
(2014) 02 AP CK 0132

In the Andhra Pradesh High Court

Case No : Writ Petition No. 3428 of 2014

Smt. K. Leelavathi and Another

APPELLANT

Vs

Debts Recovery Tribunal and Others

RESPONDENT

Date of Decision : 12-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226

DELHI RENT ACT, 1995 — Section 20 29 31(3)

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 13(1)
19 20 25 28

Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 17

Citation : (2014) 4 ALD 208 : (2014) 6 ALT 356

Hon'ble Judges : M. Satyanarayana Murthy, J; Ashutosh Mohunta, J

Bench : Division Bench

Advocate : Challa Ajay Kumar, for the Appellant; B.S. Prasad and Sri Hari Prasad Podina, for the Respondent

Final Decision : Dismissed

Judgement

M. Satyanarayana Murthy, J.—The writ petitioners K. Leevalathi and Mohd. Rafi filed this writ petition challenging the proceedings initiated by the 2nd respondent - Bank under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the DRT Act") to conduct auction proposed to be held on 13-02-2014 by issuing notice under Rule 52(2) of Second Schedule of Income tax Act as arbitrary and illegal. It is alleged in the writ petition that the 1st petitioner purchased 35 cents out of 70 cents in the total area of Acs. 11.46 cents with D. No. 26 of Etukuru Village of Guntur Sub Division in Guntur District from one Shaik Quaisar Khan, W/o. Shaik Ibrahim Khan of Lakshmipuram, Guntur on 25-09-2009 for a total consideration of Rs. 64,00,000/- and since then she is in possession and enjoyment of the property. The 2nd petitioner purchased 35 cents out of 70 cents in D. No. 26 from Shaik Mumtaj Shareef, W/o. Shaik Mahaboob Sharif, resident of Cherukupally Village

and Mandal, Guntur on 04-04-2013 for a sale consideration of Rs. 71,15,000/-.

2. Shaik Quaisar Khan stood as a guarantor to Shaik Mahin, Proprietor of M/s. Rubbin Contton Industry, the 3rd respondent herein who obtained loan from the 2nd respondent - Bank and committed default in payment of debt due to the bank.

3. The 2nd respondent - Bank filed O.A. No. 229 of 2002 on the file of the 1st respondent and obtained a certificate and initiated execution proceedings in R.P. No. 15 of 2007 for recovery of Rs. 1,31,24,777.64 ps and called for tenders by online e-auction scheduled to be conducted on 13-02-2014.

4. The main contention of the writ petitioners is that they are not aware of the factum of securing the debt by the 3rd respondent offering the schedule property to the 2nd respondent - Bank for the loan obtained by him. It is further contended that under the One Time Settlement (OTS) proposal, the debt was settled for Rs. 1,10,00,000/- out of which the 3rd respondent paid a sum of Rs. 82,50,000/-, but failed to pay the balance of amount. When the petitioners approached the 2nd respondent - Bank for payment of the balance amount, the 2nd respondent - Bank insisted payment of Rs. 4,73,64,188.64 ps which is inclusive of certificate amount of Rs. 1,31,24,777.64 plus accrued interest at the rate of 18.25% per annum with quarterly rests which comes to Rs. 3,42,39,411/- from 09-12-2006 to 13-02-2014.

5. One of the contentions of the petitioners is that as per the Reserve Bank of India (RBI) guidelines when the account of the 3rd respondent was declared as Non-Performing Asset (NPA), interest is chargeable only at the rate of 6% per annum but not at 18.25% per annum. Therefore, claim of interest at 18.25% per annum which comes to Rs. 3,42,39,411/- is arbitrary.

6. The petitioners are only bona fide purchasers for a valuable consideration and they are entitled to protect their rights. Therefore, having no other alternative, the petitioners approached this Court seeking indulgence of this Court exercising extraordinary powers of judicial review under Article 226 of the Constitution of India. Hence, prayed to declare that the action of the 2nd respondent - Bank for the proposed sale of the schedule property on 13-02-2014 in pursuance of the orders in R.P. No. 15 of 2007 in O.A. No. 229 of 2002 as illegal and arbitrary.

