

Setting aside of auction sale by DRT quashed by DRAT: DRAT KOLKATA

Smt. Balaka Bajpeyi

...Appellant

Anil Kumar Gupta

...Respondent

Case No: Appeal No. 25 of 2021

Date of Judgement: 1st March, 2023

Judges:

Anil Kumar Srivastava, J – Chairperson

For Appellant: Mr. Debabrata Basu Ray, Ms. Sharmistha Poddar,
Advocates

For Respondent: Mr. Soudip Pal Choudhuri, Ms. Saswati Sikder, Mr.
Prasenjit Pal,
Mr. Samrat Mukherjee, Advocates

Facts:

Union Bank of India sanctioned a loan to Jupiter Trading Company. Anil Kumar Gupta was the guarantor/mortgagor. Jupiter Trading Company defaulted in repayment. Loan classified as NPA. Bank filed OA before DRT. DRT allowed OA and recovery certificate of Rs 25,91,105 issued. Recovery proceedings initiated. Recovery Officer ordered auction of mortgaged property on 14th May 2013 to recover dues. Anil Kumar Gupta filed appeal before DRAT and interim order passed on 14th May 2013 directing Recovery Officer to not proceed with sale till 13 June 2013. Auction held on 14th May 2013. Balaka Bajpeyi declared highest bidder and deposited sale proceeds. But sale not confirmed. DRAT appeal of Anil Kumar Gupta dismissed on 23 March 2018. Order challenged before High Court and dismissed. Anil Kumar Gupta filed application before

Recovery Officer for setting aside auction sale on grounds of incorrect debt ascertainment and low reserve price. Rejected on 11 April 2018. Opportunity given to pay dues by 19 April 2018. Anil Kumar Gupta filed appeal before DRT. Allowed by impugned order dated 6 January 2020, setting aside auction sale and Recovery Officer's order dated 11 April 2018. Balaka Bajpeyi and Anil Kumar Gupta filed appeals before DRAT against DRT's impugned order.

Elaborate Opinions of Court:

DRT could not have directed Corporate Debtor to pay interest to auction purchaser when amount was lying with the Bank which was earning interest. Against principles of natural justice. Direction liable to be quashed. DRT exceeded jurisdiction in re-agitating valuation issue which was already decided by High Court order attaining finality. Finding of DRT adverse to High Court's finding could not be appreciated. Liable to be quashed. No appeal preferred against Recovery Officer's order regarding auction sale within 30 days as per Rule 60 of Income Tax (Certificate Proceedings) Rules. Sale could not be challenged after expiry of 30 days. DRT exceeded jurisdiction in quashing auction sale notice and Recovery Officer's order.

Arguments by Parties:

According to Rule 8(5) of Security Interest (Enforcement) Rules 2002, Recovery Officer gave go by to valuation and fixing of reserve price before auction sale. Finding recorded without jurisdiction. (Argument of Anil Kumar Gupta).

Auction sale notice and order could be challenged since sale was not confirmed. Question of illegality in auction process can be considered even if purchaser deposited sale proceeds. (Argument of Anil Kumar Gupta). As per Rule 60 of Income Tax (Certificate Proceedings) Rules, 1962, appeal against sale order to be filed within 30 days. No appeal filed against Recovery Officer's order dated 14th May 2013 hence could not be challenged. (Argument of Balaka Bajpeyi). Ground regarding setting aside sale on certain grounds was taken in appeal before DRT. So Recovery Officer's order dated 11 April 2018 was appealable. (Argument of Anil Kumar Gupta)

Sections:

Section 29 of The Recovery of Debts And Bankruptcy Act, 1993. Rule 60 of Income Tax (Certificate Proceedings) Rules 1962, 2nd Schedule.

Cases Referred/Cited:

No specific case laws have been cited or referred to.

