
(2006) 08 MP CK 0054
In the Madhya Pradesh High Court

Shayama Devi Chourasia

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 30-08-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 20, 26, 27, 29

Citation : AIR 2007 MP 51

Hon'ble Judges : A.K. Patnaik, C.J;S.C. Sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.K. Patnaik, C.J.—This is an appeal under the Madhya Pradesh Uchcha Nayayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, against the judgment and order dated 13-3-2006 passed by the learned single Judge in Writ Petition No. 15/2006.

2. The relevant facts briefly are that the respondent No. 1-State Bank of India, Main Branch, Katni (MP) filed O.A. No. 76/2000 u/s 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short "the Act") before the Debts Recovery Tribunal, Jabalpur, (for short "the Tribunal"), for recovery of Rs. 19,48,290.72 paise against the borrower as well as against the guarantors Late Gourishankar Chourasiya, the husband of the appellant was one of the guarantors and had mortgaged his house property at Jabalpur and was impleaded as a respondent in the said O.A. before the Tribunal. By judgment dated 21-11 -2000, the Tribunal ordered for recovery of the said amount with interest and for sale of mortgaged property. Accordingly, a certificate was issued to the Recovery Officer of the Tribunal and the Recovery Officer put the mortgaged property of late Gourishankar Chourasiya to auction in April 2003, but the mortgaged property could not be sold in the auction. Late Gourishankar Chourasiya died on 4-9-2003. Thereafter, a fresh auction of the mortgaged

property took place on 31-10-2003 and the mortgaged property was purchased by Sunil Jain and Smt. Navnita Jain (respondent No. 2) for Rs. 3,75,000/-. The appellant filed objection to the said sale before the Recovery Officer contending inter alia that no notice was issued to the legal representatives of late Gourishanker Chourasia nor were they brought on record and that no proclamation was made in accordance with Rule 53 of the Second Schedule of the Income Tax Act, 1961, and that the benefit of one time settlement scheme as formulated by the Reserve Bank of India (for short "the RBI") was not extended to the borrower. The respondent No. 1 filed its reply to the said objection of the appellant. The Recovery Officer of the Tribunal rejected the objection filed by the appellant by order dated 8-10-2004 of the Recovery Officer. The appellant challenged the said order dated 8-10-2004 before the Tribunal by filing an appeal (Appeal No. 26/2004) u/s 30 of the Act and the Tribunal initially stayed the operation of the said order dated 8-10-2004. but after hearing the parties, dismissed the appeal by order dated 18-2-2005. The appellant then filed an appeal against the order dated 18-2-2005 u/s 20 of the Act before the Debts Recovery Appellate Tribunal, Allahabad (for short "the Appellate Tribunal), numbered as Appeal No. S-98/2005 but by order dated 13-12-2005, the Appellate Tribunal dismissed the appeal. The appellant then filed Writ Petition No. 15/2006 before the learned single Judge of this Court against the aforesaid orders of the Recovery Officer, the Tribunal and the Appellate Tribunal. The learned single Judge first passed an interim order on 5-1-2006 but finally dismissed the writ petition by the impugned order dated 13-3-2006.

3. Mr. Satish Agrawal, learned Counsel appearing for the appellant, submitted that the amount sought to be recovered by the respondent No. 1 Bank from the borrower was a Non-Performing Asset (NPA) of the respondent No. 1-Bank and under the RBI Scheme for recovery of NPAs by one time settlement, the respondent No. 1 Bank had made an offer to the borrower to settle the dues sought to be recovered in O.A. No. 76 of 2000 at Rs. 15,84,934.72 paise, out of which 25% was to be deposited at the beginning and the rest 75% was to be deposited within one year and the borrower was required to submit his acceptance to the said offer by 30-4-2003. He submitted that the borrower accepted the said offer of the respondent No. 1 Bank on 17-4-2003 saying that after adjustment of 14.10 lakhs which had already been recovered by sale of a property on 27-8-2001, the borrower was prepared to pay the balance amount of Rs. 1,74,947.72 paise within a period of one year. He submitted that in these circumstances, the respondent No. 1-Bank could not have proceeded with the auction proceedings in respect of the mortgaged property of the appellant and the respondent No. 1 was under an obligation to wait till the expiry of period of one year and only thereafter could have proceeded to auction the mortgaged property of the appellant for recovery of remaining outstanding dues. He submitted that this objection of the appellant was rejected by the Recovery Officer by his order dated 8-10-2004 on the ground that since the borrower had not deposited 25% of the amount of Rs. 15,84,934.72 paise, the benefit of one

