(2018) 03 KL CK 0108

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 957 Of 2018

Sosamma John	APPELLANT
Vs	
Thrissur Co-Operative Agricultural & Rural	RESPONDENT

Date of Decision : 05-03-2018

Acts Referred:

- Kerala State Co-Operative Agricultural Development Banks Act, 1984 — Section 8, 9, 10, 12, 19, 19(2)(b), 20, 20(1), 23
- Kerala State Co-operative Agricultural and Rural Development Banks Rules, 1986 — Rule 8, 8(c), 8(c)(iv), 8(e)(iv), 11, 11(1)
- Code Of Civil Procedure, 1908 — Order 21 Rule 66(2), Order 21 Rule 64, Order 21 Rule 66
- Constitution Of India, 1950 — Article 226

Citation : (2018) 03 KL CK 0108

Hon'ble Judges : Anil K.Narendran, J

Bench : Single Bench

Advocate : Lindons C.Davis, E.U.Dhanya

Judgement

1. The petitioner, who obtained a loan from the 1st respondent Bank, has approached this Court in this writ petition under Article 226 of the Constitution of India, seeking a writ of certiorari to quash Exts.P1 and P2 notices dated 01.11.2017 and 25.01.2018 respectively, and seeking a writ of mandamus commanding the respondents to grant four months' time to sell a part of the mortgaged property for discharging the amount due to the 1st respondent Bank and also an order directing the 3rd respondent Sale Officer not to continue with the proceedings to sell the property till then.

2. On 10.01.2018, when this writ petition came up for admission, this Court issued urgent notice on admission by special messenger to respondents 1 to 3, returnable on 17.01.2018. On that day, the learned counsel for the 1st respondent Bank submitted that the total overdues as on that date comes to Rs.5,90,000/- and that, if the petitioner is prepared to clear the said amount within one week, the 1st respondent Bank is prepared to regularise the loan

account. Learned counsel for the petitioner sought time to get instructions as to whether a part of the mortgaged property can be sold for realising the loan amount outstanding and accordingly the matter was adjourned to 22.01.2018.

3. On 22.01.2018, when this writ petition came up for consideration, the learned counsel for the 1st respondent Bank sought time to file statement. This Court has ordered that, confirmation of the sale scheduled to be held on 25.01.2018, in terms of Ext.P2 sale notice, shall be deferred for a period of 10 days. On 29.01.2018, when this writ petition came up for further consideration, it was submitted by the learned counsel for the 1st respondent Bank that a statement is being filed on that day. The learned counsel submitted further that no sale was conducted on 25.01.2018 in terms of Ext.P2 sale notice. The said submission was recorded. In view of the said statement made by the learned counsel for the 1st respondent Bank, the interim order dated 22.01.2018, whereby confirmation of the sale scheduled to be held on 25.01.2018 in terms of Ext.P2 sale notice was ordered to be deferred for a period of 10 days, was not extended further.

4. On 09.02.2018, when this writ petition came up for consideration, it was submitted by the learned counsel for the petitioner that sale was conducted on 01.02.2018 and in the absence of bidders, the 1st respondent Bank purchased the property for Rs.18,04,000/-. Learned counsel for the petitioner sought time to file reply affidavit to the statement filed by the 1st respondent Bank. By the order dated 09.02.2018, the learned counsel for the 1st respondent Bank was directed to make available for the perusal of this Court the entire files relating to the sale conducted on 01.02.2018.

5. On 16.02.2018, when this writ petition came up for further consideration, the learned counsel for the 1st respondent produced the file relating to the sale conducted by the 3rd respondent Sale Officer on 01.02.2018. By the order dated 16.02.2018, the Registrar (Judicial) was directed to retain the original file handed over by the learned counsel for the 1st respondent Bank under safe custody and the 3rd respondent Sale Officer was directed to file an affidavit explaining the procedure undertaken before conducting the sale on 01.02.2018.

