

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.04.2017

CORAM

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.NO.39199 OF 2016

S.Shanmuganathan

.. Petitioner

VS.

The Authorized Officer
Indian Overseas Bank
Asset Recovery Management Branch
Canteen Block, First Floor,
Central Office Buildings,
No.763, Anna Salai,
Chennai - 600 002.

.. Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus, directing the respondent to refund a sum of Rs.62,00,000/- received by the respondent under an auction sale held on 21.06.2008 together with interest at the rate of 24% per annum from 21.06.2008 till the date of payment.

For petitioner : Ms.Asha
for M/s.Sarvabhauman Associates

For Respondent : Mr.F.B.Benjamin George

ORDER**(ORDER OF THE COURT WAS MADE BY M.GOVINDARAJ, J.)**

The unreasonable attitude taken by the bank in the matter of a sale of secured asset under the SARFAESI Act, by not putting the auction purchaser in vacant possession of the property or to return the sale consideration paid about nine years back, made the petitioner to file this writ petition claiming return of the amount paid by him with interest at 24% per annum. The bank is resisting the writ petition notwithstanding the fact that encumbrances and pending litigations in respect of the property were not divulged in the auction notification and the purchaser was made to offer his bid on a *bona fide* belief that the property is free from encumbrances and litigations.

2. The petitioner participated in the public auction pursuant to the auction notice issued by the respondent (hereinafter referred to as “the Bank”) on 20.05.2008, in Daily Thanthi newspaper. In the said auction, the writ petitioner was declared as the successful bidder, as per the letter issued by the bank on 21.06.2008. The writ petitioner deposited a sum of Rs.15,50,000/-, being 25% of the bid amount on 21.06.2008 itself. The balance amount of Rs.46,50,000/- was deposited by the writ petitioner on 24.07.2008 as per schedule.

3. It is the grievance of the petitioner that at the time of auction and in the public notice, the Bank took a position that the Bank is in possession of the property and assured that physical possession will be delivered to him. Since the physical possession was not given by the Bank, the petitioner requested the Bank to refund the money. Thereafter, a reminder was sent on 21.05.2014. On 03.06.2014, the Bank gave a reply that they would initiate necessary proceedings under SARFAESI Act and deliver vacant possession. The officer in-charge of the bank was in regular touch with the writ petitioner. The writ petitioner waited endlessly with a hope that the bank would put him in vacant possession. The petitioner has been requesting the bank time and again either to deliver vacant possession or refund the amount deposited by him. Since nothing was heard from the bank, the writ petitioner by his letter dated 09.04.2015 requested for refund of Rs.62,00,000/- with interest, in order to give a quietus to the matter. The respondent, despite receipt of the letter, failed to respond positively, but was trying to convince the writ petitioner that they will take action under SARFAESI Act.

4. When the respondent was bringing the property for sale, one T.Harikrishna informed the Bank that he had a claim over the property and he filed a suit in O.S.No.7998 of 2008, against his father, one Vasantha,

and the Bank, for declaration of title to the property, which is the subject matter of the auction sale dated 21.06.2008. The suit was pending on the file of XV Assistant Judge, City Civil Court, Chennai. Since there was no likelihood of disposal of the Civil Suit and the writ petitioner had to clear the outstanding liabilities, request was made to the Bank to refund Rs.62,00,000/-. Since the respondent refused to refund, the present writ petition has been filed.

5. The Bank has filed a counter affidavit controverting the averments.

(a) According to the bank, the writ petition is not maintainable in law. The amount was received from the petitioner, for sale of the subject property and accordingly, a sale certificate was issued in July 2008 followed by a revised sale certificate issued on 12.08.2014. Therefore, the sale subsists and it cannot be cancelled and that there is no question of returning the sale consideration to the petitioner.

(b) The property originally belonged to one Thulasinga Naicker and his wife Vasantha. On 20.08.2003, the property was given as security for sanctioning cash credit facility to the borrower company, namely

M/s.T.W. Air Freight (Madras) Pvt. Ltd., and its Directors, namely, Y.Suri and his wife Vijayanthi Suri. Since the borrowers were irregular in payment, action under Section 13(2) of the SARFAESI Act was taken on 28.12.2005. The bank took possession of the assets under Section 13(4) of the Act.

