

A.F.R.

Court No. - 6

Case :- WRIT - C No. - 1000394 of 2004

Petitioner :- Girija Prasad Ojha

Respondent :- State Of U.P.Thru Collector Faizabad And 4 Ors

Counsel for Petitioner :- S.M Waseem, Diwakar Pratap Pandey, I.M. Pandey Ist, Kripa Shankar Shukla, Rameshwar Tiwari, S.M.

Waseem, Smt. Usha Tiwari, Vidya Bhushan Pandey

Counsel for Respondent :- C.S.C, A. Kumar, Mayank Pathak, Ravi Shanker Mishra, S.N. Goshwami, Sharad Bhatnagar

Hon'ble Alok Mathur, J.

1. Heard Sri I. M. Pandey, learned counsel for the petitioner, learned Standing counsel for respondent No.s 1, 3 and 4 and Sri Mayank Pathak for respondent No.2- Bank.

2. By means of the present writ petition the petitioner has challenged the auction proceedings which has culminated into confirmation of the auction by the order of Sub Divisional Magistrate, Tehsil Milkpur, Faizabad.

3. The facts in brief are that the petitioner is a proprietor of a business firm, namely Rahul Fertilizers. He had taken a loan of Rs.10,000/- on 31.10.1985 from Punjab National Bank, Branch, Kumarganj, District Faizabad for the purpose of fertilizer business. The said loan was enhanced to Rs.20,000/- on 23.9.1987. The petitioner could not repay the said loan and consequently the respondent-bank initiated recovery proceedings against the petitioner by issuance of recovery certificate on 7.3.1994. Despite issuance of the recovery certificate the outstanding amount of loan was not repaid consequently the bank proceeded to auction the mortgaged property by sale proclamation on 23.2.1999 against the petitioner of the agricultural loan existing on khata No.342, gata No.s 219 A/0-18-02, 98/1/0-9-10, 207/0-13-0, 219 Ba/1-10-14, 272 Kha/1-12-0, 280/0-17-5, 281/0-1-10 and 288/0-7-0 which land was mortgaged to secure the loan obtained by the petitioner. The auction proceedings were held on 22.3.1999 and the agricultural land of the petitioner was auctioned for an amount of Rs.52,000/- in favour of respondent No.5.

4. Being aggrieved by the auction the petitioner preferred objections under Sections 285 (1) of Z.A. Rules before the Divisional Commissioner, Faizabad on 5.4.1999. The Divisional Commissioner on receiving the said objections also

considered the fact that the petitioner was ready and willing to repay the said loan gave him time by means of order dated 7.5.2003 to deposit the entire outstanding amount of loan with the bank and informed the petitioner that in case he deposits the said amount with the bank, the said auctions proceedings would not be confirmed and the auction will be set aside.

5. It seems that the petitioner could not deposit the said amount by the date fixed i.e. 7.6.2003 but in the meantime the petitioner moved another application for extension of time for depositing the outstanding amount of loan. The application of the petitioner was favorably considered by learned Commissioner who by means of his order dated 5.6.2003 gave further thirty days' time to the petitioner to deposit the said amount by 7.7.2003. Even during the extended time period the outstanding amount was not deposited by the petitioner and in these circumstances the petitioner approached this Court by filing writ petition bearing writ petition No.2127 (M/S) of 2003. This Court by means of order dated 4.7.2003 had disposed of the said writ petition recording that the petitioner had filed his objections under Section 285 (1) of Z.A. Rules and he was granted time to deposit the outstanding amount of loan by 7.6.2003. It was further observed that the petitioner could not deposit the said amount due to financial constraints but is ready and willing to deposit the entire amount and consequently the order of the Commissioner, Faizabad Division, Faizabad dated 7.5.2003 was modified to the extent that the petitioner may deposit Rs.20,000/- with the bank before 31.7.2003 and the remaining amount before 30th September, 2003.

6. It is in compliance of the order of this Court dated 4.7.2003 which had modified the order of the Commissioner dated 7.5.2003 the petitioner deposited an amount of Rs.20,000/- on 30.7.2003 but it seems that he could not deposit the remaining amount and as per the impugned order a report was called from the bank which also confirmed that the petitioner had not deposited the remaining amount as directed by the High Court in their letter dated 30.10.2003. The respondent on being made aware of the fact that even the order of High Court had not been complied and the petitioner had not deposited the remaining amount, proceeded to confirm the auction.

7. After confirmation of the auction, a sale certificate was issued in favour of respondent No.5 on 30.1.2004 and the property was also registered in favour of respondent No.5 on 7.1.2004 as per the averments made by the petitioner himself in the writ petition. It is in aforesaid circumstances that present writ petition has been filed assailing the order dated 31.12.2003 passed by Commissioner, Faizabad Mandal, Faizabad

confirming the auction. The petitioner has also prayed for a direction to the respondents not to give effect to the auction proceedings and not to mutate the said land in favour of respondent No.5.

