NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 4346 of 2009

1. R.B. Roy, son of Shri A.B. Roy, aged 31 years, Occupation – Service, Presently Working as Assistant Loco Pilot, South Eastern Central Railway, Bilaspur, resident of Deorikhurd, Bilaspur (CG)

---- Petitioner

Versus

1. Punjab National Bank, through its Authorized Officer, Special Assets Management Department, Circle Office, Chhattisgarh, Medical College Road, Raipur.

2. The Authorized Officer, Special Assets Management Department, Circle Office, Chhattisgarh, Medical College Road, Raipur.

3. The Branch Manager, Punjab National Bank, Budhwari Bazar, Bilaspur

---- Respondent

For Petitioner : Shri Rajeev Shrivastava, Advocate.
For Respondents : Shri Sudhir Agrawal, Advocate.

Hon'ble Shri Justice Prashant Kumar Mishra

C A V Order

Passed On : 06/04/2015

1. This writ petition under Article 226 of the Constitution of India has been preferred by the auction purchaser seeking quashment of the letter dated 26/29th June, 2009 (Annexure-P/1) issued by respondent No.2 informing the petitioner that upon his failure to deposit the balance price of the auctioned property amounting to Rs.2,47,875/- within the stipulated period, as per clause-7 of the agreement dated 20.5.2009, his initial deposit of Rs.82,625/- stands forfeited. The petitioner has also prayed for direction to the respondents to accept the balance amount from the petitioner

towards auction of the house and deliver actual physical possession of the house to the petitioner or in case, the respondents are not in a position to deliver possession of the house, then refund the earnest money of Rs.82,625/- with interest @ 18%.

2. Facts of the case, briefly stated, are that one JP Dubey, (since deceased) and his wife Smt. Meenu Dubey, resident of MIG-1/71, Housing Board Colony, Deorikhurd, Bilaspur, obtained housing loan from the respondent bank. On failure to repay the loan amount, the bank proceeded under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act, 2002') against them and obtained possession of the house No.MIG-1/71, Housing Board Colony, Deorikhurd, Bilaspur and thereafter proceeded to sell the property in accordance with the provisions of the Act, 2002 and the Security Interest (Enforcement) Rules, 2002 (for short 'the Rules, 2002').

3. An advertisement for auction was issued on 31.3.2009 published in the newspaper on 1st April, 2009 (Annexure-P/2). The advertisement mentioned the recoverable amount as Rs.2,70,049/- together with future interest from the date of declaration of NPA and other charges and the reserved price to be Rs.3 lakhs. The earnest money was fixed at Rs.30,000/-. The petitioner submitted tender for purchase of the property and his offer of Rs.3,30,500/- was accepted by the bank for which a communication dated 18.5.2009 was sent to the petitioner. In this communication, the petitioner was further instructed to execute an agreement with the bank and such agreement was executed between the petitioner and the bank on 20.5.2009 (Annexure-P/4) mentioning therein that symbolic possession of the property agreed to be sold will be given only on payment of full price as provided in the agreement and thereafter a

certificate of sale shall be executed by the bank and on such execution, ownership of the asset shall pass on to the petitioner, with further stipulation that the property is sold on “As is where is” basis. It is also stipulated that in case of default in payment of balance sale price or breach of any of the terms and conditions of the agreement to sell, deposit made by the purchaser shall stand forfeited.

4. The petitioner wrote a letter to the bank on 5.6.2009 objecting to mentioning of the words 'symbolic possession' despite payment of the entire price and seeking clarification about the physical possession. The bank informed the petitioner vide its communication dated 9.6.2009 that the registration of sale certificate will be possible only when the petitioner deposits the remaining amount on or before 10.6.2009 and further that the sale is conducted as per the Act, 2002, the provisions whereof are self explanatory. The petitioner was kept on noticing that in the event of default, deposits made by him shall be forfeited.

5. The petitioner did not deposit the amount on or before 10.6.2009, however, he moved an application before the bank mentioning that the format of sale certificate provided in Appendix-V of the Rules, 2002 speaks about delivery and possession of the schedule property and not about symbolic possession, therefore, agreement got executed from him on 20.5.2009 is contrary to the Rules, 2002 and as such, the remaining amount be accepted from him and physical possession be delivered. This letter was sent to the bank after due date i.e. 10.6.2009.

6. Based on the above factual aspects, it has been argued by learned counsel for the petitioner that there being no provision for symbolic possession, the agreement dated 20.5.2009 is itself illegal and the

petitioner was entitled to be delivered physical possession of the property. He would submit that the advertisement mentioned the date on which the bank had obtained possession of secured asset, therefore, there was no occasion for the petitioner to apprehend that he would be offered only symbolic possession.