7. The 2nd respondent - Bank filed counter before admission denying the allegations while admitting the claim made by it and initiation of execution proceedings to recover total amount of Rs. 4,73,64,188.64 ps which is inclusive of certificate amount and subsequent interest accrued thereon and contended that when the auction is likely to be held on 13-02-2014, the petitioners cannot straightaway approach this Court without availing statutory remedy i.e., filing an application before the Debts Recovery Tribunal and that the RBI guidelines regarding charge of interest at 6% per annum is incorrect and that the interest claimed on the amount is as per the rules. Therefore, the writ petition is not maintainable and prayed for dismissal of the writ petition.

8. During the course of arguments, learned counsel for the petitioners mainly contended that the writ petitioners are bona fide purchasers and fairly conceded that on account of urgency, the petitioners approached this Court without exhausting the statutory remedy available under the provisions of the DRT Act and seek indulgence of this Court to pass appropriate orders declaring the proceedings for realization of debt due to the bank in R.P. No. 15 of 2007 as arbitrary.

Per contra, learned counsel for the 2nd respondent - Bank vehemently contended that since the petitioners have approached this Court without exhausting efficacious and alternative adequate remedy available under the DRT Act, this Court cannot exercise its extraordinary power of judicial review as in appeal and on this simple ground, the writ petition is liable to be dismissed. Apart from that, interest is calculated only based on the certificate issued by the Debt Recovery Tribunal in O.A. No. 229 of 2002, but not otherwise. The petitioners purchased the property after obtaining certificate from Debts Recovery Appellate Tribunal and thereby they are not bona fide purchasers for valuable consideration and their rights are only subject to mortgage over the existing property as on the date of their purchase. Therefore, the petitioners are not entitled to claim any protection as bona fide purchasers for valuable consideration and prayed for dismissal of the writ petition.

Considering rival contentions and perusing the material available on record, the points that arise for consideration are as follows:

(1) Whether the writ petition is maintainable under Article 226 of the Constitution of India when alternative and efficacious remedy is available under the DRT Act?

(2) Whether the claim of interest at 18.25% per annum from the date of certificate issued by the Debts Recovery Tribunal is against the RBI guidelines. If so, whether the claim of interest is in accordance with law?

(3) Whether the petitioners are entitled to claim any relief in view of One Time Settlement arrived between the 2nd respondent - Bank and the 3rd respondent and on failure to pay the amount in terms of OTS, the petitioners being the subsequent purchasers are entitled to claim any relief in the writ petition? Point No. 1:

The first and foremost contention raised by the counsel for the 2nd respondent - Bank is that the writ petition is not maintainable when proceedings were taken under Rule 52(2) of Second Schedule of Income Tax Act read with Section 31(3) of the DRT Act, an alternative, effective and efficacious remedy is available. However, the counsel for the writ petitioners fairly conceded that due to lack of time and in view of urgency in the matter, the petitioners approached this Court seeking the relief under Article 226 of the Constitution of India.

9. Admittedly, auction is proposed to be held on 13-02-2014 by issuing notice

under Rule 52(2) of Second Schedule of Income Tax Act in execution of certificate under the DRT Act by e-auction of the schedule property. One of the main contentions of the respondents is that when an effective, efficacious statutory alternative remedy is available to the petitioners by filing a petition before Recovery Officer, the petitioners cannot invoke the jurisdiction of this Court under Article 226 of Constitution of India.

According to Section 29 of the Act of 1993, provisions of Income Tax Act are applicable to the proceedings and it reads as follows:

Section 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 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 to the Income Tax Act:

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. The provisions of 2nd and 3rd Schedules of Income Tax Act and the Income Tax (Certificate Proceedings) Rules, as in force from time to time are made applicable for enquiries in claims made by third parties. At the same time, Section 25 of the Act of 1993 prescribes modes of recovery of debt by the recovery officer on receipt of copy of the certificate under sub-section (7) of Section 19. Section 28 prescribes other modes of recovery by issuance of notice under Form Nos. 16 and 17 and if third party objects to the above recovery proceedings, he can move the recovery officer under the provisions of Income Tax Act and Certificate of Proceedings Rules.

