In the High Court of Judicature at Madras

Dated : 17.02.2016

Coram:

The Hon'ble Mr.Justice SATISH K. AGNIHOTRI
and
The Hon'ble Mr.Justice M.VENUGOPAL

W.P.No.5734 of 2016

A.H.Ahamed Shakir .. Petitioner

Vs.

The Chief Manager,
Punjab National Bank,
Khivraj Buildings, First Floor,
No.624, Anna Salai,
Chennai-600 006. .. Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India for a writ of Mandamus, directing the respondent to refund the sum of Rs.8,60,000/- to the petitioner such amount paid by the petitioner as per provisions of SARFAESI Act, pursuant to the online (E-auction) for sale of the property measuring about 10 cents comprised in S.No.177/1B2A and 177/1B2B situated at Sholinganallur Village and Taluk and as the respondent has not incurred any loss in the transaction of auctioning the property pursuant to the notice of e-auction dated 06.02.2015 whereby the respondent had not incurred any loss.

For Petitioner : Mr.S.A.Rajan

O R D E R

[Order of the Court was made by
M.VENUGOPAL, J.]

The Petitioner has focused the instant Writ Petition praying for passing of an order by this Court in directing the Respondent/Chief Manager, Punjab National Bank, Chennai-6, to refund a sum of Rs.8,60,000/- to him (such amount paid by him) as per provisions of SARFAESI Act, 2002 (pursuant to the online E-auction) for sale of the property measuring about 10 cents comprised in S.No.177/1B2A and 177/1B2B situated at Sholinganallur Village and Taluk etc.

2.According to the Learned counsel for the Petitioner, the Respondent/Bank as per the provisions of the SARFAESI Act, 2002 advertised online 'E-auction' of sale of the property measuring about 10 cents in S.No.177/1B2A and 177/1B2B situated at Sholinganallur Village and Taluk.

3.It is represented on behalf of the Petitioner that the Petitioner made an offer on 13.03.2015 and offered to purchase the property for a total price of Rs.86,25,000/- and as a condition precedent to become eligible to bid, he had deposited a sum of Rs.8,60,000/- being 10% of the value of the upset price as Earnest Money Deposit and this offer was accepted by the Respondent/Bank on 13.03.2015 and the Bank directed the Petitioner to deposit a further amount of equaling 15% of the net auction amount on 14.03.2015.

4.The Learned counsel for the Petitioner brings it to the notice of this Court that as there was no other bidder, the Petitioner's offer was accepted by the Respondent Bank and he was directed to pay 65% of total bid amount on or before 14.03.2015. Therefore, on 14.03.2015, he deputed his Manager K.Soundarrajan to follow up the matter for making payment of 15% of the amount. When his Manager Soundarrajan attended the office of the Respondent/Bank on 14.03.2015, he was informed that the Deputy Manager of the Respondent/Bank was out of the office to attend Lok Adalat.

5.The real grievance of the Petitioner is that in an 'Auction Sale', it is the duty of the seller to inform the name (s) of the owners of the property, encumbrance if any known to the Respondent/Bank, availability of the documents of title with the Respondent/Bank, for it to be handed over at the time of execution and registration of the sale certificate. Further, on 14.03.2015, the Petitioner had addressed a letter to the Chief Manager of the Respondent/Bank, Chennai, wherein, he had among other things stated that there was no response or reply to the queries raised in his enclosed letter, without which he was unable to proceed further in the matter. Added further, he had also stated in the said letter that he shall proceed further in the matter by remitting second instalment of 20% on receipt of the detailed reply from the Bank (to his enclosed letter).

6.The Learned counsel for the Petitioner submits that the Respondent/Bank sent a reply to the Petitioner on 17.03.2015 inter-alia stating that the Petitioner had participated in the 'E-auction' held on 13.03.2015 and prior to his participation, he had collected all the necessary information and documents and satisfied himself with the property under consideration and accordingly, remitted 'Earnest Money Deposit' amount of Rs.8,60,000/-. Continuing further, in the said reply, the Bank had also proceeded to state that the Petitioner as a successful bidder had not paid 25% of the bid amount (including Earnest Money Deposit) within 24 hours of the E-auction finalised by invoking the SARFAESI Rules and that they were forfeiting the already deposited Earnest Money Deposit amount.

7.Advancing his argument, the Learned counsel for the Petitioner contends that the Petitioner issued a Legal Notice dated 11.04.2015 to the Respondent/Bank requiring a 'Mail Reply' so that he can proceed with the purchase and alternatively stated that the Bank can choose to refund a sum of Rs.8,60,000/- to him to avoid any painful litigation.

8.The prime submission of the Learned counsel for the Petitioner is that the Respondent/Bank had not incurred any loss in the subject matter in issue and that 'Non Refunding of the Earnest Money Deposit' is not a right of the Respondent/Bank and further, 'Forfeiture of amount' can be made only if the actual loss is established by the Bank.

9.The Learned counsel for the Petitioner takes a stand that the Petitioner was holding talks with an official of the Respondent/Bank till November 2015 and as such, he could not file the present Writ Petition in time. Also that, the instant Writ Petition filed by the Petitioner against the Respondent/Bank is maintainable because the Respondent/Bank is an instrumentality of the Government of India and therefore, amenable to Writ Jurisdiction.

