

(2014) 03 DEL CK 0355
In the Delhi High Court
Case No : CM (M) 266/2014

Triveni Gupta and Others

APPELLANT

Vs

Mamta Goyal and Others

RESPONDENT

Date of Decision : 18-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 1, Order 30 Rule 2
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 25, 26, 27, 28, 29
Specific Relief Act, 1963 — Section 41 (h), 41(H)

Citation : (2014) 03 DEL CK 0355

Hon'ble Judges : Najmi Waziri, J

Bench : Single Bench

Advocate : Bijender Singh, Advocates for the Appellant

Judgement

Najmi Waziri, J.—The petitioners have impugned an order of 12.2.2014 which has dismissed their application for interim relief. The relief sought was for the stay on the disposal/auction of his property by the respondent /bank arising out of the proceedings under the Recovery of Debts due to Banks and Financial Institution Act, 1993 (RDDBFI).

2. The learned counsel for the petitioners states that the so-called debt / mortgage in the property was created in the year 1994 although he had purchased it through GPA for consideration in the year 1991 and it has been in its occupation ever-since. Therefore, there could have been no occasion for the bank to proceed against the petitioner especially in view of the Second Schedule of the Income Tax Act of Schedule II of 1961 (the "Act") which reads as under:-

11. (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. Learned counsel submits that given the same, the Recovery Officer ought to have released the property. Counsel for the respondent/bank, upon service of advance copy, submits that this petition is not maintainable. She contends that Schedule II is a complete code in itself and in so far as the relief sought by the petitioners was refused under Rule 11, Clause 4 thereof, they would have remedy before the Debt Recovery Tribunal (DRT); and indeed, the petitioners had already taken recourse to this statutory remedy and although interim stay had been rejected, their application was pending before the DRT. The next date of hearing is scheduled on 15.05.2014. The petitioners have not appealed against the denial of the interim stay. The auction is fixed for today. She further relies upon an order of the Supreme Court in *Sadashiv Prasad Singh Vs. Harender Singh & Ors.* in Civil Appeal no.161/2014, which inter alia, reads:

"15. At the time of hearing, we were thinking of remanding the matter to the Recovery Officer to investigate into the objection of Harender Singh under Rule 11 of the Second Schedule to the Income Tax Act, 1961. But considering the delay such a remand may cause, we have ourselves examined the objections of Harender Singh and reject the objections for a variety of reasons. Firstly, the contention raised at the hands of the respondents before the High Court, that the facts narrated by Harender Singh (the appellant in Special Leave Petition (C) No. 26550 of 2010) were a total sham, as he was actually the brother of one of the judgment-debtors, namely, Jagmohan Singh. And that Harender Singh had created an unbelievable story with the connivance and help of his brother, so as to save the property in question. The claim of Harender Singh in this objection petition, was based on an unregistered agreement to sell dated 10.1.1994. Not only that such an agreement to sell would not vest any legal right in his favour, it is apparent that it may not have been difficult for him to have had the aforesaid agreement to sell notarized in connivance with his brother, for the purpose sought to be achieved. Secondly, it is apparent from the factual position depicted in the foregoing paragraphs that Harender Singh, despite his having filed objections before the Recovery Officer, had abandoned the contest raised by him by not appearing (and by not being represented) before the Recovery Officer after 26.10.2005, whereas, the Recovery Officer had passed the order of sale of the property by way of public auction more than two years thereafter, only on 5.5.2008. Having abandoned his claim before the Recovery Officer, it was not open to him to have re-agitated the same by filing a writ petition before the High Court. Thirdly, a remedy of appeal was available to Harender Singh in respect of the order of the Recovery Officer assailed by him before the High Court under Section 30, which is being extracted herein to assail the order dated 5.5.2008:

30. Appeal against the order of Recovery Officer:- (1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under section 25 to 28 (both inclusive).

The High Court ought not to have interfered with in the matter agitated by Harender Singh in exercise of its writ jurisdiction. In fact, the learned Single Judge rightfully dismissed the writ petition filed by Harender Singh. Fourthly, Harender Singh could not be allowed to raise a challenge to the public auction held on 28.8.2008 because he had not raised any objection to the attachment of the property in question or the proclamations and notices issued in newspapers in connection with the auction thereof. All these facts cumulatively lead to the conclusion that after 26.10.2005, Harender Singh had lost all interest in the property in question and had therefore, remained a silent spectator to various orders which came to be passed from time to time. He had, therefore, no equitable right in his favour to assail the auction-purchase made by Sadashiv Prasad Sinha on 28.8.2008. Finally, the public auction under reference was held on 28.8.2008. Thereafter, the same was confirmed on 22.9.2008. Possession of the property was handed over to the auction-purchaser Sadashiv Prasad Sinha on 11.3.2009. The auction-purchaser initiated mutation proceedings in respect of the property in question. Harender Singh did not raise any objections in the said mutation proceedings. The said mutation proceedings were also finalized in favour of Sadashiv Prasad Sinha. Harender Singh approached the High Court through CWJC No. 16485 of 209 only on 27.11.2009. We are of the view that the challenged raised by Harender Singh ought to have been rejected on the grounds of delay and laches, especially because third party rights had emerged in the meantime. More so, because the auction purchaser was a bona fide purchaser for consideration, having purchased the property in furthermore of a duly publicized public auction, interference by the High Court even on ground of equity was clearly uncalled for.

