

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Orders Reserved on 22.01.2015]

Dated:03.02.2015

Coram

THE HONOURABLE Mr. JUSTICE SATISH K.AGNIHOTRI
AND
THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

W.P.No.31904 of 2014

Mohd. Ismail Haroon

...Petitioner

V.

1. The Debts Recovery Appellate Tribunal,
Rep. By its Registrar,
55, Wellington Estate,
Ethiraj Salai IV Floor,
Chennai - 600 105.

2. The Indian Overseas Bank
Periyar Nagar Branch,
Chennai - 600 082.

...Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari calling for the records pertaining to the order dated 01.10.2014 made in I.A.No.607 of 2014 in R.A.No.48 of 2012 on the file of the Debts Recovery Appellate Tribunal at Chennai, the 1st Respondent herein and quash the same.

For Petitioner : Mr.V.Arun for
M/s. R.Sugumaran

For 1st Respondent : Tribunal

For 2nd Respondent : Mr.F.B.Benjamin George

ORDER

M.VENUGOPAL, J.

The Petitioner has filed the instant Writ Petition challenging an order dated 01.10.2014 in I.A.No.607 of 2014 in R.A.No.48 of 2012 passed by the Debts Recovery Appellate Tribunal, Chennai and to quash the same.

2.The Debts Recovery Appellate Tribunal, Chennai, while passing the order in I.A.No.607 of 2014 in R.A.No.48 of 2012 (filed by the Writ Petitioner), on 01.10.2014, had passed the following order:

"The petitioner is directed to deposit a sum of Rs.34,55,953/- into this Tribunal on or before 31.12.2014. In the even the petitioner fails to deposit the said sum of Rs.34,55,953/- into the loan account on or before 31.12.2014 this IA shall stand automatically dismissed."

3. The Resume of Writ Facts:

(i) According to the Petitioner, his father Haji T.N.Mohammed Ibrahim, during his lifetime, purchased the property viz., house, ground and premises at Old No.6/38, New No.43, Ward No.11, Muslim Bazaar Street, Abiramam Town, measuring to an extent of 2656.25 sq. ft. or thereabouts from one V.S.N.Sheikh Dawood Aliyar, by a Sale Deed dated 15.06.1999, registered as Document No.495 of 1999 in the office of Sub Registrar of Assurances, Abiramam. From the date of purchase of the property, his father along with family was in absolute possession and enjoyment of the property without any let or hindrance till his demise on 03.07.2007. His father died in the year 2007, leaving behind him, himself, his sister, two other sons, his mother and the possession continued with them.

(ii) Further, the Petitioner is carrying on business in Chennai and the property is situated in his native place and during the fag end of February 2011, his relatives informed him that the auction sale notice being circulated in the locality by the 2nd Respondent/Bank fixing the date of sale on 10.03.2011. He made enquiries which revealed that his father's vendor V.S.N.S.D.Aliyar had mortgaged the property for certain credit facilities availed by him and the 3rd Respondent had brought the property for sale pursuant to DRC issued after the final order passed in O.A.No.427 of 2007 by the Learned Debts Recovery Tribunal - III, Chennai.

(iii) At this stage, the Petitioner preferred I.A.No.91 of 2011 under Rule 11 of the Second Schedule to the Income Tax Act, 1961 to quash the Sale Notice. However, the same was summarily rejected on 25.04.2011, against which the Petitioner filed an Appeal in Appeal No.1 of 2011 under Section 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the same was rejected by the Debts Recovery Tribunal - III, Chennai on 29.02.2012, against which he filed an Appeal in R.A.No.48 of 2012. In R.A.No.48 of 2012, the Petitioner filed an Application in I.A.No.607 of 2014 seeking waiver of pre-deposit and that on 01.10.2014, the Debts Recovery Appellate Tribunal, Chennai passed the impugned order directing him to pay a sum of Rs.34,55,953/- thereby refused to allow his plea of 'Complete Waiver of Deposit' of the said sum as precondition.

Petitioner's Contentions:

4.The Learned Counsel for the Petitioner submits that the impugned order of the Debts Recovery Appellate Tribunal in I.A.No.607 of 2014 in R.A.No.48 of 2012 dated 01.10.2014 is incorrect and has no legal basis, unsustainable in the eye of law.

