

(2004) 11 OHC CK 0045

In the Orissa High Court

Case No : Writ Petition (Civil) No. 260 of 2004

Sri Ramkrishna Vivekananda Educational Trust

APPELLANT

Vs

Registrar, Debt Recovery Tribunal and Others

RESPONDENT

Date of Decision : 25-11-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89

Constitution of India, 1950 — Article 226

Income Tax (Certificate Proceedings) Rules, 1962 — Rule 4, 44, 45, 47

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(7), 29

Transfer of Property Act, 1882 — Section 53A

Citation : AIR 2005 Ori 75

Hon'ble Judges : M.M. Das, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : M. Kanungo, Y.S.P. Babu, D. Pradhan, S. Nanda, B. Kanungo and Y. Mohanty, for the Appellant; P. Kar, A.K. Mohanty, G.D. Kar, P. Mohapatra and P.K. Samantasinghar, for the Respondent

Judgement

M.M. Das, J.—The writ petitioner has assailed the auction notice published on 28-12-2003 by the Recovery Officer, Debt Recovery Tribunal, Cuttack under Annexure-4 and the order dated 21-10-2003 under Annexure-5.

2. The petitioner in the writ application has averred that he, as a Trustee entered into an agreement on 15-1-2001 for purchase of land with one Biswanath Chandak-O. P. No. 2 for which the said Opp. party accepting Rs. 1,00,000/- as advance out of the consideration money settled at Rs. 7,00,000/- agreed to sell Plot No. 310/538 under Khata No. 38 measuring Ac. 1.00 decimals situated in mouza Jamuna Naki in the district of Sundargarh to Shri Ramakrishna Vivekananda Educational Trust, represented by the petitioner and delivered possession of the said land to the petitioner. The petitioner alleges that the said agreement was executed by Shri Sajal Kumar Roy, the power of Attorney holder of Opp. party No. 2 who also has been paid the balance Rs. 6,00,000/- on

25-4-2001 by the petitioner. In spite of the said payment, the petitioner states that, Opp. Party No. 2 though agreed to pay the said amount to the Bank of India. Civil Township Branch, Rourkela and get the property free from mortgage, did not pay the same to the Bank nor executed the sale deed. The petitioner came across the auction sale notice published in local daily "Sambad" dated 28-12-2003 and on approaching the D.R.T., Cuttack, he was informed that as he is not a party to the recovery proceeding, he cannot file any application before the said Tribunal in the recovery proceeding. Opp. party No. 3 has entered appearance in the writ application and has filed a counter-affidavit, inter alia, stating that Opp. party No. 3 Bank advanced a loan to M/s. Bijay Laxmi Steel Corporation and the property in question was mortgaged to the Bank as a security to the said loan by Opp. Party No. 2. It is further averred in the counter that on a suit being filed for recovery of the outstanding dues from the borrower and the guarantor, a preliminary mortgage decree was passed in favour of the Bank for Rs. 44,11,416.60 paise. As the decretal dues were not paid by the defendants, the Bank filed an application to make the said decree final on which a final decree was passed for sale of the mortgaged property. The decree was thereafter put to execution and during the pendency of Execution Case No. 59 of 1996 before the Civil Judge, (Senior Division), Rourkela, Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "The Act") came into force and the execution proceeding was transferred to the D.R.T. at Patna and was numbered as Execution Case No. 27 of 1998 (P.T.) As none appeared for the defendants and after hearing the Bank, a Certificate u/s 19(7) of the Act was drawn up and the said certificate was sent to the Recovery Officer, D.R.T., Patna being numbered as R. P. No. 19 of 1998. In course of said recovery proceeding before the D.R.T., Patna, the property in question along with other properties mortgaged in favour of the Bank was attached following due procedure of law. On 14-8-1999, when the matter was proceeding for sale of the mortgaged property to recover the dues of the Bank, in view of the Government of India Notification dated 29-12-2000 establishing a Debts Recovery Tribunal at Cuttack, R. P. case No. 19 of 1998 was transferred to D.R.T., Cuttack where it was re-numbered as R. P. No. 13/2000/CTC. Fresh notice was issued to the Certificate debtors and as none of them appeared, the property was advertised to be sold in public auction. Learned counsel for Opp. Party No. 3 Bank submits that the petitioner has no locus standi to file the present application as he was not a party to the proceeding and there is no illegality committed in publishing the notice for sale of the mortgaged property.