(c) In the meanwhile, the guarantors namely, Thulasinga Naicker and his wife Vasantha filed a civil suit in O.S.No.4552 of 2006, on the file of III Assistant Judge, City Civil Court, Chennai, praying to declare the equitable mortgage created over the property, in favour of the bank as null and void, and also for permanent injunction. The Bank entered appearance in the suit and filed an application in I.A.No.15775 of 2006 to reject the plaint. But the Trial Court, by order dated 10.07.2007, dismissed the application for rejection of plaint, against which, the Bank has preferred a Civil Revision Petition in C.R.P.No.2234 of 2007 and an interim order was granted on 08.08.2007, staying all further proceedings in O.S.No.4552 of 2006 and that the same was made absolute on 03.09.2007. The Civil Revision Petition is still pending on the file of the High Court.

(d) The Bank would further contend that the sale notice was

issued on 19.05.2008, and the bid was submitted on 20.06.2008. The petitioner was informed of the pendency of the suit. Knowing fully well about the pendency of the suit, the petitioner paid the entire sale consideration and sale certificate was issued to him, with all original title deeds.

(e) However, when the Bank filed a petition under Section 14 of the SARFAESI Act, for taking possession of the property, the bank received another notice from City Civil Court, in O.S.No.7998 of 2008. One T.Harikrishna claimed that the mortgaged property does not belong to the Guarantor, namely, Thulasinga Naicker, who is the plaintiff in O.S.No.4552 of 2006. Therefore, application under Section 14 of the SARFAESI Act was not pursued and the petitioner was advised to wait till the outcome of the above civil suits. The Civil Suit in O.S.No.7998 of 2008 was dismissed on 30.04.2013. However, C.R.P.No.2234 of 2007 filed against I.A.No.15775 of 2006 in O.S.No.4552 of 2006 is still pending on the file of the High Court.

(f) On coming to know that O.S.No.7998 of 2008 was dismissed, the writ petitioner approached the Bank, seeking physical possession of the property. When the bank expressed its difficulties in handing over physical possession, the petitioner requested the Bank to refund the sale

consideration. The Bank called the petitioner and explained about the pendency of the Civil Revision Petition and assured to render all its assistance to deliver physical possession after the disposal of the Civil Revision Petition.

(g) The petitioner agreed to wait and requested the bank to issue a fresh sale certificate to enable him to register the sale certificate. Accordingly, the respondent issued a fresh sale certificate on 12.08.2014. Thus, the petitioner has abandoned his request to cancel the sale and refund the sale consideration. But, the writ petitioner has now come up with the present writ petition seeking refund.

(h) Even though the respondent is bound to hand over physical possession as per the provisions of the Act, which cast a legal obligation, the petitioner has waived his right and therefore, is estopped from pleading anything contra.

(i) The writ petitioner has purchased the property as early as on 20.06.2008 and had also obtained a sale certificate. Therefore, the request of the petitioner, at this belated stage, to refund the money, cannot be considered.

(j) In any event, it is settled law that the principle caveat emptor

is applicable for sale in respect of immovable properties also. It is further contended that if it is so directed by this Court, the respondent is ready and willing to apply afresh under Section 14 of the Act and take every step to hand over physical possession of the asset to the petitioner. There is no constitutional or statutory violation in the sale entitling the petitioner to invoke the jurisdiction under Article 226 of the Constitution of India.

6(a). The learned counsel for the petitioner contended that the writ petitioner had deposited the entire sale consideration to the tune of Rs.62,00,000/- and had waited for several years to get the subject property delivered to his possession. Since there was pressure from his creditors to settle the amount borrowed for the purpose of purchasing the subject property, he was constrained to approach the Bank time and again for delivery of possession. The Bank pacified him with a promise that the physical possession of the property will be delivered to him soon. Thereafter, on 21.05.2014, he had made a representation to the Bank to refund the entire amount, along with interest at the rate of 24% per annum, from the date of deposit, till the date of realisation, as he has mobilised this amount by securing loan from financiers. To his surprise, for the first time, the Bank by its letter dated 03.06.2014 had expressed its inability and also had come out with the fact that Civil Suits are pending

before the Civil Courts and that Bank was defending the same. The Bank had promised to file petition for taking physical possession of the property, before the Chief Judicial Magistrate Court. Therefore, according to the learned counsel, the writ petitioner sent a letter dated 11.08.2014, saying that in view of the case pending before the Civil Court, he did not arrange for registration of the sale certificate. Therefore, he sought for a revised sale certificate for registering the same. While writing this letter, the writ petitioner was under an impression that there is only one suit pending before the Civil Court i.e. O.S.No.7998 of 2008.

