THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

and

THE HONOURABLE SRI JUSTICE K. LAKSHMAN

Writ Petition No.21967 of 2019

ORDER : (per Hon'ble M.S. Ramachandra Rao)

The petitioners herein have questioned in this Writ Petition the order dt.05.09.2019 of the Debt Recovery Appellate Tribunal, at Calcutta (In-charge Debt Recovery Appellate Tribunal), Allahabad in Diary No.120 of 2019/184, dismissing the appeal preferred by petitioners against the order dt.12.04.2019 passed by the Presiding Officer, Debt Recovery Tribunal-II, Hyderabad, dismissing S.A.No.1246 of 2017 (Old S.A.No.406 of 2015).

2. The 4th respondent is the father of petitioners. He mortgaged premises bearing House No.12-13-161, admeasuring 900 Sq.yds., consisting of ground floor and 1st floor with a plinth area of 1500 Sq.ft., situate in Survey No.185 of Lalaguda Village, Tarnaka, Secunderabad to the 3rd respondent-Bank at Visakhapatnam to secure a loan granted by the said Bank to M/s.Shri Infratech. The 4th respondent was also a partner in the borrower firm.

3. Since the loan was not repaid in terms of the loan agreement, the 3rd respondent-Bank proceeded under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest **Act**, 2002 (also known as the **SARFAESI Act**).

4. Demand Notice dt.06.10.2015 was issued under Section 13(2) of the Act followed by possession Notice dt.14.08.2015 under Section 13(4) of the Act.

5. The petitioners herein filed S.A.No.406 of 2015 before the Debt Recovery Tribunal-I, Hyderabad for quashing the possession Notice dt.14.08.2015 issued under Section 13(4) by the 3rd respondent-Bank against the above property.

The contentions of the petitioners

6. It was contended in the said application by petitioners that the subject property is an ancestral property and was allotted to the branch of the 4th respondent in a partition between the 4th respondent and his brothers as per a registered Partition Deed dt.01.09.2004.

7. According to them, their grand-father by name, Dr. N. Ramana Rao, during his life-time, purchased 1744 Sq.Yds., in Survey No.185 of Lalaguda Village, Tarnaka, Secunderabad under a Sale Deed dt.25.09.1962 from one Mir Syed Ali and he constructed a house therein which was assessed to property tax with premises bearing House No.12-13-161. They contended that their grand-father died *intestate* on 12.03.1996 leaving behind him his widow Smt. N.V.V. Laxmi and three sons, i.e., the 4th respondent, Subba Rao Srinivas and Lakshmi Narayana Prasad. They alleged that under the Partition Deed dt.01.09.2004, Smt. N.V.V. Lakshmi, relinquished her share in lieu of payment of Rs.4,50,000/- and this property fell to the share of the 4th respondent in the said partition deed.

8. It is contended that the 1st petitioner was born on 02.01.1994 and the 2nd petitioner was born on 23.11.1991 and that they are coparceners who have 2/3rd share in the schedule property since it was ancestral property, and they have shares equal to that of their father.

9. They contended that the 4th respondent was employed and was not a partner in the business and the law does not permit him to bind other coparceners for his personal debts in view of sub-Section (4) of Section 6 of the Hindu Succession Act, 1956.

10. According to them the Bank, in collusion with the 4th respondent and his alleged coparceners, brought about the mortgage by fraud, collusion and connivance and the mortgage is null and void, and does not bind them.

11. They also claim to have filed O.S.No.138 of 2015 before the I Additional Chief Judge seeking partition of the suit schedule property.

12. They therefore prayed that the mortgage of the subject property created by 4th respondent in favour of 3rd respondent-Bank be declared null and void and unenforceable to the extent of 2/3rd share of the subject property belonging to petitioners; to declare that proceedings under the Act are not maintainable in respect of joint property without partition and separate possession; and to declare the possession Notice dt.14.08.2017 issued under Section 13(4) of the Act is null and void and not binding on the petitioners to the extent of their 2/3rd share therein.

The contentions of the 3rd respondent Bank

13. The 3rd respondent-Bank filed counter-affidavit denying the contentions of petitioners.

14. It contended that the 2nd respondent is the absolute owner of the schedule subject property and he had furnished a sworn affidavit confirming his exclusive rights over the property.

15. It contended that the petitioners/applicants in the OA have no crystallized right in their favour, and therefore they cannot question the steps taken against the subject property.

16. Alternatively, they also contended that if the subject property is ancestral property, the 4th respondent had every right to mortgage the same as a *karta* of the Hindu Joint Family and there is a pious obligation on the part of petitioners to redeem the debts of the 4th respondent. It also contended that petitioners are bound by the actions of 4th respondent as coparceners of the Hindu Undivided Family.

