
(2014) 211 DLT 96 : (2014) 144 DRJ 134

Delhi High Court

Case No: W.P. (C) 5335/2011, CM Nos. 10833/2011, 12672/2013 & 3454/2014

Promila Ghai

APPELLANT

Vs

Oriental Bank of
Commerce and Others

RESPONDENT

Date of Decision: May 23, 2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Section 60#Constitution of India, 1950 " Article 226#Punjab Land Revenue Act, 1887 " Section 31, 34, 35#Recovery of Debts Due to Banks and Financial Institutions Act, 1993 " Section 13, 19, 25, 28(i), 29#Transfer of Property Act, 1882 " Section 100, 48, 58, 58(f)

Citation: (2014) 211 DLT 96 : (2014) 144 DRJ 134

Hon'ble Judges: Vibhu Bakhru, J; S. Ravindra Bhat, J

Bench: Division Bench

Advocate: Abhinav Vasisht, Sr. Advocate, Mr. Gaurav Kakar and Mr. Anuj Malhotra, Advocate for the Appellant; H.P. Bhardwaj, Advocate for R-1, Mr. Chetan Sharma, Sr. Advocate and Mr. Anil K. Khaware, Advocate for R-2 and 3, Advocate for the Respondent

Final Decision: Dismissed

Judgement

S. Ravindra Bhat, J.

In this proceeding under Article 226, an order of the Debt Recovery Appellate Tribunal (DRAT) made on 27.6.2011

dismissing the Petitioner"s appeal has been impugned.

2. The appeal before DRAT emanated from proceedings initiated by the first respondent bank (hereinafter referred to as "the OBC") against M/s.

Mahine Tools, Sh. P.S. Tanwar and Sh. Hemant Vij ("borrowers") for recovery of Rs. 13,17,420.70 with interest. These proceedings were

initiated before the DRAT in respect of borrowings of the said M/s. Mahine Tools. Sh. Hemant Vij was impleaded as the third respondent in those

proceedings and later as a guarantor and mortgager of the suit property (measuring 24 canals out of Khewat No. 164, Khasra No. 74 and 78,

Village Gaval Pahari, Tehsil Sohna, Gurgaon hereinafter referred to as ""suit property""). The DRAT decreed the suit in favour of the OBC and

recovery certificate was issued on 13.7.2002. The certificate debtors, i.e., the defendants/borrowers before the DRAT had unsuccessfully sought

to compromise the matter. On 08.10.2002, the property was attached by the Recovery Officer.

3. The petitioner claimed that she became aware of the attachment only in the year 2005 when she saw the advertisement that it was scheduled to

be auctioned on 06.05.2005. It was in these circumstances that she claims to have made inquiries about the antecedent facts and become aware

about the debt, amounts due and payable to the OBC and the fact of attachment. The auction, which took place on 06.05.2005--in the scheduled

manner-saw Sh. H.C. Nanda and Sh. Puneet Nanda (hereinafter referred to collectively as ""the auction purchasers"") emerging as highest bidders.

They bid Rs. 47.10 lakh for the property. The petitioner preferred objections before the Recovery Officer which were dismissed on 04.10.2005.

Being aggrieved, she preferred an appeal before the DRT u/s 13 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993

(hereinafter referred to as ""Recovery of Debts Act""). This was dismissed on 25.09.2007. In these circumstances, she further appealed to the

DRAT.

4. Before the DRAT, the petitioner's contentions were that she was bona fide purchaser of the suit property, without notice of the prior

encumbrance. She relied upon a duly registered sale deed of 25.09.1995 and a subsequent mutation of the property in the Revenue records. She

had contended that the OBC's omission to have the property noted or mutated in the revenue record disentitled it to claim or enforce any prior

encumbrance or rights that overrode her entitlement to the suit property as a purchaser for valuable consideration without notice. It was also urged

that the OBC had, in fact, agreed to settle the matter with the borrowers and in these circumstances, further auction was not justified. The

petitioner also urged that she compromised the matter with the OBC and moved an application on 23.01.2007. The hearing before the DRT on

11.05.2007 recorded that the OBC had agreed to accept the amounts deposited by the petitioner, i.e., Rs. 50 lakhs. In these circumstances, she

stated that the auction ought to have been set aside.