8. Learned counsel for the petitioner while assailing the order dated 31.12.2003 has submitted that the petitioner has full right for redeeming the mortgage and even High Court had recognized the right of redemption in as much as this Court had directed the bank to accept Rs.20,000/- by 31.7.2003 and the remaining amount before 30.9.2003 and consequently the auction proceedings could not have been confirmed in case the petitioner had complied with the directions of this Court. He has further submitted that in pursuance of the directions of this court admittedly he had deposited Rs.20,000/- on 30.7.2003. He has further submitted that he had further deposited Rs.2500/- with the respondent bank. It is only subsequently that that he was made aware of the fact that the cheque was dishonored on account of insufficiency of funds and on coming to know about the dishonoring of the cheque he had deposited Rs.9500/- in cash on 30.10.2003. He has further submitted that this is admitted fact that the petitioner on being aware of dishonouring of the cheque had deposited the remaining amount in cash and, therefore, it is submitted that the benefit of the same should be given to the petitioner and accordingly submits that his right of redemption was not extinguished on non compliance of the directions of this Court dated 4.7.2003. Lastly, he has also taken a plea that the said loan was commercial loan and the proceedings for recovery of the commercial loan could not have been made as arrears of land revenue as the said proceedings could be taken only with regard to agricultural loan and submits that accordingly the entire recovery proceedings are without jurisdiction and is liable to be set aside.

9. It is noticed that the said plea has neither been taken before any of the authorities below nor in the writ petition and only averment has been made in para 9 of the supplementary affidavit filed by the petitioner on 23.1.2024. Learned counsel for the bank has, on the other hand, submitted that according to the recovery certificate the loan has been shown to be agricultural loan and in any view of the matter this issue has not been raised before any authority and consequently cannot be permitted to raise the same by oral submissions for the first time in writ proceedings.

10. In support of his submissions, learned counsel for the petitioner has relied upon the judgment of Supreme Court in the case of **Surendra Pal Singh Vs. Vijaya Bank** passed in Civil Appeal No.6843 of 2023 as well as **Narandas Karsondas Vs.**

S.A. Kamtam, 1976 CJ (SC) 287 to canvass his plea that his right to redemption of the mortgaged property existed even subsequent to confirmation of the auction and consequently he may be permitted to deposit the outstanding amount of loan and the impugned orders may be set aside directing the respondents to hand over the property back to the petitioner.

11. Learned counsel for the respondents, on the other hand, have vehemently opposed the writ petition. It has been submitted that the recovery proceedings were initiated against the petitioner after he failed to repay the loan in terms of the agreement entered into between the petitioner and the respondent. It was stated that repeated opportunities were given to the petitioner to repay the outstanding amount of loan but despite the said notice the loan was not repaid and consequently the mortgaged property was auctioned by the respondent-bank. It has been submitted that the petitioner was fully aware of the auction proceedings in as much as ZA Form 74A was issued to the petitioner and according to the said provisions the petitioner was fully aware of the auction proceedings. The auction proceedings settled in favour of respondent No.5 who was the highest bidder for an amount of Rs.52,000/-.

12. There is no dispute with regard to the fact that the entire amount of auction money has been tendered by respondent No.5. Prior to confirmation of the sale the petitioner had submitted his objections. It is stated that it is only after considering the objections filed by the petitioner that he was further granted time to redeem the said mortgage and to repay the entire amount of loan by 7.6.2003. At the behest of the petitioner the said period was extended till 7.7.2003 and despite expiry of the time period the said loan was not repaid. Even after that time was extended by this Court and even the directions of this Court was not complied by the petitioner.

13. It is stated that even the directions of this Court have not been complied and the Commissioner in these circumstances had no other option but to confirm the auction and even it has been stated that after confirmation of the auction the sale certificate was issued and the property has been registered in favour of respondent No.5. It has further been stated that this fact has been mentioned by the petitioner himself that the sale certificate has been issued in favour of respondent No.5 and the property has also been registered in his favour on 7.1.2004 i.e. much prior to filing of the present petition and still the petitioner has failed to assail the sale certificate as well as sale deed issued in favour of respondent No.5.

14. It is stated that the present writ petition has been rendered

infructuous from the start in as much as proper prayer has not been made for setting aside the sale certificate and sale deed and setting aside the impugned orders will not have any effect upon the validity of the sale deed issued in favour of respondent No.5. Accordingly, he submits that proper prayer has not been made by the petitioner and accordingly the relief as sought by him cannot be granted.

15. I have heard learned counsel for the petitioner and perused the records.

16. In light of the aforesaid narration of facts the question which arises for determination by this Court was as to whether right of redemption existing in favour of the petitioner, who had mortgaged his property to secure the agricultural loan subsists even after the confirmation of the auction and after the sale deed has been registered in favour of successful bidder/auction purchaser i.e. respondent No.5.