time settlement scheme of the RBI could not have been extended to the borrower. He submitted that there was nothing in the offer of the respondent No. 1 Bank dated 28-2-2003 that 25% of the amount of Rs. 15,84,934.72 paise was required to be deposited for availing the benefit of RBI one time settlement scheme. He submitted that this contention was raised before the learned single Judge but in the impugned order the learned single Judge merely held that the order dated 21-11-2000 of the Tribunal in OA No. 76/2000 for recovery of Rs. 19,48,290.72 paise with interest has attained finality and the RBI guidelines for one time settlement of NPA issued on 29-1-2003 have to be read in the context of the clarification issued on 7-10-2003 in the RBI guidelines that one time settlements are not applicable to cases where decree/order has been passed by the Court/Tribunal. He vehemently submitted that the view taken by the learned single Judge in the impugned order is not correct and the borrower should have been given the benefit of one time settlement of the NPA offered by the respondent No. 1 Bank in its letter dated 28-2-2003 and accepted by the borrower on 17-4-2003.

4. Mr. Rajesh Maindiratta, learned Counsel appearing for the respondent No. 1 Bank, on the other hand, submitted that different High Courts as well as the Supreme Court have already held that no relief can be granted by the Court to the borrower on the basis of the guidelines issued by the RBI for one time settlement of the NPA. He cited the decision of the Allahabad High Court reported in *Sardar Prem Singh Vs. Bank of Baroda and Others*, in which it has been held that the High Court under Article 226 of the Constitution of India cannot direct for one time settlement. He also relied on the decision in *Krupa Alloys and Metals v. Chief Manager, State Bank of India, Secunderabad* reported in I (2003) BC 417 in which a learned single Judge of Andhra Pradesh High Court has held that a reading of the guidelines of the RBI would show that the guidelines will only cover cases where Court cases are pending and in case the Banks have obtained decrees, the same have no application. He cited the decision of the Bombay High Court in *Kanwar Vilas Raj Nath v. Syndicate Bank* 2005 (2) DRTC 517 (Bom) in which a Division Bench of the Bombay High Court has taken a similar view. Finally, he cited the decision of the Supreme Court in *X-Calibre Knives (P) Ltd. v. State Bank of India* (2005) 10 SCC 265 in which the appellant claimed relief on the basis of guidelines of the RBI and the Supreme Court took the view that since the Debts Recovery Tribunal has already passed an order on 31-1-2002 determining the sum payable by the appellant and thereafter a recovery certificate has been issued by the Tribunal, no relief can be granted to the appellant beyond what has been granted by the Bank in terms of the revised guidelines issued by the RBI.

5. We have considered the aforesaid submissions of Mr. Satish Agrawal, learned Counsel appearing for the appellant and Mr. Rajesh Maindiratta learned Counsel appearing for respondent No. 1 Bank and we are of the considered opinion that the learned single Judge has taken a correct view in the impugned order that once the Tribunal has passed an order on 21-11-2000 in OA No. 76/2000 for

recovery of Rs. 19,48,290.72 paise along with interest and a recovery certificate was issued to the Recovery Officer for recovery of the said amount, the order dated 21-11-2000 of the Tribunal had become final. u/s 26(1) of the Act, it is not open to the defendant to dispute before the Recovery Officer the correctness of the amount specified in the certificate and u/s 27(4) of the Act, when the amount of the outstanding demands is reduced as a result of an appeal, the Presiding Officer of the Tribunal amends the certificate reducing the amount. Hence, unless the order dated 21-11-2000 of the Tribunal in OA No. 76/2000 for recovery of Rs. 19,48,290.72 paise along with interest was modified by the Appellate Tribunal by a consent decree on the basis of any settlement made between the respondent No. 1 Bank and the borrower in terms of the RBI guidelines for one time settlement and the certificate was amended accordingly, the Recovery Officer had no option but to recover the said amount of Rs. 19,48,290.72 paise along with interest. Thus, the offer dated 28-2-2003 of the respondent No. 1 Bank to the borrower for one time settlement at Rs. 15,84,934.72 paise after the order dated 21-11-2000 of the Tribunal in OA No. 76/2000 for recovery of Rs. 19,48,290.72 paise along with interest had become final and the acceptance thereof by the borrower on 17-4-2003 were misconceived in law.

