

IN THE DEBTS RECOVERY APPELLATE TRIBUNAL AT KOLKATA

Appeal No. 228 of 2018

(Arising out of SA No. 31 of 2016 in DRT-Cuttack)

**THE HON'BLE MR. JUSTICE ANIL KUMAR SRIVASTAVA
CHAIRPERSON**

1. Authorised Officer, The Urban Co-operative Bank Ltd., Cuttack
At- Tinikonia Bagicha, P.O. Buxi Bazar, Dist. Cuttack -753001,
Odisha.
2. Branch Manager, The Urban Co-operative Bank Ltd., Cuttack Main
Branch, at Tinikonia Bagicha, P.O. Buxi Bazar, Dist -Cuttack -753001,
Odisha

...Appellants

-Versus-

1. Smt. Manorama Mohanty, aged about 86 years, W/o-Late Rabindra
Kumar Mohanty. At /PO-Arunodaya Nagar, (Near High Court Colony)
Badambadi, Dist-Cuttack -753012, Odisha.
2. Sri Bira Kishore Mohanty, aged about 61 years, S/o-Late Rabindra
Kumar Mohanty At /PO-Arunodaya Nagar, (Near High Court Colony)
Badambadi, Dist-Cuttack -753012, Odisha.
3. Nirmal Chandra Mohanty, aged about 57 years, S/O – Late Rabindra
Kumar Mohanty. Arunodaya Nagar, (Near High Court Colony)
Badambadi, Dist-Cuttack -753012, Odisha.
4. Smt. V. Anusuya Devi, aged about 79 years, W/o Late V. Sundar Rao,
Police Line, (Behind Hanuman Temple), Mani Sahoo Chhak, PO- Buixi
Bazar, Dist – Cuttack -753001
5. Smt. V. Kanyakumari, aged about 49 years. W/o Late V. Durga
Prasad Police Line, (Behind Hanuman Temple), Mani Sahoo Chhak,
PO- Buixi Bazar, Dist – Cuttack -753001
6. Bijaya Laxmi Mohanty, (Auction Purchaser), W/o – Brahmananda
Nayak C/o – Urban Co-operative Bank Ltd., AT/PO- Tinikonia
Bagicha, P.O. Buxi Bazar, Dist. Cuttack -753001

... Respondents

Counsel for the Appellants

Mr. Lalatendu Kanungo,
Learned Advocate

Counsel for the Respondents

Mr. Nemani Srinivas,
Learned Advocate

JUDGMENT

: On 5th October, 2023

THE APPELLATE TRIBUNAL

Instant appeal has been preferred against an order dated 03.04.2018 passed by Learned DRT Cuttack dismissing the MA No. 1116 of 2017 arising out of S.A. No. 31 of 2016.

2. As per the pleadings of the parties, Appellant Bank is a primary Co-operative Society. Dr. V. Durga Prasad (since deceased) availed a term loan of Rs. 27,60,000/- as proprietor of M/s Durga Nursing Home from the Appellant on 25.04.2005. Loan was secured by registered mortgage of the land and building of Respondent No. 4, Smt. V. Anusuya Devi vide mortgage deed dated 19.04.2005 and registered mortgage of land and building of Respondent No. 1 to 3 namely Smt. Manorama Mohanty, Sri Bira Kishore Mohanty and Sri Nirmal Chandra Mohanty vide mortgage deed No. 2501 of 23.04.2005. Loan was classified as NPA. Demand Notice was issued on 01.02.2008. Possession notice was issued on 24.04.2008. Mortgagor preferred W.P. (C) No. 6912 of 2008 and W.P. (C) 6913 of 2008 before the Hon'ble High Court which were dismissed on 21.12.2012. Notice under Section 8(6) of the Security Interest (Enforcement) Rules, 2002 was issued by the Bank on 06.03.2013. Distress value of the property of Respondent No. 1 to 3 was assessed as Rs.48,70,000/-. Sale notices were published in two newspapers on 27.03.2013.

3. W.P. (C) No. 653 of 2013 was filed before the Hon'ble High Court of Orissa. Hon'ble High Court vide order dated 14.04.2013 issued direction to conduct the auction sale but not to confirm the sale subject to Appellant complying the order dated 15.01.2013 on or before 18.04.2013. Writ petition No. 653 of 2013 was dismissed on 08.12.2015.

4. Thereafter, fresh sale notice was published on 05.03.2016 in two newspapers demanding an amount of Rs.68,35,624/- as on 31.12.2015 fixing the auction sale dated as 21.03.2016. Consequently, Respondent No. 6 namely Bijaya Laxmi Mohanty was declared as successful bidder who deposited the amount of 25% on 21.03.2016 and balance 75% on 31.03.2016. In the meantime, a writ petition (C) No. 4537 of 2016 was filed before the Hon'ble High Court wherein status quo order was passed. S.A. No. 31 of 2016 was also filed by the Respondent Nos. 1 to 3 before DRT Cuttack. Hon'ble High Court disposed of Writ Petition No. 4537 of 2016 vide order dated 14.07.2017 quashing the impugned sale notice with a direction to the Bank to refund the amount of Rs. 49 lacs to the auction purchaser with interest and liberty was granted to the Bank to issue fresh sale notice.