10.In this connection, the Learned counsel for the Petitioner cites the decision of the Hon'ble Supreme Court in Union of India V. Rampur Distillery & Chemical Co. Ltd., reported in AIR 1973 Supreme Court at page 1098 and at special page 1099, whereby and whereunder at paragraphs 3 to 5 it is observed and laid down as follows:

> "3.Only one contention was urged on behalf of the appellants before us: that the security deposit was taken from the respondents in order to ensure the due performance of the contract and respondents having defaulted, the entire amount was liable to be forfeited. A similar contention was advanced in Maula Bux V. Union of India, (1970) 1 SCR 928 = (AIR 1970 SC 1955). The appellant therein had entered into a contract with the Government of India for the supply of certain goods and had deposited a certain amount of security for the due performance of the contract. As in the instant case, it was stipulated in the contract there that the amount of security deposit was to stand

forfeited in case the appellant neglected to perform his part of the contract. On the appellant committing default in the supply, the Government rescinded the contract and forfeited the security deposit. It was held by this Court that forfeiture of earnest money under a contract for sale of property does not fall within S.70 (74?) of the Contract Act, if the amount is reasonable, because the forfeiture of a reasonable sum paid as earnest money does not amount to the imposition of a penalty. But, "where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty." It was further held that the amount deposited by way of security for guaranteeing the due performance of the contract cannot be regarded as earnest money.

4.It is important that the breach of contract caused no loss to the appellants. The stipulated quantity of rum was subsequently supplied to the appellants by the respondents themselves at the same rate. The appellants, in fact, made no attempt to establish that they had suffered any loss or damage on account of the breach committed by the respondents.

5.Following the decision in Maula Bux's case, (1970) 1 SCR 928 = (AIR 1970 SC 1955) we hold that the High Court was right in rejecting the appellants' claim that they are entitled to forfeit the security deposit. Civil Appeal 1346 of 1967 is accordingly dismissed with costs."

11.It is to be borne in mind that the parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other, or may agree that in the event of breach by one party any amount paid by him to the other shall be forfeited. If this amount is a genuine pre-estimate of damages likely to flow from the breach, it is described as 'Liquidated Damages'. If it is not a genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, it may be a penalty. At this stage, this Court aptly points out that the essence of a penalty is a payment of money which stipulated as in terrorem of the offending party, the essence of Liquidated Damages is a genuine covenanted pre-estimate of damages as per decision of Michel Habib Raji Ayoub V. Sheikh Suleiman El Taji El Farouqui reported in AIR 1941 Privy Council 101. Indeed, the term 'Penalty' is an elastic one with many different shades of meaning, but this always involves an idea of 'Punishment'.

12.It is to be noted that in the present E-auction notice dated 06.02.2015, the condition Nos.8 to 10 reads as under:

> "8.The Participating Bidder shall improve the offer in multiples of Rs.25,000/- (Rupees Twenty Thousand only). Bidders have to make their own arrangements for accessing the e-auction site on the date & time as mentioned above. Bidders are also advised to make their bids within 5 minutes after the last bid as the auction will come to a close if there are no bids during the last 5 minutes of the closing time. However, if there is a new bid during the last 5 minutes of the closing time, the e-auction will get extended by another 5 minutes. In such a situation, the auction will extend beyond the scheduled closing time and will come to a close till there are no new bids in the next 5 minutes after the last bid.
>
> 9.The successful bidder shall deposit 25% of the bid amount (including EMD) by way of RTGS/NEFT to Account # 3612002100000890 (IFSC:PUNB0361200) in the name of PNBARMBCHENNAIEAUCTION within 24 hours on the e-auction being finalized in his/her favour and balance amount of 75% of the bid amount shall be payable within 15 days from the date of e-auction.
>
> 10.In case the successful bidder fails to deposit 25% of the bid amount or the balance amount within the specified time frame as aforesaid, the entire deposit amount made by the bidder including EMD shall be forfeited by the Authorised Officer without any notice and the property shall forthwith be put up for sale again and resold by the Bank. The defaulting bidder shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold."

Apart from that, condition No.1 of the E-auction notice reads as follows:

> "1.The auction sale will be done by "Online e-auctioning" through website www.e-auctions.in."

13.Be that as it may, in the present case, in view of the fact the Petitioner had made an offer dated 13.03.2015 to purchase the property for a price of Rs.86,25,000/- and as a condition precedent, he had deposited Rs.8,60,000/- (being 10% value of the upset price as Earnest Money Deposit) which was accepted by the Respondent/Bank on 13.03.2015 and apart from that, the Respondent/Bank had directed him to deposit a further sum equal to 15% of the net auction amount on 14.03.2015 etc., and also, this Court bearing in mind a primordial fact that the Petitioner had with open eyes had taken part in E-auction (of-course subject to the terms and conditions thereto), is of the considered view that the disputed factual issues/aspects of the terms and conditions set out in E-auction notice dated 06.02.2015 of the Respondent/Bank in Writ Jurisdiction cannot be gone into by this Court by way of a Writ Petition. Viewed in that perspective, the Writ Petition sans merits.

14.In view of the foregoing reasons, the Writ Petition stands dismissed. No costs. However, it is abundant to make it clear that it is open to the Petitioner to work out his remedy seeking refund of Rs.8,60,000/- (being the Earnest Money Deposit amount) before the Competent Forum in the manner known to Law and in accordance with Law, if he so desires/advised.

DP

s/d-
Assistant Registrar(AS)

True Copy

Sub-Assistant Registrar

To

The Chief Manager,
Punjab National Bank,
Khivraj Buildings, First Floor,
No.624, Anna Salai,
Chennai-600 006.

+ 1 cc to Mr.S.A.Rajan, Advocate SR 10327
mg(co)
prk2/3 W.P.No.5734 of 2016