6. On 22.02.2018, on perusing the file handed over by the learned counsel for the 1st respondent relating to the sale conducted on 01.12.2018, this Court found that the proceedings before the 3rd respondent were in violation of the procedure prescribed under Circular No.58/2013 dated 19.09.2013, Circular No.70/2013 dated 12.11.2013, etc. issued by the Registrar of Co-operative Societies. Subsequent to the said order, the 3rd respondent has filed a counter affidavit through the Special Government Pleader. Paragraphs 3, 4 and the last paragraph of the said counter affidavit read thus;

"3. It is submitted that the Thrissur Primary Co-operative Agriculture and Rural Development Bank is functioning at Thrissur with its head office at Civil Lane Road, Thrissur and branches at Mannuthy and Cherpu. The petitioner, Smt.Sossama John had availed loans from the Bank on various occasions to the tune of Rs.16,70,000/-. The loan was granted based on a security of 3.64 Ares of land in Survey No.74/4/65 of Kainnur Village and 26.00 Ares of land in Survey No.74/4/67 and 0.15 Ares of land in Survey No.74/4/68 of the same Village. In fact, there was a continuous default in repayment of loan by the petitioner and it was in the above circumstances, the Bank had issued a demand notice dated 14.04.2017 to the petitioner under Section 20 of the Kerala State Co-operative Agriculture Bank Act. A true copy of the demand notice is produced herewith and marked as Exhibit-R3(a). The petitioner did not remit the default amount even after the receipt of demand notice and hence the Bank had made an application dated 19.10.2017 before the Sale Officer, for conducting the auction of properties of the petitioner. Another notice dated 01.11.2017 under Section 20 Rule 8(c) of the 1984 Kerala State Co-operative Agriculture Bank Act was issued to the petitioner by this respondent directing the petitioner to pay the arrears within 15 days of receipt of the said notice. In fact, the State Government has not fixed the land value of the land mortgaged and hence the upset price was fixed based on the local enquiry conducted by this respondent. The maximum value which could be fixed is Rs.20,000/- per cent. This valuation corroborates with the valuation report of the Bank and Assistant Registrar/ Valuation Officer also and therefore sale notice dated 15.12.2017 was issued after giving intimation to the petitioner regarding the date of auction. A true copy of sale notice is produced herewith and marked as Exhibit-R3(b).

The sale notice was published in Malayala Manorama daily dated 18.01.2018. A true copy of the same is produced herewith and marked as Exhibit-R3(c). The auction date was fixed as 25.01.2018, but due to some official reasons, the sale was postponed to 01.02.2018. On that day, none except the Bank had attended the auction and hence the Bank auctioned the property for Rs.18,04,000/-.

4. It is submitted that after sale, the Special Sale Officer had sent a notice to the petitioner on 02.02.2018 stating that the mortgaged property was sold in public auction on 1. 02.2018 for Rs.18,04,000/- and if the petitioner repay the loan amount with interest and all other expenses within 30 days of the sale, the property will be released to the petitioner. In fact, no further steps were taken in the matter till date by this respondent.

There is no willful negligence or latches on the part of this respondent in the matter of sale mentioned above and therefore it is humbly prayed that this Honourable Court may be pleased to uphold the contentions of the respondent and dismiss the Writ petition with costs."

(underline supplied)

7. Heard the learned counsel for the petitioner, the learned counsel for the 1st respondent Bank and also the learned Special Government Pleader appearing for the 3rd respondent Sale Officer.

8. The file relating to the sale conducted by the 3rd respondent Sale Officer, which has already been produced pursuant to the order of this Court dated

09.02.2018, would show that the 3rd respondent conducted sale of the property mortgaged by the petitioner, without even fixing a fair and accurate value of that property. The 3rd respondent has also not taken a decision as to whether sale of the entire extent of 30.39 Ares (75 cents) is required for discharging the debt due to the 1st respondent Bank in E.P.Nos.130, 131, 132, 133 and 134 of 2017.

9. The total extent of property mortgaged by the petitioner is 30.39 Ares (75 cents), which is spread over in three survey sub-divisions, i.e, Survey No.74/4/65 (3.64 Ares), Survey No.74/4/67 (26.60 Ares) and Survey No.74/4/68 (0.15 Ares). The specific stand taken by the petitioner is that, sale of a portion of the property having an extent of 10 or 15 cents will fetch more than the amount to be realised by the 1st respondent Bank in respect of the loan transactions in question and as such, the 3rd respondent was not justified in proceeding against the entire extent of land.