5.The Learned Counsel for the Petitioner urges before this Court that the Debts Recovery Appellate Tribunal should have assigned valid reasons as to why the Petitioner's I.A.No.607 of 2014 seeking waiver of pre-conditional deposit should not be allowed for preferring the Appeal against an order of the Debts Recovery Tribunal when he is neither a borrower nor a guarantor of the loan.

6.The stand of the Petitioner is that the Appellate Tribunal had failed to see that his father is a bona fide purchaser of the land which was sold by the Bank behind his back and adjudication in respect of the case of the Petitioner is in the form of a claim which does not require the payment of Court fees as that of a borrower and also deposit of any amount as pre condition for entertaining the Appeal.

7.The prime plea taken on behalf of the Petitioner is that the Appellate Tribunal ought to have seen that the property claimed by the Petitioner was already sold in auction by the Recovery Officer.

8.It is the submission of the Learned Counsel for the Petitioner that the Appellate Tribunal should have seen that the 2nd Respondent/ Bank should have impleaded the Petitioner's father as party to the Original Application, when the Petitioner's father purchased the

property way back in the year 1999.

9.The Learned Counsel for the Petitioner submits that the Petitioner is concerned, only with regard to Item II of the property mentioned in the auction sale notice in RP.No.73 of 2008 in DRC No.69/2008 and that the upset price was fixed for Rs.4,00,000/-.

10.The Learned Counsel for the Petitioner contends that Section 28(9) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provides for any person discharging any liability to the defendant after the receipt of a notice under this sub-section shall be personally liable to the Recovery Officer to the extent of his own liability to the defendant so discharged or to the extent of the defendant's liability for any debt due under this Act, whichever is less.

The Second Respondent's/Bank Submissions:

11.Conversely, it is the plea of the 2nd Respondent/Bank that the Writ Petition filed by the Petitioner is neither maintainable in law nor on facts and therefore, the same is liable to be dismissed in limini.

12.The Learned Counsel for the 2nd Respondent submits that the property in question originally belonged to V.S.N.Shiekh Dawood Aliyar, who was the proprietor of the business concern by M/s.General Agencies and he availed certain credit facilities from the 2nd Respondent/Bank. Furthermore, to secure the dues in the said account, he had mortgaged the property owned by him bearing Old No.6/38, New No.43, Ward No.11, Muslim Bazaar Street, Abriamam Town, Mudukulathur Taluk, now Kumuthi Taluk in S.No.265/872/1286 admeasuring 2656.25 sq.ft. to the Bank on 08.12.1988 and it was periodically extended from time to time. In fact, the mortgage created in favour of 2nd Respondent/Bank was lastly extended on 12.03.1994.

13.The Learned Counsel for the 2nd Respondent brings it to the notice of this Court that during the subsistence of the mortgage one T.N.Mohammed Ibrahim, father of the Petitioner, allegedly purchased the property from the mortgagor on 15.06.1999 and in the meanwhile, the borrower committed default in repayment of the dues in the loan account and that the 2nd Respondent/Bank on numerous occasions called upon the borrower to settle the dues. In view of the fact that the borrower and guarantors had not come forward to settle the dues, the 2nd Respondent/Bank initiated proceedings under SARFAESI Act. As a matter of fact, the 2nd Respondent/Bank filed O.A.No.427 of 2007 for recovery of a sum of Rs.31,99,661/- with subsequent interest and cost

and it was allowed on 10.01.2008. Resultantly, the Recovery Certificate bearing No.DRC 69 of 2008 was issued and the property was attached by the Recovery Officer by following the procedure prescribed under the rules and subsequently sale proclamation was issued. However, these were not challenged by any one.

14.The Learned Counsel for the 2nd Respondent/Bank contends that in the auction sale held on 10.03.2011, one Basheer Ibrahim was the highest bidder and his bid amount of Rs.9,80,000/- was accepted and that the said purchaser paid the entire sale consideration and the sale was confirmed in his favour. Also that, he paid the poundage charges and the sale certificate was issued in his favour.

15.That apart, it is also represented on behalf of the 2nd Respondent/Bank that just one day prior to the sale, the Petitioner preferred I.A.No.91 of 2011 before the Recovery Officer of the Tribunal praying to quash the auction sale notice on the ground that his father was a bona fide purchaser of the property and after his demise, he had inherited the property along with his mother and other siblings. Also, he claimed that after the demise of his father, he obtained patta for the property in his name and after the sale, the Petitioner's mother S.A.Mahammakuda Beevi and brother TM.Syed Anver Jamal also filed similar petitions bearing Nos.144 and 145 of 2011 and the said applications were dismissed by the Recovery Officer, by a common order dated 25.04.2011.