The Counter of the 4th respondent

17. The 4th respondent filed a counter stating that he had not received any notice under Section 13(2) of the Act, that he is not engaged in any business and did not borrow any money from any Bank including the 3rd respondent-Bank and if anybody had obtained his signatures it is without his consent and it does bind him. He further stated that the subject property is joint Hindu Undivided Family which he inherited from his father, and he is in joint possession of the same along with petitioners. He also denied receiving the possession Notice dt.14.08.2015.

Order dt.12.4.2019 in SA 1246/2017

18. The said S.A.No.406 of 2015 was transferred to the Debt Recovery Tribunal-II and re-numbered as S.A.No.1246 of 2017.

19. By order dt.12.04.2019, the said S.A. was dismissed. Several decisions were cited before the Court below.

20. The Tribunal observed that though the 4th respondent denied mortgaging the subject property as security, he did not explain as to how he parted with the original partition deed of the subject property. It held that at no point of time the 4th respondent had raised any objection for the 3rd respondent retaining the partition deed of the subject property as a security.

21. It also held that the 3rd respondent-Bank had produced material to show the issuance of the demand Notice under Section 13(2) and possession Notice under Section 13(4) apart from proof of publication of possession notice in two leading newspapers. It rejected the plea of petitioners and the 4th respondent that there was a violation of provisions of the **SARFAESI Act** by the 3rd respondent.

22. It held that the 4th respondent had mortgaged the subject property as security for credit facilities availed by M/s.Shri Infratech Partnership Firm and such an action on the part of the 4th respondent cannot be said to be illegal and not beneficial to the joint family.

23. It further observed that petitioners had not contended that the 4th respondent mortgaged the subject property for *'Avyavaharik Debt'* and if the 4th respondent had derived benefits from the borrower's firm's business, the petitioners would have accepted the profits with all appreciation to the 2nd respondent.

24. It therefore held that petitioners are bound by the mortgage on the principle of 'pious obligation' and they have not made out any ground for quashing the possession Notice dt.14.08.2015 issued under Section 13(4) of the Act.

<u>The order dt.5.9.2019 of the In-charge Debt recovery Appellate Tribunal, Allahabad</u>

25. This was assailed by petitioners before the Debt Recovery Appellate Tribunal at Calcutta by filing an appeal against the order dt.12.04.2019 in S.A.No.1246 of 2017.

26. The said appeal was also dismissed by the In-Charge Debt Recovery Appellate Tribunal at Allahabad in Diary No.120/19/184, dt.05.09.2019.

27. After referring to the contentions of the parties, it observed that the petitioners were neither borrowers nor guarantors to the loan, and the 3rd respondent-Bank was not required to serve any notice on the petitioners.

28. It held that the 3rd respondent-Bank had contended that it had issue demand notice under Section 13(1) and possession Notice under Section 13(4) to both the borrower and mortgager including the 4th respondent; and if the 4th respondent had any dispute regarding the service of these notices he should file a separate securitization application before the Debt Recovery Tribunal challenging the same. But, he has not done so.

29. It held that the Bank had placed on record before the Debt Recovery Tribunal postal receipts and acknowledgment of service of Notice under Section 13(2) and also 13(4) which were not disputed by petitioners or the 4th respondent, and that symbolic possession of the property was taken on 11.08.2015.

30. The Appellate Tribunal then held that after partition, the property continues to be ancestral property and son of that person takes interest in it and is entitled by survivorship; and after the amendment to the Hindu Succession Act in the year 2005, the daughter is also treated as coparcener. It further held that petitioners are coparceners in the property to the extent of the share inherited by the 4th respondent, and the 4th respondent being the *Karta* of the Hindu Joint Family, had every right to deal with the property for the benefit of the family and was competent to mortgage the property for that purpose; and the petitioners were under a 'pious obligation' to pay the debts.

31. It also held that petitioners and 4th respondent had colluded to defeat the recovery of the loan amounts by the Bank, that the loan was taken by the 4th respondent for betterment of the family and it cannot be treated as a loan taken for an illegal or for an immoral purpose.

32. It also held that though Section 6(4) of the Hindu Succession Act, 1956 [as amended on 09.09.2005] did not recognize 'pious obligation' of the sons, in the instant case, the property was partitioned on 01.09.2004 much prior to the amendment of the Act, and the amended Act provisions are not applicable to the partition made before 20.12.2004.

