

(2009) 07 CAL CK 0124

Calcutta High Court

Case No: C.O. No. 2404 of 2008

Suresh Chandra Biswas

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision: July 22, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10(2), Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 92, 65
- Constitution of India, 1950 - Article 227
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 20, 21

Citation: (2010) 1 BC 401 : 114 CWN 1077

Hon'ble Judges: Jyotirmay Bhattacharya, J

Bench: Single Bench

Advocate: Jishnu Saha, Debojyoti Dutta and Aruna Ghosh, for the Appellant; Jayabrata Basu Roy and Mekhala Kanji for Respondent No. 1 and Jiban Ratan Chatterjee and Partha Pratim Roy and D. Karmakar, for the Respondent

Final Decision: Dismissed

Judgement

Jyotirmay Bhattacharya, J.

This application under Article 227 of the Constitution of India is directed against an order being No. 09 dated 27th June, 2008 passed by the Kolkata Debt Recovery Tribunal No. 2 in Appeal No. 5 of 2008 whereby the opposite party No. 2 being the auction purchaser was impleaded as a party in the appeal filed by the judgment debtor against an order dated 10th March, 2008 passed by the learned Recovery Officer. Debt Recovery Tribunal in TRC/ 100/2001.

2. The propriety of the order of addition of the auction purchaser as a party in the aforesaid appeal, has been challenged before this Court by the judgment debtor/petitioner (appellant) herein.

3. Heard Mr. Jishnu Saha learned Advocate appearing for the petitioner and Mr. Jiban Ratan Chatterjee learned Senior Counsel appearing for the added party and Mr. Jayabrata Basu Roy learned Advocate appearing on behalf of the decree holder Bank. Considered the materials-on-record including the order impugned.

4. Let me now consider as to how far the learned Tribunal was justified in passing the impugned order in the facts of the instant case. A decree for recovery of a sum of Rs. 15,33,178/- was passed by the Debt Recovery Tribunal-II against the petitioner herein in a suit filed by the State Bank of India, the opposite party No. 1 herein. Such decree was passed sometime in 1999.

5. After passing of the said decree, the petitioner approached the Bank for settlement of its dues as per the Reserve Bank of India one-time Settlement Scheme of 2003. The Bank accepted the petitioner's proposal, and ultimately agreed to settle the petitioner's dues on acceptance of a sum of Rs. 12,91,941/- as per the said one-time Settlement Scheme of 2003.

6. Admittedly the time schedule which was fixed for payment of the said settled amount in instalments could not be honoured by the petitioner. Since the petitioner could not pay the entire settled amount within the time fixed under settlement, the respondent Bank unilaterally increased the settled amount of Rs. 12,91,941/- to Rs. 15,33,178/- and thus an additional liability was imposed upon the petitioner by the Bank which according to the petitioner was made by the Bank in gross disregard of the R.B.I. Guidelines.

7. Admittedly a sum of Rs. 2,25,000/- could not be paid by the petitioner even within the extended time though repeated extensions were given to the petitioner for payment of the said amount. Since ultimately the petitioner did not pay the sum of Rs. 2,25,000/- to the Bank within the last extended date, the mortgaged property of the petitioner was directed to be sold by public auction. Accordingly, sale proclamation was issued and 10th March, 2008 was fixed for holding public auction for sale of the mortgaged property of the judgment debtor.

8. On 10th March, 2008, the petitioner, even before commencement of the proceeding for sale of the mortgaged property by public auction, tendered two demand drafts for a total sum of Rs. 2,50,000/- before the Recovery Officer. The petitioner claimed that the payment of the said sum of Rs. 2,50,000/- will satisfy the decree in full as per the settlement arrived at between the Bank and the petitioner under the one-time Settlement Scheme of 2003. The reason for non-payment of the said amount within the scheduled date as per the said settlement, was also explained by the petitioner before the Recovery Officer. The petitioner contended that because of his wife's illness during the said period and also due to her subsequent death which occurred on 10th October, 2001, the petitioner could not pay the said amount within the schedule date. The illness of the petitioner's daughter who was also suffering from brain tumor during the said period, was an

added reason for which payment of the said dues could not be made within the scheduled date as the petitioner had to spend a lot of money for his daughter's treatment at Vellore.

9. Since the certificate holder vehemently opposed the petitioner's prayer for settlement of his dues on acceptance of the said demand drafts the Recovery Officer returned those demand drafts to the petitioner and directed the petitioner to pay a further sum of Rs. 42 lakh in addition to the payment which had already been made by the petitioner towards satisfaction of the (decretal amount). The said figure was arrived at, on the basis of the petitioner's liability under the original decree which according to the Recovery Officer became operative due to failure of the petitioner to pay and/or deposit the entire settled amount within the stipulated period. The said order was passed by the Recovery Officer on 10th March, 2008 vide Order No. 96.