(b) The letter written by the Bank dated 03.06.2014 would also show no information about the pendency of the Civil Suit or Civil Revision Petition before the High Court. The Bank had time and again ensured the petitioner that there was no encumbrance on the subject property and the officer concerned had requested the writ petitioner to wait for some more time. Therefore, the writ petitioner had waited for long and when he came to know that delivery of possession is impossible, even after the dismissal of the Civil Suit in O.S.No.7998 of 2008, he insisted for refund of the amount.

(c) The learned counsel would further submit that the reading of the plaint in O.S.No.4552 of 2006 would disclose that there was a criminal

case registered on the complaint given on 10.09.2004, pursuant to a direction issued by this Court in Crl.M.P.No.5837 of 2005, to the Central Bureau of Investigation (CBI) and to investigate the same as there was allegation of cheating in the creation of mortgage dated 20.08.2003. Therefore, it is clear that the subject property is under a cloud as the Civil Revision Petition pending before this Court in C.R.P.(PD) No.2234 of 2007 is yet to be decided.

(d) According to the learned counsel, as on date, the situation is nebulous and there is no guarantee for immediate possession of the property. Moreover, as per the submission of the learned counsel for the respondent, it is not certain that the criminal case registered by the Central Bureau of Investigation will reach its conclusion in the near future. Therefore, the demand made by the writ petitioner is very much justifiable and reasonable.

(e) According to the learned counsel, the respondent Bank does not have title to convey the property to the petitioner, as it is subjudice before the Civil Court.

(f) The learned counsel would strenuously contend that as per Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, the

description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor, shall be provided. As per Rule 8(6)(f) of the Security Interest (Enforcement) Rules, 2002, 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, should also be put on notice. The Bank had suppressed all these material facts in the auction notice. Had it been disclosed, the writ petitioner would not have invested a huge sum in the auction proceeding.

(g) Further, as per Rule 9(9) of the Security Interest (Enforcement) Rules, 2002, the authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money. Rule 9(10) would further state that the certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser had purchased the immovable secured asset free from any encumbrances known to the secured creditor or not. Despite the mandatory provisions, the Bank had by giving wrong information, acted in contravention to the statutory requirement contemplated under the SARFAESI Act and Rules.

(h) The Bank would not be justified, in compelling the writ petitioner to go ahead with the sale, together with the encumbrance.

Therefore, the Bank is duty bound to refund the money along with interest at the rate of 24% per annum, from the date of deposit, till the date of realisation.

7. The learned counsel for the petitioner would rely on a Division Bench judgment of this Court in **JAI LOGISTICS VS. THE AUTHORISED OFFICER, SYNDICATE BANK [2010 (4) CTC 627]** wherein this Court had observed as follows:

“5. We have considered the submissions. Of course, in the aforesaid judgment, the Supreme Court, while considering a sale by the Official Liquidator, has held that it is the duty of the intending purchaser to satisfy himself as to the encumbrance before participating in the bid. Having participated in the bid, the intending purchaser cannot later on turn around and question the Official Liquidator on the ground that the encumbrance was not notified. In that case, the provisions of the Rules as applicable in the present case are not applicable to the Official Liquidator. But in the case on hand, once possession is taken over under [Section 13\(4\)](#) or under [Section 14](#) of the SARFAESI Act, whenever the secured creditor contemplates a sale of immovable property,

they will have to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. Rule 8(6)(f) 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. A reading of the said rule, in our opinion, would also include the encumbrance relating to the property. We are inclined to read the rule in that way keeping in mind the interest of the intending purchaser to be put on notice as to the encumbrance, as otherwise he/she will be purchasing the property and simultaneously buying the litigation as well and an intending purchaser may not bid in the event he/she came to know of any encumbrance over the property. That is why the rule specifically contemplates a provision for the authorised officer, while notifying the sale, to specifically state as to the encumbrance. 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. In the absence of such indication

in the sale notice, in our considered view, the respondent-bank would not be justified in compelling a purchaser to go ahead with the sale by depositing the balance sale consideration together with the encumbrance. “

8. (a) The learned counsel appearing for the respondent Bank would submit that the Bank had obtained the mortgage on 20.08.2003. Thereafter, the mortgagor had filed a suit in O.S.NO.4552 of 2006, on 17.05.2006, praying for a declaration that the mortgage executed on 20.08.2003 was null and void and for a permanent injunction. The Bank has taken earnest steps to get the suit rejected, by filing an application under Order VII Rule 11 of the Civil Procedure Code, for rejection of plaint. But the same was dismissed on 10.07.2007, against which, the Bank preferred a Civil Revision Petition, in which, interim order of stay came to be granted, which was also made absolute on 03.09.2007. The Civil Revision Petition is still pending. Thereafter, on 11.04.2008, the Bank had taken symbolic possession of the property. On 21.06.2008, the auction was conducted and the writ petitioner was declared as a successful bidder and he deposited a sum of Rs.62,00,000/-.