10. The sale conducted by the 3rd respondent Sale Officer is one under the provisions of the Kerala State Co-operative (Agricultural and Rural Development Banks) Act, 1984 (for brevity, 'the Act') and the rules made thereunder, i.e., the Kerala State Co-operative Agricultural and Rural Development Banks Rules, 1986 (for brevity, 'the Rules'). Section 8 of the Act deals with the powers of Agricultural Development Banks to advance loans; Section 9 deals with security for loans; and Section 10 deals with charge on the movable or immovable property of borrower for amounts borrowed. Section 12 of the Act deals with priority of the amount payable under a 'Gehan' created or mortgage or hypotecation executed in favour of the Agricultural and Rural Development Banks or Primary Bank; Section 19 deals with the power of sale of property charged without intervention of court; and Section 20 deals with application for sale and manner of sale.

11. Rule 8 of the Kerala State Co-operative Agricultural and Rural Development Banks Rules, which deals with procedure in the sale of mortgaged property/ Gahan, reads thus;

"8. Procedure in the sale of Mortgaged property/ Gehan.- In the sale of secured immovable property under the provisions of Chapter V of the Act, the following procedures shall be observed:-

(a) No application under sub-section (1) of Section 20 of the Act shall be entertained unless the Board or the Committee deposits the necessary costs of proclamation and sale as may be fixed by the Registrar.

(b) The application shall be in such form as may be required by the Registrar and shall be signed by the Board or the Committee or a person duly authorised by the Board or the Committee. It shall state the amount due for recovery including interest, expenses incurred in the service of the notice referred to in clause (b) of sub-section (2) of Section 19 of the Act, the names and addresses of the persons on whom notice was served under the said clause. It shall also contain a description of the immovable property including buildings, machinery and its accessories to be proceeded against, sufficient for its identification, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the specification of such boundaries or numbers.

(c) On receipt of the application, the Sale Officer shall give a notice in writing to all the persons referred to in clause (b) of sub-section (2) of section 19 of the Act stating the amount claimed by the Bank including expenses incurred by it in the service of notice and the particulars of the properties to be sold in case of non-payment and demanding payment within a time to be allowed by the Sale Officer.

(d) If, before expiration of the time allowed in the notice issued under clause (b), the amount specified in such notice is not paid, the Sale Officer shall, after giving notice to the Agricultural Development Bank or Primary Bank, as the case may be, on whose behalf the application is made, proceed to sell the property specified in the application.

(e) A proclamation of sale shall be published by affixing a notice in the office of the Principal Officer of the Co-operative Department in the District and in the Taluk Office at least thirty days before the date fixed for the sale and may also be published in a local daily having wide circulation in the area and by beat of tom tom in the Village where the security property, to be sold is situated on two consecutive days previous to the date of sale and on the day of sale, prior to commencement of the sale. The proclamation shall state the time and place of sale and specify as fairly and accurately as possible:-

(i) The property to be sold;

(ii) the revenue or rent payable in respect thereof;

(iii) the amount for the recovery of which the sale is ordered; and

(iv) any other matter which the Sale Officer considers material for a purchaser to ascertain in order to judge the nature and value of the property.

(f) When any mortgaged/secured immovable property is sold under these rules, the sale shall be subject to prior encumbrances, if any, on the property. The sale shall be by public auction to the highest bidder. The Sale Officer may, in his discretion, adjourn the sale to a specified day and hour, recording his reasons for such adjournment. Where a sale is so adjourned for a period longer that seven days, a fresh proclamation under clause (e) shall be issued unless the defaulter consents to waive it.

(g) A sum of money equal to 15 per cent of the price of the property shall be deposited by the purchaser with the Sale Officer at the time of the purchase and in default of such deposit, the property shall forthwith be resold:

Provided that where the Agricultural Development Bank or the Primary Bank at whose instance the property is sold is the purchaser and is entitled to set off the purchase money against the amount due under clause (1) the Sale Officer shall dispense with the requirements of this clause.