Therefore, the petitioners in this matter, being the third parties to the recovery proceedings, can move the recovery officer under Rule 11 of 2nd Schedule of Income Tax Act and it is useful to refer relevant Clauses of the Rule for better appreciation of facts with reference to law.

Investigation by Tax Recovery Officer:

(1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection:

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise, as the Tax Recovery Officer shall deem fit.

(3).....

(4).....

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil Court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.

In view of the provisions referred above, the third parties, the petitioners herein, who are claiming rights over the property which was attached for recovery of debt under the certificate of recovery and where the recovery officer issued sale-cum-e-auction sale notice calling for "bid forms" online and for fixing date, can file objections to the attachment or sale of the property in execution of certificate of recovery. If any order is passed by the recovery officer under Rule 11 of Schedule-II of Income Tax Act, an appeal would lie u/s 30 of the Act. In the instance case on hand, the petitioners did not file any objections before the recovery officer as contemplated under Rule 11 of Schedule-II of Income Tax Act. Thus, without exhausting the effective, efficacious and alternative statutory remedy provided under the Act, the petitioners directly approached the Court. When an alternative remedy is available, this Court cannot exercise its jurisdiction under Article 226 of Constitution of India.

In *Machine Tools and Accessories (P) Ltd. Vs. The Debts Recovery Appellate Tribunal and Others*, Division Bench of Madras High Court in the similar situation held as follows:

When a remedy u/s 29 of the Act of 1993 read with Rule 11 of 2nd Schedule under Income Tax Act, 1961, which is an alternative and effective remedy to question the auction sale, without exhausting such remedy, it is not open to the petitioner to project the present Writ Petition after a gap of more than 3 years and 3 months from the date of conduct of auction. Thereby, the Writ Petition is not per se maintainable and dismissed the petition.

In a recent judgment of the Apex Court in *Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal*, , it was held as follows:

Non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. It is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy, however, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the

petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. However, when a statutory forum is created by law for redressal of grievances, a Writ Petition should not be entertained ignoring the statutory dispensation. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to invoke the writ jurisdiction when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). Assessee in the instance case neither described the available alternative remedy under the Act as ineffectual and non-efficacious nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. Writ Court accordingly, as held, should not have entertained the Writ Petition.

In view of the principle laid down in the above judgment, if alternative remedy by way of claim before recovery officer is ineffective or non-efficacious, this Court can exercise its power under Article 226 of Constitution of India. Still, the person, who is claiming the property attached or proposed to be sold, can approach the civil Court under Sub-rule (6) of Rule 11 of Schedule-II of Income Tax Act against the order passed by Recovery Officer but without exhausting those remedies, the petitioners approached this Court.

Similar question of availability of alternative remedy under the Act of 1993 came up for consideration before the Allahabad High Court in M/s. Oswal Agencies and another v. Recovery Officer, Debt Recovery Tribunal and others, the Allahabad High Court held as follows:

When a Writ Petition is filed impugning the recovery certificate, since objection that recovery certificate amounted to order within the meaning of Section 13(1) of the Act of 1993 for which an appeal was provided u/s 20 of the Act of 1993 to the appellate tribunal, the petitioner had a statutory alternative remedy, the Writ Petition was not maintainable. The contention of the petitioner was that the amount sought to be recovered was not debt and order of the Debts Recovery Tribunal was illegal.

The Allahabad High Court is of the view that the points raised in the writ petition could be raised before the appellate tribunal also and the petitioner could satisfy the appellate tribunal that since the amount sought to be recovered was not a debt and that it could not be saddled with liability as a condition precedent for entertaining and adjudicating the appeal and finally, the Writ Petition was dismissed.

In view of the principles laid down in the above judgments though not binding but persuaded by those principles and the provisions contained in the Act, we are of firm view that the third party claimants to the recovery proceedings, the

petitioners herein, can file the claim u/s 29 of the Act 1993 read with Rule 11 under Schedule-II of Income Tax Act which is more effective and efficacious remedy. In case the recovery officer did not accept the claim, the claimants can approach the civil Court under Sub-rule (6) of Rule 11 of Schedule-II of Income Tax Act where all claims after making necessary enquiry be decided by the civil Court. Thus, the remedy before the enquiry officer and civil Court are more effective and efficacious than the remedy available under Article 226 of Constitution of India.