6. This view has also been taken by the Supreme Court. In *X-Calibre Knives (P) Ltd. (supra)*, the Debts Recovery Tribunal had already passed an order dated 13-1-2002 determining the sum payable by the borrower and had issued a recovery certificate also by the time the matter was taken by for consideration in terms of revised guidelines issued by the RBI or one time settlement and a letter dated 25-2-2003 was issued by the Bank stating that the minimum amount required to be paid towards the settlement and the Supreme Court held that it is apparent that the said letter was issued without being aware of the stage of the proceedings before the Debts Recovery Tribunal and the stand taken by the Bank that the guidelines relating to one time settlement had no application to a case where the decree/order has already been passed by the Tribunal, was correct. In the present case also, the learned single Judge has taken a correct view in the impugned order that the guidelines are not applicable to the cases where already a decree/order has been passed by the Court/Tribunal, as has been stated in Clause (b) of the Circular dated 11-11-2003 of the RBI.

7. Mr. Satish Agrawal next submitted that Section 29 of the Act provides that the provisions of the Second Schedule to the Income Tax Act 1961 shall, as far as possible, apply with necessary modifications as if the said provisions referred to the amount of debt due under the Act instead of to the income tax and that any reference in the provisions of Second Schedule to the "assessee" shall be construed as a reference to the "defendant" under the Act. He argued that the provisions of Second Schedule of the Income Tax Act, 1961, are therefore applicable to recovery proceedings undertaken by the Recovery Officer for recovery of the amount ordered to be recovered from the defendants by the Tribunal. He submitted that the Recovery Officer was required to serve a notice upon the defaulter requiring him to pay the amount specified in the certificate

and only if the defaulter failed to pay the same, steps for recovery of the amount could be taken under the Second Schedule of the Income Tax Act, 1961. He submitted that in this case, although notice was served on late Gourishankar Chourasiya, who was defendant No. 4 in OA No. 76/2000, after the death of late Gourishankar Chourasiya on 4-9-2003, no such notice was served on the legal representatives of late Gourishankar Chourasiya including the appellant nor have the legal representatives of late Gourishankar Chourasiya been brought on record by the Recovery Officer. He referred to the provisions of Rule 53 of Second Schedule to the Income Tax Act 1961, which provides that a proclamation of sale of immovable property shall be drawn up after notice to the defaulter, and shall state the time and place of sale, and shall specify, as fairly and accurately as possible, various matters specified in the said Rule 53. He submitted that no notice was actually served on the legal representatives of late Gourishakar Chourasiya before the proclamation of sale of his property was drawn up. He submitted that before 31-10-2003 two other properties had been sold by the Recovery Officer, the property of another guarantor situated at Katni for Rs. 14.10 lakhs on 27-8-2001 and a property of the borrower for Rs. 6,71,000/- on 28-10-2003 and the aforesaid two amounts should have been adjusted and the proclamation of sale in respect of the property of late Gourishankar Chourasiya should have been settled by the Recovery Officer by an order passed in the order-sheet for the balance amount due to the respondent No. 1 Bank. He submitted that had the appellant been served a notice as required under Rule 53 before the proclamation of sale of the immovable property of late Chourasiya was drawn up, she would have objected to the amount stated in the proclamation for recovery of which sale was ordered. He submitted that the sale of the property of the appellant on 31-10-2003 was liable to be set aside under Rule 61 of the Second Schedule of the Income Tax Act, 1961, on the ground that notice was not served" on the defaulter as required by the Second Schedule of the said Act or on the ground of material irregularity in conducting the sale. He cited the decision of the learned single Judge of the Madras High Court in Jagannathan alias Govindarasu and others Vs. Angamuthu Pillai and others, , in which it has been held that where the sale proclamation was not drawn up by the Court under Order 21, Rule 66 of the CPC 1908, but by the Advocate Commissioner appointed by the Court, the sale itself is nullity and is illegal and is liable to be set aside.

