

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 9th February, 2016

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W.P.(C) No.1455/2015

SPEED TRACK CARGO

..... Petitioner

Through: Mr. Shankar Kumar Jha, Adv.

versus

STATE BANK OF PATIALA AND ORS.

..... Respondents

Through: Ms.Kritika Dawar, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition seeks a mandamus to the respondents no.1 to 3 State Bank of Patiala (Bank) to return the Earnest Money Deposit (EMD) made by the petitioner in the sum of Rs.8,10,000/- along with interest at the rate of Rs.18% per annum from the date of deposit till realisation.
2. Notice of the petition was issued and pleadings have been completed.
3. Adjournment is sought on behalf of the counsel for the respondents no.1 to 3 Bank on the ground of non-availability of Mr. Rajiv Kapur, Advocate.
4. Being *prima facie* of the view that this petition under Article 226 of the Constitution of India is not the appropriate remedy, the counsel for the petitioner has been heard.
5. It is the case of the petitioner (i) the respondents no.1 to 3 Bank on 13th May, 2014 published an advertisement of e-auction, under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, of immovable property situated at

Jhajjar and Gurgaon; (ii) the petitioner bid and made EMD for both the properties; (iii) e-auction was scheduled for 19th June, 2014 between 2.00 p.m. to 3.00 p.m.; (iv) the respondents no.1 to 3 Bank had appointed the respondent no.4 M/s ABC Procure e-Procurement Technologies Limited to conduct the e-auction; (v) that the petitioner after making the EMD learnt that neither of the two properties was in physical possession of the respondents no.1 to 3 Bank; (vi) that the respondents no.1 to 3 Bank had however not disclosed the said fact in the Notice dated 13th May, 2014 of the e-auction; (vii) upon learning the said fact, the petitioner was uncertain regarding participation in the e-auction; (viii) that the petitioner tried to create an ID and password for participating in the e-auction but failed therein and thus could not participate in the e-auction; (ix) though the petitioner demanded refund of the EMD made by him but the respondents no.1 to 3 Bank took a stand that the same had been forfeited in terms of the order of the Supreme Court in the case of *National Highway Authority of India Vs. Ganga Enterprises* (2003) 7 SCC 410.

6. The respondents no.1 to 3 Bank in their counter affidavit have contended (i) that the dispute cannot be agitated under Article 226 of the Constitution of India; (ii) that notice dated 13th May, 2014 of e-auction specifically provided that only the Courts of Haryana will have jurisdiction over any type of dispute relating to the sale/e-auction; (iii) that the petitioner on 18th June, 2014 i.e. prior to the date of e-auction withdrew from participating in e-auction; and, (iv) that it was a term of the EMD made by the petitioner that the petitioner would not withdraw his bid during the bid validity period and the forfeiture has been effected in accordance with the

terms of the e-auction and the law. Reliance is placed on ***Shree Hanuman Cotton Mills Vs. Tata Air Craft Limited*** 1969 (3) SCC 522 and ***Maula-Bux Vs. Union of India*** (1970) 1 SCR 928.

7. The petitioner in his rejoinder has relied upon the judgment of the Madras High Court in ***E. Muthuraj Vs. The Authorised Officer*** MANU/TN/2157/2012.

8. I am of the view that the writ remedy is not appropriate for the relief claimed.

9. The Division Bench of this Court in similar situation in judgment dated 10th March, 2011 in W.P.(C) No.8418/2010 titled ***Madhucon Projects Ltd. Vs. National Highway Authority of India*** had directed refund of 5% of the bid security given for the tender floated and which 5% was forfeited. However, the Supreme Court in order dated 18th March, 2015 in SLP (C) No.15689/2011 titled ***National Highways Authority of India Vs. MEIL-EDB LLC (JV)*** has dealt with the matter as under:-

“We are confronted with a situation when there is a contract between the parties, duly signed by the Respondent which restricts forfeiture of 5% of the value of the Bid Security ostensibly not by way of a penalty. Of course, as is to be expected, the Respondent disagrees and on the contrary submits that the deduction / forfeiture is in terrorem and is punitive in nature. A Writ Court may at least as a temporary or preliminary view decide whether the damages imposed by an Authority amenable to writ jurisdiction such as NHAI indubitably are punitive or not, but it should abjure from going into the minute calculation. That controversy should be left to the Civil Court to decide, i.e. whether the deduction / forfeiture, in the present instance of 5% of the value of the Bid Security is punitive or otherwise. We think that the course that commends itself to us is to relegate the parties to the Civil Courts to determine whether any damages had been suffered by the National Highways Authority of India and if so whether the deduction of 5% was a fair pre-estimate or was punitive in nature. Since the parties have been bona fide prosecuting writ proceedings in the event of the plaintiff seeks enlargement / extension of time for filing of a Suit, the Courts in seisin will keep all the circumstances in view before passing an order.”

10. In the light of the said dicta of the Supreme Court, the remedy if any of the petitioner is not under Article 226 of the Constitution of India.