5. The other arguments made on behalf of the petitioner were that the property was improperly valued, and that the equities in favour of the auction

purchasers were so inchoate and weak that the sale confirmation ought not to be given. The last argument made before the DRAT was that the

proceeding during the auction was irregular inasmuch as some of the bidders were connected to each other and in view of this and other

circumstances, the auction purchaser should not be confirmed, but rather rejected.

6. Learned senior counsel for the petitioner, Mr. Abhinav Vasisht argues that the impugned order is erroneous inasmuch as all the material on

record unequivocally pointed to the petitioner's lack of knowledge about the mortgage of the suit property in favour of OBC, when the sale deed

was executed in 1995. Arguing that in the absence of any entry in the Revenue record, as mandatorily required by the provisions of the Punjab

Land Revenue Act, 1887, there was no method by which the innocent third party purchaser could verify the existence of a prior encumbrance,

learned counsel urged that in these circumstances, Section 100 of the Transfer of Property Act provides an exception. Counsel submitted that the

provisions of the Land Revenue Act are mandatory and the OBC consciously failed to comply with the provisions. Consequently, the priority of its

claim found by the impugned order, in terms of Section 48 could not prevail. The learned counsel relied upon the Sections 31, 34, and 35 of the

Punjab Land Revenue Act, 1887.

7. Reliance was also placed upon Sri Mohan Wahi Vs. Commissioner, Income Tax, Varanasi and Others, to argue that the lack of confirmation of

the sale which was conducted on 06.05.2007 meant that there was no obligation to confirm the bid of the auction purchasers. It was submitted in

this regard that the attachment notice and a subsequent auction of 06.05.2005 could not bind the writ petitioner, i.e., the innocent third party

purchaser, particularly when the latter filed an affidavit within the period of 30 days provided by Rule 60 of Schedule II to the Income Tax Act,

which was applicable in the circumstances. It was argued, therefore, that the petitioner had every right to object to the auction proceedings in view

of the irregularities highlighted in the affidavit. Furthermore on 07.10.2005, concededly a sum of Rs. 50 lakh was deposited. Under the

circumstances, the auction purchasers could not insist that they became owners of the property and have the sale confirmed. Reliance was placed

upon Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, and Bombay Salt and Chemical Industries Vs. L.J. Johnson and Others, for the

proposition that the highest bidder does not automatically secure a vested right.

8. It was also argued that the order of the DRT dated 11.05.2007 clearly showed that the deposit of Rs. 50 lakh was acceptable to the OBC as a

compromise. Its subsequent re-think and rejection could not have prevailed since the amount was lying for more than two years with it. It was

submitted that the findings of the DRAT with respect to absence of notice of attachment and service of the sale proclamation upon the defaulter are

untenable. Learned counsel urged that the impugned order proceeded on the assumption that since these questions were agitated before the DRT,

it could not go into their merits. Learned senior counsel urged that the question of whether the sale proclamation was served upon the

defaulter/deed-holder, went to the root of the assumption of jurisdiction and the validity of the auction purchase. A third party purchaser without

notice, like the writ petitioner, was entitled to agitate the questions of intervening rights since it involved appreciation of principles of law.

9. It was argued next that the findings with respect to the valuation of the property were plainly contrary to the record and lastly that the auctioneer

had in the report, disclosed that two bidders appeared to have colluded. Learned counsel submitted that the DRAT should have scrutinized the

matter in greater detail to unravel this collusion which vitiated the auction itself.

