HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.3945 of 2015

ORDER :

The revision petitioner is the third party to the suit O.S. No.566 of 1996 on the file of Principal Senior Civil Judge, Vijayawada of Krishna District, Andhra Pradesh. This was a suit maintained by the revision petition 1st respondent, decree holder, against the revision petition 2nd respondent/defendant judgment debtor, based on a mortgage. A mortgage preliminary decree was passed on 30.12.1999 for realization of the decree amount of Rs.4,62,000/-, which includes pre-liti interest of Rs.1,62,000/-, with subsequent interest at 6% p.a. by fixing the time for redemption and the defendant in the suit supra having failed either to seek for extension of the redemption time fixed or to liquidate the mortgage secured debt within the redemption period which enable the decree holder to apply for final decree and after notice and enquiry in I.A. No.376 of 2001 the trial Court passed mortgage final decree dated 27.04.2001 extinguishing the right of redemption to enable the decree holder to bring the property to sale. Irrespective of passing of a mortgage final decree the right of redemption of the defendant/judgment debtor (borrower) is available by virtue of the Order XXXIV Rule 5 (1) C.P.C which speaks on or before the day fixed for sale or at any time before confirmation of sale made in pursuance of the mortgage final decree the defendant (judgment debtor) if makes payment into the Court all amounts due from him pursuant to the preliminary and final decrees respectively and on application made by the defendant in this behalf, order for the redemption and re-transfer the property and redeliver of the property if any.

2) The Constitution Bench of the Apex Court considering the scope of law in this regard in ***Mathuralal V.Keshar Bai***[1] particularly from paras 12 to 15 categorically upheld the right of the mortgagor to liquidate the suit mortgaged debt before confirmation of sale and transfer of the property pursuant thereto. Same is the position of law reiterated by the subsequent expressions of the Apex Court in ***Narandas Karson Das V. S.A.Kamtam***[2], ***Sagar Mahila Vidyala, Sagar V. Pandit Sadashiv Rao Harshe***[3] and in ***B.Arvind Kumar V. Government of India***[4]***,*** leave about the doctrine of merger recognized from the appeal is a continuation of suit, even pending appeal mortgaged property brought to sale in the event of appeal finalization and meantime the judgment debtor i.e, the defendant-borrower tenders the amount, it applies with the requirement of Order XXXIV Rule 5 vide ***Philimonia Jose V. Federal Bank***

Limited[5].

3) The law is discussed also by a Division bench of this Court in dealing with a matter under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'SARFAESI Act') vide ***M/s.India Fine Lease Securities V. Indian Overseas Bank***[6].

4) It is not the defendant/judgment debtor but his vendeeof whom prior to the passing of the preliminary decree right is created, which no doubt subject to the mortgage, that wants to deposit by filing an application in E.A. No.76 of 2004 before the auction sale conducted was confirmed. That application was disposed of on 11.06.2014 and having been unsuccessful, he maintained the present revision by also showing the auction purchaser as 3rd respondent to the revision petition.

5) Heard the learned counsel for the revision petitioner (vendee of the judgment debtor), learned counsel for the decree holder and auction purchaser and taken as for the judgment debtor, failed to attend and perused the material on record.

6) From the law referred supra, once the mortgagor as judgment debtor even before confirmation of sale entitled to liquidate the mortgaged debt due, the remedy of

the auction purchaser is while seeking refund, at best to insist for payment of interest to compensate for his money is locked. It no way takes away thereby the mortgagor's right of redemption statutorily recognized by Order XXXIV Rule 5 CPC vis-à-vis Section 60 of the Transfer of Property Act from the expressions supra. When such is the case, equally such right of discharge to save the property is available to the transferee of the (mortgagor) Judgment debtor from reading of above provisions with reference to Section 146 and Order XXII Rule 10 C.P.C. However, such right of the transferee to Judgment debtor (mortgagor) is subject to payment of entire amount paid of auction purchaser to refund with interest and by payment of poundage and full satisfaction of the mortgage decree debt due to the decree holder from out of amount lying Court deposited by auction purchaser, for taking refund of excess amount if any by joining with or in presence of J.Dr. The right of auction purchaser to the amount he deposited with interest to claim in such event is well considered in the recent expression of the Apex Court in ***Mathew Verghese V. M.Amritha Kumar***[7] while dealing with the sale of the property under the provisions of the SARFAESI Act brought by the secured creditor bank from the right of debtor to redeem and the right of the auction purchaser to claim interest in seeking refund of the amount. It was observed in this regard particularly at para 70.2 by ordering interest at 18% p.a. that also to be paid while refunding the amount to the auction purchaser in fixing said rate of interest as just and reasonable.

7) It is because, the rate of interest entitled for the mortgage transaction by the mortgagee and also that is to be adjudged by the Court either under Order XXXIV Rule 11 C.P.C till expiry of the period of redemption and subsequently invoking the general provision under Section 34 of C.P.C is different from compensating the auction purchaser for refund of the amount under locking, while recognizing the right of the mortgagor or his alienee and in ordering to redeem before confirmation of sale. As had the mortgagor failed to redeem of the bid knocked in favour of the auction purchaser from having deposited the amount pursuant to the terms of the auction (non-voluntary either through process of Court or other statutory agency as the case may be) entitled to confirmation of auction sale, sale certificate and delivery of possession to have the benefit since depriving from the valid right of the mortgagor or his alienee before sale confirmation and transfer.

8) Having regard to the above, the trial Court could have been allowed the application of the petitioner in E.A. No.322 of 2014 in E.P. No.25 of 2014 filed prior to confirmation of sale to liquidate the debt from his entitled by stepping into the shoes of the mortgagor-judgment debtor being his alienee by virtue of Order XXXIV Rule 5

CPC and Sections 60 to 67 of Transfer of Property Act read with Order XXII Rule 10 CPC and Section 146 CPC.

9) Accordingly, in the result, the revision petition is allowed by directing the revision petitioner (petitioner in E.A. No.322 of 2014), while setting aside the dismissal order of the lower Court and by allowing the application, to deposit the entire amount deposited by the auction purchaser together with interest from the date of respective deposits by the auction purchaser till the date of deposit with notice to the auction purchaser at 18% p.a. and also the poundage amount. It is made clear that poundage amount shall go to the Court. It is also made clear that such deposit shall be made within one month from date of receipt of the order with no further right of extension and for any non-compliance the Court sale can be confirmed and sale certificate has to be issued in favour of the auction purchaser who can execute and take possession and get voucher title deeds of the property if lying with D.Hr or in Court as the case may be. It is further made clear that in the event of liquidating as above, out of the amount lying in the Court or adjusted to the mortgage decree debt and balance, if any, the petitioner is entitled to claim refund by showing the judgment-debtor as a co-respondent to the application either jointly with him or in his presence and after hearing. Needless to say what the petitioner while filing E.A. No.322 of 2014 stated deposited and lying in fixed deposit, if any, is the amount to be

considered in payment of the difference. The auction purchaser is entitled in such event for the amount with interest in deposit to file cheque petition and receive for what he entitled.

10) Miscellaneous petitions, if any pending, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

27.07.2016
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[1] AIR 1971 SC 310
[2] AIR 1977 SC 774
[3] AIR 1991 SC 1825
[4] (2007)5 SCC 745
[5] AIR 2006 SC 1162
[6] AIR 2013 AP 31
[7] (2014)5 SCC 610