11. Reliance by the counsel for the petitioner on ***E. Muthuraj*** supra is totally misconceived. The counsel for the petitioner during the hearing has drawn my attention to para 5 under para 11 of the said judgment and on the basis whereof has contended that the Court therein held that Rule 8(6)(f) of the Security Interest (Enforcement) Rules, 2002 under the SARFAESI Act mandates the secured creditors to set out in the terms of sale notice any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property and that the said Rule would include the encumbrance(s) relating to the property. However the paragraph cited by the counsel for the petitioner is not the paragraph of ***E. Muthuraj*** but the paragraph of ***Jai Logistics Vs. The Authorised Officer, Syndicate Bank*** reported in 2010 (4) CTC 627 referred to in para 11 of the judgment in ***E. Muthuraj***. Thereafter in para 12 of ***E. Muthuraj*** itself it is noted that the judgment in ***Jai Logistics*** was considered by a Division Bench of the Madras High Court in ***R. Shanmugachandran Vs. The Chief Manager, Indian Bank, Asset Recovery Management Branch, Coimbatore*** MANU/TN/1243/2012 in which it was held that the purport of Rule 8(6) cannot be extended to such an extent that it obliterates the liability of the purchaser to undertake due diligence and to scrutinise the title to the property and that the obligation of the authorised officer is only to disclose the encumbrance that have come to the notice of the secured creditor and that it is for the auction purchaser to apply for encumbrance certificates in the time of 30 days made available to the intending buyers to see if there are

any encumbrances. In the light of the judgment of the Division Bench in ***R. Shanmugachandran*** the writ petition in ***E. Muthuraj*** was dismissed. ***E. Muthuraj*** is thus against the petitioner rather than being in favour of the petitioner and reliance thereon appears to have been made making a Google like search and not after reading the judgment fully.

12. I am otherwise also entirely in agreement with the view taken in ***E. Muthuraj***.

13. The Security Interest (Enforcement) Rules have been framed in exercise of the rule making power contained in Section 38(1) and 38(2)(b) read with Section 13(4), (10) and (12) of the SARFAESI Act. SARFAESI Act has been enacted to regulate the securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The SARFAESI Act is not concerned with the relationship between the banks/financial institutions holding the financial assets and security interest and the purchasers from the Banks / financial institution thereof. Section 13 lays down the procedure for enforcement of security interest and in sub Section (4) thereof empowers the secured creditor to take possession, in sub Section (10) thereof empowers the secured creditor to, if the dues are not fully satisfied from the sale proceeds of the secured asset, initiate proceedings before the Debt Recovery Tribunal (DRT) and in sub-Section (12) thereof provides for the rights of the secured creditor to be exercised by one or more its (authorized) officers. Section 38 empowers the Central Government to make rules *inter alia* for the manner in which the rights of secured creditor may be exercised. There is nothing in the provisions of SARFAESI Act to indicate the intent to

encompass the relationship between the secured creditor as seller of the secured asset and the purchaser thereof. The Security Interest (Enforcement) Rules have to be read and interpreted in the said light. Rule 8 thereof provides for sale of immovable secured assets and sub Rule (6) thereof is as under:-

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

PROVIDED that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers; one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,-

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.”

14. Sub Rule (6) aforesaid is also dealing with the rights *inter se* between the secured creditor and its borrower. The same limits the liability of the secured creditor to, in the public notice of sale by auction, give details only

of the encumbrances known to the secured creditor and *inter alia* of any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property. The same does not impose an absolute obligation on the secured creditor to disclose all the encumbrances or all the things which a purchaser should know but only such of the encumbrances which are known to the secured creditor and only such other things which the authorised considers it material.

15. A perusal of the public notice in pursuance to which the petitioner submitted its bid along with EMD shows the terms and conditions thereof to be *inter alia* as under:-

“(2) Bidders are advised to go through the website <https://sarfaesi.abeprocure.com> for detailed terms and conditions of auction sale before submitting their bids and taking part in e-auction sale proceedings.

(8) The successful bidder shall have to pay 25% of the purchase amount (including earnest money) already paid, immediately on closure of the e-auction sale proceedings on the same day of the sale in the same mode stipulated in clause 7 above. The balance 75% of the purchase price shall have to be paid within 15 days of acceptance/confirmation of sale conveyed to them.

(11) The property is sold on “as is where is” and “as is what is” condition and the intending bidder should make discreet inquiries as regards on the property of any authority besides the banks charges and should satisfied themselves about the title, extent, quality and quality of the property/security before submitting their bid. No claim of whatsoever nature regarding the property/security put for sale charges encumbrances over the property/security on any other matter etc. will be entertained after submission of the online bid.

(19) The Court of Haryana only shall have the jurisdiction to adjudicate any type of dispute/case(s) relating to the above said sale/auction.

(20) All the terms used in the present sale notice are in the terms of the rules and meaning as enumerated under the provisions of SARFAESI Act, 2002. The sale is subject to conditions prescribed in the SARFAESI Act/Rules, 2002 and the condition mentioned above.”

16. It is thus obvious that the sale was on “as is where is” and “as is what is” condition and no claims of whatsoever nature were to be entertained. By stating so, in my view the proposed purchasers had been sufficiently warned/cautioned to satisfy themselves as to the nature and title of the property.

17. I may also state that a writ petition even otherwise is not maintainable. The claim in the writ petition is based on contract and has no public law character in it. I have recently in ***CCPL Developers Pvt. Ltd. Vs. Gail (India) Ltd.*** MANU/DE/4361/2015, relying *inter alia* upon ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728 held such writ petitions to be not maintainable.

18. I am also of the opinion that the present controversy shall entail disputed questions of fact and which can be at best adjudicated in a suit and cannot be addressed in a writ petition under Article 226 of the Constitution of India.

19. The petition is thus dismissed as not maintainable with liberty however to the petitioner to take appropriate remedies.

No costs.

RAJIV SAHAI ENDLAW, J

FEBRUARY 09, 2016
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