3. While issuing notice of this writ application on 12-1-2004 we directed that public auction for sale of the land in question belonging to Opp. party No. 2 may take place, but the sale will not be finalized in favour of any party without leave of this Court. Accordingly, the Recovery Officer, D.R.T., Cuttack invited bids for purchase of the suit land and one Nalini Kumar Roy was the highest bidder. He filed an application to be impleaded as a party in this writ application. The same being allowed, he has been added as Opp. Party No. 4 and has filed a counter-

affidavit to the writ application. It has been stated in the said counter-affidavit that the petitioner did not choose to participate in auction and the application made by the petitioner that he was disallowed to offer his bid is not correct. Opp. party No. 4 has pleaded that he being the highest bidder and having offered Rs. 7,00,501/- as price to purchase the properties in question, pursuant to the public auction held by the Recovery Officer, the sale should be confirmed. In the counter-affidavit he denies the fact that Opp. Party No. 2 agreed to sell the land in question to the petitioner.

4. From Annexure-3 to the writ petition i.e. the reply given by Opp. Party No. 2 to the Advocate's notice issued to him by the petitioner, it is seen that Opp. Party No. 2 has disputed the authority of the so-called power of attorney holder in executing the agreement to sell the land in favour of the petitioner and has further stated that the power of attorney in favour of Sajal Kumar Roy was cancelled by him on 3-4-2001 and he has not received any money from the petitioner towards consideration for sale of the land.

5. We, therefore, find that the present writ petition involves various disputed questions of fact and more so the said questions are essentially with regard to a private dispute between the petitioner and Opp. Party No. 2 relating to the right over the immovable property and such dispute cannot be entertained by this Court in exercise of power under Article 226 of the Constitution of India. The Supreme Court in the case of Mohan Pandey and Another Vs. Smt. Usha Rani Rajgaria and Others, held that the appropriate remedy for settlement of the dispute regarding property right between private persons is a regular suit and the remedy under Article 226 of the Constitution is not available except where the allegation of violation of statutory duty by a statutory authority is alleged. This position was again reiterated in the case of Prasanna Kumar Roy Karmakar Vs. State of West Bengal and others, .

6. Leaving aside the above disputed questions of fact, the only other point alleged by the petitioner before us is that even though he has filed an application under Order 21, Rule 89 of the CPC claiming a right over the property which he has acquired u/s 53-A of the Transfer of Property Act, the said application is not being entertained by the Recovery Officer, D.R.T., Cuttack and by such action, the petitioner is being denied his right of establishing his title over the disputed property in the Recovery proceeding. Mr. Kar, learned counsel appearing for the Bank, in reply submitted that the provisions contained in Order 21 of the CPC are not applicable to a recovery proceeding under the Act.

7. Section 29 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 provides as follows :

"The provisions of the Second and Third Schedules to the Income Tax Act, 1961 (43 of 1961), and the Income Tax (Certificate Proceedings) Rules, 1962, are in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of

debt due under this Act instead of to the Income Tax;

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

8. From the above provision, it is clear that a recovery proceeding under the Act is to proceed under the Second and Third Schedules of the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 as in force from time to time. Rule 4 of Schedule II of the Income Tax Act, 1961 provides the modes of recovery of certificate dues. Rules 44, 45 and 47 of the Income Tax (Certificate Proceedings) Rules, 1962 are the provisions to which a person other than a defaulter if dispossessed by the purchaser, can take recourse to. Under Rule 44 such a person can make an application complaining of such dispossession within thirty days from such dispossession. Under Rule 45 if the authority concerned finds the allegation of 3rd party to be true, he can restore possession to him. Rule 47 gives a right to any party not being a defaulter against whom an order is made under Rule 45 to file a suit in a civil Court to establish the right, which he claims over (he property.

9. After considering rival submissions made by the parties before us, in view of the above provisions of law, we are of the view that provisions under Order XXI of the CPC are not applicable in a recovery proceeding under the Act, before the D.R.T. The petitioner can exercise his right as available under the above Rules which are applicable to a recovery proceeding under the Act and we do not find any reason to interfere with the auction sale notice under Annexure-4. In the event the petitioner files an application complaining dispossession from the land in question by the auction purchaser pursuant to Rule 44 of the Income Tax (Certificate Proceedings) Rules, 1962, the same will be dealt with in accordance with law by the Recovery Officer of the D.R.T., Cuttack.

10. The writ application is, accordingly, disposed of with the above observations. There will be no order as to costs.

A.K. Patnaik, J.

11. I agree.