10. The counsel for the respondents, i.e. the OBC and the auction purchasers resisted the submissions of the petitioner. They submitted that the

proposition that "entries in the Revenue record do not confer title" is well settled and the absence of such entries, in respect of the suit property

could not, in any manner have defeated the priority of the OBC's claim in terms of Section 48 of the Transfer of Property Act. It was argued that

the petitioner cannot claim to be an innocent third party purchaser because concededly, she did not have possession of the original title deeds of

the suit property. Her silence in that regard meant that, at the time of purchase of the property, she was aware that the title deeds were with

someone else, to say the least. The inference that there was a cloud over title or a prior encumbrance, therefore, was irresistible. Urging that with

the expiry of 30 days from the time that the auction was conducted, i.e., 06.05.2005, the auction purchaser's rights crystallized, learned counsel

submitted that mere filing of an affidavit or objecting to an auction did not diminish the important fact that the petitioner, though aware of the

proceedings, chose not to participate in the auction on 06.05.2005. It was submitted that the sum of Rs. 50 lakh was deposited much later, i.e., on

07.10.2010. This could not confer any right upon the petitioner since the auction purchaser had, by then, acquired an indefeasible right to the

property at least for confirmation of the sale.

11. The learned counsel next argued that though the proceedings of 11.05.2007 before the DRT prima facie indicated the OBC's willingness to

compromise the matter, the fact remained that no such decree or order was made since the offer could not be effected on account of intervening

right of the auction purchaser. It was urged that the submissions with respect to irregularity of the auction or the valuation report cannot be

countenanced as they are not based upon a correct reading of the record.

Analysis & Findings

12. It is apparent from the above discussion that the petitioner premises her grievance against the impugned order on the omission of the OBC to

have the mortgage in its favour, reflected in the Revenue records; it is urged that this failure defeats the OBC's argument regarding priority of its

claim u/s 48 of the Transfer of Property Act, thus protecting the title (acquired later), in 1995 to the suit property.

13. The DRAT ruled against the writ petitioner and affirmed the DRT's findings as to the primacy of the prior encumbrance to the property. The

provisions of the Punjab Land Revenue Act, 1887, especially Sections 31, 34, and 35 no doubt require that appropriate entries have to be made

whenever transfer or alienation of agricultural property is made. Equally, there cannot be any dispute that to the extent one claims any protections

under the land revenue legislation, the fulfillment of such legal requirements assumes importance. The question, however, is whether failure to make

those entries in the land revenue record renders the encumbrance or transfer in favour of a previous transferee (that term encompassing the

mortgagee by deposit of title deeds in favour of a creditor) unenforceable or void. In this Court's opinion, the answer to this necessarily has to be

in the negative. Consistently courts in India have held that omission to make entries in the land revenue records would not invalidate title which is

otherwise enforceable, *Suraj Bhan and Others Vs. Financial Commissioner and Others*, . Under the Transfer of Property Act, mortgage by

deposit of title deed is valid and enforceable (Section 58(f)). Mortgage is also ""transfer"" as defined under that Act (Refer to Section 58 of the

Transfer of Property Act). In these circumstances, the previous encumbrance--through mortgage by deposit of title deeds--in favour of the OBC,

has to prevail by virtue of Section 48. Such a legal consequence can be avoided only if an unequivocal overriding provision is shown in any other

legislation which requires additional compliance. There is no provision in the Punjab Land Revenue Act containing such overriding stipulation.

Consequently, the prior encumbrance in favour of the OBC--evidenced by mortgage through deposit of title deeds--has to prevail over the claims

of the petitioner made on account of the subsequent registered sale deed of 1995. This Court also recollects the decision of the Supreme Court in

Mohan Lal Vs. Anandibai and Others, that a subsequent transfer of property in respect of which mortgage security is credited earlier, cannot

confer a priority over the rights of the creditor.

14. As far as the complaint that the petitioner's title as innocent third party purchaser without notice goes, this Court notes that concededly, the

original title deeds to the property were not handed over at the time when the registered sale deed was executed on 29.05.1995 by Sh. Hemant

Vij, the owner/certificate debtor. This meant that the inference that the petitioner did not care to inform herself about the nature of title and

existence of any prior encumbrance over it, is clear and apparent. In these circumstances, this Court cannot countenance the submission that the

petitioner's right as a purchaser has to prevail over the prior encumbrance in favour of the mortgagee creditor, i.e., the OBC.