(h) The remainder of the purchase money and the amount required for the general stamp for the certificate under Section 23 of the Act shall be paid within 15 days from the date of the sale:

Provided that the time for payment of the amount required for the general stamp may, for good and sufficient reasons, be extended at the discretion of the Principal Officer of the Co-operative Department in the District, upto thirty days from the date of the sale.

Provided further that in calculating the remainder of the purchase money to be paid under this clause, the purchaser shall have the advantage of any set off to which he may be entitled under clause (1).

(i) In default of payment within the period mentioned in clause (h), the deposit may, if the Sale Officer thinks fit, after defraying all costs, charges and expenses of the sale, be forfeited to the bank and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold.

(j) Any deficiency of price which may happen on the resale by reason of the purchaser's default and all expenses attending such resale shall, at the instance of either the applicant or the mortgagor or the person who created the Gehan, be recoverable from the defaulting purchaser under the provisions relating to the execution of an award of an arbitrator under the Kerala Co-operative Societies Act, 1969 (21 of 1969).

(k) Every resale of machinery or mortgaged property in default of payment of the purchase money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period herein before prescribed for the sale.

(l) Where the Agricultural Development Bank or the Primary Bank, at whose instance the property is sold, is the purchaser, the purchase money and the amount due shall be set off against one another and the Sale Officer shall enter up satisfaction of payment of the mortgaged money in full or in part accordingly." (underline supplied)

12. The provisions of sub-clause (iv) of clause (e) of Rule 8 of the Rules make it explicitly clear that, the sale proclamation issued by the Sale Officer shall state the time and place of sale and specify as fairly and accurately as possible the property to be sold; the revenue or rent payable in respect thereof; the amount for the recovery of which the sale is ordered; and any other matter which the Sale Officer considers material for a purchaser to ascertain, in order to judge the nature and value of the property.

13. The provision contained in sub-clause (iv) of clause (e) of Rule 8 of the Kerala State Co-operative Agricultural and Rural Development Banks Rules is in pari materia with sub-rule (2) of Rule 66 of Order XXI of the Code of Civil Procedure, 1908 as per which, proclamation shall be drawn up as fairly and

accurately as possible and clause (e) of sub-rule (2) mandates that every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property shall be included in the proclamation.

14. In Babu John v. A.K. Ramakrishnan and another (2016 (2) KHC 515) a Division Bench of this Court held that, law is settled that under Rule 66 of Order XXI of the Code the proclamation shall be drawn up as fairly and accurately as possible and clause (e) of sub-rule (2) mandates that every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property shall be included in the proclamation. In the said decision, the Division Bench relied on an earlier decision of this Court in Chandradas v. A. Nizar (2009 (3) KHC 841) wherein it was held that, an obligation cast on the court to incorporate such relevant particulars which even the decree holder omits to furnish. If there has been any failure on the part of the court in that regard, the judgment debtor to whom notice has been given cannot be found fault with for not raising objections with regard to omissions which the Court considers material. In the said decision, this Court held further that, it is the obligation of the court to ensure that the judgment debtor whose property is being sold is entitled to a fairly accurate description of his property so as to secure the presence of such class of bidders who would make fair bids of the property having regard to the size, location and other features of the property.

15. The file relating to the sale conducted by the 3rd respondent Sale Officer, which has already been produced before this Court pursuant to the order dated 09.02.2018, would show that the 3rd respondent proceeded with the sale of the mortgaged property, without even fixing a fair and accurate value of that property. Though in the counter affidavit, the 3rd respondent has stated that he has fixed the upset price of the property based on local inspection, the said fact is not discernible from the file. Therefore, conclusion is irresistible that the sale conducted by the 3rd respondent on 01.02.2018 is one in violation of the mandate of sub-clause (iv) of clause (e) of Rule 8 of the Rules.

16. Rule 11 of the Kerala State Co-operative Agricultural and Rural Development Banks Rules, which provides that sale of immovable property to be proportionate to arrears due, reads thus;

"11. Sale of immovable property to be proportionate to arrears due.- (1) It shall be lawful for the Sale Officer to sell the whole or any portion of the mortgaged property of a defaulter in discharge of money due, provided always that, so far as may be practicable no larger section or portion of immovable property shall be sold than may be sufficient to discharge the amount due with interest, and expenses of sale.