Laws Referred:

The Recovery of Debts And Bankruptcy Act, 1993

Security Interest (Enforcement) Rules 2002

Income Tax Act, 1961

Income Tax (Certificate Proceedings) Rules, 1962

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Court

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Full Text of Judgment:

1.Both these appeals have arisen against one common judgment and order dated 6th January, 2020, passed by Learned Debts Recovery Tribunal-III, Kolkata (hereinafter referred to as the 'Tribunal') in Appeal No. 04 of 2018 arising out of R.P. No. 46 of 2009 arising out of O.A. 06 of 2004, hence both the appeals are being decided by a common judgment.

2. Appeal No. 25 of 2021 is filed by Smt. Balaka Bajpayi, who is Respondent No. 2 before the Tribunal while Appeal No. 26 of 2021 is filed by Anil Kumar Gupta, who was the Applicant before the Tribunal.

3. As per the pleadings of the parties, the facts in brief are that the Respondent Bank, Union Bank of India, sanctioned a loan to M/s. Jupiter Trading Company, Respondent No. 3 in Appeal No. 25 of 2021. Appellant, Anil Kumar Gupta, was guarantor/mortgagor of the said land. Borrower defaulted in repayment of the loan, accordingly, loan was classified as N.P.A. O.A. 06 of 2004 was filed before the Learned Tribunal by the Bank, Union Bank of India (hereinafter referred to as the 'Bank'). Learned Tribunal allowed the O.A.3 Appeals No. 25 & 26 of 2021-DRAT-Kolkata.

4. Recovery Certificate of Rs.25,91,105.30p was issued. Accordingly, Recovery Proceedings was initiated. Learned Recovery Officer. Vide order dated 27th February, 2013, initiated auction sale process of the mortgaged property for recovery of the dues. Sale was fixed on 14th May, 2013. Appellant filed an appeal before this Appellate Tribunal, being Appeal No. 198 of 2012 wherein an interim order was passed on 14th May, 2013 to the effect that "This Tribunal directs in the best case of justice, the Recovery Officer not to proceed with the sale till 13th June, 2013. If anything is already done that will be subject to the result of the application and the appeal."

5. It is asserted that Appellant verbally informed the Recovery Officer regarding the order passed by this Appellate Tribunal but auction sale was conducted. Smt. Balaka Bajpayi (Respondent No. 2 in Appeal No. 26 of 2021 and Appellant in Appeal No. 25 of 2021) was the highest bidder, who deposited the sale proceeds in time but the sale was not confirmed.

6. Guarantor/Mortgagee, Anil Kumar Gupta, was aggrieved by the order of the Recovery Officer. Sale Certificate was not issued. It was informed that on 10th May, 2013 Borrower as well as the Guarantor approached the Recovery Officer for stay of the e-auction wherein he directed them to deposit Rs.13.00 lac by 13th May, 2013 in a 'No Lien Account' which was not complied.

7. Appeal No. 198 of 2012 was dismissed by the Appellate Tribunal vide order dated 23rd March, 2018 by holding that "I also do not find any substance in the submission of the Learned Counsel for Appellant that the Applicant may be given an opportunity to pay the compromise amount. This stage is over, in as much as this Bench has no power to issue such direction." This order was challenged before the Hon'ble High Court at Calcutta by filing revisional application, being C.O. 815 of 2018, which was dismissed on 16th May, 2018.

8. On 11th April, 2018, Respondents No. 1, 3 and 4, namely, Anil Kumar Gupta, Jupiter Trading Company and Smt. Sujata Gupta, filed 4 Appeals No. 25 & 26 of 2021-DRAT-Kolkata an application before the Learned Recovery Officer for recalling and/or setting aside the auction sale

conducted on 14th May, 2013, inter alia, on the ground that the debt for which sale was made, was not correctly ascertained/crystallized and also the reserve price was fixed much below the prevailing market price, which was dismissed by the Learned Recovery Officer. However, the Learned Recovery Officer gave an opportunity to Respondents No. 1, 3 and 4 to pay the legitimate dues of the Certificate Holder Bank by making payment to the Certificate Holder Bank by 19th April, 2018.

