

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.17437 of 2014(O&M)

Date of decision:3.8.2015

Mukesh Gupta and another

....Petitioners

VERSUS

Authorized Officer Bank of Baroda and othersRespondents

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA

HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Rakesh Gupta, Advocate for the petitioners.

Mr. G.S. Anand, Advocate for respondents No.1 to 3.

Mr. Akshay Bhan, Senior Advocate with
Mr. Amandeep Singh Talwar, Advocate for respondent
No.4.

HEMANT GUPTA, J.(Oral)

The challenge in the present writ petition is to an order passed by Debts Recovery Appellate Tribunal (for short 'Appellate Tribunal') on 10.03.2014 whereby an order passed by the Debts Recovery Tribunal (for short 'Tribunal') was set aside, consequently the sale of the property by private treaty is to be treated as valid.

The petitioner No.1 is the Director of the borrower-Company M/s Abka Pharmacare Pvt. Ltd. whereas petitioner No.2 is one of the guarantors of the loan facility availed by the borrower-Company. The Company availed financial facility to the tune of Rs.2.07 crores and mortgaged property bearing No.E-41, Industrial

Area, Sonapat apart from the personal guarantee of the promoter directors and the private guarantors. It is the said property measuring 900 square yards sold by private treaty, which is in question in the present writ petition.

On account of default of repayment of the loan amount, the Bank issued notices under Section 13(2) of the Securitization and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (for short 'the Act') followed by proceedings under Section 13(4) of the Act. The possession of the premises mortgaged was taken over by the Bank on 29.8.2008. Thereafter, the Bank has taken steps for sale of the property by public auction. Three attempts were made on 27.11.2008, 06.06.2009 and 18.05.2010 but the property could not be sold by public auction. In the meantime, the Bank has also tried to sell the property through private treaty vide notice dated 24.01.2010. It is in pursuance of the second notice dated 12.8.2010 (Annexure R-4/9) to the petitioners, the Bank entered into a private treaty with respondent No.4. The said sale was disputed by the petitioner under Section 17 of the Act before learned Tribunal. Learned Tribunal allowed the application on 15.05.2013 (Annexure P-4) holding that there is nothing on record that the petitioners herein agreed for selling the secured assets for Rs.67 lacs by private treaty on receiving intimation from the respondent-Bank. It is the said order which was set aside by learned Appellate Tribunal on 10.03.2014 wherein it was held that the word

‘parties’ appearing in Rule 8 sub-Rule (8) of the Security Interest (Enforcement) Rules, 2002 (for short ‘the Rules’) would not include the borrower. The Tribunal held as under:-

“Whether the requirement laid down in this rule is directory or mandatory may not be of very relevance as the core issue in this case to be considered is whether the word ‘parties’ used in this rule would include the borrower or not. The provisions of the SARFAESI Act and the rules made there under empowers the bank to conduct the sale of the property by way of public auction or by inviting public tender. Besides this, the sale can also be effected by way of private treaty. Rule 8(8) of the Rules apparently is applicable when the bank intends to carry out the sale of the property by method other than the public auction or public tender. In that event, this rule provides that such sale shall be on such terms as may be settled. The terms to be settled have to be between the seller and the purchaser and they alone would be parties to the sale. The purpose or reason behind this rule apparently is that the bank should not be able to do anything by way of private treaty without settling the terms to avoid any allegation of connivance etc. If the legislature had any intention to include the borrower in this buyer, then the same could have very well been so provided in the provision itself clearly. The legal position as to whether this requirement is mandatory or directory would result in examination of sale to see it from the angle if any prejudice has been caused to the parties concerned. If the requirement is mandatory, then it is to be followed. If it is directory, then the forum concerned may have to see if this sale has led to any prejudice to any of the parties.

By way of alternative argument, the counsel for the appellant has also pleaded that in this case if it is viewed that the word ‘parties’ would include borrower then he had complete notice, as option was given to him to purchase this property, but he did not do so. I may not be required to go into this aspect once a view is that the terms are to be settled between the bank and the prospective buyer and the word ‘parties’ used in this rule

would not include the borrower. There is substance in the submission that the word ‘parties’ used in the rule relates to the sale and not to the parties which are litigating. If the sale is by any other method, it will be between the bank and the prospective buyer. So, settlement is to be between these parties and not anybody else.”

Learned counsel for the petitioners submits that the Rule 8 (5) of the Rules confers a right on the authorized officer to sell the property by four different methods including by private treaty. Such sale could be affected after serving a notice of 30 days to the borrower as per sub-Rule (6) of Rule 8 of the Rules. Sub-Rule (8) of Rule 8 of the Rules contemplates that sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing. The relevant clauses such as Rule 8(5), (6), (7) and (8) of the Rules reads as under:-

“8. Sale of immovable secured assets

(1) to (4) xx xx xx xx

(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; or

(d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the web-site of the secured creditor on the Internet.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.”