5. Fresh valuation was assessed at Rs. 46 lacs on 05.09.2017. The Chief Executive officer of the Bank received the notice in SA No. 31 of 2016 who was directed to appear before DRT on 16.09.2017.

6. A Writ Petition (C) No. 1991 of 2016 was filed by the Respondent No. 4 before Hon'ble High Court of Orissa against possession notice dated 30th January, 2016 and paper publication dated 27.03.2016 which was dismissed on 07.09.2017 being not pressed.

7. On 16.09.2017 in the Lok Adalat the Learned Presiding Officer Debts Recovery Tribunal Cuttack issued direction to accept an amount of Rs.20 lacs in full and final settlement of the loan dues of Rs.84,57,659.00 as on 30th June, 2017 and to release the mortgaged property. Law Officer Shri Himanshu Kumar Mishra signed the order. On receipt of the order dated 16.09.2017, an amount of Rs.20 lacs were deposited by the Respondent No. 4 and a request was made on 16.10.2017 for return of the title documents. Order dated 16.09.2017 was referred to the Committee of Management by the Appellant Bank. This order was passed on the face of the order dated 14.07.2017 passed by Hon'ble High Court of Orissa in Writ Petition (C) No. 4537 of 2016.

8. Miscellaneous Application No. 1116 of 2017 was filed before the Learned DRT for recall of the order dated 16.09.2017 which was dismissed by the Learned DRT.

9. Feeling aggrieved, Appellant preferred the Appeal.

10. I have heard the Learned Counsel for the parties and perused the record.

11. Perusal of the impugned order dated 16.09.2017 would show that the matter of O.A. No. 31 of 2016 was taken up by the Learned DRT in the Lok Adalat wherein Sri Nirmal

Chandra Mohanty Appellant No. 3, Smt. V. Kanyakumari, Respondent No. 4 as well as Respondent Bank's Law Officer Shri Himanshu Kumar Mishra and Chief Executive Officer Sri Akula Swain were present. Bare perusal of the order will also show that a settlement was arrived at between the parties. Following order was passed:

"On the request of both the parties, this case is being taken up in the Lokadalat for amicable settlement and disposal of the case.

Mr. Nirmal Chandra Mohanty, applicant No. 3 along with Counsel Shri A.K. Das, Mrs. V. Kanyakumari, Respondent No. 4 is present along with her Counsel Shri Pupun Das. Counsel for the Respondent Bank along with Law Officer, Shri Himanshu Mishra and CEO, Shri Akula Swain are present."

12. This order bears the signature of Shri Himanshu Kumar Mishra, Law Officer. Presence of Chief Executive Officer of the Appellant Bank, Shri Akula Swain is also recorded in the order.

13. Recall application was filed by the Bank on the ground that the relief sought in the SARFAESI application is already covered by the order of the Hon'ble High Court passed in W.P. (C) No. 4537 of 2016 dated 14.07.2017. Further, the Bank being a Primary Co-operative Society has no jurisdiction and competence for remission of the amount. Learned DRT exceeded its jurisdiction by accepting the amount of Rs. 20 lacs in the settlement. Consent of the competent authority was not ensured by the Learned DRT for arriving at a settlement. Law officer was not the competent authority. Chief Executive officer's signatures

were not obtained. Defendant No. 3 deposited the sum of Rs. 20 lacs in the loan account of Dr. V. Durga Prasad since deceased. In the meeting of the Committee of Management dated 21.10.2017, it was resolved that Law Officer is bereft of competence to agree to the settlement.

14. Learned Counsel for the Appellant submits that the impugned order suffers from illegalities. The consent of the competent authority was not ensured by the Learned DRT at the time of arriving at the settlement. No written settlement was submitted as required under Order 23 of the Code of Civil Procedure. The matter was not referred for Lok Adalat by the competent Authority.

15. Per Contra, Learned Counsel for the Respondent submits that the Chief Executive officer of the Appellant Bank was present at the time of hearing and settlement of terms and conditions. It is further submitted that after the impugned order Appellant Bank accepted the amount of Rs.20 lacs without protest. It is further submitted that in the Appeal certain allegations have been labelled against the Learned Presiding officer which did not find place in the recall application.

16. As per the note submitted by the Chief Executive Officer on 16.09.2017, the loan dues were Rs.22,84,588/- (principal) + Rs. 12,73,071/- as interest, coupled with it Rs.49 lacs were the sale proceeds for refund. A sum of Rs.19,28,450/- is deposited out of which Rs.4,10,000/- were

deposited by the co-sharer i.e. Shri Nirmal Chandra Mohanty.