9. Certificate Debtor No. 1, Anil Kumar Gupta, filed an appeal before the Learned Presiding Officer of the Learned Tribunal under Section 30 of The Recovery of Debts And Bankruptcy Act, 1993 challenging the order passed by the Learned Recovery Officer dated 11th April, 2018. Appeal No. 04 of 2018 was allowed by the Learned Tribunal by the impugned judgment and order dated 6th January, 2020.

10. Feeling aggrieved the Auction Purchaser filed the instant appeal, being Appeal No. 25 of 2021, for the relief to quash the order dated 6th January, 2020 passed by the Learned Tribunal with consequential reliefs.

11. Certificate Debtor, Anil Kumar Gupta, filed Appeal No. 26 of 2021 with the relief to set aside the order dated 6th January, 2020 to the extent that the direction by the Learned Tribunal to the effect that "x x x or else total money deposited by him shall be returned to him with simple interest at the rate of 6%, as decided by the Learned Tribunal in the R.C. Total accrued interest for that purpose shall have to be borne by the Corporate Debtors in the event auction purchaser do not participate in the proposed auction sale or not selected as the highest bidder." I have heard the Learned Counsel for the parties and perused the record.

12. At the very outset in the facts and circumstances of the case, it would be appropriate to quote the operative portion of the order passed by the Learned Tribunal:

"12. In the result appeal is allowed. Impugned auction sale notice and the order dated 11.04.2018 passed by the learned R0 are set aside. When CDs claimed that they deposited entire dues, Learned R0 is directed to examine after hearing the parties to the appeal whether

CDs had deposited entire dues upto date. If learned RO is not satisfied with the deposit, he is directed to initiate auction sale process afresh after obtaining fresh valuation report and fixing reserved price on its basis. Auction purchaser shall be allowed to participate in the auction sale, if he so desire, and money so deposited by him shall be adjusted against the EMD and sale proceeds, if he again selected highest bidder or else total money deposited by him shall be returned to him with simple interest @ 06% as decided by this Tribunal in the RC. Total accrued interest for that purpose shall have to be borne by the CDs in the event auction purchaser did not participate in the propose auction sale or not selected as highest bidder. Learned Recovery Officer is directed to proceed with the recovery proceeding accordingly. No costs."

13. Bare perusal of the order will show that the Learned Tribunal quashed the auction sale notice as well as the order dated 11th April, 2018 passed by the Recovery Officer. Further, direction was issued to the Recovery Officer to examine as to whether Corporate Debtor had deposited the entire dues up-to-date and if he is not satisfied with the deposit, auction sale process should be started afresh after ascertaining the Annual Valuation Report and fixing reserve price. Auction purchaser should be allowed to participate in the auction sale and the money so deposited by him would be adjusted against the EMD and the sale proceeds if he is again selected as the highest bidder or else total money deposited by him shall be returned to him with simple interest at the rate of 6%. Total accrued interest for that purpose shall have to be borne by the Certificate Debtors in the even auction purchaser did not participate in the proposed auction sale or not selected as highest bidder.

14. It is admitted between the parties that the amount deposited by the Auction Purchaser is lying with the Union Bank of India. Amount is not lying either with the Corporate Debtors or the Guarantors. Bank is earning and enjoying the interest over the amount, hence there was no occasion for the Learned Tribunal to issue a direction to the Corporate Debtor to make payment of interest to the Auction Purchaser. This portion of the direction, at the very outset, is against the

basic principles of law and natural justice which is liable to be quashed.

