IN THE HIGH COURT OF JUDICATURE OF MADRAS
DATED: 03.01.2017
CORAM:
THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

W.P.No.32337 of 2016 &
W.M.P.No.28049 of 2016

R.G.Housing and Infra Private Limited,
Rep.by its Managing Director,
M.G.Surendranath
No.A7, 6th Cross Street,
Indira Nagar, Adyar,
Chennai - 600 020. ... Petitioner

-vs-

1.Union of India,
Rep.by its Secretary to Government,
Ministry of Finance,
North Block, Central Secretariat,
Raisina Hill, New Delhi - 110 001.

2.State Bank of India,
Rep.by its Deputy General Manager,
No.1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037.

3.The Authorised Officer,
State Bank of India,
Stress Assets Management Branch,
No.1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037. ... Respondents

Prayer: Writ petition has been filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, calling for the records of the second respondent relating to the impugned Reference No.SAMB/CBE/CLO-11/1065 dated 09.09.2016 forfeiting the EMD payment of Rs.6,60,00,000/- made by the petitioner and quash the same thereby consequently direct the respondents 2 and 3 to enlarge the time for compliance of the balance payment of Rs.9,92,50,000/- payable by the petitioner in accordance to the E-Auction dated 07.09.2016.

For Petitioner : Mr.R.Thiagarajan
For Respondents : Mr.S.Sethuraman for R2 & R3

O R D E R

[Order of the Court was made by N.AUTHINATHAN, J.]

The petitioner has come up with the present writ petition for a Writ of Mandamus, calling for the records of the second respondent relating to the impugned Reference No.SAMB/CBE/CLO-11/1065 dated 09.09.2016 forfeiting the EMD payment of Rs.6,60,00,000/- made by the petitioner and quash the same and consequently direct the respondents 2 and 3 to enlarge the time for compliance of the balance payment of Rs.9,92,50,000/- payable by the petitioner in accordance to the E-Auction dated 07.09.2016.

2.The Authorised Officer / third respondent issued e-auction sale notice dated 25.07.2016 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act") for the sale of the mortgaged property bearing Nos.240, 241, 242, 718, 719, 720, 721, 722, 737, 854 & 855 at Thillai Ganga Nagar Subway, Morrisson Street, St.Thomas Mount, Adambakkam Village, Alandur Taluk, Chennai and the e-auction was fixed for 07.09.2016 between 10.00a.m. to 11.00a.m. Rs.66,00,00,000/- was fixed as reserve price. The intending bidders are required to deposit Earnest Money Deposit of Rs.6,60,00,000/-. The petitioner company submitted its E-auction Bid Form on 03.09.2016 by depositing a sum of Rs.6,60,00,000/-. The petitioner became the highest bidder in the e-auction sale held on 07.09.2016 having bid for Rs.66,10,00,000/-. The petitioner was asked to deposit Rs.9,92,50,000/- being the 25% of the bid amount on 07.09.2016 or by 08.09.2016. The Bank has informed the petitioner by their notice dated 07.09.2016 that Rs.49,57,50,000/- being 75% of the bid amount was to be paid within fifteen days from the date of e-auction sale i.e. on or before 21.09.2016.

3.The petitioner sent a representation dated 08.09.2016 to the third respondent seeking extension of time till 29.09.2016 for payment of the balance amount of 25% of the bid amount. He has also informed about the pendency of W.P.No.16561 of 2016 and raised certain issues of encumbrance and encroachment on the property. However, the Bank cancelled the sale since the petitioner failed to pay the balance of Rs.9,92,50,000/- by their letter dated 09.09.2016. The Bank has also forfeited the Earnest Money Deposit paid by the petitioner.

4.Thereafter, the petitioner approached this Court by way of the present Writ Petition. This Writ Petition has been filed to issue a Writ of Certiorarified Mandamus, calling for the records of the second respondent relating to the impugned Reference No.SAMB/CBE/CLO-11/1065 dated 09.09.2016 forfeiting the EMD payment of Rs.6,60,00,000/- made by the petitioner and quash the same thereby consequently direct the respondents 2 and 3 to enlarge the time for compliance of the balance payment of Rs.9,92,50,000/- payable by the petitioner in accordance to the E-Auction dated 07.09.2016.

5.Subsequent to the said sale notice, the Bank has filed W.P.No.16561 of 2016 filed by the State Bank of India, Stressed Assets Management Branch, Raja Plaza, First Floor, No.1112, Avinashi Road, Coimabtore, Rep.by its Asst. General Manager on the file of this Court against [i] The Inspector General of Registration, No.100, Santhome High Road, Chennai; [ii] The District Collector (Administration), South Chennai, Saidapet, Chennai; and [iii] The Sub-Registrar, Office of the Sub-Registrar, Velachery, Chennai. The Bank has prayed for a Writ of Mandamus, directing the respondents therein to take necessary action and steps for cancellation, annulment of the fraudulent documents as held by the second respondent in proceeding No.8743/AA3/2015 dated 01.06.2016 and removal of the same from the entries in the index on the file of the third respondent in terms of the proceedings.