8. In reply, Mr. A. D. Deoras, learned Counsel appearing for the respondent No. 2, submitted that a proclamation of sale in respect of the property of late Gourishankar Chourasiya (defendant No. 4 in OA No. 76/ 2000) was in fact drawn up by the Recovery Officer on 13-2-2003 after "notice to late Gourishankar Chourasiya for a sum of Rs. 22,97,081.45 paise which was found due in O.A. No. 76/2000 as on 22-4-2003. He further submitted that Rule 84 of the Second Schedule of the Income Tax Act, 1961, provides that no certificate shall cease to be in force by reason of the death of the defaulter and Rule 85 of the Second Schedule to the Income Tax Act. 1961 provides that if at any time, after the certificate is drawn up by the Recovery Officer the defaulter dies, the

proceedings under the Schedule may be continued against the legal representatives of the defaulter and the provisions of the Schedule shall apply as if the legal representatives were the defaulters. He submitted that the Second Schedule does not provide for any fresh notice to be served under Rule 53 of the Second Schedule to the Income Tax Act if the defaulter dies after the proclamation is issued. He further submitted that proviso (a) to Rule 61 of the Second Schedule to the Income Tax Act 1961 makes it clear that no sale can be set aside even on the ground of non-service of notice or material irregularity in conducting the sale unless the Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of such non-service or irregularity. He submitted that interpreting a similar provision in Order 21, Rule 90(2) of the Code of Civil Procedure, 1908, the Supreme Court in the case of AIR 2000 3402 (SC) has held that in absence of any pleading by the objector in his objection that on account of such material irregularity in conducting the sale, he was put to substantial injury, it was not open to the executing Court to set aside the auction. He submitted that in the present case, the appellant has not been able to establish that she was put to any substantial injury on account of non-service of notice or material irregularity in conducting the sale, if any. He also cited the decision of the Supreme Court in Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others, in which it has been held that mere substantial injury without material irregularity is not enough and for setting aside the sale, there should be presence of both the elements of irregularity and injury.

9. Mr. Rajesh Maindiratta, learned Counsel appearing for the respondent No. 1 Bank, submitted that proviso (b) to Rule 61 of the Second Schedule to the Income Tax Act 1961 also makes it clear that an application made by a defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in execution of the certificate. He submitted that by the time, the sale of the property of late Gourishankar Chourasiya was conducted on 31-10-2003 only the sale proceeds of the first property of Umarkand Chourasiya, another guarantor, which was sold for Rs. 14,10 lakhs had been deposited with the respondent No. 1- Bank on 31-10-2003 and after adjustment of the said amount of Rs. 14.10 lakhs, an amount of Rs. 11,86,414.20 paise was recoverable as on 31-12-2003 and hence, the respondent No. 1 in its reply to the objection to the sale filed before the Recovery Officer had stated that the said amount of Rs. 11,86,414/- was outstanding with further interest and yet the appellant did not deposit the said amount of Rs. 11,86,414/-. He submitted that the application of the appellant under Rule 61 of the Second Schedule of the Income Tax Act, 1961, was, therefore, rightly disallowed by the Recovery Officer. He submitted that this is one of the grounds on which the appeals of the appellant have been rejected by the Tribunal and the Appellate Tribunal in their respective orders dated 18-2-2005 and 13-12-2005.

10. Rule 61 of the Second Schedule of the Income Tax Act, 1961, which provides for application for setting aside the sale of immovable property on the ground of non-service of notice or irregularity, is quoted herein-below:

Rule 61. Application to set aside sale of immovable property on 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 authorized 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 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 execution of the certificate.

(Emphasis supplied)

11. A reading of the aforesaid Rule 61 of the Second Schedule of the Income Tax Act, 1961, would show that one of the grounds on which an application can be made for setting aside sale of immovable property before the Recovery Officer is that notice was not served on the defaulter to pay the arrears "as required by the Second Schedule". Rule 2 of the Second Schedule of the Income Tax Act, 1961, states that when a certificate has been drawn up by the Tax Recovery Officer for the recovery of arrears under the Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default steps would be taken to realize the amount under the Schedule. It is not the case of the appellant that notice as required by Rule 2 of the Second Schedule of the Income Tax Act, 1961 was not served on late Gourishankar Chourasiya, who was defendant No. 4 in OA No. 76/2000. Late Gourishankar Chourasiya died on 4-9-2003. Rule 84 of the Second Schedule of the Income Tax Act, 1961, provides that no certificate shall cease to be in force by reason of the death of the defaulter and Rule 85 of the Second Schedule provides that if at any time after the certificate is drawn up by the Recovery Officer, the defaulter dies, the proceedings under the Schedule may be continued against the legal representative of the defaulter, and the provisions of the Schedule shall apply as if the legal representative was the defaulter. Mr. Agrawal has not brought to our notice any provision in the Second Schedule of the Income Tax Act, 1961 requiring that after the death of defaulter, a fresh notice is required to be served on the legal representatives of the defaulter to pay the amount sought to be recovered. Thus, this is not a case where notice