(b) According to the learned Counsel, possession could not be

handed over to the petitioner, in view of the suit filed by one T.Harikrishnan, who claimed to be the owner of the subject property, in O.S.No.7998 of 2008. On 30.04.2013, the above suit was dismissed. But due to the pendency of another suit, the Bank could not hand over possession of the property. Therefore, the Bank has advised the petitioner to wait for some more time. However, without waiting further, the petitioner had come up with a representation dated 21.05.2014 to cancel the sale.

(c) According to the learned counsel, the demand made by the writ petitioner is not sustainable in the eye of law. He would further contend that the writ petitioner had accepted their advise to wait for sometime and asked for revised sale certificate, which was promptly given to him on 12.08.2014. Thereby, the writ petitioner had waived his right to demand refund of the money.

(d) The learned counsel would further submit that a reading of the auction notice would clearly reveal that the writ petitioner had purchased the property on "as is what is condition", as per clause 9 of auction notice.

(e) It was contended that if at all the writ petitioner wants to get sale cancelled, he has to take steps for setting aside the sale under rule 62

of Income Tax Rules. The writ petitioner, without exhausting the alternative remedy, had approached this Court. There is no provision in the SARFAESI Act for cancellation of the sale certificate.

9. In support of his contention, the learned counsel for the Bank relied on Rule 62 of Second Schedule of Income Tax Rules, which reads as follows:

“62.Setting aside sale where defaulter has no saleable interest. - At any time within thirty days of the sale, the purchaser may apply to the Tax Recovery Officer to set aside the sale on the ground that the defaulter had no saleable interest in the property sold.”

10. The learned counsel would rely on the judgment of the Honourable Supreme Court in **SULOCHANA CHANDRAKANT GALANDE VS. PUNE MUNICIPAL TRANSPORT AND OTHERS [2010 (8) SCC 467]** wherein the word encumbrance was explained. Encumbrance is a mere charge on the property and it must run with the property. Para 14 of the judgment is extracted hereunder in this regard :-

“14. "Encumbrance" actually means the burden caused by an act or omission of man and not that created

by nature. It means a burden or charge upon property or a claim or lien on the land. It means a legal liability on property. Thus, it constitutes a burden on the title which diminishes the value of the land. It may be a mortgage or a deed of trust or a lien of an easement. An encumbrance, thus, must be a charge on the property. It must run with the property. (Vide Collector of Bombay Vs. Nusserwanji Rattanji Mistri & Ors., AIR 1955 SC 298; H.P. State Electricity Board & Ors. Vs. Shiv K. Sharma & Ors., AIR 2005 SC 954; and AI Champdany Industries Ltd. Vs. Official Liquidator & Anr., (2009) 4 SCC 486).“

11. The learned counsel would rely on the judgment of the Supreme Court in **MATHEW VARGHESE VS. M.AMRITHA KUMAR AND OTHERS [2014 (5) SCC 610]** wherein it has been held that Section 29 of the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, is an enabling provision, under which, the II and III Schedules of the Income Tax Act, 1961 and the Income Tax Rules 1962, can be applied, as far as possible, with necessary modifications, as if the provisions and the rules are referable to the debt due, instead of income tax due. Therefore, according to the learned counsel, the remedy of the writ petitioner is only an appeal under the Income Tax Rules as mentioned above and the writ

petition is not at all maintainable.

12. The core issue before this Court is as to whether the writ petitioner is entitled for refund of the sale consideration deposited with the Bank with interest.

13. The bank initiated SARFAESI proceedings against the borrower to recover the outstanding. The bank issued a notification calling for bids to purchase the secured asset. The auction notification dated 20.05.2008 is silent with regard to the encumbrances and pending litigations. The notification proceeded as if the secured asset was free from litigation and the bank would be in a position to put the purchaser in vacant possession of the property.

14. There is a statutory obligation cast on the bank to notify the encumbrance and delivery of the property to the purchaser free from encumbrance.