6.The learned counsel for the petitioner would submit that the Bank authorities have not mentioned the details about the pendency of the Writ Petition and certain encumbrances on the property in question in W.P.No.16561 of 2016 that the petitioner's bid / offer was subject to the outcome of the writ petition and that the petitioner participated in the auction on the assurance of the Bank that they would take steps to clear the encumbrances and encroachments. It has contended that the Bank has agreed to extend the time for payment, however, without considering the request of the petitioner, the Bank authorities cancelled the sale. According to him, the Bank is not entitled to forfeit the Earnest Money Deposit.

7.The learned counsel for the respondents would submit that the petitioner was well aware of the encumbrances and the pending cases relating to the property which have been clearly set out in the sale notice. No one has compelled him to participate in the e-auction. The Bank has forfeited the earnest money deposit in accordance with the provisions of SARFAESI Act and time cannot be extended as requested by the petitioner. According to him, a relief contrary to the statute cannot be granted.

8.Admittedly, the security creditor put up the property for e-auction sale. E-auction notice has been issued in terms of Rule 8 of Security Interest (Enforcement) Rules, 2002. The petitioner submitted bid form to participate in the e-auction and deposited earnest money deposit and he became the successful bidder in the e-auction held on 07.09.2016. As per Rule 9(3) of Security Interest (Enforcement) Rules, 2002, successful bidder is required to deposit 25% of the sale price immediately. The Bank has allowed the petitioner to deposit the balance amount of Rs.9,92,50,000/- by 08.09.2016. However, the petitioner has failed to pay the balance sale consideration. The Bank forfeited the earnest money deposit and cancelled the auction.

9.The learned counsel for the petitioner relied on the decision in VISHAL N.KALSARIA vs. BANK OF INDIA AND OTHERS [(2016) 3 SCC 762 to submit that the SARFAESI Act can be enforced subject to the other mandate of laws including the Transfer of Property Act, 1882. According to him, in terms of Section 55 of Transfer of Property Act, 1882 the Bank is bound to disclose the material defects in the property put up for sale. His contention is that in the sale notice issued by the Bank the pendency of the Writ Petition and the encumbrances listed in W.P.No.16561 of 2016 were omitted to be mentioned and therefore, the Bank is not entitled to forfeit the earnest money deposit. In JANATHA TEXTILES AND OTHERS vs. TAX RECOVERY OFFICER AND ANOTHER [(2008) 12 SCC 582] the Supreme Court in a similar situation has held that "in view of Sections 55(1)(a) and (b), Transfer of Property Act, 1882, it was incumbent upon the appellant SFC to disclose to the respondent about the non-existence of the independent passage to the unit. It was also the duty of the appellant SFC to inform the respondent that the passage mentioned in the revenue record was not fit for the movement of vehicles." The Supreme Court upheld the order of the High Court, by which, the order of forfeiture passed by the State Finance Corporation was quashed.

10.A Division Bench of this Court in JAI LOGISTICS vs. THE AUTHORIZED OFFICER, SYNDICATE BANK [2010 (4) CTC 627] has observed that the intending purchaser should be put on notice of the encumbrances relating to the property, the Court has set aside the order of forfeiture and the Bank was directed to refund the earnest money. A learned single Judge of this Court in CHEMSTAR CHEMICALS & INTERMEDIATES (P) LTD., vs. THE COMMERCIAL TAX OFFICER [2010 (6) CTC 635] held that the Bank is bound to disclose order of attachment of Tax Department in sale notice itself.

11.In the present case, the Authorised Officer has disclosed in the sale notice that there are few encumbrances created by third parties subsequent to the creation of the mortgage, which are not binding on the bank. He has also given the details of the legal actions against the encroachers in the sale notice. The intending bidders are required to make their own independent inquiries regarding the encumbrances, title of property put on auction and claims / rights / dues / affecting the property, prior to submitting their bid. The e-auction advertisement does not constitute and will not be deemed to constitute any commitment or any representation of the bank. The property is being sold with will the existing and future encumbrances whether known or unknown to the bank. The Authorised Officer/ Secured Creditor shall not be responsible in any way for any third party claims / rights / dues. The sale notice contained other terms and conditions of the e-auction. The auction sale is subject to rules / conditions prescribed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. This sale will attract the provisions of Section 194-1A of the Income Tax Act. The sale notice in the instant case has been issued on 25.07.2016. Request letter for participation was to be submitted on or before 03.09.2016 and the sale dated was fixed for 07.09.2016. It is important to note that the bank has filed W.P.No.16561 of 2016 only on 29.08.2016. Therefore, there is sufficient time for intending purchasers to make their own independent inquiries regarding the defects in the property.