10. Since the petitioner expressed his inability to pay the said amount, the process for selling the mortgaged property by auction commenced and ultimately M/s. National Steel Trading Corporation was declared as the highest bidder for such sale. This is the other part of the order passed by the Recovery Officer on 10th March, 2008 vide Order No. 96.

11. The said bidder also deposited the entire bid money of Rs. 38,01,000/- as per the condition of sale. The said bidder has also deposited the poundage fees.

12. The petitioner was aggrieved by that part of the order dated 10th March, 2008 by which the Recovery Officer refused to accept the payment of Rs. 2,50,000/- which the petitioner tendered by two demand drafts and directed the petitioner to pay a further sum of Rs. 42 lakh in addition to the payment which had already been made by the petitioner towards the settled amount as per the one-time settlement arrived at between them. Accordingly, the petitioner preferred an appeal being Appeal No. 05 of 2008 before the Kolkata Debt Recovery Tribunal No. 2 for challenging that part of the said order against which he was aggrieved. The other part of the impugned order wherein the proceeding for sale was recorded and the added party was declared as highest bidder was not challenged in the said appeal, as according to Mr. Saha, his client is not aggrieved by that part of the impugned order.

13. The opposite party No. 2 herein namely the auction purchaser filed an application inter alia praying for its addition as party in the said appeal. It was stated by the said opposite party therein that since the said opposite party has deposited the entire bid money of Rs. 38,01,000/- together with the poundage fees amounting to Rs. 38,300/- after being declared as the highest bidder, the said opposite party is not only entitled to get an order for confirmation of sale but also is entitled to get physical possession of the property. It was further stated therein that since admittedly the petitioner could not deposit the settled amount within the stipulated period and the proclamation of sale was issued on his failure to deposit the

certificate amount and further since there was no irregularity in the process of such sale, the petitioner has no right to challenge the order dated 10th March, 2008 passed by the Recovery Officer in the said appeal. The said opposite party claimed that the interest of the said opposite party will be highly prejudiced if any order is passed in the said appeal in its absence.

14. The prayer for such addition of part of the opposite party No. 2 was opposed by the petitioner who contended that the presence of the opposite party is not at all necessary for adjudication of the dispute involved in the appeal within its limited scope of inquiry relating to first part of the order dated 10th March, 2008, as mentioned above. It was contended by the petitioner that avoidance of multiplicity of proceeding cannot be a consideration for adding a party against whom neither any relief has been claimed nor his presence is necessary for complete adjudication of the dispute involved in the proceeding.

15. The learned Debt Recovery Tribunal, however, was pleased to allow the opposite party's prayer for addition of party by holding inter alia that there will be no harm if the applicant is impleaded as a party in the appeal, particularly when such impleadment will avoid multiplicity of litigation. Thus, the said auction purchaser was added as a party in the said appeal.

16. The petitioner is aggrieved by the said order. Hence, the instant revisional application has been filed.

17. A preliminary objection regarding maintainability of this application under Article 227 of the Constitution of India was raised by Mr. Chatterjee learned Senior Counsel appearing for the added party. According to him the impugned order is appealable u/s 20 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993. Mr. Chatterjee submitted that when a particular Forum for challenging such an order is available to the aggrieved party under the said Act itself and furthermore when the remedy by way of appeal before the prescribed Forum, is equally efficacious, this revisional application should not be entertained by this Court.

18. Mr. Chatterjee further submitted that, in fact, the petitioner intentionally avoided the said Appellate Forum for avoiding statutory compliance regarding deposit of the requisite amount, which is necessary for maintaining the said appeal, as per Section 21 of the said Act.

19. Mr. Saha, learned Advocate, appearing for the petitioner contended that availability of an alternative Forum for challenging an order by way of appeal is not an absolute bar in entertaining an application under Article 227 of the Constitution of India particularly when it is found that the rights of the parties was not determined by the Court and/or Tribunal by a speaking order.

20. By drawing my attention to the impugned order, Mr. Saha tried to impress upon this Court that the opposite party's prayer for addition of party was allowed by the learned Tribunal by a totally non-speaking order. According to Mr. Saha, a non-speaking order should be regarded as non est in the eye of law. Mr. Saha, thus, contended that for challenging the non-speaking order, the aggrieved party is not required to file an appeal u/s 20 of the said Act. According to him such an order can be challenged before this Court under Article 227 of the Constitution of India, as the challenge against such non-speaking order by an appeal before the Appellate Forum, will practically become illusory.

