

(2012) 07 KL CK 0091
In the High Court Of Kerala
Case No : W.A. No. 1229 of 2012

Thampi

APPELLANT

Vs

Kunnathunad Taluk Primary Co-op. Agrl. and R.D. Bank Ltd.

RESPONDENT

Date of Decision : 04-07-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 3 KLJ 733 : (2012) 3 KLT 628

Hon'ble Judges : C.N. Ramachandran Nair, J;C.K. Abdul Rehim, J

Bench : Division Bench

Advocate : M. Narendra Kumar, for the Appellant; George Mecheril and Saidu Alavi) and Jeemon K. Abraham, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—The appellant borrowed funds from the 1st respondent, which is an Agricultural Rural Development Bank, and defaulted payment. The Bank referred the matter for arbitration and based on award passed, the 2nd respondent notified appellant's mortgaged property for sale against which Writ Petition was filed. The limited prayer made by the appellant before the learned Single Judge was to permit him to sell part of the mortgaged property and settle the debt due to the Bank so that he can retain balance property. In the first place, this is an equitable relief normally granted by this Court in writ proceedings filed under Art 226 of the Constitution of India, and invariably in every such case debt is cleared within the time granted and the debtors are able to save at least part of their property. Whenever we gave freedom to borrowers to sell mortgaged property on condition of settlement of liability due to the Bank before execution of sale deed, they were able to sell the property at market price, settle the arrears and retain some amount for themselves. In this case also identical relief was sought based on R. 11 of the Co-operative Agricultural Development Bank Rules, which was turned down by the learned Single Judge by holding that mortgagor is free to sell the mortgaged property in full. Even though the loan availed was for Rs. 5.70 lakhs and the appellant has already repaid Rs. 3 lakhs, the balance outstanding with interest is

a little over Rs. 9 lakhs. According to him, the property mortgaged is 1.40 acres of land with a residential house therein and another 85 cents of garden land. The value of the mortgaged property under the current market rate is multiples of the loan amount and therefore by sale of a small portion of the mortgaged property, entire loan could be cleared. In these circumstances, we feel the prayer of the appellant needs to be considered humanly and not in a strict legal angle more so when we are sitting in the extraordinary writ jurisdiction conferred on us under Art. 226 of the Constitution of India. We have also heard learned counsel appearing for the 1st respondent Bank and learned Government Pleader.

2. Since learned counsel for the appellant has relied on R. 11 of the Co-operative Agricultural Development Bank Rules, we extract hereunder the said Rule for easy reference.

11. Sale proportionate to arrears due.

(1) It shall be to lawful of immovable property be 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.

3. From the above Rule, what is clear is that recovery proceeding by sale of defaulter's property should not be made in a destructive manner to deprive him of his landed properties. On the other hand, it is for the Sale Officer to sell the minimum extent of land of the defaulter, the sale price of which will be sufficient to discharge the debt, so that defaulter is allowed to retain his balance property. The judgment of the learned Single Judge upholding proposal for sale of the entire mortgaged property in this case is against the letter and spirit of the above Rule. In our view, when any specific amount is to be recovered from the defaulter by the recovery authority, whether it be the Sale Officer under the Co-operative Societies Act or the Revenue Recovery authorities, the principle that should be followed is to ensure minimum harm to the defaulter i.e., by depriving of the minimum extent of land that is required to settle the liability and not to destroy him by selling his entire property in recovery proceedings.

4. Learned counsel for the appellant rightly pointed out that the present value of the mortgaged land is such that sale of a few cents will be sufficient to settle the amount, i.e., less than Rs. 10 lakhs, due from the appellant to the 1st respondent Bank. It is common knowledge that land value even in village areas in Kerala are going up steadily, and as a result of this, all the Co-operative Banks, Financial Institutions and creditors, who are lending money against property mortgage are absolutely safe. Further, land is in great demand in Kerala and it takes hardly any time to sell land at market value. We have to consider the relief to be granted to the appellant keeping in mind these ground realities.

