

(2000) 09 MAD CK 0069

In the Madras High Court

Case No : C.S. No. 8 of 2000 and Original Application No. 20 of 2000

Shanthi Vihar and Others

APPELLANT

Vs

Syndicate Bank

RESPONDENT

Date of Decision : 06-09-2000

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 18

Citation : (2000) 09 MAD CK 0069

Hon'ble Judges : A. Ramamurthi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A. Ramamurthi, J.—Application filed by the applicants/plaintiffs under Order XIV, Rule 8 of the original side rules read with Order 39, Rules 1 and 2 of the Civil Procedure Code, 1908, to grant interim injunction restraining the respondent and their men from bringing the property mentioned in the schedule to the judge's summons to sale pursuant to the recovery certificate obtained in T. A. No. 210 of 1997, pending disposal of the suit.

2. The case in brief is as follows : The first applicant is carrying on hotel business and enjoying credit facilities with the respondent. The first applicant offered security of the property bearing door No. 140, Royapettah High Road, Luz, Chennai-4 for the amounts advanced by the bank. The said property originally belonged to the father of the third applicant and the uncle of the second applicant who created equitable mortgage by deposit of title deeds. There was default in repayment of the amount due to the respondent-bank and the bank filed C. S. No. 752 of 1993, on the file of this court for recovery of the amount. After the constitution of the Debt Recovery Tribunal the suit was transferred to the Tribunal and renumbered as T. A. No. 210 of 1997. His father died on June 7, 1997, and necessary application was taken out by the respondent to implead his legal heirs. Individual notice was not served on the legal heirs but publication was effected. The legal heirs were never put on notice which resulted in ex parte

decree being passed against the firm and its partners and the legal heirs of the late J. Sudarshanlal Gupta on April 28, 1998. On May 9, 1981, as against the payment of Rs. 3 lakhs, a portion of the property mortgaged in favour of the bank having an extent of 3 grounds and 2,361 sq. ft. was, released by the bank. By letter dated May 9, 1981, the respondent-bank released an extent of 3,000 sq. ft. from the property mortgaged. The first applicant had credit facilities with the respondent-bank at the Royapettah and Nandanam branches. Out of the properties given as security two portions of the property were released in 1981. The property described in the schedule was given as security for the dues of Atomax Exports Pvt. Ltd., in which his father was one of the directors. An offer for settlement was made by the father and the respondent-bank by letter dated November 10, 1987, accepted the offer and agreed to release the property consisting of ground and first floor portion together with its proportionate undivided share of land on payment of Rs. 150 per sq. ft. for the ground floor and Rs. 125 per sq. ft. for the first floor. The respondent further agreed to retain the constructed area in the basement with the undivided interest over the land. As per the terms of acceptance, the father was required to execute an agreement and accordingly the father executed an agreement on November 10, 1987, whereby the respondent-bank agreed to release its charge over the constructed portions of the ground floor and first floor aggregating to 30,000 sq. ft. in piecemeal against proportionate payment of amounts. Pursuant to the agreement, 29 agreements have been entered into for sale of the constructed area in the ground floor and 21 agreements have been entered into for sale of constructed area in the first floor. A sum of Rs. 2,44,200 was paid to the bank and the balance of sale consideration has been set apart for payment to the respondent-bank.

3. The applicants called upon the respondent-bank to release a portion of the property on payment of the proportionate value of the property. The consideration realised out of sale of the property has been retained by his father since the bank has not co-operated and failed to give clearance to the purchasers. Suppressing the agreement dated November 10, 1987, the bank obtained recovery certificate from the Debt Recovery Tribunal in respect of portions of property already released by them and filed execution proceedings. The agreement dated November 10, 1987, has been acted upon by both the parties. The Debt Recovery Tribunal has no jurisdiction to entertain a claim application from any person other than the financial institution. The applicants issued a notice on July 28, 1999, and the respondent acknowledged the same. No action has been taken to rectify the illegality. Now the respondent is proceeding with the execution against the entire property. The recovery certificate issued by the Tribunal is null and void and it has been obtained fraudulently by suppressing the material facts. Hence this application.