15. The next submission of the petitioner was that the proclamation of sale was not published, and that in any event, the absence of any

confirmation of the outcome of auction, which took place on 06.05.2005, did not confer any benefit or entitlement upon the auction purchaser.

This Court notices that the petitioner had filed an affidavit dated 19.05.2005 and an application before the Recovery Officer leveling various

allegations including that the auction proceedings did not take place on 06.05.2005. The order of the DRT and the DRAT have noticed that the

report of the Court Auctioneer and the record of proceedings dated 06.05.2005 clearly mentioned that the petitioner's husband, Sh. Kuldeep

Ghai went to the place of auction and sought to disrupt the proceedings, on 06.05.2005 itself. Furthermore, this Court notices that the

proclamation for sale was made pursuant to the order of 25.02.2005 of the Recovery Officer; the order of the Recovery Officer dated

31.03.2005 shows that the proclamation was served. The terms of auction were also notified in the proclamation. In these circumstances, the

concurrent findings of the DRT and DRAT do not call for interference.

16. The next question urged on behalf of the petitioner was whether the auction purchaser acquired any right or entitlement over the property. The

contention here was two-fold, first, that the absence of a confirmation of the auction sale meant that auction purchaser did not acquire any right and

second, that the petitioner had deposited Rs. 50 lakh on 07.10.2005, and that this amount was in excess of the auction purchaser's bid.

17. As regards the first contention, it would be necessary to notice the relevant provisions of the Recovery of Debts Act, i.e., Section 25, 28(i),

(ii), (v) and 29, which are extracted below:

25. Modes of recovery of debts.--The Recovery Officer shall, on receipt of the copy of the certificate under subsection (7) of section 19, proceed

to recover the amount of debt specified in the certificate by one or more of the following modes, namely:-

(a) attachment and sale of the movable or immovable property of the defendant;

(b) arrest of the defendant and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the defendant.

28. Other modes of recovery.--(1) Where a certificate has been issued to the Recovery Officer under subsection (7) of section 19, the Recovery

Officer may, without prejudice to the modes of recovery specified in section 25, recover the amount of debt by any one or more of the modes

provided under this section.

(2) If any amount is due from any person to the defendant, the Recovery Officer may require such person to deduct from the said amount, the

amount of debt due from the defendant under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to

the credit of the Recovery Officer:

Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court u/s

60 of the Code of Civil Procedure, 1908 (5 of 1908).

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(5) The Recovery Officer may recover any amount of debt due from the defendant by distraint and sale of his movable property in the manner laid

down in the Third Schedule to the income tax Act, 1961 (43 of 1961).

29. Application of certain provisions of income tax Act.--The provisions of the Second and Third Schedules to the income tax Act, 1961 and the

income tax (Certificate Proceedings) Rules, 1962, as 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.

18. Schedule II to the Income Tax Act concerns itself with the procedure for recovery of tax; Rule 52 enables the sale of immovable property. The

procedure for sale mandates drawing up of a proclamation under Rule 53 and its affixation on a conspicuous part of the property, being made

known by beat of drums or other customary mode (Rule 54). The proclamation has to mention the time of sale (Rule 55). Rule 56 states that sale

should be by auction to the highest bidder and shall be subject to confirmation by the Tax Recovery Officer. Rule 60 which is pertinent for the

present purposes prescribed as follows:

Application to set aside sale of immovable property on deposit.

60. (1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale,

may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing--

(a) [***] the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of

[one and one-fourth per cent for every month or part of a month], calculated from the date of the proclamation of sale to the date when the deposit

is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that

application, be entitled to make or prosecute an application under this rule.