Undisputedly, when equally effective and efficacious statutory remedy is available under the Act of 1993, the petitioners are not entitled to claim any relief in a petition filed under Article 226 of Constitution of India. Time and again, the Apex Court held that when alternative remedy in a different forum under the statute is available, without exhausting the statutory remedy, the petitioners cannot invoke the jurisdiction of this Court under Article 226 of Constitution of India. In case the petitioners are affected parties on account of proposed sale, they can file a petition before Recovery Officer of Debts Recovery Tribunal and if any adverse order is passed, they can approach Civil Court or file an appeal u/s 30 of Act 1993, but without exhausting such statutory remedies, the petitioners cannot straightaway approach this Court invoking the extraordinary jurisdiction of this Court under Article 226 of Constitution of India.

In view of aforementioned reasons, this Court cannot exercise its extraordinary power of judicial review under Article 226 of Constitution of India as statutory, effective and efficacious remedy is available to the petitioners. Accordingly, the point is held against the petitioners and in favour of the respondents.

Point No. 2:

One of the contentions raised by the counsel for the petitioners is that as per the RBI guidelines when the loan account of the 3rd respondent is declared as NPA, charging of interest at 18.25% per annum is illegal and arbitrary and at best, interest can be charged only at 6% per annum. All these contentions based on factual aspects and guidelines issued by the Reserve Bank of India cannot be looked into while exercising power under Article 226 of the Constitution of India. Even otherwise, in a judgment in *Oriental Bank of Commerce Vs. Sunder Lal Jain and Another*, , the Supreme Court held as follows:

6. A perusal of the aforesaid revised guidelines issued by the Reserve Bank of India on January 29, 2003 for compromise settlement of chronic Non-Performing Assets (NPAs) of public sector banks will show that the same will be applicable and will cover NPAs classified as sub-standard as on 31st March, 2000 which have subsequently become doubtful or loss. The revised guidelines have no application where the NPAs have not been classified as sub-standard as on 31st March, 2000. It is not in dispute that the account of the respondents was a performing account between 1-4-2000 and 31-2-2001. According to the records of the bank, the account was consigned to Protest Bill Account on 15-10-2001

and was declared as NPA as per prudential norms of RBI on 31-2-2001. The respondents contested the case before the DRT and did not admit their liability. No such plea was raised that their account had become NPA as on 31-3-2000 before DRT. Therefore, the revised guidelines issued by Reserve Bank of India on January 29, 2003 for compromise settlement of chronic Non-Performing Assets (NPAs) of public sector banks were not at all applicable to the facts and circumstances of the case and no direction could be issued to declare the respondents account as NPA from 31st March, 2000. The guidelines further provide that in case where borrowers are unable to pay the entire amount in lump sum, at least 25% of the amount of settlement should be paid up-front and the balance amount of 75% should be recovered in instalments within a period of one year together with interest. The High Court, in the impugned order, has directed that the amount should be recovered by the appellant bank in quarterly instalments over a period of two years. This is again contrary to the revised guidelines, which provide a period of one year only for recovery of the entire amount.

9. These very principles have been adopted in our country. In *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others*, , after referring to the earlier decisions in *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, *Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College*, and *Dr. Umakant Saran Vs. State of Bihar and Others*, this Court observed as follows in paragraph 15 of the reports:

..... There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate Tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance..... In the instant case, it has not been shown by respondent No. 1 that there is any statute or rule having the force of law which casts a duty on respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that respondent No. 1 was not entitled to apply for grant of a writ of mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same.

10. Therefore, in order that a writ of mandamus may be issued, there must be a legal right with the party asking for the writ to compel the performance of some statutory duty cast upon the authorities. The respondents have not been able to show that there is any statute or rule having the force of law which casts a duty on the appellant bank to declare their account as NPA from 31st March, 2000 and apply R.B.I. guidelines to their case.