STATUTORY OBLIGATION

15. Rule 8(6)(a) of the Security Interest (Enforcement) Rules, 2002 reads as follows:

“(a) the description of the immovable property to

be sold, including the details of the encumbrances known to the secured creditor: “

16. There is no dispute that rule 8(6)(a) and 8(6)(f) are mandatory in nature. The Purchaser should be put on specific notice about all the encumbrances and other materials so as to enable him to take a conscious decision with regard to his participation in the auction and the amount to be quoted in his bid. The disclosure is not an empty formality. The auction notification is defective and improper in case the encumbrances and known litigations are not disclosed. Since there is a statutory obligation on the part of the secured creditor under rule 9(9) to deliver the property free from encumbrance to the purchaser, such disclosure must be made well before the auction to give an option to the purchaser to take part in the auction.

17. In the subject case, the bank was aware of the pending litigations with respect to the secured asset. Even then the bank failed to disclose it in the auction notification.

18. There is a statutory obligation on the part of the bank to disclose the encumbrances in the sale notice. The failure to adhere to such duty would come within the ambit of sub Section (2) of Section 18 of the

Contract Act, enabling the other party to avoid the contract.

19. When the statute mandates that a particular thing shall be done in a particular manner, it shall be done only in that manner.

20. In *Indian Banks' Association, Bombay and others vs. Devkala Consultancy Service and others*, 2004 (11) SCC 1, the Supreme Court observed that "it is well settled that when a procedure has been laid down, the Statutory Authority must exercise its power in the manner prescribed or not at all".

21. The bank was well aware of the cloud on title to the secured asset, on account of the pending litigations. Even then, the bank suppressed the information with regard to litigation in the sale notice.

Whether the writ petitioner had prior knowledge of encumbrance

22. The learned counsel for the Bank contended that the bank informed the petitioner about the litigation. This contention has no basis. The counter affidavit filed by the bank does not contain a statement that the petitioner was informed about the litigation and encumbrance before the auction sale. The statement in the counter affidavit that the bank

called the petitioner and appraised him of the pendency of civil revision petition and assured him of all assistance to deliver physical possession supports the case of the petitioner that such information was not disclosed prior to sale. This would also show that only when the petitioner called upon the bank to refund the sale amount, materials with regard to the pending litigations were furnished to him.

23. Even in the letter dated 31.6.2014, rejecting the request made by the petitioner to refund the amount, the bank was not sure as to how many suits were pending and the encumbrances.

24. The following statement in the counter affidavit would support the case of the petitioner.

“ ... It is true that some proceedings were pending before the civil courts and we are defending the cases. However to the best of our knowledge, there is no encumbrance over the property”.

25. The materials available on record are sufficient to arrive at a conclusion that the bank for reasons best known, withheld information with regard to litigation with a view to sell the secured asset some how or

the other. In any case, there is nothing on record to show that the writ petitioner had prior knowledge about the litigation and in spite of such information, participated in the auction.

Non exhaustion of alternative remedy:-

26. The learned counsel for the bank contended that the petitioner must avail the alternative remedy to redress his grievances. There is no substance in the said argument. The petitioner is a third party to the loan transactions. He is neither a borrower nor a person claiming interest under the borrower. The petitioner is aggrieved by the failure on the part of the bank to put him in possession of the secured asset in spite of paying the entire sale consideration about nine years ago. The bank violated the mandatory provisions of SARFAESI Rules by not disclosing the known encumbrances. There is no question of directing the petitioner to approach the DRT or other authorities notwithstanding the serious violations committed by the Bank. Since the facts are clear and in the absence of disputed questions of fact, the Bank is not justified in its contention based on alternative remedy.

27. The argument of the learned counsel for the Bank that the

properties sold in auction were given at a meagre sale consideration and the reserve price was fixed considering the litigiousness of the property does not augur well. The further argument that having known that the auction purchaser gets wide margin between the market price and the reserve price, he has to wait till he gets delivery of possession, is clearly contrary to the object of the statute.

28. Viewing from every angle the Bank has given an impression that they are exploiting the innocent borrowers by selling their properties at throw away prices, not only below the market price, but also below the guideline rate. Such an argument cannot be countenanced and exploitation in any form, whether it be the borrower or auction purchaser is depreciable. So also, the statement that the auction purchaser should be beware of the title, even though it is sold by Bank does not also sound reasonable. The financial institutions, while issuing sale notification, discharge a statutory duty. So much of credibility is naturally fastened on the Bank. It is not expected from a Public Sector Bank, to state that purchaser shall be aware of encumbrances. Even though the auction purchaser should be aware of the encumbrances, which are visible by spot inspection and on enquiry, but the defect in title and the other materials on record shall be disclosed only by the secured creditor, as it would be

within its exclusive knowledge. Therefore, it cannot be accepted that the auction purchaser should know each and every minute detail by site inspection. Therefore, the argument that the auction purchaser should be beware of encumbrances notwithstanding the failure of the Bank to disclose the relevant information is not tenable.