For the reasons recorded hereinabove, we are of the view that the impugned order dated 17.5.2010 passed by the High Court allowing Letters Patent Appeal no.844 of 2010 deserves to be set aside. The same is accordingly, set aside. The right of the appellant Sadashive Prasad Sinha in Plot no.2722, Exhibition Road, P.S. Gandhi Maidan, Patna, Measuring 1289 sq. ft. is hereby confirmed. In the above view of the matter, while the appeal preferred by Sadashive Prasad Sinha sands allowed, the one filed by Harender Singh is hereby dismissed."

4. The order impugned in the petition records as under:-

"Arguments are heard at length from both the sides. With regard to prima facie

case, the plaintiff has alleged that she is (sic "has") the owner of the suit property in question being the bona fide purchaser from defendant no.2. She is allegedly titled deed of the suit property in question in her favour and it was bonafidely purchased by her without knowledge of encumbrance over the suit property in question. It is further alleged that, as she has become the owner of the suit property in question, she is not affected by any further illegal transaction as alleged by defendant no.3. It is further alleged on behalf of plaintiff that defendant no.2 has denied any mortgaged so executed by her qua the suit property in question. Therefore, defendant no.3 under the procurement of illegal order from DRT are harassing plaintiff. The counsel for defendant no.3 who is representing the bank and is main contesting party has alleged that it has already been decided by DRT that the mortgaged qua the suit property in question was duly executed. The counsel for defendant no.3 has drawn attention towards the documents filed by him along with his written statement and has alleged by virtue of order of Recovery Officer as well as DRT 3, the objections of defendant no.2 and plaintiff present herein have been dismissed. It is further stated that as per the RDDBFI Act, section 30, no other court except the recovery tribunal is appropriate forum to decide any such matter pertaining to the loan and mortgaged qua the suit property in question.

After perusal of the documents filed by the defendant no.3 and the judgments so relied upon by him it is reflected and I am of the view that this matter pertaining to existence of mortgaged qua suit property in question has already been considered by DRT, objections so taken by the plaintiff present herein also considered and rejected by DRT accordingly. Therefore, if the plaintiff is having any grievance against any such order then he/she can move vertically, i.e. by way of appeal/revision against the said order. I am of the opinion that in this regard, alternate efficacious remedy is available with the plaintiff qua this relief hence, bar under Section 41 (h) Specific Relief Act is applicable here qua this relief. It is pertinent to mention here that plaintiff has not sought any declaration against non existence or cancellation of alleged mortgaged in the present suit. In these circumstances, therefore, the doctrine of Caveat Emptor is applicable against the plaintiff. The plaintiff therefore, cannot be said to have establish case prima facie case in his favour qua the relief so prayed. The balance of convenience cannot be said to be titled in his favour. The third point the irreparable loss, in these circumstances need not be considered as the first two essential ingredients are not established by him. Hence, the application under order 30 Rule 1 and 2 of CPC is dismissed.

Matter be put up for replication and further proceedings on 22.3.2014."

5. Learned counsel for the respondent draws the attention of this Court to an earlier writ proceedings preferred by the petitioners viz WP(C) 412/2014, in which the only relief sought was the placing on record of the original title deeds before the Recovery Officer. The writ petition was dismissed as withdrawn on 20.01.2014 in the following terms:

"(1) At the outset, learned counsel for the petitioners seeks leave to withdraw the present petition while reserving the right of the petitioners to assail the order dated 24.05.2014, passed by the Recovery Officer-II, DRT-III, Delhi, dismissing their objections, in accordance with law.

(2) If such a remedy is available to the petitioners against the order dated 24.05.2013, they shall be entitled to seek the same in accordance with law.

(3) The petition is dismissed as withdrawn."

6. This Court notices that the petitioners have withheld information which has bearing upon the proceedings before the Trial Court that passed the impugned order. The original documents which were sought to be placed on record should have been made available for consideration by the DRT. They have come to the Court without disclosing the complete facts. They have indulged in suppressio veri.

7. The order impugned in the petition declines interim relief and reasons for the same are clearly spelt out. The Trial Court reasoned that since the petitioners have already initiated and pursued their remedy under the Act, they could appeal against the order of the DRT if so aggrieved. This Court is of the opinion that when efficacious statutory remedy is available there, the Court would decline a relief under Section 41(H) of the Specific Relief Act. In the present case, the proceedings have been initiated by the petitioner before the DRCT. They cannot now petition the Civil Court seeking alternative remedies.

In the circumstances, the petition is dismissed with cost of Rs.15,000/- to be paid to the respondent within two weeks from today.