16.The Learned Counsel for the 2nd Respondent submits that the Writ Petitioner took part in the auction but was unsuccessful and in fact, the Recovery Officer, while passing the common order in I.A.Nos.91 of 2011, 144 and 145 of 2011 in R.P.No.73 of 2008 (DRC No.69/2008 in O.A.No.427 of 2007) on 25.04.2011 had inter alia observed that '... Since the validity of the mortgage has already been upheld by the Tribunal, rights if any of the Petitioner is subject to prior mortgage rights in favour of the respondent bank. All the petitioners are members are the same family and the petitions are aimed at delaying the confirmation of sale and thwarting the recovery proceedings' and resultantly dismissed the petitions as devoid of merits and further observed that sale confirmation would be done as per law.

17.The Learned Counsel for the 2nd Respondent submits that the auction proceedings took place on 10.03.2011 which resulted in conclusion of sale for a consideration of Rs.9,80,000/- in favour of Shri Basheer Ibrahim and that the Petitioner filed R.A.No.48 of 2012 on 28.03.2012 as against the order passed by the Debts Recovery

Tribunal - III, Chennai in Appeal No.1 of 2011 and only on 11.06.2014 he filed I.A.No.607 of 2014 seeking waiver after a lapse of four years.

18.Continuing further, the Learned Counsel for the 2nd Respondent submits that the Petitioner filed an Appeal No.1 of 2011 before the Debts Recovery Tribunal - III, Chennai praying to set aside the order in I.A.No.91 of 2011 and the said Appeal was dismissed on 29.02.2012 by the Tribunal inter alia observing that '... It is admitted fact that the predecessor in interest of the appellants purchased the property during the subsistence of the mortgage. The appellants ought to have invoked Rule 60 of II Schedule of the Income Tax Act'.

19.The Learned Counsel for the 2nd Respondent proceeds to submit that the order in Appeal No.1 of 2011 dated 29.02.2012 is challenged by the Petitioner before the Debts Recovery Appellate Tribunal and that the Petitioner filed I.A.No.607 of 2014 claiming waiver of pre-deposit because of reason that Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act mandates pre-deposit for preferring an Appeal.

20.The Learned Counsel for the 2nd Respondent contends that the father of the Petitioner purchased the mortgage property and as such, what was purchased in law was the Equity of Redemption and if the Petitioner really wanted to save the property, he should have paid the due amount under the mortgage and redeemed the property. Also that, he ought to have participated in the auction sale and purchased the property. Furthermore, after the conclusion of the sale, the Petitioner cannot be permitted to pay a little more than the sale amount and keep the property. Besides this, an individual who had not participated in the auction cannot question the auction sale.

21.The Learned Counsel for the 2nd Respondent/Bank draws the attention of this Court that after the sale of the property in question, the right of an individual to question the sale by claiming title is only to file an Application either under Rule 60 or Rule 61 of the II Schedule of the Income Tax Act, 1961 praying to set aside the sale of the property by depositing the money and in the instant case on hand, the Petitioner has not resorted to such a course.

22.While winding up his arguments, the Learned Counsel for the 2nd Respondent/Bank contends that the impugned order dated 01.10.2014 passed by the 1st Respondent/Debts Recovery Appellate Tribunal does not suffer from any illegality or irregularity, because of the reason that the discretionary order was passed under Proviso to Section 21

of the Act. Apart from that, the petitioner cannot take umbrage under the sale consideration paid by the purchaser to escape from the liability of making pre-deposit under Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Discussion:

23. Before traversing upon the factual and merits of the present case, this Court, at the outset, worth recalls and recollects the words of Robert Frost, 'A Bank is a place where they would lend you an Umbrella in a fair weather and asked for it back when it begins to Rain'.

24. Indeed, the definition of 'Debt' under Section 2(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would cover any liability secured or unsecured and, thus, the Debts Recovery Tribunal is entitled to entertain prayer of a mortgagee for recovery of debt as per decision Hindustan Laminators Private Limited V. Central Bank of India, A.I.R. 1998 Calcutta 300.