Learned counsel for the respondents also pointed out that before learned Tribunal, the petitioners were given one chance to bring better buyer than the purchaser subject to the condition that offer will be considered if the said offer is accompanied by demand draft of 25% of sale price. It is so recorded in the order dated 04.03.2011. The relevant extract from the order reads as under:-

“.....During the course of arguments the learned counsels for the applicants, respondent bank and auction purchaser-respondent No.4 agreed that in view objections raised by the applicants with regard to valuation of property and consideration on which sold to auction purchaser, it would be fair to give one chance to the applicants to bring better buyer than the auction purchaser whose offer may be considered if the said offer is accompanied by demand draft for 25% of sale price paid by the auction purchaser in favour of the Registrar of the Tribunal.

Accordingly, it is directed that if the applicants bring any purchaser who offers more than the sale price paid by the auction purchaser and deposit 25% of the said amount by way of Demand Draft in favour of Registrar, DRT-1, Chandigarh on the

next date of hearing, there shall be an inter se bidding between the auction purchaser and purchaser brought by the applicants for which order will be passed on the next date.”

In this factual background, learned counsel for the petitioners argued that the word ‘parties’ in Rule 8 sub-Rule (8) does not mean only the Bank or the purchaser but the borrower as well. Therefore, unless the borrower is part of the settlement in writing, the sale by private treaty cannot be affected. He relies upon a Division Bench judgment of Madras High Court reported as AIR 2012 Madras 12 titled J. Rajiv Subramanian and another v. M/s Pandiyas and others.

The possession of the mortgaged property was taken by the Bank in the year 2008. A perusal of the record shows that a notice dated 12.08.2010 (Annexure R-4/9) was served upon the petitioners informing the petitioners that the Bank had earlier negotiated with Mr. Ravinder Gupta for sale of the asset who offered to pay Rs.75 lacs but subsequently withdrew the offer given by him. Therefore, the Bank communicated that they are left with no alternative but to go ahead with the sale of the captioned asset by way of private treaty at the present realizable value of Rs.67 lacs as per valuation report dated 19.07.2010 submitted by Bank’s approved valuer. In response to the said communication, the petitioners submitted their reply (Annexure R-4/10) proposing to enter into one time settlement on payment of Rs.1 crore towards full and final settlement of the dues. The petitioners did not dispute the valuation

communicated to the petitioners. The petitioner also sent a demand draft of Rs.10 lacs dated 21.09.2010. It is thereafter on 29.09.2010, the request of the petitioner for one time settlement was declined for the reason that contractual dues are quite high and that while the plant and machinery could be disposed of but the land and building could not be disposed of for want of buyer and yet no proposal/offer has been made by the petitioners for years together and there is no other specific source of funds divulged by the petitioners for making payment in the event of an amicable settlement. The Bank conveyed that they are convinced neither about the reasonableness of the offer amount nor about the timely payment at all. Vide separate communication of the same date i.e. 29.9.2010 (Annexure R-4/12), the petitioners were informed that the property has been sold to respondent No.4 for a sum of Rs.67.50 lacs on 29.09.2010.

Once the property is mortgaged, the mortgagee has a right to realize the security by way of sale of the mortgaged property. The Bank has initiated process of sale by public auction and three attempts by public auction have remained unsuccessful. Even an earlier attempt to sell the property by private treaty has also remained unsuccessful. Since, there was no option, the Bank proceeded to sell the property but after giving notice to the petitioners. The petitioners did not dispute the valuation of the property given in the show cause notice but came with a counter-offer of one time settlement. Therefore, the petitioners cannot be

permitted to argue that any other process was required. Sub-Rule 8 has to be given contextual meaning and not that the borrower has to be a party to the settlement for sale of the mortgaged property. The context in which Rule 8 appears, the terms of the sale have to be settled between the purchaser and the seller but in terms of sub-Rule (6), only notice was required to be served and was actually served. Therefore, the order passed by the Appellate Tribunal does not warrant any interference in the writ jurisdiction of this Court.

Therefore, the Bank has complied with the conditions of sale of the secured assets as mentioned in sub-Rule (5) of Rule 8 as well as sub-Rule (6) of Rule 8. The word 'settled between the parties' appearing in sub-Rule (8) only means between the willing purchaser and the mortgagee, the borrower is only to be served with a notice in terms of sub-Rule (6). The borrower who has mortgaged his property has given right to the mortgagor to realize the value of the secured asset in the event it commits default in making payment of the due amounts.

In reference to the judgment in J. Rajiv Subramanian's case (supra), suffice it to say that the Bench has interfered with the process of sale by simply observing that the presence of debtor and his willingness in writing are essential. With respect, we are unable to agree with the view expressed. We find that in view of the scheme of the Rules, the consent of the borrower is not necessary to settle the terms of sale after notice of the process of private treaty is served

upon the petitioner. Since the sale of the secured assets has taken place in accordance with the procedures prescribed in Rule 8, we do not find any merit in the present writ petition.

In view thereof, the present writ petition is dismissed.

(HEMANT GUPTA)
JUDGE

AUGUST 3, 2015
‘D. Gulati’

(LISA GILL)
JUDGE