21. Though it is rightly pointed out by Mr. Chatterjee that appeal lies against such an order before the Appellate Tribunal as per Section 20 of the said Act but, still then, this Court cannot hold that availability of a remedy by way of appeal is an absolute bar in entertaining an application under Article 227 of the Constitution of India before this Court. This revisional application was entertained on 22nd September, 2008. A limited interim order of stay was also passed in connection with the revisional application on the said date in the presence of the added party. Subsequently the said interim order was extended repeatedly by this Court in the presence of the added party. But no objection was raised regarding maintainability of this application by the added party either at the stage of entertainment of this revisional application before this Court or subsequently thereafter at the time when interim order was extended earlier. As such, this Court holds that the added party cannot object to the entertainability of this application at the stage of final hearing of this application.

22. Accordingly, this Court is not inclined to reject the petitioner's instant revisional application on the ground of its maintainability as raised by Mr. Chatterjee learned Senior Counsel on the ground as aforesaid.

23. Let me now consider the merit of this revisional application in the facts of the instant case.

24. It is no doubt true that primary object of Order 1 Rule 10(2) of the CPC is not to prevent multiplicity of action though it may incidentally have that effect. Addition of party is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of the facts and circumstances of a particular case. The Hon"ble Supreme Court in the case of [Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others](#), held that the Court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the Rule direct addition of a person whose presence is not necessary for that purpose. It was further held therein that if the intervener has a cause of action against the plaintiff relating to the subject matter of the existing action, the Court has the power to join the intervener so as to give effect to the primary object of the order which is to avoid multiplicity of action.

25. Mr. Saha has also cited another decision of the Hon"ble Supreme Court in the case of [Kasturi Vs. Iyyamperumal and Others](#), , to support his submission that a party can be added only where a right to some relief against such party in respect of controversies is involved in the proceeding or where no effective decree can be passed in his absence.

26. On perusal of the impugned order, this Court finds that though the learned Tribunal, while allowing the auction purchaser"s application for addition of party, did not consider as to whether its presence is necessary for complete adjudication of the dispute involved in the appeal or not, but, still then, this Court cannot hold that the said order should be struck down as a non-speaking order as contended by Mr. Saha. The learned Tribunal gave his own reasons for allowing the said application for addition of the party; though the discussion on the issue was not elaborate but, still then, it cannot be said that the impugned order is a totally non-speaking order, as some reason in support of its conclusion, was given by the learned Tribunal in the impugned order.

27. An order may not be sound in law, or may be a cryptic one, but, still then, such illegal or erroneous order is binding upon the parties so long as it is not set aside in the higher Forum in accordance with law. As such, this Court cannot agree with the submission of Mr. Saha who contended that the impugned order should be struck down as it is absolutely a non-speaking order.

28. Let me now consider as to whether the presence of the said auction purchaser is necessary for adjudication of the said appeal completely or not.

29. It is rightly pointed out by Mr. Saha that his client preferred the said appeal only for challenging that part of the impugned order by which his client"s prayer for acceptance of a sum of Rs. 2,50,000/- was not only rejected by the Recovery Officer but also his client was directed to deposit a further sum of Rs. 42 lakh in addition to the payment which had already been made by the petitioner under onetime settlement agreement between the Bank and the petitioner. Mr. Saha. thus, contended that for resolving the said dispute in the appeal, the presence of the auction purchaser is not at all necessary as the auction purchaser neither can support the said order nor can oppose the said order in the said appeal.

30. Mr. Saha further contended that the legality of the auction sale on account of any irregularity in the conduct of such sale which is the other part of the impugned order, has not been challenged by the petitioner in the said appeal. Mr. Saha, thus, contended that the auction purchaser is neither a necessary party nor a proper party in the said appeal and as such, the said auction purchaser ought not to have been added as a party in the said appeal.

31. According to Mr. Saha if the addition of the said auction purchaser is allowed in the said appeal, the scope of appeal will be unnecessarily enlarged as added party viz. the auction purchaser will then get an opportunity to support the impugned

order for defending the auction sale, though the validity of such sale is not the subject matter of consideration in the appeal and the petitioner is not otherwise competent to support and/or oppose that part of the order impugned wherein the right of the petitioner vis-a-vis the right of the Bank under the decree was dealt with by the Recovery Officer.

32. Mr. Chatterjee learned Senior Counsel submitted that the proceeding before the Debt Recovery Tribunal is not conducted strictly in accordance with the provisions of the Civil Procedure Code. He submitted that the proceeding under the said Act is guided by the principles of natural justice. He further submitted that when admittedly the proclamation of sale of the mortgaged property was issued on the failure of the petitioner to deposit the settled amount within the stipulated time, the petitioner lost his right to challan the impugned order in the said appeal as probably now he cannot contend that his liability under the original decree has not stood revived even though he has failed to comply with the one-time settlement agreement. Mr. Chatterjee further contended that his client has deposited huge amount of money towards the bid money as well as poundage fees and as such, if the sale is set aside, his client will be prejudicially affected and as such, his client has every right to defend the said sale to protect its title in the property sold to his client in the auction sale.