4. The respondent filed a counter affidavit and denied the various averments. The suit itself is not maintainable in law and barred u/s 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The applicants have

suppressed the material facts and have not come to the court with clean hands. The applicants filed W. P. No. 3575 of 1999, and sought for interim orders to stay the proceedings before the Debt Recovery Tribunal. A conditional order was passed on March 8, 1999, directing them to pay one-third of the amount due. They have failed and neglected to comply with the condition. They have also filed I. A. No. 620 of 1999, before the Debt Recovery Tribunal for setting aside the order dated April 28, 1998, and the same was also dismissed on December 21, 1999. The respondent-bank filed an appeal regarding the rate of interest awarded by the Debt Recovery Tribunal and the appeal was also disposed of on January 13, 2000, by revising the rate of interest. The first applicant is a defunct firm and its assets and liabilities were taken over by Shanti Vihar Hotel Pvt. Ltd., the 6th defendant in the suit. The applicants deliberately made false allegations. Only 3,000 sq. ft. was released and not 3 grounds and 2,361 sq. ft. The late J. Sudharshanlal Gupta promised and undertook to settle all the dues of his group borrowings but failed and neglected to settle the same as promised. Instead he dragged on and contested the suits filed by the respondent-bank. The suit against Atomos Exports P. Ltd. was decreed after a long-drawn trial. The applicants are delaying recovery by various tactics such as writ petition and applications. The Sampath and Co. suit was transferred to the city civil court from this court. A sum of Rs. 2,44,200 was paid specifically towards the dues of Sam-path and Co. and has nothing to do with dues in T. A. No. 210 of 1987. No reliance was placed on the alleged agreement dated November 10, 1987 signed by the late J. Sudharshanlal Gupta as he failed and neglected to perform the promises and undertakings given by him. While the late Gupta developed and sold the properties, he failed to make the payments as undertaken by him. As such the applicants are estopped from placing any reliance on the said agreement. The alleged agreements entered into with the third parties and the conveyance are not valid and binding on the bank. They have now filed the suit with mala fide intention as the Tribunal had already issued direction for issue of recovery certificate. The applicants could have stated all that they have raised in the suit before the Tribunal as their defence. The notice dated July 28, 1999, was duly replied and hence the application is liable to be dismissed.

5. The applicants/plaintiffs filed a reply affidavit denying the various allegations in the counter affidavit. There are no mala fides on their part to file the suit. The writ petition was filed challenging certain provisions in the Recovery of Debts Due to Banks and Financial Institutions Act. Since the condition imposed was onerous and therefore it could not be complied with. For impleading only they stated no objection before the Tribunal. The bank did not keep up its commitments and forced his father to go to court. The dues of Shanti Vihar, Atomos Exports Pvt. Ltd. and Sampath and Co. were all clubbed together and in accordance with the terms of the compromise entered into with the bank and payments were made. The property was developed and the basement portion was given as security for the dues of Atomos Exports Pvt. Ltd. and the constructed area was sold to various buyers with an understanding that the sale consideration will be remitted

to the bank and the charge created over the property will be released. Till date the bank has not confirmed the said payment towards the dues of Sampath and Co. In view of the attitude of the bank the purchasers of the other undivided share of land did not come forward to make the payment and take a risk. Even though the remaining portions were sold to various buyers, the amount is retained by them with an understanding that the same will be remitted into the bank as and when the bank gives clearance for sale of the property in their favour. The respective buyers have occupied their respective portions after obtaining the sale deeds. The property tax is also assessed in their names. The balance of convenience is only in favour of the applicants as they are ready to abide by the terms of the settlement already entered into. The damages that will be caused by reason of not granting injunction cannot be compensated in terms of money. Heard learned counsel for the parties.

6. The points that arise for consideration are :

1. Whether the applicants have got prima facie case and the balance of convenience is in their favour ? To what relief ?

Points : The applicants/plaintiffs filed the application to grant interim injunction restraining the respondents and their men from bringing the property mentioned in the schedule for sale pursuant to the recovery certificate granted in T. A. No. 210 of 1997, pending disposal of the suit. The first applicant offered security of the property bearing door No. 140, Royapettah High Road, Luz, Chennai, for the amount advanced by the bank. There was default in repayment of the amount and for which, the respondent-bank filed a suit in C. S. No. 752 of 1993, on the file of this court for recovery of the amount. After the constitution of the Debt Recovery Tribunal, the suit was transferred to the Tribunal and renumbered as T. A. No. 210 of 1997. By letter dated May 9, 1981, the respondent-bank released an extent of 3 grounds and 2,361 sq. ft. from the property mortgaged. The first applicant had also credit facility with the respondent-bank at the Royapettah and Nandanam branches. An offer for settlement was made by the father of applicants Nos. 2 and 3 and the respondent-bank by letter dated November 10, 1987, whereby the bank accepted the offer and agreed to release the property consisting of ground and first floor portion together with its proportionate undivided share of land on payment of Rs. 150 per sq. ft. for the ground floor and Rs. 125 per sq. ft. for the first floor. The respondent also agreed to retain the constructed area in the basement with the undivided interest over the land. The father of the applicants also executed an agreement on November 10, 1987, whereby the respondent-bank agreed to release its charge over the constructed portions in the two floors aggregating to 30,000 sq. ft. in piecemeal against proportionate payment of amounts. Pursuant to the agreement, 29 agreements have been entered into for sale of the constructed area in the ground floor and 21 agreements have been entered into for sale of the constructed area on the first floor.