19. The preceding factual narrative shows that the proclamation took place sometime in March, 2005; the date for auction was 06.05.2005. There

is no dispute that the auction purchasers' bid was the highest. Equally, the auctioneer's report dated 12.05.2005 showed that the petitioner was

aware of the proceedings; her husband sought to disrupt them. The petitioner even filed an affidavit asking the Recovery Officer not to take any

further steps, on 19.05.2005. However, the petitioner did not comply with the terms of Rule 60 and deposit an amount equivalent to the successful

bid together with interest from the date of proclamation within the time prescribed time, i.e., 60 days. Even if one were to construe the petitioner as

a person entitled to apply for setting aside of sale, there was no withdrawal of the application (made on 19.05.2005) within the time period nor,

more importantly, did the petitioner deposit the requisite amount. In these circumstances, the auction purchaser's right to secure confirmation of the

sale crystallized into an indefeasible entitlement. This conclusion is supported by the ruling of the Supreme Court reported as K. Sadanand Rao Vs.

K. Murari Rao, 1987 (Supp) SCC 334 . The deposit of Rs. 50 lakh much later on 07.10.2005 did not alter the circumstances in favour of the

petitioner. Therefore, this Court is of the opinion that the writ petitioner's arguments on this aspect are without merit.

20. During the hearing, learned senior counsel for the petitioner had urged that much prior to the auction sale, in fact, the OBC had settled the

disputes with the borrower. This argument is unpersuasive. The DRAT has, in its impugned order, discussed the entire circumstances which

impelled the petitioner to urge that the OBC had agreed to a settlement in proceedings before the DRT. This Court notices that this aspect has

been dealt with somewhat elaborately by the DRAT. Moreover on 01.02.2007, a contention was made that the petitioner had entered into a

settlement with the OBC which had agreed to receive Rs. 50 lakh. Notice on this application was given and the matter was listed later on

11.05.2007. Eventually however, the OBC did not agree to the proposal because the auction purchaser's right had intervened. Looking at the

totality of these circumstances and having regard to the fact that, by reason of expiration of 30 days from 06.05.2005 (during which no attempt

was made by the petitioner to deposit the amount indicated in Rule 60 of Schedule II to the Income Tax Act) the findings of the DRAT are not

flawed. It is, therefore, held that the submission with respect to the matter having been compromised is unmerited.

21. This leads the Court to a discussion on the valuation of the property and alleged irregularities in the auction proceedings. The petitioner had

urged that the reserve price of the property was based upon an old valuation report dated 28.08.2003, i.e., nearly a year and a half before the

date of auction. The DRAT dealt with this aspect in paragraphs 36 and 37 of the impugned order and took note of the circumstances. Apart from

there being no material in support of the petitioner's allegation with respect to undervaluation, the significant fact is that the belated offer made on

07.10.2005 also was for Rs. 50 lakh, which is marginally higher than that offered by the auction purchaser. The petitioner also did not place on

record any material to show how the property was grossly or substantially undervalued. In the circumstances, the submission as to stale valuation

leading to purchase is insubstantial.

22. The last aspect which is required to be considered is the petitioner's allegation that a cartel was formed by certain bidders and the auction was

unfair. Apart from the pleadings, an argument was made that during the bidding process, two banker's cheques offered by two separate bidders

were from the same bank and the same branch--issued one after the other. The contention of cartelization was made before the DRAT. However,

the petitioner did not succeed in persuading the DRAT. On this aspect, this Court notices that the earnest money received from two bidders, i.e.,

Sh. Puneet Aggarwal and Sh. Naveen Goel were both issued by the Vaish Cooperative Adash Bank Ltd., Darya Ganj (Nos. 140063 and

140064). However, the bidding proceeding, recorded by the Court Auctioneer reveals that these two parties, i.e., Sh. Puneet Aggarwal and Sh.

Naveen Goel were not active bidders; the rival bids were made by Sh. Puneet Nanda and Sh. Saurav Gupta. The auction purchaser eventually

turned out to be the successful highest bidder. In these circumstances, the charge that the auction sale was unfair or irregular is without basis.

23. This Court is of the opinion that the writ petition has to fail in view of the above findings. It is accordingly dismissed without any order as to

costs.