The Present Writ Petition

33. Assailing the same, the present Writ Petition is filed.

34. The counsel for petitioners reiterated that the property was ancestral property in which the petitioners had 2/3rd share and the 4th respondent was therefore not competent to mortgage the same, and the said mortgage will not bind the shares of petitioner nos.2 and 3.

35. The counsel for petitioners placed reliance on the following decisions of the Supreme Court in **Rohit Chauhan vs. Surinder**

Singh and others[1] and **Shyam Narayan Prasad vs. Krishna Prasad and others**[2].

36. The counsel for 3rd respondent-Bank placed reliance on the decision of the Supreme Court in **Commissioner of Wealth Tax, Kanpur and others vs. Chander Sen and others**[3] and **Uttam Vs. Soubhag Singh and others**[4].

37. The counsel for 3rd respondent-Bank contended that the Debt Recovery Tribunal-II, Hyderabad and the In-Charge Debt Recovery Appellate Tribunal, Allahabad were justified in rejecting the contention of petitioners.

<u>The consideration by the Court</u>

38. From the facts narrated above, it is not in dispute that on 25.09.1962 the subject property was purchased under a registered sale deed by the father of 4th respondent by name Dr. N. Ramana Rao. The said Dr. N. Ramana Rao died *intestate* on 12.03.1996 leaving behind his wife Smt. N.V.V. Laxmi and three sons including the 4th respondent.

39. On 01.09.2004, under a registered partition deed the subject property was allotted to 4th respondent.

40. It is the plea of petitioners that the subject property had been purchased by their grand-father under a registered sale deed

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[1] (2013) 9 S.C.C. 419
[2] (2018) 7 S.C.C. 646
[3] (1986) 3 S.C.C. 567
[4] (2016) 4 S.C.C. 68

dt.25.09.1962 as vacant land and then he constructed premises bearing No.12-13-161.

41. From the above pleas, it is clear that the property is the self-acquired property of the grand-father of petitioners, viz., Dr. N. Ramana Rao.

42. The said Dr. N. Ramana Rao died *intestate* on 12.03.1996.

43. Therefore, the property would devolve on his widow Smt. N.V.V. Laxmi and the three sons including the 4th respondent under Section 8 of the Hindu Succession Act, 1956 since they are heirs who are relatives specified in Class I of Schedule under Section 8 of the Hindu Succession Act, 1956.

44. In **Chander Sen** (3 supra), the Supreme Court observed that when Schedule to the Hindu Succession Act mentions only a son and does not include a son's son, it cannot be said that when a son inherits the property in a situation contemplated by Section 8, he takes it as a *Karta* of his own undivided family. It categorically declared that it would be difficult to hold today that property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be Hindu Undivided Family in his hand vis-à-vis his own son.

45. This decision has been reiterated in **Yudhishter v. Ashok Kumar**[5], **Sheel Devi vs. Lalchand and another**[6] and in **Soubhag Singh** (4 supra).

46. The reliance placed by the counsel for petitioners in **Rohit Chauhan** (1 supra) and **Shyam Narayan Prasad** (2 supra) is incorrect. Because those cases dealt with inheriting of ancestral property and do not deal with inheritance of self-acquired property.

47. In fact, the correctness of the decision of the Supreme Court in **Rohit Chauhan** (1 supra) has been doubted in view of the decisions in **Chander Sen** (3 supra) and in **Yudhishter** (5 supra), and the matter has been referred to a larger Bench in Civil Appeal No.3022 of 2006 on 26.02.2015 [**Balhar Singh vs. Sarwar Singh and another**].

48. Since admittedly the property was purchased by Dr. N. Ramana Rao and was his self-acquired property, on his death, it would devolve under Section 8 of the Hindu Succession Act, 1956 on his widow and the three sons including the 4th respondent; and even if the widow had relinquished her share and the three sons partitioned the properties, such property, in the hands of the 4th respondent, would still be only self-acquired property. It would not have the character of ancestral property or joint family property.

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[5] 1987 (1) S.C.C. 204
[6] (2006) 8 S.C.C. 581

49. Consequently, the petitioners would have no share in the said property by birth, and they are not entitled to contend that it is ancestral property in the hands of 4th respondent and they have a right by birth in it, and so he could not have mortgaged it to the 3rd respondent-Bank.

50. No other point was canvassed by the counsel for petitioners.

51. In this view of the matter, we find no merit in the Writ Petition and it is accordingly dismissed. No order as to costs.

52. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.

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JUSTICE M.S.RAMACHANDRA RAO

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JUSTICE K. LAKSHMAN

Date: 26.11.2019
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