29. The Supreme Court in ***Bharat Sanchar Nigam Ltd. vs. Telephone Cables Ltd. [2010(3) Scale 36]***, indicated the need for the Public Sector Undertakings to ensure fairness in all their transaction.

"A public undertaking is required to ensure fairness, non-discrimination and non-arbitrariness in their dealings and decision making process. Their action is open to judicial review and scrutiny under the Right to Information Act, 2005."

30. The Supreme Court in ***J.Rajiv Subramaniyan and Another Vs.Pandiyas and Ors. (2014(2) CTC 323)***, indicated the requirement to take *bona fide* measures to ensure maximum yield from secured assets.

The Supreme court observed :-

"17. It must be emphasised that generally

proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire straits. The provisions of the SARFAESI Act, 2002 and the 2002 Rules have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bona fide measures to ensure that there is maximum yield from such secured assets for the borrowers.”

31. The representation that the property is free from encumbrance and that he would get vacant possession soon made the petitioner to take part in the auction and to submit his bid. Even according to the Bank, details of litigations were not disclosed in the auction notification in spite of clear knowledge. The petitioner with a fond hope that he would be in a position to enjoy the property made his offer which was accepted by the bank. The petitioner deposited the amount way back on 24.07.2008. The bank was expected to put the petitioner in vacant possession of the property within a reasonable time. Even after a period of

nine years, the bank is not in a position to deliver vacant possession. The secured asset is now in the midst of civil litigations. There is also a criminal case in respect of the mortgage relating to the secured asset. The petitioner waited all these years. It was only when he was convinced that the chances of culmination of litigation is very remote, the petitioner made a request to the bank to refund the amount. The bank instead of admitting its mistake in not disclosing the encumbrances, and litigations, dragged the petitioner from pillar to post and finally prompted him to approach this court. In view of the background facts, the bank is liable to refund the sale consideration to the petitioner.

Interest :-

32. The other question is as to whether the petitioner is entitled to interest.

33. The petitioner deposited the sale consideration on 24.07.2008. The bank retained the money all these years without delivering the property to the petitioner. The bank is therefore liable to pay interest to the petitioner.

34. In *Ambalavanan vs. Canara Bank (order dated 01.04.2016 in Review Application (Writ) No.302 of 2015)* a Division Bench of this

court considered the question regarding payment of interest. The Division Bench made the following observation, while directing payment of interest to the purchaser of a secured asset:-

“9. The Bank issued the sale notice to auction the property mortgaged by the first respondent. The applicant participated in the auction. The bid submitted by the applicant was accepted by the Bank and the sale was confirmed in his name. The applicant paid a sum of Rs.65,07,000/- to the Bank. The amount was deposited on 27 August 2010. The sale was subsequently set aside by this Court. The Bank refunded the amount deposited by the applicant. However, interest was not paid. The Bank cannot be heard to say that the purchaser of the property is not entitled to interest. The money was deposited with the Bank. The Bank was having the money throughout the proceedings. The Bank utilized the money. The Bank charges different rates for different transactions. The Bank is charging 14% for mortgage loans. There are other transactions wherein the Bank charges even 18% interest per annum. Such being the factual position, the Bank cannot be heard to say that the applicant has to be satisfied only with the principal amount. We are of

the view that the Bank having kept the amount for years together, is bound to pay interest to the applicant."

35. The petitioner is entitled to interest which we fix at 12% per annum.

36. We direct the bank to refund the sale consideration viz. Rs.62,00,000/- (Rupees Sixty Two Lakhs only) to the petitioner with interest at the rate of 12 % per annum, calculated from 24.7.2008 within a period of four weeks from the date of receipt or production of a copy of this order. The bank is given liberty to cancel the sale certificate.

37. The writ petition is allowed, as indicated above. No costs.

[S.M.K., J]

[M.G.R., J]

28.04.2017

Index : Yes/No

Internet : Yes/No

TK

Note : Issue order copy on 03.05.2017

To

The Authorized Officer
Indian Overseas Bank
Asset Recovery Management Branch
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