25. Further, in the present case, the indisputable fact is that the property was attached by the Recovery Officer by following the procedure prescribed under the Rules and subsequently sale proclamation was issued and they were not assailed by the Petitioner or by any person so aggrieved. After the auction sale that took place on 10.03.2011, the highest bidder had already paid the entire sale consideration of Rs.9,80,000/- and the sale was confirmed in his favour and besides the sale certificate was issued in his favour.

26. In this regard, at the risk of repetition, this Court points out that the Petitioner had not participated in the auction and therefore, he is estopped from assailing the 'Auction Sale' and the position of Law is that after the sale, the right of the person questioning the sale thereby claiming title is only by way of projecting an Application either under Rule 60 or 61 of the II Schedule of the Income Tax Act seeking to set aside the sale of the property by depositing the money and in fact, the Writ Petitioner has not availed this remedy.

27. That apart, this Court pertinently points out that 'Right to Appeal' is a statutory right and it can be circumscribed by the condition in the grant. After all, the purpose of Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act is obviously to ensure the deposit of 'Debt' due from the Appellant in case he prefers to file an Appeal against the order made or deemed to have been made by a Tribunal under the Act.

28. Moreover, the aim of Section 21 of the Act is to keep in balance the Right of Appeal, which is conferred upon a person who is affected by the order of the Tribunal directing the recovery of the 'Debt' due and at the same time to protect the Bank to have speedy recovery of the debt due and moreso, to prevent the delay in effecting the recovery in question.

29. It is to be noted that under Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, when an Appeal is preferred by any person, he is required to deposit 75% of the due amount to the Bank or Financial Institutions for the appeal to be registered. Indeed, the Right of Appeal being a vested right could not be taken away by the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. However, for ordering waiver of pre-deposit, sufficient/special reasons/necessary materials ought to be placed before the Appellate Tribunal. The discretion contemplated under Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act cannot be exercised as a matter of routine or in a casual fashion. The power to waive the deposit would by implication also include the power to extend the time for deposit. Of course, the relaxation power is given to the Appellate Tribunal for reasons to be recorded in writing provided 'Good Cause' or 'Sufficient Cause' or special reasons are shown to waive or reduce the amount to be deposited under Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, in the considered opinion of this Court.

30. It is to be borne in mind that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was promulgated with a avowed object of providing expeditious adjudication and recovery of public dues with a view to serve public/societal interest. Also that, Section 21 of the Act is similar to the provision of Sales Tax and Income Tax. Therefore, there is no unfairness or capriciousness in Section 21 of the Act, as opined by this Court.

31. Be that as it may, as far as the present case is concerned, on the date of filing the Appeal No.1 of 2011 on the file of the Debts Recovery Tribunal - III, Chennai, i.e., on 02.04.2012 a sum of Rs.69,11,905/- was due to be paid by the Petitioner. It appears that no amount was paid after the Borrowal. Undoubtedly, an 'Appeal' is a creation of statute. In fact, the 1st Respondent/Appellate Tribunal had passed a conditional order in I.A.No.607 of 2014 (in Waiver Application) on 01.10.2014, by directing the Petitioner to deposit a sum of Rs.34,55,953/- before it on or before 31.12.2014 failing

which, the said Interlocutory Application would stand automatically dismissed. In fact, the 1st Respondent, while dismissing I.A.No.607 of 2014 on 01.10.2014, had observed that no grounds were made by the Petitioner either for reduction of pre-deposit to that of 25% of the amount due nor a complete waiver. Suffice it for this Court to point out that the 1st Respondent/Appellate Tribunal had considered the relevant facts and circumstances of the case and passed the impugned order in question. As such, there is no infirmity/irregularity or patent illegality in the conditional order passed in I.A.No.607 of 2014 dated 01.10.2014 by the 1st Respondent/Appellate Tribunal. Per contra, the said order is flawless. Consequently, the Writ Petition is devoid of merits.

32. In the result, the Writ Petition is dismissed, leaving the parties to bear their own costs.

Sd/-
Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

Sgl

To

1. The Registrar,
The Debts Recovery Appellate Tribunal,
55, Wellington Estate,
Ethiraj Salai IV Floor,
Chennai - 600 105.

2. The Manager,
The Indian Overseas Bank
Periyar Nagar Branch,
Chennai - 600 082.

1 CC to Mr.F.B.Benjamin George, Advocate SR.No. 5433

1 CC to Mr.V.Arun, Advocate SR.No. 5445

W.P.No.31904 of 2014

KJI (CO)
PSI (11.02.2015)