15. It is undisputed that O.A. 06 of 2004 was allowed by the Learned Tribunal as the Recovery Certificate of Rs.25,91,105.30 was issued and Recovery Proceedings were initiated. Vide order dated 27th February, 2013 Learned Recovery Officer initiated auction sale process of the mortgaged property. Sale was fixed on 14th May, 2013 and Appeal No. 198 of 2012 was filed before this Appellate Tribunal wherein a conditional interim order was passed on 14th May, 2013 to the effect that "This Tribunal directs in the best case of justice, the Recovery Officer not to proceed with the sale till 13th June, 2013. If anything is already done that will be subject to the result of the application and the appeal." Thereafter, sale was conducted on the date fixed, i.e. 14th of May, 2013 and Smt. Balaka Bajpeyi was declared as the highest bidder who also deposited the sale proceeds. It is also undisputed that Appeal No. 198 of 2012 was dismissed on 23rd March, 2018. This DRAT order was challenged before the Hon'ble High Court at Calcutta by filing Revisional Application No. C.O. 180 of 2018 which was dismissed on 16th May, 2018.

16. Challenge was made by M/s. Jupiter Trading Company and Smt. Sujata Gupta, Proprietress of Partnership Firm, namely, M/s. Jupiter Trading Company before the Hon'ble High Court.

17. Before the Hon'ble High Court the first ground of challenge was that despite direction of the DRAT as to deduction of the payments received by the Bank during the pendency of the litigation, Recovery Certificate was issued in respect of the entire dues as 'Award', i.e. Rs.25,91,105.30p and the substantial amount has already been paid by the Appellant to the Bank during pendency of the litigation, were not given back. It was held by the Hon'ble High Court that "The obvious mode of reconciliation between the two propositions would be in respect of debt adjudicated by the Tribunal while distributing the proceeds the amount already paid by the award debtors during litigation would be deducted and the balance would be handed over to the Award Holder/Bank. Hence there is substance in the contention of the opposite party No. 1 that such deduction would not fetter the

Court from passing an award in respect of the entire debt and issuance of Certificate for recovery of such amount.”

18. It was also argued before the Hon’ble High Court that there was a violation of the said order passed by the DRAT, Kolkata on 14th May, 2013. It was held by the Hon’ble High Court that “The certificate was already issued previously and no specific steps were taken by the Recovery Officer thereafter. Even if the proposed purchasers deposited, the balance consideration amount of the sale proceeds subsequently, such action did not amount to proceeding with the sale and could not in any event, vitiate the sale itself. In fact, the sale has not been confirmed as yet.”

19. It was further held that “Next coming to the objection regarding valuation of the property in question for the purpose of sale, the Recovery Officer, after hearing both the sides, had passed order No. 38 dated 10th May, 2013, thereby categorically finding that the valuation arrived at for the purpose of issuance of certificate was justified. Reasons were also given for arriving at such finding. The said order attained finality in view of no successful challenge having been mounted against the same. In such view of the matter, neither the borrower can take such point afresh, nor can the guarantors reagitate the said issue at a juncture when the Appellate Tribunal was hearing the arguments. Such belated attempt of the guarantors was only a futile attempt to stall the proceedings.”

20. It was further held that “Although the objection as to valuation arises out of a subsequent development, such objection cannot be permitted to be repeated time without number, in particular, since such question was led to rest by the Recovery Officer long back.”

21. Finding of the Hon’ble High Court became final as no SLP or appeal was preferred against the judgment. Hence it is clear that as far as assessment of valuation is concerned, it had attained its finality by the judgment of the Hon’ble High Court.

22. The impugned order, passed by the Tribunal, shows that Learned Tribunal had framed three issues. The first issue was whether the

provisions of 8 (5) of the Rules of 2002 has been complied with? In the finding Learned Tribunal held that Learned Recovery Officer allowed the auction sale to proceed giving complete go by to the Rule 8 (5) of the Rules of 2002. Although it would not be appropriate to deal with this issue again but if we go through Rule 8 (5) of the Rules, 2002 which provides as under :

8. Sale of immoveable secured assets (5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved

valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

- (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or
- (b) by inviting tenders from the public;
- (c) by holding public auction including through e-auction mode; or
- (d) by private treaty.