17. According to Section 60 of the Transfer of Properties Act, right of redemption exists with the mortgagee till such time the mortgage has been extinguished by the act of either of the parties. In the present case, in exercise of his right to redemption the Commissioner, Faizabad Division, at the outset, before confirming the said auction had given time to the petitioner till 7.6.2003 to repay the said loan. Undoubtedly there is no dispute with regard to the fact that even subsequent to the auction which was settled in favour of respondent No.5 existence of the right of redemption in favour of the petitioner was duly recognized by the confirming authority. Even at the behest of the petitioner the said time period was extended by one month and he was further given time till 3.7.2003 to repay the outstanding amount of loan.

18. This right vested in the petitioner of redemption was further recognized by this Court when this Court had passed order on 4.7.2003 where the petitioner was further granted till 30th September, 2003. This Court while passing the order dated 4.7.2003 had given the petitioner time till 3.7.2003 to deposit the amount of Rs.20,000/- and again granted time till 30.9.2003. Accordingly undoubtedly the petitioner even in the extended time provided by this Court till 30th September to repay the said loan. There is no dispute that till 30.9.2003 the amount of outstanding loan was not deposited by the petitioner. Considering the arguments raised by the petitioner that he had deposited Rs.20,000/- on 30.7.2003 i.e. within the time provided by this Court. While remaining amount of Rs.12500/- was deposited by the petitioner through cheque which had bounced. The reason for bouncing of cheque is insufficiency of

funds. Considering the fact that till conclusion of auction the full outstanding amount of loan was not credited in the bank account and the bouncing of the cheque on account of insufficiency of funds cannot be taken as an act of redemption of the loan by the petitioner. Even subsequently against the outstanding amount of Rs.12500/- the petitioner had deposited only Rs.9500/- on 30.10.2003.

19. This Court has noticed that even the amount do not match with the amount of cheque deposited previously by the petitioner i.e. 30.10.2003 but according to the time prescribed by this Court even if the petitioner had come to know about bouncing of the cheque subsequent to 30.10.2003 then he could have moved appropriate application before this Court in writ petition No.2127 (M/S) of 2003 seeking time for depositing the outstanding amount in peculiar circumstances of the present case and could also demonstrate before this Court that the petitioner had no knowledge that the cheque had bounced. Unfortunately, no such application was made by the petitioner and the directions of this Court for depositing the outstanding loan till 30.10.2002 remained unchanged and unaltered. It is in these circumstances, this Court is of the considered opinion that the outstanding loan amount was not repaid by the petitioner within the time prescribed despite the fact that repeated extensions were given by the authorities themselves and also by this Court. Accordingly, the auction concluded and the property was duly registered in the name of respondent No.5- the auction purchaser. The act of registration of the property in favour of respondent No.5 had extinguished the right vested with the petitioner to redeem the said loan.

20. We have also considered the judgments relied upon by the petitioner. In the case of **Surinder Pal Singh Vs. Vijaya Bank and others**, passed in Civil Appeal No.6843 of 20023 the question that was considered of provisions of Section 13 (8) of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (in short SARFAESI Act) with regard to repayment of loan taken by the borrower from the banks and the amended provisions of Section 38 vested the right with the borrower to redeem the loan prior to issuance of the sale certificate but subsequently amendment of Section 13(8) of SARFAESI Act right of redemption was limited till the date of issuance of advertisement for the said auction. In light of the above, Supreme Court has held that right of redemption in a matter where the SARFAESI Act is applicable right of redemption has been extinguished on the issuance of advertisement for auction. The said judgment concerns the SARFAESI Act which are not applicable in the facts of the present case and consequently does not apply in the

present case. In the case Supreme Court while explaining the provisions of Section 60 of Transfer of Properties Act have held as under:-

The right of redemption which is embodied in section 60 of the Transfer of Property Act is available to the Mortgagor unless it has been extinguished by the Act of parties. The combined effect of section 54 of the Transfer of Property Act and section 17 of the Indian Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption."

21. In the aforesaid judgment Supreme Court has held that right of redemption would only exist till the date when sale is complete. In the present case as we have already noticed the sale deed was registered in favour of respondent No.5 on 7.1.2004 and consequently even as per the judgment of Supreme Court the right of redemption if any in favour of the petitioner stand extinguished on the date of the said auction. There is no law or rule which has been demonstrated by the petitioner to indicate that right of redemption vested even after execution of sale deed and also considering the fact that neither the sale deed nor the sale certificate issued in favour of respondent No.5 has been challenged in the present proceedings accordingly there is no infirmity in the order passed by Commissioner confirming the auction in favour of respondent No.5.

22. For the aforesaid reasons, there is no merit in the writ petition which is accordingly **dismissed**.

(Alok Mathur, J.)

Order Date :- 30.1.2024

RKM.