10. The High Court, therefore, erred in issuing a writ of mandamus directing the appellant bank to declare the respondents' account as NPA from 31st March, 2000 and to apply the RBI Guidelines to their case and communicate the outstanding which shall be recoverable by quarterly instalments over a period of two years. The later part of the order passed by the High Court wherein a direction has been issued to stay the recovery proceedings and the recovery certificate issued against the respondents has been cancelled is also wholly illegal as the decree passed by the DRT had attained finality and proceedings for execution of decree could not be stayed in an independent writ petition when the respondents had not chosen to assail the decree by filing an appeal, which is a statutory remedy provided u/s 20 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

In a petition filed under Article 226 of the Constitution of India for issue of mandamus seeking a direction to the bank to declare their account as NPA and to apply revised guidelines issued by the Reserve Bank of India to their case, since the said guidelines are purely executive instructions having no statutory force in creating any right, issuance of mandamus by the High Court directing the bank to declare the respondents account as NPA and to apply the said RBI guidelines is not proper.

In the same judgment, the Supreme Court further held that a decree for recoverable amount passed against the respondent borrower by Debts Recovery Tribunal which attained finality could not be stayed in an independent writ petition when the respondents had not chosen to assail the decree by filing an appeal availing the statutory remedy. The present facts of the case are squarely covered by the judgment of the Supreme Court. Applying the principle laid down in the above judgment to the present case, the RBI guidelines to charge 6% interest is only an executive instruction having no statutory force and apart from that in the certificate issued by Debts Recovery Appellate Tribunal interest at 18.25% per annum was awarded. The judicial order is binding, whereas the executive instructions without any statutory force is only instructive in nature. The Courts cannot compel the banks to charge interest at 6% per annum. In any view of the matter, it is a question to be decided by the appellate tribunal in an appeal filed against the order of the tribunal u/s 20 of the DRT Act and all these aspects cannot be looked into in a petition filed under Article 226 of the Constitution of India.

In view of the principles laid down by the apex Court, the writ petition is not maintainable. Therefore point No. 2 is also held against the petitioners and in favour of the 2nd respondent - Bank.

Point No. 3:

11. The contention raised by the petitioners is that that the petitioners have already paid Rs. 82,50,000/- in terms of OTS and the balance amount is meager. In such a case, the entire property cannot be sold in auction. But, this contention

would not stand to any legal reasoning in view of the principle laid down by the Supreme Court in Union Bank of India and Another Vs. Panchanan Subudhi wherein the Supreme Court held that when the borrower failed to abide by the terms of OTS, there was no justification for the High Court to entertain the writ petition and that too by ignoring the fact that statutory alternative remedy is available to the borrower u/s 17 of the SARFAESI Act and set aside the order passed by the High Court.

12. Here also, according to the allegations made in the affidavit annexed to the writ petition, OTS was arrived and out of the settled amount Rs. 82,50,000/- was already deposited and the balance is only meager amount. The allegation itself indicates that the 3rd respondent - borrower violated the terms and conditions of OTS and in such case, writ petition is not maintainable under Article 226 of the Constitution of India. Hence on this count also, the writ petition is not maintainable. This point is also held against the petitioners and in favour of the 2nd respondent - Bank.

13. The main endeavour of the counsel for the petitioners is to convince this Court that the petitioners are only bona fide purchasers for a valuable consideration and they are entitled to protection of the property purchased by them. No doubt, the petitioners are purchasers of schedule property under two different sale deeds dated 25-09-2009 and 04-04-2013 respectively referred to in the petition. By the date of purchase, O.A. was filed before the Debts Recovery Tribunal and certificate for recovery of debt was issued by the Debts Recovery Tribunal. When the property was purchased subsequent to the mortgage created in favour of the 2nd respondent by the vendors of the petitioners, the purchase is always subject to charge over the property i.e., mortgage and they are not entitled to any protection though they are bona fide purchasers for a valuable consideration. Therefore, the petitioners are not entitled to any indulgence of this Court by exercising extraordinary jurisdiction under Article 226 of the Constitution of India in view of the peculiar facts and circumstances of the case.

14. In view of our foregoing discussion, the writ petition is devoid of merits and deserves to be dismissed. In the result, the writ petition is dismissed. Miscellaneous petitions, if any, pending consideration in the writ petition shall stand closed. No order as to costs.