7. Learned senior counsel for the applicants stated that they called upon the

bank to release a portion of the property on payment of the proportionate value of the property. The bank has not co-operated and has failed to give clearance to the purchasers. The bank also suppressed the agreement dated November 10, 1987, and obtained a decree in the Recovery Tribunal and also later obtained recovery certificate from the Tribunal in respect of the portions of property already released by them and filed execution proceedings. Since the agreement dated November 10, 1987, has been acted upon by both the parties, the Tribunal has no jurisdiction to entertain a claim application from any person other than the financial institution and in fact, the applicants sent a notice dated July 28, 1999, and the bank has not chosen to send any reply. Under the circumstance, the bank is not entitled to bring the property for sale based upon the recovery certificate issued by the Tribunal as it was obtained fraudulently by suppressing the material facts.

8. Per contra, learned counsel for the respondent-bank mainly contended that the suit as well as the present application are barred u/s 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the Act"). There was no suppression on the part of the bank and the applicants already filed Writ Petition No. 3575 of 1999, and the conditional order passed by this court, directing the applicants to deposit one-third of the amount has not been complied with. Furthermore, the applicants also filed I. A. No. 620 of 1999, before the Debt Recovery Tribunal for setting aside the order dated April 28, 1998, and it was also dismissed on December 21, 1999. Only 3,000 sq. ft. was released and not 3 grounds and 2,361 sq. ft. The agreement dated November 10, 1987, is riot a concluded contract and the terms and conditions have not been complied with in a period of three months as mentioned in the document. On the other hand, the father of the applicants the late Gupta developed and sold the property, but failed to make the payment as undertaken by him. Furthermore, the sale of the property entered into by the applicants with the third parties is not valid and binding on the bank and the notice dated July 28, 1999, has been duly replied.

9. Learned senior counsel for the applicants mainly contended that the respondent-bank had obtained only an ex parte decree in T. A. No. 210 of 1997, and they have suppressed to place the agreement dated November 10, 1987. Although the bank agreed to release the property under mortgage consisting of ground and first floor on payment of Rs. 150 per sq. ft. for the ground floor and Rs. 125 per sq. ft. for the first floor, the bank agreed to release its charge over the constructed portions of 30,000 sq. ft. on proportionate portion of sale of flats to the third parties. On the strength of the said settlement, Sudharshanlal Gupta had executed sale deeds of undivided shares of land and also delivered possession of flats to various allottees in fact, the said Gupta paid a sum of Rs. 2,44,200 towards the claim to the bank but the bank receiving the same, refused to release the proportionate share and because of this, the flat owners refused to make the payment unless and until the clearance is given by the bank to them.

10. Learned senior counsel further stated that the amount is now available with the purchasers and they are prepared to deposit the same if the bank agrees to receive the same and release the properties. The applicants have established that they have got a prima facie case and the balance of convenience is in their favour. No doubt, it is seen from one of the documents that the bank had released about 3,000 sq. ft. of land in the said property. The applicants also offered to pay in full and final settlement up to Rs. 75 lakhs, but the same is not agreeable by the respondent-bank and they claimed more amount. Because of this, learned senior counsel for the applicants contended that the bank only refused to honour the undertaking already made by them on November 10, 1987, and suppressing the same, obtained a decree and, as such, the only course open to the bank authorities is to receive the money from the hands of the third parties and they are not entitled to bring the properties for sale.

11. Learned counsel for the respondent mainly contended that the agreement dated November 10, 1987, is not a concluded contract. The applicants had to fulfil certain prerequisites as stipulated therein and none of the terms of the memorandum of understanding was acted upon by the applicants. The very first clause in the memorandum of understanding itself was not acted upon. Clauses 5 and 6 of the memorandum of understanding would envisage release of 15,000 sq. ft. only piecemeal as against proportionate payments to the respondent from and out of the sale proceedings, but it was not done. Till date, only a sum of Rs. 2.44 lakhs has been paid. Clause 3 also contemplates that the late Gupta would pay a sum in respect of the liabilities of the Shanti Vihar Group at the Royapettah and Nandanam branches within three months and this has also been not fulfilled.