23. I am constrained to observe that the Learned Tribunal has exceeded its jurisdiction in re-agitating the issue of valuation of the property when this has already been set at rest by the judgment of the Hon'ble High Court as quoted above. Judgment of the Hon'ble High Court was final. It was having binding effect over the Tribunal. Judicial discipline requires rather mandates that htre judgment of the Hon'ble High Court should be complied with by all the Courts and Tribunals within the jurisdiction of the Hon'ble High Court. When the Hon'ble High Court has held that the order of the Recovery Officer regarding valuation of the property in question for the purpose of sale had attained its finality, then there remain no option for the Learned Tribunal to re-open the issue and to record a finding adverse to the finding recorded by the Hon'ble High Court. Such attitude of the Learned Presiding Officer, Learned Debts Recovery Tribunal-3, Kolkata could not be appreciated. However, this finding cannot sustain and is liable to be quashed.

24. The second issue framed was whether the impugned order dated 11th

April, 2018 is sustainable in law? Learned Tribunal held that the sale was not confirmed therefore, question of illegality in the process of auction sale could be considered even at a stage when auction purchaser had deposited the entire sale proceeds in 2014. It is evident on record that the sale was conducted on 14th May, 2013. This order of the Recovery Officer was not challenged. Section 29 of The Recovery of Debts And Bankruptcy Act, 1993 provides as under: "29. Application of certain provisions of Income Tax Act The provisions of the Second and Third Schedules to the Income Tax Act, 1961 (43 of 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 Act:"

25. Rule 60 of Income Tax (Certificate Proceedings) Rules 1962, 2nd Schedule reads as under : "Rule 60 Application to set aside sale of immovable property on deposit:

(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."

26. Learned Counsel for Auction Purchaser submits that according to Rule 60 of Income Tax (Certificate Proceedings) Rule 1962 where the

immoveable property has been sold in execution of a certificate the defaulter or any person whose interest are affected by sale, may, at any time within thirty days, apply to the Tax Recovery Officer to set aside the same. Learned Counsel submits that no appeal was preferred against the order of the Recovery Officer within thirty days of the sale, i.e. 14th May, 2013. Accordingly, the sale could not be challenged after expiry of the period of thirty days.

27. Learned Counsel for Respondent submits that the appeal was filed before the Tribunal wherein in paragraph 1 (V) of the grounds, this ground was taken when the Learned Recovery Officer failed to consider the backdrop of the application for setting aside the sale.

28. I do not find any force in the submission made by the Learned Counsel for Respondent. Appeal against the order dated 11th Applicant 2018 was filed wherein a prayer was made that sale conducted on 14th May, 2013 may also be quashed. No appeal was filed within thirty days of the sale before the appellate forum.

29. It is submitted by the Learned Counsel for Respondent that the interim order passed by DRAT, Kolkata in appeal on 14th May, 2013 was communicated orally to the Recovery Officer who did not consider the same and conducted the sale. I do not find any force in the submission. There is no material available on record to show that Recovery Officer was informed about the order passed by the DRAT regarding sale. Further in the interim order, passed by DRAT, Kolkata it was mentioned that it would be subject to the decision of the appeal. Hence, it could not be accepted that the order passed by this Appellate Tribunal, dated 14th May, 2013, was communicated to the Recovery Officer. Learned Tribunal exceeded its jurisdiction in quashing the auction sale notice and the order dated 11th April, 2018, passed by the Learned Recovery Officer.

30. On the basis of the discussion made above, I am of the view that the Learned Tribunal has committed patent illegality in passing the impugned order which is liable to be quashed.

31. Accordingly, both the appeals are liable to be allowed and the

impugned order is liable to be set aside. Both the appeals, being Appeal No. 25 of 2021 and Appeal No. 26 of 2021, are allowed. Judgment and order, passed by Learned Debts Recovery Tribunal-III, Kolkata, dated 6th January, 2020, is hereby set aside. No order as to costs. File be consigned to Record room. Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT. Let a copy of this judgment be retained in the file of Appeal No. 26 of 2021. Copy of the Judgment/Final Order be uploaded in the Tribunal's Website. Order signed and pronounced by me in the open Court on this the 1st day of March, 2023.