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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP-21358-2014
Date of decision : 05.04.2017

M/s Sharma and Gangahar Builders and Colonizers Private Limited

... Petitioner(s)

Versus

State of Punjab and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Aalok Jagga, Advocate
for the petitioner(s).

Mr. Yatinder Sharma, Addl. A.G., Punjab.

Mr. C.S. Pasricha, Advocate
for respondent No.5.

Mr. H.S. Bhatia, Advocate
for respondent Nos.7 and 8.

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AMIT RAWAL, J. (ORAL)

The petitioner-M/s Sharma and Gangahar Builders and Colonizers (P) Ltd., is aggrieved of the action of the Bank/respondent No.5, whereby adjoining to the plot bearing No.179, in violation to duly sanctioned layout and zoning plan, the possession of the constructed house built on a land measuring 5 kanals 16 marals of khasra No.26/26/1/1 situated at Village Naushera, Majitha Road, Tehsil and District Amritsar has been sought in pursuance to the sales certificate obtained by the Bank for recovery of the amount of loan extended to the original borrower.

Mr. Aalok Jagga, learned counsel appearing on behalf of the petitioner submits that the petitioner is an approved builder and developer by the Punjab Urban Development Authority (PUDA). On 26.12.2001 conceived a project/colony by the name of "SG Enclave" at Naushera, Majitha Road, Amritsar. The said colony/project was approved by the PUDA and spread over an area of 25.024 acres. The petitioner was also granted licence (Annexure P-2) vide order dated on 26.12.2001. The terms and conditions of the licence reveal that the licensee shall not contravene any provisions of any law for the time being, much less, comply with the Punjab Apartment and Property Regulations Act, 1995 (for short 'the 1995 Act') and Rules made thereunder, much less, zoning plans. On 26.12.2001, the PUDA approved the site plan (Annexure P-3) of the said colony. Consequent upon the sanction of the site plan, the petitioner developed a residential colony on the said piece of land comprising 267 houses and 20 shops-cum-offices of various sizes. The petitioner was astonished, on having acquired the knowledge of breaking of the boundary wall next to the house No.179 in the colony and realized that a borrower purchased some land adjoining to the colony, whereby he raised the construction of the house and for the purpose of obtaining the loan, mortgaged to the Indian Overseas Bank/respondent No.5. Being defaulter, the Bank had put the property on sale and respondent Nos.7 & 8 had purchased the property in open auction being highest bidder. It is, in that process, the possession was being taken.

He further submits that as per the documents and the information derived, the plot No.179 has never mortgaged, but this fact was affirmed by Mr. C.S. Pasricha, as the same was not mortgaged by the Bank except the area aforementioned. He has no objection in case, the auction purchaser is taken the possession of land measuring 3509 sq. yards and plot No.179, if the same is mortgaged, but not in the manner and mode, as indicated above i.e. by breaking the boundary wall. In this regard, he has drawn the attention of this Court to the zoning plan dated 24.06.2013 for S.G. Gardens, Village Naushera, Majitha Road, Amritsar (Annexure P-6), whereby as per condition No.4, the builder has been prevented from having no opening or gate from adjoining land on the plots having the sites along the scheme boundary.

Mr. C.S. Parciha, learned counsel appearing on behalf of respondent No.5/Indian Overseas Bank submits that the auction purchaser had approached this Court vide CWP No.8038 of 2011 and the Division Bench of this Court, vide order dated 13.03.2013, gave the liberty to approach the Debts Recovery Appellate Tribunal (DRAT) under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act') and in those proceedings having been availed by the auction purchaser, the report of Tehsildar revealed that there is a passage from the colony, aforementioned, to the property measuring 3509 sq. yards, but as per the contents of the written statement, there is no such document to establish that plot No.179 measuring approximately 243 sq. yards, was ever mortgaged. He relies upon the report of the Surveyor to contend that there was an access of 12 ft. from the Colony to the area measuring 5 kanals 16 marals i.e. 3509 sq. yards, where the loanee had constructed a house. The aforementioned loan was also against a collateral security as primary was the stocks. Since, the borrower had run away, the Bank had no other option, in order to realize dues had to put the collateral security for auction by taking the aid of the provisions of the SARFAESI Act.