(2) When the sale has become absolute the Sale Officer shall issue a certificate of sale to the purchaser within 90 days from the date of sale in form No.IV."

(underline supplied)

17. Sub-rule (1) of Rule 11 makes it explicitly clear that, it shall be lawful for the Sale Officer to sell the whole or any portion of the mortgaged property of a defaulter in discharge of money due. However, as per sub-rule (1) of Rule 11, it is imperative that, so far as may be practicable no larger section or portion of immovable property shall be sold that may be sufficient to discharge the amount due with interest, and expenses of sale.

18. The provision contained in sub-rule (1) of Rule 11 of the Kerala State Co-operative Agricultural and Rural Development Banks Rules is in pari materia with Rule 64 of Order XXI of the Code, which provides that any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof, as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

19. In Augusthy M.D. v. Catholic Syrian Bank Pvt. Ltd. (2014 (3) KHC 669) this Court held that the statutory mandate under Rule 64 of Order XXI of the Code is that any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. It is further clarified under sub-rule (2) of Rule 66 of Order XXI that proclamation shall be drawn up specifying as fairly and accurately as possible the property to be sold or where a part of the property would be sufficient to satisfy the decree, such part. In all execution proceedings, the court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may be seen necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the court shall bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law, only such portion of the property should be sold. This is not just a discretion, but an obligation imposed on the court. This is the view of the Apex Court in Ambati Narasayya v. M. Subba Rao [(1989) Supp (2) SCC 693].

20. In the instant case, the total extent of property mortgaged by the petitioner is 30.39 Ares (75 cents), which is spread over in three survey sub-divisions. The petitioner would contend that, sale of a portion of the property having an extent of 10 or 15 cents will fetch more than the amount to be realised in respect of the loan transactions in question and as such, the 3rd respondent Sale Officer was not justified in proceeding against the entire extent of land. Relying on certain documents produced in this writ petition, the learned counsel for the petitioner would contend that sale of a portion of the property would fetch the entire amount due to the 1st respondent Bank and as such, the sale of the entire extent was unnecessary. Per contra, the learned counsel for the 1st respondent

Bank would submit that since the property in question is situated near to a forest it will fetch only lesser amount. The rival contentions raised as to the value of the property need not be gone into further in this writ petition filed under Article 226 of the Constitution of India and it is for the 3rd respondent Sale Officer to consider the said issue in accordance with law, while taking a decision as to whether sale of a portion of the said property is sufficient to satisfy the amount due to the 1st respondent Bank. The file relating to the sale conducted by the 3rd respondent, which has already been produced before this Court, would not show any such exercise undertaken by the Sale Officer before issuing Ext.P2 sale notice. Therefore, conclusion is irresistible that Ext.P2 sale notice issued by the 3rd respondent is in violation of the provisions under sub-clause (iv) of clause (e) of Rule 8 and sub-rule (1) of Rule 11 of the Kerala State Co-operative Agricultural and Rural Development Banks Rules. In that view of the matter, the sale alleged to have been conducted by the 3rd respondent on 01.02.2018 cannot have any legal sanctity.

21. In the result, this writ petition is disposed of by setting aside Ext.P2 sale notice issued by the 3rd respondent Sale Officer and the said respondent is directed to issue fresh sale notice, after complying with the mandate of the provisions under sub-clause (iv) of clause (e) of Rule 8 and sub-rule (1) of Rule 11 of the Kerala State Co-operative Agricultural and Rural Development Banks Rules, after fixing a fair and accurate value of the mortgaged property, and taking a decision as to whether sale of a portion of the said property is sufficient to satisfy the amount due to the 1st respondent Bank. The 3rd respondent shall take a decision in this regard, strictly in accordance with law, with notice to the petitioner and also to the 1st respondent Bank, and after affording them an opportunity of being heard, as expeditiously as possible, at any rate, within a period of three weeks from the date of receipt of a certified copy of this judgment. Based on such decision, the 3rd respondent shall proceed further with the sale of the property.

Registrar (Judicial) shall return the original file relating to the sale conducted on 01.02.2018 by the 3rd respondent Sale Officer to the learned Special Government Pleader.