12.A Division Bench of this Court in R.SHANMUGACHANDRAN (DECEASED) & OTHERS vs. THE CHIEF MANAGER, INDIAN BANK ASSET RECOVERY MANAGEMENT BRANCH [2012-4-L.W.900] has held 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 JAI LOGISTICS vs. THE AUTHORIZED OFFICER, SYNDICATE BANK [2010 (4) CTC 627] the Division Bench has observed thus "it will be a different issue in the event the auction notice indicated that it is the duty of the intending purchaser to verify not only the encumbrance by way of alienation of the property, but also the other statutory liabilities and in that case, the intending purchaser cannot later on turn around and seek for either the refund of the earnest money deposited or insist the Bank to clear the encumbrance."

13.It is not in dispute that an auctioner can set his own terms and conditions for holding auction and the parties are bound by those conditions. The sale in question is governed by the provisions contained in Rules 8 & 9 of Security Interest (Enforcement) Rules, 2002. The Hon'ble Supreme Court in Civil Appeal Nos.6989 to 6990 of 2013 has held that Rule 9(3) of Security Interest (Enforcement) Rules, 2002 is mandatory in nature. The Supreme Court has held that the time for payment of 75% of the purchase money can be extended beyond 15 days by an written agreement between the parties. The work for the purposes Rule 9(4) of Security Interest (Enforcement) Rules, 2002 according to the supreme Court must mean the secured creditor, borrower and the auction purchaser. In the case at hand, the petitioner prayed for extension of time to make the balance payment. As it has been declared by the supreme court that Rule 8(3) of Security Interest (Enforcement) Rules, 2002 is mandatory, we hold that the petitioner is not entitled to extension of time for the balance payment.

14.The learned counsel for the petitioner would submit that the petitioner is ready to make the payment of Rs.9,92,00,000/- and willing to pay the balance 75% of the bid amount once the respondents cleared all the encumbrances on the property. The learned counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court in JANATHA TEXTILES AND OTHERS vs. TAX RECOVERY OFFICER AND ANOTHER [(2008) 12 SCC 582] wherein it has been held that a third party auction-purchaser's interest in the auctioned property continues to be protected notwithstanding that the underlying decree is subsequently set aside. However, in the instant case, the sale was not confirmed in favour of the petitioner. Therefore, this decision does not in any way help the petitioner in the present case.

15.However, as per Rule 9(3) of Security Interest (Enforcement) Rules, 2002 if the buyer does not deposit 25% of the sale price immediately, the immovable assets shall be offered for e-auction on 25.07.2016. The Bank has already issued subsequent sale notice on 15.09.2016 and the sale was fixed for 24.10.2016 in terms of Rule 9(3) of Security Interest (Enforcement) Rules, 2002. Therefore, we are inclined to accede to the offer of the petitioner. The Bank has forfeited the earnest money deposit of Rs.6,60,00,000/- paid by the petitioner.

16.In R.SHANMUGACHANDRAN (DECEASED) & OTHERS vs. THE CHIEF MANAGER, INDIAN BANK ASSET RECOVERY MANAGEMENT BRANCH [2012-4-L.W.900], the Division Bench of this Court has held there is a distinction between forfeiture made under Rule 9(3) Security Interest (Enforcement) Rules, 2002 the forfeiture of the earnest money deposit is not taken care of by the Rules and hence the Bank may have to fall back upon the terms and conditions of sale. In the present case, the terms and conditions do not provide for forfeiture of the earnest money deposit. Therefore, we are inclined to quash the impugned order dated 09.09.2016 passed by the third respondent only in respect of the forfeiture of the earnest money deposit.

17.For the reasons stated above, the Writ Petition is allowed in part. In other aspects, the writ petition is dismissed. The Bank is directed to refund the earnest money deposit of Rs.6,60,00,000/-to the petitioner within a period of six weeks from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

sri

To

1.The Secretary to Government,
Union of India,
Ministry of Finance,
North Block, Central Secretariat,
Raisina Hill, New Delhi - 110 001.

2.The Deputy General Manager,
State Bank of India,
No.1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037.

3.The Authorised Officer,
State Bank of India,
Stress Assets Management Branch,
No.1112, Raja Plaza, Avinashi Road,
Coimbatore - 641 037.

+1 cc to Mr.S.Sethuraman Advocate sr 418
+1 cc to Mr.R.Thiagarajan Advocate sr570

W.P.No.32337 of 2016

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