income tax Officer as may be authorised by the Chief Commissioner or Commissioner in this behalf, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale:

Provided that-

(a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or irregularity; and

(b) an application made by a defaulter under this rule shall be disallowed unless

the applicant deposits the amount recoverable from him in the execution of the certificate.

62. At any time within thirty days of the sale, the purchaser may apply to the Tax Recovery Officer to set aside the sale on the ground that the defaulter had no saleable interest in the property sold.

21. True it is that the order dated 28.6.2010 passed in W.P. No. 7789/2010 was not strictly in consonance with Rule 60 of Second Schedule of Act, 1961. However, Section 29 of 1993 Act stipulates "29. Application of certain provisions of income tax Act.- The provisions of the Second and Third Schedules to the income tax Act, 1961 (43 of 1961), and the income tax (Certificate Proceedings) Rules, 1961, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of the income tax;

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act."

22. The expression "as far as possible" which appear in Section 29 makes the provision of second schedule directory and not mandatory.

23. In Iridium India Telecom Ltd. v. Motorola Inc. (2005 AIR SCW 138) it is observed:

41. Learned Counsel for the appellant next contends that even clause 37 of the Letters Patent establishing the High Court of Bombay, which empowers the High Court to make rules and orders on its Original Side, is subject to the proviso "that the said High Court shall be guided in making such rules and orders as far as possible, by the provisions of the Code of Civil Procedure.." He contends that the words "as far as possible" are words of limitation and must be interpreted to mean that the rules made should be consistent with the provisions of the CPC as amended from time to time.

42. The Full Bench of the High Court of Calcutta in Manickchand v. Pratabmull AIR 1961 Cal 483 para 13 had occasion to consider this very contention with regard to clause 37 of the Letters Patent and observed:

...The restriction upon the power of the Court as contained in the proviso to cl. 37 of the Letters Patent is that the rules framed under that clause should, "as far as possible" be in conformity with the provisions of the Code of Civil Procedure. This restriction as the phrase "as far as possible" indicates is merely directory. The provisions of the CPC are intended for the purpose of guidance of This Court in framing rules under cl. 37 of the Letters Patent. Consequently, if any rule framed by the High Court under cl. 37 be inconsistent with or confers any additional power besides what is granted by the Code of Civil Procedure, the rule framed under cl. 37 will prevail over the corresponding provisions of the Code of Civil Procedure.

This we think is the correct view to be taken in interpreting the words "as far as possible" in clause 37 of the Letters Patent. This interpretation would be consistent with the amplitude of the words used in Section 129 of the CPC by which the High Court is empowered to make rules "not inconsistent with the Letters Patent to regulate its own procedure in the exercise of its original jurisdiction as it shall think fit.

24. Since there was a substantial compliance by the petitioner by depositing the amount of Rs. 9,03,0007- as directed in W.P. No. 7789/2010, the Recovery Officer and the Tribunal ought to have given the credence, instead of brushing aside the same. We, therefore, observe that the petitioner is justified in raising grievance in respect of procedure adopted by the Recovery Officer as well as Tribunal in respect of dealing with the matter. The recovery officer, in our considered opinion, ought to have objectively considered the objections raised by the petitioner and the fact that the petitioner had deposited the amount with the Bank, because the Bank is more interested in recovering the outstanding amount due rather in the residential accommodation. True it is that the petitioner initially did not adhere to the time schedule as was stipulated in W.P. No. 3770/2010 but subsequently in pursuance to order passed in W.P. No. 7789/2010 she deposited the amount as was directed by order dated 28.6.2010.

25. True it is that the order for depositing the amount was subject to outcome of the petition which subsequently stood disposed of with liberty to the petitioner to avail the alternative remedy; however, the direction for deposit was with an intention to resolve the dispute so that the petitioner could have been burden-free of the outstanding loan amount. Though there is an allegation made by the petitioner against the functioning of the recovery officer as well as the counsel who was representing the Bank and auction purchaser. It is alleged that the Bank and Auction purchaser having connived both were represented by same counsel and that the recovery officer was not ready to give a fair hearing to the petitioner. We are, however, not inclined to get into the said controversy as we observed that the recovery officer as well as the Tribunal failed to consider the entire matter objectively. It is not that the Bank is being put to loss as amount which the auction had fetched was already deposited by the petitioner. Therefore, all possible efforts ought to have been made by the Tribunal and Recovery Officer to have settled the matter even at the stage when the property was subjected to auction for recovery of dues outstanding. It is for all these that we are inclined to interfere with the matter despite of preliminary objection raised on behalf of Bank as well as auction purchaser as to the maintainability of the petition on the ground that the petitioner has an alternative statutory remedy for redressal of her grievances. The alternative remedy in our considered opinion, in the given facts of case would not be efficacious remedy to resolve the nature of controversy which had cropped up as the Tribunals being the creature of law are bound to operate within statutory limits; whereas in the case at hand equity is the feature which when taken into consideration leaves no iota of doubt that the petitioner has been unjustified in respect of settlement of dues.

26. We, therefore, set aside the impugned orders as well as quash the sale certificate issued in favour of auction purchaser.

27. Since we have set aside the auction and the sale certificate issued thereon, the auction purchaser would be entitled for refund of entire amount deposited with the Bank along with interest. The interest part would be borne by the petitioner. Furthermore, as per memo dated 5.7.2012 filed by respondent Bank, the petitioner would also be liable to pay the amount of Rs. 2,38,361/-. Thus, in case the petitioner within a period of 60 days pays the amount of Rs. 2,38,361/- + Rs. 96,880/- (being the interest payable to auction purchaser as on 4.7.2012), the respondent Bank and the Auction Purchaser shall return the documents of title to petitioner. It is made clear that no further extension would be granted to the petitioner and in case any deviancy is shown by the petitioner in respect of repayment to the respondent Bank, as directed herein-above, the order of sale in favour of auction purchaser shall revive and the auction purchaser would be under no obligation to return the document of title and the respondent Bank would be at liberty to recover the remaining outstanding in accordance with law.

28. That, in the appellate order, we have noted certain disturbing factors. The Tribunal has recorded a finding in respect of missing record and has attributed the same to the petitioner and has directed for an investigation by the C.B.I. This was despite of the fact that Head of Branch, C.B.I./A.C.B vide its letter dated 25.11.2011 has informed the Tribunal that the missing of file is a simple case of theft which comes within the jurisdiction of local police. We are apprised of the decision of Supreme Court in State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, wherein it is observed by their Lordships:

70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

29. In the case at hand as apparent from the order passed by the Tribunal that it is from the office of Tribunal that the file is said to be missing. The same is a case of simple theft and is not of an exceptional nature as would warrant an investigation by C.B.I. Therefore, direction to that effect is also hereby quashed. The Tribunal if so advised would be at liberty to move local police in the matter and also to take disciplinary action against the employees found to be involved in the matter. The petition is allowed in the above terms.