5. The above Rule obviously contemplates part sale of mortgaged property by the Sale Officer. Even though the Rule provides for part sale, no Sale Officer has probably ventured for the same, and no such case is brought to our notice in any of the large number of cases of this nature decided by us because it is practically not possible or preferred by any Sale Officer for fear of allegations to venture to sell part of the mortgaged property. Therefore, invariably in every case notification for sale of the entire mortgaged property of the defaulter irrespective of the debt amount happens, where purchase is made by land dealers and brokers, generally called land mafia, by forming cartel by themselves leading to sale at far below the market price. Since the mortgagor is not free to negotiate for sale of his mortgaged property to a buyer of his choice at market price, he is kept out of the whole transaction. We do not think the rights of the mortgagee - creditor is anyway affected by giving reasonable time to the debtor himself to negotiate and sell part or full of the mortgaged property but on condition that sale deed will be executed only after documents of title are released by the creditor Institution that too on payment of the debt amount either by the mortgagor or by the purchaser of the property under agreement with the mortgagor-owner. Even though we had occasion to grant similar relief in several cases to the full satisfaction of creditor Institutions, so far, this Court has not issued any general directions to the concerned authorities to adopt a Policy in line with R. 11 above, so that debtors are not deprived of their full land and homestead, and in some cases at least driven to the street which could be easily avoided by giving them reasonable time to arrange a purchaser and sell part or full of the mortgaged property by themselves.

6. In view of the findings above, we give the appellant freedom to negotiate and enter into agreement for sale of any part or full of the mortgaged property. However, sale deed will be executed only after full arrears are deposited with the 1st respondent Bank and title deeds are released by them. Time is granted to the appellant to settle the liability, till 15.9.2012. All recovery proceedings will remain stayed till 15.9.2012 for compliance as above. On failure to settle the liability within the time granted either by way of sale of the mortgaged land or otherwise, the second respondent will proceed for sale of appellant's property. In that event also, if the second respondent is able to sell part of the property and recover the arrears due to the first respondent, he shall do it, failing which he will sell the entire property and recover the arrears due to the first respondent.

7. Our findings above hold good in all recovery proceedings whether same is initiated by the Sale Officers of Co-operative Societies or by the Revenue Recovery authorities under the Kerala Revenue Recovery Act. In fact, by virtue of the notification issued under the Kerala Revenue Recovery Act, large number of Financial Institutions are entitled to recover arrears by initiating revenue recovery proceedings, where reference is made by the creditor Institution to the revenue recovery authority, namely the Tahsildar, to proceed for attachment and sale of borrowers' properties whether mortgaged or not. We feel all the recovery proceedings covered by mortgage, and if not after attachment by Recovery

authority creating charge on defaulter's property, reasonable time should be given to the debtors to arrange for sale of part or full of the mortgaged or attached property and clear the arrears, so that the debtor will be able to retain part of the property or at least keep the difference between the market value and the debt amount. However, sale deed will be permitted to be executed by the debtors only after arrears are cleared and after documents of title are released or after attachments are lifted. This can be ensured by the mortgagor informing the purchaser about the charge over the property, and under the agreement for sale the purchaser himself can, if necessary, be authorised to clear the arrears and get released the title deeds before execution of sale deed. We feel in the interest of debtors all over the State facing RR proceedings, additional respondents 3 and 4 can be directed to issue proper guidelines to all the authorities under the Co-operative Societies Act like Sale Officers of Agricultural Credit Societies, Primary Credit Societies, Co-operative Banks and also the Recovery authorities under the Revenue Recovery Act so that all debtors need not approach this Court with Writ Petitions for the relief of the kind stated above. Certainly, time to be granted for sale of property by the debtor can be made flexible. However, we feel at least three months' time should be given to debtors to arrange for sale of property as a last chance for them to retain part of their property or at least to retain difference between market price obtained on sale by them and debt amount. We direct the Registrar of Co-operative Societies to issue guidelines in exercise of powers conferred under S.66A of the Co-operative Societies Act as above. Similarly, the Revenue Secretary to the State Government is also directed to issue guidelines in exercise of powers conferred on the Government under the Revenue Recovery Act to Tahsildars and other recovery authorities to give reasonable time to debtors to sell their property in part or in full, and clear the arrears and only on failure, to notify part or full of the mortgaged/attached property for sale.

Registry will issue one copy of the judgment each to the Registrar of Co-operative Societies, Thiruvananthapuram and to the Secretary to Government, Revenue Department, Secretariat, Thiruvananthapuram for compliance.

This Writ Appeal is disposed of as above.