33. Thus, according to Mr. Chatterjee the appeal cannot be decided in the absence of the auction purchaser whose title in the property which was purchased by him in the auction sale is dependent upon the merit of this appeal. Mr. Chatterjee contended that the auction purchaser is a necessary party in the said appeal as it is the auction purchaser who will be ultimately affected if the appeal is allowed. As such, the auction purchaser should be given an opportunity of hearing in the said appeal.

34. On consideration of the aforesaid submission of the learned Counsel of the respective parties and on perusal of the order which is impugned in the said appeal and the memorandum of appeal filed by the petitioner before the Appellate Forum, this Court finds that the challenge in the said appeal is restricted to the first part of the impugned order wherein the petitioner's prayer for acceptance of a sum of Rs. 2,50,000/- was rejected by the learned Recovery Officer and he was directed to pay a sum of Rs. 42 lakh in addition to the payment already made by the petitioner under the One-time Settlement Scheme of 2003 towards full satisfaction of the decree.

35. Mr. Saha rightly pointed out that the legality of the auction sale which is the other part of the impugned order was not under challenge in the said appeal. In fact, the petitioner has not prayed for setting aside of the auction sale on the ground of any irregularity in the process of conduct of such sale, in the said appeal. But it is equally true that if ultimately this appeal is allowed by accepting the contention of the petitioner then automatically the sale will be set aside affecting the right of the auction purchaser in the property sold in the auction.

36. Though it is true that the sale of the mortgaged property has not been confirmed as yet by the Recovery Officer but fact remains the auction purchaser was declared as the higher bidder in the said auction and the entire bid money together with the stipulated time.

37. Now can it be said that the auction purchaser has not acquired any title in the property sold in the auction in the absence of such confirmation?

38. The answer to the said question can be traced out from Section 65 of the CPC which provides that where immovable property is sold on execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. No doubt it is true that sale becomes absolute when sale certificate is issued by the Recovery Officer. But if the sale has not been challenged by the judgment debtor then the Recovery Officer has no option but to confirm such sale and such confirmation of sale is a mere formality as it is held by the Division Bench of this Hon'ble Court in the case of Sashi Bhusan Mitra and Ors. v. Ramlal Mitra AIR 1977 Calcutta 351. It was held therein that the purchaser has an absolute vested interest in the property although there is vesting power in the Court to set aside such sale under Order 21 Rules 89 and 90 of the Civil Procedure Code. It was further held therein that if a party fails to avail himself of the appropriate provision, the sale shall be confirmed as per Order 21 Rule 92 of the Civil Procedure Code. Their Lordships further held that an expressed order for confirmation of sale is not absolutely necessary for conferring the title in the property sold, upon the auction purchaser.

39. In fact, the Bombay High Court in the case of Praydutt Natwarlal Shah v. Suryakanta N. Sangani and Ors. AIR 1979 Bombay 166 held that the right acquired by the auction purchaser in the property cannot be defeated by any transfer made by the judgment debtor in favour of a third party between the date of auction of sale and confirmation of sale.

40. In the aforesaid background this Court holds that even in the absence of the expressed confirmation of sale, the auction purchaser has acquired a right in the property sold to it in auction and thus it has also acquired a right to recover possession of the property sold to him in the auction from the judgment debtor. When his right to get the said sale confirmed and his right to recover possession of the property sold to him in the auction, is dependent upon the fate of the said appeal, in my view, the presence of the auction purchaser in the said appeal is absolutely necessary as Order 21 Rule 92 provides that such auction sale cannot be set aside without notice to the auction purchaser and the said principle, in my view, was introduced in the said provision in recognition of the principle of natural justice.

41. Thus, this Court concludes by saying that when the title and/or interest of the auction purchaser in the property sold in the auction is dependent upon the fate of

the said appeal, the auction purchaser cannot be held to be an unnecessary party in the said appeal.

42. This Court is still at a loss to understand as to how far the petitioner can maintain its challenge in the said appeal without praying for setting aside the auction sale as these two parts of the impugned order are practically two sides of one coin, which maintain their co-existence on one common base and one side of the common base cannot exist without the other side of the said base. Though Mr. Saha was correct in his submission that the dispute regarding the rights of the petitioner vice-a-vice the rights of the Bank is involved in the appeal and the auction purchaser has no independent and direct interest in the said dispute, but, still then, this Court holds that for protecting its title in the property, the auction purchaser can incidentally support the order of the Recovery Officer, as he participated in the said auction and deposited huge amount of money towards consideration for such transfer, by acting upon the first part of the order of the Recovery Officer, which is under challenge in the appeal.

43. This Court, thus, does not find any merit in this revisional application. The revisional application, thus, stands rejected.

Urgent xerox certified copy of this order, if applied for, be supplied expeditiously after complying with all formalities.