was not served on the defaulter to pay the amount "as required by the Second Schedule" and the contention of Mr. Agrawal that the sale is liable to be set aside on the ground of non-service of notice on the defaulter to pay the amount "as required by Second Schedule of the Income Tax Act, 1961", has no merit.

12. A further reading of Rule 61 of the Second Schedule of the Income Tax Act, 1961 would show that the second ground on which an application can be filed before the Recovery Officer to set aside sale of immovable property is that there has been a material irregularity in publishing or conducting the sale. According to Mr. Agrawal, since the Recovery Officer did not serve a notice on the appellant and did not pass any order in the order sheet settling the terms of the proclamation of sale of the property belonging to late Gourishankar Chourasiya after adjusting the amount already deposited towards the sales of the first property and the second property, there has been a material irregularity in conducting the sale. But we find from the records that on 13-2-2003 a proclamation of sale was, in fact, drawn up in Form No. 13 and signed by the Recovery Officer specifying that the property consisting of plot and house constructed on Plot No. 109/5, settlement No. 660 PH No. 25, Khasra No. 170, 171, 172 situated at Lokalyan Grah Nirman Samiti, Madhotal, Jabalpur, admeasuring area 30" x 50" (1500 sq. ft.) would be sold to recover a sum of Rs. 22,97,081.45 paise including the costs and interest and the reserve sale price was indicated in the said proclamation to be Rs. 3,75,000/-. The proclamation of sale was addressed to late Gourishankar Chourasiya who was alive when the said proclamation was made on 13-2-2003. It is not the case of the appellant that before making the said proclamation of sale, notice was not served on late Gourishankar Chourasiya. There is no provision in the Second Schedule of the Income Tax Act 1961 for issuing fresh notice and for making fresh proclamation of sale after the death of the original defaulter. Rule 53 of the Second Schedule of the Income Tax Act, 1961, only requires that a proclamation of sale shall be drawn up by the Recovery Officer and it does not state that a Recovery Officer will pass an order in the order-sheet settling the terms of proclamation as contended by Mr. Agrawal. There is, thus no material irregularity in conducting the sale of the property.

13. Even assuming as contended by Mr. Agrawal that there was non-service of notice on the defaulter to pay the amount as required by the Second Schedule of the Income Tax Act, 1961 or there was material irregularity in conducting the sale, proviso (a) to Rule 61 of the Second Schedule made it clear that no sale shall be set aside on any such ground unless the Recovery Officer was satisfied that the applicant had sustained substantial injury by reason of the non-service or the irregularity. Interpreting a similar provision in Order 21, Rule 90(2) of the CPC 1908, the Supreme Court has held in *Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others*, and *Ram Maurya v. Kailashnath* AIR 2000 SC 3402 (supra) that for the Court to set aside the sale under the said provisions, it must be established that there were both material irregularity and substantial injury. In this case, the appellant has not been able to show that she has suffered any

substantial injury on account of non-service of notice or material irregularity in conducting the sale, if any.

14. Moreover, proviso (b) to Rule 61 of the Second Schedule of the Income Tax Act, 1961, mandates that an application made by a defaulter under the Rule "shall be disallowed" unless the applicant deposits the amount recoverable from him in execution of the certificate. The appellant in her application for setting aside the sale before the Recovery Officer has herself stated that after acceptance of the offer of the respondent No. 1 for one time settlement at Rs. 15,84,934.72 paise, the borrower was required to deposit the balance amount of Rs. 1,74,934.72 paise within a year, but even this meagre amount of Rs. 1,74,914.72 paise was not deposited by the appellant. Hence, the Tribunal and the Appellate Tribunal have rightly held that the application made by the appellant for setting aside the sale had to be disallowed by the Recovery Officer.

15. We do not, therefore, find any merit in this appeal and we accordingly dismiss the same and vacate the interim order passed by this Court on 28-4-2006.