12. It, is, therefore, evidently clear the memorandum of understanding" dated November 10, 1987, appears to be an unilateral offer which was not acted upon in full. In the circumstance, it is not proper on the part of the applicants to take shelter under the agreement dated November 10, 1987, and compel the bank to receive a particular amount when evidently the breach has been committed by the applicants. The applicants have been seeking time for payment under one pretext or the other and in fact, they have alienated substantial property to third parties and they have not chosen to obtain any consent from the respondent-bank to alienate the properties. Now, it is too late for the applicants to challenge the decree passed by the Tribunal, In fact, the applicants filed a petition before the Debt Recovery Tribunal to set aside the ex parte decree and it was dismissed. There is nothing to show that they have preferred any appeal and under the circumstance, I am of the view that the decree passed by the Tribunal is final, conclusive and binding on the parties. If really the agreement dated November 10, 1987, has been agreed upon by the bank also and they have failed to give effect to the document, nothing prevented the applicants to put forth the said agreement before the Tribunal and contest the case. When the decree has been obtained by the bank and the Tribunal had also issued the recovery certificate, I am of the view that the applicants have no prima facie case. The balance of convenience is also not in favour of the applicants because they have already

alienated the properties and they have failed to deposit the amounts to the credit of the loan at an earliest point of time. Having failed in their attempt to set aside the ex parte decree passed by the Tribunal and as the bank had been issued with the recovery certificate, now the applicants have come forward with a fresh suit to get a declaration that the recovery certificate issued by the Tribunal is invalid and inoperative. In view of Section 18 of the Act, the present application itself is not maintainable under law. Whatever defence is open to the applicants has to be agitated before the Tribunal when it has been specifically constituted to decide the dispute between the parties. Simply because an extent of 3,000 sq. ft. was released at an earlier point of time, this does not mean whatever terms and conditions put forward by the applicants have to be accepted by the bank. It is admitted that the applicants filed Writ Petition No. 3575 of 1999, and sought interim orders to stay the proceedings before the Tribunal and the conditional order passed on March 8, 1999, directing them to pay one-third of the amount due has not been complied with and the aforesaid circumstances only indicate that the only aim of the applicants is to protract the proceeding's without paying money to the bank. Considering the fact that the Tribunal had issued the recovery certificate, the bank is normally entitled to execute the same and it is not open to this court to interfere in the same and, as such, the balance of convenience is also only in favour of the respondent.

13. A perusal of the documents filed on both the sides clearly establishes that the agreement dated November 10, 1987, has not been acted upon by the parties and there was more of breach than of compliance. In one of the communications, the applicants themselves have communicated to the bank that they are prepared to deposit Rs. 125 lakhs towards the full settlement of the loan account and called upon the bank to give a clearance relating to the charged properties. Now, learned senior counsel for the applicants would state that they are prepared to pay only Rs. 75 lakhs. It is seen from the document dated October 8, 1996, wherein it is stated as follows :

"After taking into consideration all the aspects, I now propose to pay Rs. 125 lakhs to settle the entire dues of my group of companies at Royapettah, Nandanam and main branch. Further, I propose to pay the entire sum within five months from the date of receipt of bank's approval for my above proposal ; because I have to obtain Income Tax clearance for the sale".

14. In spite of this, there is no material to show that the applicants have paid Rs. 125 lakhs in the bank. This is one more circumstance to show that there was an offer on the part of the applicants to pay the amount, but it is not implemented in letter and spirit.

15. The recovery certificate issued by the Tribunal is dated January 25, 1999. Notice was sent by the Recovery Officer of the Tribunal on February 1, 1999. The order of attachment by the Recovery Officer is dated March 2, 1999. Only thereafter, the applicants have sent a notice dated July 28, 1999. The present suit has been filed by the applicants for a declaration that the mortgage decree

obtained by the bank in T. A. No. 210 of 1997, on the file of the Debt Recovery Tribunal is null and void and not binding on the plaintiffs as it has been obtained fraudulently by suppression of material facts and also for permanent injunction. When the applicants have failed in their attempt, to get the ex parte decree set aside before the Tribunal, the applicants are not entitled to file this application before this court. The only remedy available to the applicants if aggrieved, is to prefer an appeal against the orders passed by the Tribunal and not by a separate proceeding before this court.

16. Learned counsel for the respondent-bank also relied on Allahabad Bank v. Canara Bank : (2003)11SCC796 , wherein it is observed that u/s 18 of the Act, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal. This decision is applicable to the case on hand on all fours in the light of the aforesaid discussion and position of law, I am of the view that the applicants have no prima facie case and the balance of convenience is not in their favour. For the reasons stated above, the application fails and is dismissed.