17. Perusal of the order dated 16.09.2017 will show that the matter was listed on that date. The matter was taken up in the Lok Adalat. Chief Executive Officer of the Appellant Bank namely Sri Akula Swain was present along with his Counsel as well as Sri Himanshu Mishra, Law officer. There is a specific recording by the Learned Presiding Officer to the effect that on mutual discussion and mediation, both the parties agreed for settlement of the claim on payment of Rs.20 lacs in full and final settlement. A certificate is also endorsed in the order itself that the Learned Presiding officer was convinced that the parties have understood and have consented to the above settlement and the Tribunal is of the opinion that the settlement with the terms and conditions are beneficial to both the sides. Accordingly, award was passed. Sri Himanshu Mishra, law officer also signed the order sheet and agreed to the terms and conditions of the settlement. In the recall application the only ground taken is that the matter is already disposed of by the Hon'ble High Court in the order dated 14.07.2017. Further, the Chief Executive Officer did not agree for the settlement. On 21.10.2017 decision was taken to recall the order. These grounds were not accepted by the Learned DRT. No plea is taken in the recall application that the Presiding Officer has recorded wrong facts in the order. Had it been so, this plea should have been taken before the same Presiding Officer so

that he may have an opportunity to record his finding on this issue. No allegations have been levelled against the Presiding Officer. Hence, it cannot be accepted that Learned Presiding Officer has recorded wrong facts in the order.

18. As far as the grounds taken by the Appellant are concerned, I am in full agreement with the findings recorded by the Learned DRT in passing the impugned order. Section 21 of the Legal Services Authorities Act 1987 provides that the award of the Lok Adalat shall be treated as decree of a Civil Court. In the order dated 16.09.2017, presence of the Chief Executive Officer was there which is also not disputed by the Appellant Bank even in the Appeal. Learned DRT recorded a certificate about the satisfaction of the parties regarding terms and conditions of the settlement. Further, the law officer Shri Himanshu Mishra signed the order which shows that at the time of passing of the order Shri Himanshu Mishra as well as Chief Executive officer were present before the Learned Tribunal. Shri Himanshu Mishra signed the order sheet without any protest. If they were not agreeable for the terms and conditions as set out in the order, they could have raised the issue then and there and should not have signed it. The recall application was filed after about a month. What restrained them from making an application immediately there on 16.09.2017 or the next working day disagreeing with the terms and conditions of the settlement, that too was not done.

19. Amount of Rs. 20 lacs was deposited by the Respondents although in a different branch which was accepted by the Bank without any protest.

In State of Punjab & Others -vs- Dhanjit Singh Sandhu (2014) 15 SCC 144 it is held that-

"22. The doctrine of "approbate and reprobate is only species of estoppels, it implies only to the conduct of parties. As in the case of estoppels it cannot operate against the provisions of a statute.

23. It is proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra State Road Transport Corporation -vs- Balwant Regular Motor Service, Amravati & Ors., AIR 1969 SC 329). In R.N. Gosain -vs- Yashpal Dhir, AIR 1993 SC 352, this Court has observed as under "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

In Union of India & Others -vs- N. Murugesan (2022) 2 SCC 25, the Hon'ble Apex Court, in para 26, held as under :

"26. These phrases are borrowed from the Scott's law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage

of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.”

20. Accordingly, when the terms and conditions were acceptable to both the parties and no objection was raised either at the time of order or immediately thereafter, hence, now Appellants cannot raise the plea that they are not amenable for the settlement amount. Appellant accepted the amount of Rs. 20 lacs without any protest. Even if it is accepted that the amount was deposited in some other branch, then when Appellant came to know about it, protest letter could have been sent to the Respondent. Hence Appellant cannot be permitted to approbate and reprobate i.e. accepting the amount without any protest in compliance of DRT order and thereafter challenging the same. Now Appellant is estopped and barred from challenging the impugned order.

21. As far as question of decisions of S.A. in W.P.(C) No. 4537 of 2016 dated 14.07.2017 is concerned, it cannot be accepted. In the said order the sale notice was set aside by the Hon'ble High Court. But it cannot be said that the

matter was settled by the Hon'ble High Court. Sale notice was quashed with giving liberty to the Bank to issue fresh notice for sale of the mortgaged property under the law. Hence, this order in no way decided in SARFAESI application. Further, this plea was not even raised before the Learned DRT at the time of settlement of the matter on 16.09.2017.

22. On the basis of discussion made above, I am of the view that the Learned DRT has rightly dismissed the recall application. Appeal lacks merit and is liable to be dismissed.

ORDER

Appeal is dismissed. Judgment and order passed by DRT- Cuttack dated 03.04.2018 is confirmed.

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.

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 5th day of October, 2023.

(Anil Kumar Srivastava,J)
Chairperson

Dated: 5th October, 2023

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