Mr. H.S. Bhatia, learned counsel appearing on behalf of respondent Nos.7 and 8 submits that the Bank Official had put a auction notice regarding a clear access to the house. It is in this aspect and expectation of the matter, had given the highest bid despite strict competition. This Court had also come to the rescue of respondent Nos.7 & 8, to provide the possession with the help of the police. There is already access to the house which fact is evident from the report of the Surveyor and therefore, the property, as per the auction notice, was 3509 sq. yards, but the plot bearing No.179 falling within "SG Enclave". There is no other access than the one as reflected in the site plan and therefore, the auction purchaser will be left high and dry, in case, the access so provided is not being allowed as was being used by the erstwhile borrowers. If the grievance of the petitioner cannot be addressed by not allowing the making of the wall owing to the zoning plan, the client is no longer interested in going ahead and taking the possession, thus, prays for refund of the money along with suitable interest including the element of compensation.

I have head the learned counsel for the parties and appraised the paper book. Before I could give my finding, I called upon Mr. C.S. Pasricha, to apprise this Court as to whether a construction raised on a land, even for extending a loan for collateral purposes, in a unregulated area without sanction plan or in prohibited zone, the bank can extend the loan, the answer was in negative. It is a classic case, whereby the area measuring

3509 sq. yards, has not been shown to have raised a construction with the approved site plans either from the concerned Municipal Corporations or District Town and Country Planner, much less, CLU as the nature of the land at that time was vacant land. The title deed shown to me is only in respect to the agriculture land and thereafter, raising of construction and obtaining of the loan, the report of valuer also reveals the factum of construction. No doubt the Bank has to recover the amount by taking the aid of the provisions of the SARFAESI Act, but the fact remains that it has to apply the basic yardsticks/parameters, whether a property put to auction would yield a highest bid and would not create any further impediment, in essence, whether it would affect the third party rights or not. Intriguingly the loanee, on his own, without the consent of the petitioner, had, at one point of time, demolished the boundary wall of the Enclave for providing an access to his land on a presumption that there was no other passage. Instead of putting the mortgaged land to the auction, much less, the cost of the auction and recurring interest, the Bank should have made the sincere efforts in assuring that there is no violation qua the third party rights i.e. like petitioner, in the instant case, for, until and unless, a property which is being put to auction, does not have any access, no buyer would come and the loan amount of the Bank would remain unrealized. The Officers are to be sensitized on this issue, while extending the loan. The remedy for the Bank, in my view, was/is to seek indulgence either of the Civil Court or the Authority for acquisition of land for providing an access/passage to the vacant land or demolition the superstructure and sell it as a plot to the Buyer, who knows its consequences, whether a residential house can be erected or not. All these points were required to be visited before putting it to auction. Once the builder i.e. the petitioner, has been imposed a condition of not deviating of the conditions of zoning plan particularly Condition No.4, which reads as under:-

> *"4. No opening or gate from adjoining land shall be allowed on plots having sites along the scheme boundary."*

even a boundary wall had been broken, the same cannot be used as an access to the mortgaged area, thus, in my view, it is a fit case where the request of the petitioner viz-a-viz not providing the access from his zoned area and as well as the respondent(s) viz-a-viz refund of auction money along with interest with some compensation, has to be accepted.

Resultantly the respondent No.5/Bank is restrained from providing an access to the land mortgaged with them i.e. area measuring 3509 sq. yards, khasra No.26/26/1/1.

However the prayer of respondent Nos.7 & 8/auction purchasers is also accepted and auction is set aside. The Bank is directed to refund the entire amount of auction money along with interest @ 18% (normal interest 12% + 6% interest as compensation).

As far as the interest is concerned, though the normal banking interest is either 6% or 9% keeping in view the facts and circumstances, where the auction purchaser has been made to believe that he would be utilizing the fruits of the property in the way and manner, it was put to auction, having left no other access, I am of the view that the entire exercise of auction has been unfruitful. It is, in this aspect of the matter, I deem it appropriate to add another 6% interest (as damages/compensation) in 12%, to the auction purchaser.

However, this will not prevent the Bank from auctioning the land, but according to observation, aforementioned.

The auction purchaser shall return the original title deeds against the receipt and thereafter, the Bank shall return the amount.

This exercise of returning the original title deeds and refund of the auction money along with interest shall be done simultaneously preferably in the presence of the learned counsel representing the parties.

With the aforesaid observations, the present writ petition stands disposed of.

(AMIT RAWAL)
JUDGE

05.04.2017
Yogesh Sharma

✓
Whether speaking/reasoned **Yes/ No**
✓
Whether Reportable **Yes/ No**