7. Per contra, learned counsel for the bank would submit that the petitioner was under obligation to deposit the entire balance amount by 10th June, 2009, however, he failed to deposit the said amount, therefore, as per terms of agreement dated 20.5.2009 to which the petitioner is a signatory and in view of Rules 9(5) & 9(9) of the Rules, 2002, the petitioner is neither entitled to refund of the amount nor delivery of possession of the auctioned property. He would further submit that since thereafter, important development has taken place whereunder the subject loan account has been brought back to the regular status and the borrower is depositing the installments of the loan and as such, the asset is no longer available for handing over possession to the petitioner.

8. The core issue falling for consideration is – whether reference to the date of obtaining possession of the secured asset by the bank under Section 13(4) of the Act, 2002, mentioned in the advertisement was illegally mentioned to mislead the auction purchaser that the bank is in actual physical possession and the subsequent agreement offering symbolic possession to the auction purchaser was illegal, as the bank was under obligation to deliver actual physical possession and not to get executed separate agreement.

9. To dwell on the issue, reference would be necessary to the provisions contained in Section 13 of the Act, 2002 and the Rules, 2002. Section 13

of the Act, 2002, makes provisions concerning enforcement of security interest. Under Section 13(2) the bank is under obligation to issue a notice to the borrower before seeking to enforce the security interest. If the borrower fails to discharge the liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the measures provided therein to recover his secured debt. Under clause (a) of sub-section (4), the secured creditor is entitled to take possession of the secured asset of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset. The bank is thereafter entitled to sell the secured asset in order to recover dues. Where possession of the secured asset is required to be taken by the secured creditor, it may, for the purpose of taking possession or control of such secured asset, request, in writing, the Chief Metropolitan Magistrate or District Magistrate of the concerned area where secured asset may be situated, to take possession thereof and on such request being made, the said authority shall take possession of such asset and the documents relating thereto and forward the same to the secured creditor.

10. The provisions contained in Sections 13 and 14 of the Act, 2002 makes it explicit that possession referred to in Section 13(4) of the Act, 2002 includes symbolic possession because it does not refer to taking of “actual physical possession”. If the word possession under Section 13(4) would mean only actual physical possession, there was no occasion to provide a mechanism under Section 14 for obtaining actual physical possession.

11. In the case in hand, the advertisement issued by the bank mentioned that the bank has recovered the possession of the secured asset under Section 13(4) of the Act, 2002. The bank has never mentioned that the bank is in actual physical possession of the property. In any case, when

the bank directed the petitioner to execute the agreement which the petitioner duly executed on 20.5.2009, the said agreement clearly stipulated that the petitioner shall be delivered symbolic possession. Once the petitioner agreed to obtain symbolic possession, it was not open for him to agitate that unless physical possession is delivered even on his failure to make payment of balance amount on or before 10th June, 2009 he would still be entitled to make payment of balance amount as and when actual physical possession is delivered and the initial deposit made by him shall not be forfeited.

12. Rule 8 of the Rules, 2002 deals with the procedure for sale of immovable secured assets. It provides that the authorized officer shall take possession or cause to be taken possession by delivering a notice prepared as nearly as possible in Appendix-IV to the Rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property and the said possession notice shall be published within 7 days from the date of taking possession, in 2 leading newspapers. In the event of possession of immovable property being actually taken by the authorized officer, such property shall be kept in his own custody or in the custody of any person authorized or appointed by him. The language employed in sub-rules (1), (2) & (3) of Rule 8 of the Rules, 2002 again makes it explicit that the sale of immovable secured asset is permissible even when the bank is in symbolic possession of the property because under Rule 8(1), before proceeding to take steps for sale, the bank is enjoined to give possession notice to the borrower by affixing the same on the outer door or at such conspicuous place of the property. The provision nowhere mandates that the sale of immovable secured asset can only be made when the bank is in actual physical

possession of the property. Since the advertisement refers to possession taken by it under Section 13(4) of the Act, 2002, which includes symbolic possession, when the same is read with Section 13(4) and Rule 8, neither the bank made any attempt to mislead the auction purchaser nor the petitioner can complain that he was misled by the bank on account of reference to the word “date of bank obtaining possession”.

13. The petitioner is otherwise also bound by the terms of tender notice and agreement dated 20.5.2009 wherein it was clearly provided that in the event the balance amount is not deposited within 15 days or within agreed extended date, the initial deposit shall be forfeited.

14. Thus, the forfeiture being an outcome of the terms and conditions of the contract and the statutory provisions as well, this Court in exercise of powers under Article 226 of the Constitution of India is not entitled to quash the order/communication which would ultimately be giving effect to the terms of contract and is otherwise in accordance with the statutory provisions.

15. The writ petition being bereft of any substance deserves to be and is hereby dismissed.

J U D G E

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